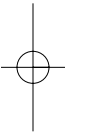
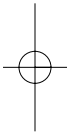


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Criminal Division  
*Organized Crime and Racketeering Section*

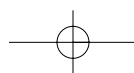


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# **Civil RICO: A Manual for Federal Attorneys**



**October 2007**



# **Civil RICO: 18 U.S.C. §§ 1961-1968**

## **A Manual for Federal Attorneys**

**October 2007**

**Prepared by the Staff of the Organized Crime and Racketeering Section  
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## PREFACE

This manual is intended to assist federal attorneys in the preparation and litigation of cases involving the civil provisions of the Racketeer Influenced & Corrupt Organization Act, 18 U.S.C. §§ 1961-1968. Federal attorneys are encouraged to contact the Organized Crime and Racketeering Section of the United States Department of Justice (“OCRS”) early in the preparation of their case for advice and assistance.

All Government civil RICO complaints, RICO Civil Investigative Demands and all proposed settlements of Government civil RICO suits must be submitted, with a supporting prosecution memorandum, to OCRS for review and approval before being issued or filed with the court. The submission should be approved by the Government attorney’s office before being submitted to OCRS. Due to the volume of submissions received by OCRS, Government attorneys should submit the proposal three weeks prior to the date final approval is needed. Government attorneys should contact OCRS regarding the status of pending submissions and must refrain from finalizing any settlement agreement concerning a proposed civil RICO lawsuit before final approval has been obtained from OCRS.

The policies and procedures set forth in this manual and elsewhere relating to 18 U.S.C. §§ 1961-1968 are internal Department of Justice policies and guidance only. They are not intended to, do not, and may not be relied upon to, create any right, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

# I

## INTRODUCTION AND APPROVAL PROCESS

### A. Introduction

#### 1. Overview

RICO was enacted October 15, 1970, as Title IX of the Organized Crime Control Act of 1970<sup>1</sup> and is codified at 18 U.S.C. §§ 1961-1968. RICO provides for both criminal and civil remedies. RICO's civil remedies are set forth in 18 U.S.C. § 1964(a), (b) and (c), which provide as follows:

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

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining order or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of Section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The

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<sup>1</sup> Pub. L. No. 91-452, 84 Stat. 941 (1970).

exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

Section 1964(a) vests the Attorney General of the United States with the exclusive authority to sue for equitable relief, whereas Section 1964(c) vests private litigants, but not the United States, with authority to sue for treble damages for injury to their business or property. See Section II (D) below. Because the United States may not sue for treble damages under Section 1964(c), this Manual does not address such suits for treble damages.<sup>2</sup>

To obtain civil equitable relief under 18 U.S.C. § 1964(a), the United States must prove by a preponderance of the evidence that: (1) a defendant committed or intended to commit a RICO violation by establishing the same elements as in a criminal RICO case, except that criminal intent is not required; and (2) that there is a reasonable likelihood that the defendant will commit a violation in the future. See Section III (A) below. However, this Manual does not address the elements of a criminal RICO violation or the substantial body of law interpreting criminal RICO because those matters are addressed in the Organized Crime and Racketeering Section (“OCRS”) manual entitled: Racketeer Influenced and Corrupt Organizations: A Manual for Federal Prosecutors (4<sup>th</sup> Ed. July

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<sup>2</sup> To obtain relief under Section 1964(c), a plaintiff must establish that a defendant committed a violation of the RICO statute, and that such RICO violation was the proximate cause of injury to the plaintiff’s business or property. See, e.g., Anza v. Ideal Steel Supply Corp., 547 U.S. \_\_\_\_, \_\_\_\_, 126 S.Ct. 1991, 1996 (2006); Beck v. Prupis, 529 U.S. 494, 496-503 (2000); Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992).

2000) (“Criminal RICO Manual”).<sup>3</sup> Therefore, Government attorneys handling civil RICO lawsuits should consult OCRS’ Criminal RICO Manual in addition to this Manual.

This Manual first discusses the origins and general nature of courts’ equitable authority and then addresses the specific equitable relief Congress intended civil RICO to authorize. This Manual also includes an analysis of: (1) the elements of Government civil RICO lawsuits; (2) principles of liability and certain defenses; (3) various procedural and discovery issues that are likely to arise in Government civil RICO lawsuits; and (4) analysis of the law governing judgments, consent decrees, enforcement, injunctions, contempt and the authority of court-appointed officers. This Manual also includes detailed analyses of the Government’s civil RICO lawsuits involving labor unions and issues likely to arise in such lawsuits as well as other matters.

## **2. Guidelines for Bringing Civil RICO Lawsuits**

Civil RICO, 18 U.S.C. § 1964(a), authorizes potentially intrusive remedies, including injunctive relief, reasonable restrictions on defendants’ future activities, disgorgement of unlawful proceeds, divestiture, dissolution, reorganization, removal from positions in an entity, and appointment of court officers to administer and supervise the affairs and operations of defendants’ entities and to assist courts in monitoring compliance with courts’ orders and in imposing sanctions for violations of courts’ orders. See Sections II (C), VII (C), (D) and (E), and VIII (A), (B), and (C) below. Because such civil RICO remedies may be powerful and intrusive, the Government should bring a civil RICO lawsuit only when the totality of the circumstances clearly justify imposition of

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<sup>3</sup> (Available at [www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/rico.pdf](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/rico.pdf)).

such remedies, and not in a routine case where there has been a RICO violation.

Moreover, Government civil RICO lawsuits typically are brought against defendants that are collective entities such as corporations and labor unions, and hence such suits may affect innocent third parties such as union members and corporate shareholders. See Sections III(A)(2) and (B)(2) and (3) below. Therefore, the Government should consider the adverse effects, if any, of a civil RICO lawsuit upon innocent third parties. Generally, Government attorneys should apply the same factors in determining whether to bring a civil RICO lawsuit against a collective entity as they do with respect to individual defendants. Thus, Government attorneys must weigh the sufficiency of the evidence, the likelihood of success at trial and the consequences of a finding of liability.

In addition, Government attorneys should consider the following factors, among others, in determining whether to bring a civil RICO lawsuit against an individual and/or a collective entity:

- (1) the nature and seriousness of the predicate racketeering offenses;
- (2) whether the predicate racketeering offenses were committed over a substantial period of time, and/or pose a threat of continuing unlawful activity;
- (3) whether an organized crime group participated in any of the predicate racketeering offenses or exercised corrupt influence over any proposed enterprise, defendant or related entity;
- (4) whether there is a reasonable likelihood that the defendant will commit unlawful activity in the future;
- (5) the pervasiveness of wrongdoing within a collective entity that is a proposed defendant, including the complicity in, or condonation of, the wrongdoing by the collective entity's officers and management;



- (6) the defendant's history of similar unlawful conduct, including prior criminal, civil or regulatory enforcement actions against it;
- (7) whether the defendant has derived unlawful proceeds from his RICO violation that are subject to disgorgement;
- (8) the defendant's timely and voluntary disclosure of wrongdoing and his/her or its willingness to cooperate with the authorities to eliminate corruption involving the defendant or related entities;
- (9) the existence and adequacy of a collective entity's compliance program and other remedial actions;
- (10) collateral consequences, including harm, if any, to innocent third parties, including a collective entity's shareholders, employees, or union members;
- (11) whether and to what extent the sought remedies are likely to be effective; and
- (12) the availability and adequacy of other remedies.<sup>4</sup>

No single factor is dispositive. Rather, these factors must be considered under the totality of the circumstances. Moreover, the factors listed are intended to be illustrative of those that should be considered and not a complete or exhaustive list.

For example, it may be especially appropriate to bring a Government civil RICO lawsuit where injunctive relief and structural reform is necessary to eliminate extensive and prolonged corruption in an entity and to cure its ill effects, such as in the cases involving Government civil RICO lawsuits against labor unions. In these labor union-related civil RICO cases, La Cosa Nostra figures and corrupt union officials had exercised corrupt control and influence over the labor unions involved for many years, and

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<sup>4</sup> The factors listed are similar to the factors to be considered in determining whether to bring criminal charges against a corporation. See Department of Justice Memorandum from Paul J. McNulty, Deputy Attorney General on Principles of Federal Prosecution of Business Organizations (December 12, 2006).

successful criminal prosecution of many of those wrongdoers was not sufficient to eliminate such systemic corruption from those unions. In such circumstances, civil RICO's equitable remedies, especially injunctive relief, removal of corrupt union officers and members from the unions, and appointment of court officers to administer and oversee aspects of the unions' operations, achieved substantial success in eliminating and reducing such corruption within the unions involved and related businesses. See Section VIII below.

**B. Prior Approval by the Organized Crime and Racketeering Section of All Government Civil RICO Lawsuits is Required**

**1. Approval Authority and Process**

The Code of Federal Regulations, 28 C.F.R. § 0.55, provides, in relevant part, as follows:

**§ 0.55 General Function**

The following functions are assigned to and shall be conducted, handled or supervised by, the Assistant Attorney General, Criminal Division

...

(d) Civil or criminal forfeiture or civil penalty actions (including petitions for remission or mitigation of forfeiture and civil penalties, offers in compromise, and related proceedings under the . . . Organized Crime Control Act of 1970 . . . [i.e., RICO, 18 U.S.C. § 1961 et. seq.].

...

(g) Coordination of enforcement activities directed against organized crime and racketeering.

Pursuant to USAM § 9-110.010, such authority has been delegated to the Organized Crime and Racketeering Section of the Criminal Division. Accordingly, the following procedures must be followed in all civil RICO lawsuits brought by or against

the United States:

(1) No civil RICO complaint shall be filed, and no RICO investigative demand shall be issued, without the prior approval of OCRS.

(2) No civil RICO complaint shall be settled or dismissed, in whole or in part, without prior approval of OCRS.

(3) No remedy in any civil RICO lawsuit brought by the United States shall be sought without prior approval by OCRS.

(4) In any civil RICO lawsuit brought by, or against, the United States, any adverse decision on an issue involving an interpretation of the RICO statute from any District Court or any Circuit Court of Appeals shall be timely reported to OCRS, in addition to reporting to the Solicitor General's Office and the appropriate Appellate Section of the Civil or Criminal Divisions, to enable OCRS to submit a recommendation to the Solicitor General's Office whether to seek further review of the decision.

(5) In any civil RICO lawsuit brought by, or against, the United States, any brief submitted in any appeal to any Circuit Court of Appeals involving an issue of an interpretation of the RICO statute must be timely submitted to OCRS for review prior to filing the brief in the Court of Appeals.

These requirements are necessary to enable OCRS to carry out its supervisory authority over all Government uses of the RICO statute and to promote consistent, uniform interpretations of the RICO statute. See, e.g., USAM § 110.300 "RICO Guidelines Policy", which provides that "[i]t is the purpose of these guidelines to centralize the RICO review and policy implementation functions in the section of the

Criminal Division having supervisory responsibility for this statute,” i.e., OCRS.

The review process for authorization of all Government civil and criminal suits pursuant to the RICO statute is set forth in the United States Attorneys Manual. See USAM §§ 9-110.010 -- 9-110.400, which provisions are attached as Appendix A. To commence the formal review process, submit a final draft of the proposed complaint, including the remedies sought, and a detailed prosecution memorandum to OCRS. The prosecution memorandum should be similar, in organization and types of information provided, to a RICO criminal prosecution memorandum, which is described in the Criminal Resource Manual at section 2071 et seq. The prosecution memorandum should also address the factors to be considered in determining whether to bring a civil RICO lawsuit set forth in Section I (A)(2) above. Before the formal review process begins, Government attorneys are encouraged to consult with OCRS in order to obtain preliminary guidance and suggestions.

The review process can be time-consuming, especially in light of the complexity of Government civil RICO lawsuits and the sensitive remedies involved; and also because of the likelihood that modifications will be made to the complaint, and the heavy workload of the reviewing attorneys. Therefore, unless extraordinary circumstances justify a shorter time frame, a period of at least 15 working days must be allowed for the review process.

## **2. Post-Complaint Duties**

Once a civil RICO complaint has been approved and filed, it is the duty of the Government’s attorney handling the matter to submit to OCRS a copy of the complaint,

including all attachments, bearing the seal of the clerk of the district court. In addition, the Government's attorney should send OCRS copies of the Government's filings for pre-trial motions and should keep OCRS informed of adverse decisions as noted above and legal problems that arise in the course of the case to enable OCRS to provide assistance and carry out its supervisory functions.

## II

### OVERVIEW OF EQUITABLE RELIEF, CIVIL RICO, AND ITS LEGISLATIVE HISTORY

#### A. Origins and General Nature of Courts' Equitable Authority

##### 1. Origins of Courts' Equitable Authority

Article III, Section 2 of the United States Constitution provides, in relevant part, that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties Made, or which shall be made, under their Authority.” “[E]quity is that portion of the law which was developed by the English and American courts of chancery to remedy defects in the common law.”

Howard L. Oleck, Historical Nature of Equity Jurisprudence, 20 *FORDHAM L. REV.* 23, 24 (1951) (“Equity Jurisprudence”).

At the time the United States Constitution was adopted and continuing for a considerable period thereafter, various states had separate equity courts, and federal courts recognized separate causes of action for equity that were distinguished from suits at common law. See generally Parsons v. Bedford, 28 U.S. 433, 446 (1830); Equity Jurisprudence, 20 *FORDHAM L. REV.* at 23-26, 40-43; Leonard J. Emmerglick, J. Emmerglick, A Century of the New Equity, 23 *Tex. L. Rev.* 244 (1944-45) (“The New Equity”). However, commencing in 1845, states began to abandon their separate equity courts, and in 1938, federal courts adopted new Federal Rules of Civil Procedure for all civil matters, wherein a single form of civil action is provided for all civil suits. See Equity Jurisprudence, 20 *FORDHAM L. REV.* at 41-43; The New Equity, 23 *Tex. L. Rev.* at 244-250.

Classification of a cause of action as to whether it seeks a remedy “at law” or “in equity” remains important for several reasons of general significance: (1) “equitable remedies are generally enforceable by contempt while legal remedies are not”; (2) generally, litigants do not have a right to a jury trial to obtain equitable relief, whereas in many cases a right to a jury trial attaches to the suits “at law”; and (3) “equitable relief is discretionary.” DAN B. DOBBS, *DOBBS LAW OF REMEDIES*, Vol. One at 11-12, 56-57 (West Publ’g Co. 2d ed. 1993) (“DOBBS”).

However, determining whether a particular cause of action seeks remedies “at law” or “in equity” is not an easy task. As one commentator perceptively observed, “[t]he description of equity as that law which was administered by the old English Courts of Chancery, of course, is hardly a definition.” Equity Jurisprudence, 20 *FORDHAM L. REV.* at 24. To determine “whether [a cause of] action is more similar to suits tried in courts of law,” the Supreme Court examines “both the nature of the action and of the remedy sought.” Tull v. United States, 412 U.S. 412, 417 (1987). First, the Court compares the action at issue “to 18<sup>th</sup> Century actions brought in the courts of England prior to the merger of the courts of equity,” and second, the Court examines “the remedy sought and determine[s] whether it is legal or equitable in nature.” Tull, 481 U.S. at 417-418. See also Section V (C) below, which addresses whether an action is equitable, and hence does not carry a right to a jury trial.

Under these principles, courts have ruled that a wide variety of causes of actions constitute actions for equitable relief, including injunctions,<sup>5</sup> disgorgement of

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<sup>5</sup> See, e.g., Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993); Tull, 481 U.S. at 423;

(continued...)

wrongdoers' ill-gotten gains,<sup>6</sup> restitution of illegally obtained profits,<sup>7</sup> divestiture or dissolution,<sup>8</sup> appointment of a receiver and others to assist the court in executing its duties,<sup>9</sup> and constructive trusts.<sup>10</sup>

Moreover, “[g]enerally, an action for money damages” is a remedy “at law.”

Teamsters Local No. 391 v. Terry, 494 U.S. 558, 570 (1990). However, an award of monetary relief is not necessarily legal relief. Id. at 570. The Supreme Court has “characterized damages as equitable where they are restitutionary, such as in ‘actions for

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<sup>5</sup>(...continued)

Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 291-92 (1960); United Steelworkers of America v. United States, 361 U.S. 39, 40-41 (1959); Porter v. Warner Holding Co., 328 U.S. 395, 399 (1946); Barton v. Barbour, 104 U.S. 126, 133-34 (1881).

<sup>6</sup> See, e.g., Harris Trust & Savings Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 250 (2000); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 352 (1998); Teamsters Local No. 391 v. Terry, 494 U.S. 558, 570 (1990); Tull, 481 U.S. at 424; FTC v. Gem Merchandising Corp., 87 F.3d 464, 468-70 (11th Cir. 1996); SEC v. Rind, 991 F.2d 1486, 1493 (9th Cir. 1993); SEC v. Tome, 833 F.2d 1086, 1096 & n. 7 (2d Cir. 1987); SEC v. Commonwealth Chem. Securities, 574 F.2d 90, 94-96 (2d Cir. 1978); Bradford v. SEC, 278 F.2d 566, 567 (9th Cir. 1960); United States v. Philip Morris, 273 F. Supp. 2d 3, 8 (D.D.C. 2002); SEC v. Asset Mgmt. Corp., 456 F. Supp. 998, 999-1000 (S.D. Ind. 1978); SEC v. Petrofunds, Inc., 420 F. Supp. 958, 959 (S.D.N.Y. 1976); SEC v. Associated Minerals, Inc., 75 F.R.D. 724, 726 (E.D. Mich. 1977). Cf. SEC v. Blavin, 760 F.2d 706, 713 (6th Cir. 1985) (“the district court possesses the equitable power to grant disgorgement”); SEC v. Williams, 884 F. Supp. 28, 30-31 (D. Mass. 1995).

<sup>7</sup> See, e.g., Porter v. Warner Holding Co., 328 U.S. 399, 402 (1946).

<sup>8</sup> See, e.g., California v. American Stores Co., 495 U.S. 271, 281-95 (1990); United States v. E.I. DuPont de Nemours & Co., 366 U.S. 316, 326-27 (1961); Schine Chain Theatres v. United States, 334 U.S. 110, 128 (1948).

<sup>9</sup> See Gordon v. Washington, 295 U.S. 30, 37 (1935). See also cases cited in Sections VII (E) and VIII (B)(3) below.

<sup>10</sup> See DOBBS, Vol. One at 157.



disgorgement of improper profits.” or when “a monetary award [is] ‘incidental to or intertwined with injunctive relief.’” *Id.* at 570-71 (citations omitted). Generally speaking, “a claim could be deemed equitable if it sought a coercive remedy like injunction,” or “if the plaintiff sought to enforce a right that was originally created in the equity courts, or a right that was traditionally decided according to equitable principles.” *DOBBS*, Vol. One at 155.<sup>11</sup>

## **2. Courts Are Vested With Broad Equitable Powers To Remedy Unlawful Conduct, Including Ordering Intrusive, Structural Changes in Wrongdoers’ Entities and Practices**

The Supreme Court has repeatedly emphasized that courts are vested with extensive equitable powers to fashion appropriate remedies to redress unlawful conduct. For example, in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), the Supreme Court stated:

Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

“The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.” *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330 (1944).

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<sup>11</sup> For a comprehensive discussion of equitable remedies, *see* *DOBBS*, Vol. One at 55-81, 148-275, 586-655.

Swann, 402 U.S. at 15. Accord California v. American Stores, Co., 495 U.S. 271, 284 (1990).

Moreover, the Supreme Court has pointedly ruled that where “the public interest is involved. . . those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.” Porter v. Warner Holding, Co., 328 U.S. 395, 398 (1946). Accord Virginia Ry. Co. v. Sys. Fed’n. No. 40, 300 U.S. 515, 552 (1937) (“Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.”) (collecting cases); Golden State Bottling Co. v. NLRB, 414 U.S. 168, 179-80 (1973) (same).<sup>12</sup>

In accordance with these principles, courts have imposed a wide variety of highly intrusive equitable remedies in institutional reform litigation to remedy constitutional violations and to foster paramount public interests, including various structural reforms.<sup>13</sup> Typically in such cases, the equitable relief afforded exceeds an injunction enjoining the

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<sup>12</sup> See also Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291-92 (1960) (“When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purpose. As this Court has long ago recognized, ‘there is inherent in the Courts of Equity a jurisdiction to. . . give effect to the policy of legislature.’ Clark v. Smith, 38 U.S. (13 Pet. ) 195, 203, 10 L. Ed. 123.”).

<sup>13</sup> See generally DOBBS, Vol. Two at 349-353 (“Some civil rights injunctions. . . [seek] to halt a group of wrongful practices by restructuring a social institution such as a mental hospital, school or prison. Structural injunctions are not limited to civil rights cases; one might restructure a private corporation in an effort [to] make its compliance with legal rules more likely.”) (*id.* at 349). See also Special Project: The Remedial Process in Institutional Reform Litigation, 78 COLUM. L. REV. 784 (1978) (hereinafter “Special Project”); William Fletcher The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 YALE L.J. 635 (1982).

proscribed conduct, and also encompasses compelled changes in practices, structural changes and prolonged court-supervision over implementation of the equitable relief. See generally, DOBBS, Vol. Two at 348-353.

For example, in Brown v. Bd. of Educ., 349 U.S. 294, 300-01 (1955), the Supreme Court ruled that courts had very broad equitable powers to order structural changes in school systems to desegregate schools, including “ordering the immediate admission of plaintiffs to schools previously attended only by white children.” Similarly, in Swann, 402 U.S. at 9-10, 18-32, the Supreme Court upheld a district court’s equitable authority to order a school district to implement a comprehensive plan to desegregate a school system, including various structural changes such as re-zoning, busing of students, and re-assignment of teachers to different schools. Moreover, in Milliken v. Bradley, 433 U.S. 267, 279-91 (1977), the Supreme Court upheld the equitable powers of a district court, as part of a desegregation decree, to “order compensatory or remedial educational programs for schoolchildren who have been subjected to past acts of **de jure** segregation.” Id. at 267.

Similarly, in Local 28 of the Sheet Metal Worker’s Int’l Assoc. v. EEOC, 478 U.S. 421 (1986), the district court found that Union Local 28 discriminated against non-white workers in recruitment, selection, training and admission to the union. The Supreme Court upheld the district court’s imposition of an affirmative action program requiring Local 28 to adopt various changes its practices and policies, including requiring Local 28 “to offer annual, nondiscriminatory journeyman and apprentice examinations, select members according to a white-non-white ratio to be negotiated by the parties,

conduct extensive recruitment and publicity campaigns aimed at minorities, secure the [court-appointed] administrator's consent before issuing temporary work permits, and maintain detailed membership records." Id. at 432-33.<sup>14</sup>

The Supreme Court has, likewise, recognized courts' expansive equitable authority to order structural changes and other intrusive remedies to redress unconstitutional prison conditions. See, e.g., Hutto v. Finney, 437 U.S. 678, 683 (1978) (describing district court's orders to change various prisons practices and policies to remedy constitutional violations).<sup>15</sup> Courts, likewise, have afforded similar equitable relief to compel changes in conditions and policies to remedy unconstitutional treatment of mental patients.<sup>16</sup>

## **B. Congressional Findings and Purposes Regarding Civil RICO**

Congress found that organized crime, particularly La Cosa Nostra ("LCN"), had extensively infiltrated and exercised corrupt influence over numerous legitimate businesses and labor unions throughout the United States, and hence posed "a new threat

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<sup>14</sup> Courts have upheld similar intrusive equitable relief in other cases to remedy racial discrimination in schools and other institutions and entities. See, e.g., EEOC v. Local 638, 565 F.2d 31, 33-35 (2d Cir. 1977); Evans v. Buchanan, 555 F.2d 373, 378-82 (3d Cir. 1977); Morgan v. McDonough, 540 F.2d 527, 533-35 (1st Cir. 1976); EEOC v. Local 638, 532 F.2d 821, 829-31 (2d Cir. 1976); Hart v. Cmty. School Bd. of Ed., N.Y. Sch. Dist. #21, 512 F.2d 37, 52-55 (2d Cir. 1975).

<sup>15</sup> For similar expansive equitable relief in cases involving unconstitutional prison conditions, see Miller v. Carson, 563 F.2d 741, 748-52 (5th Cir. 1977); Rhem v. Malcom, 507 F.2d 333, 340-41 (2d Cir. 1974) (collecting cases); Gates v. Collier, 501 F.2d 1291, 1303-05, 1309-10 (5th Cir. 1974); Hamilton v. Landrieu, 351 F. Supp. 549 (E.D.La. 1972); Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Oh. 1971), aff'd, 456 F.2d 854 (6th Cir. 1972).

<sup>16</sup> See, e.g., Sharp v. Weston, 233 F.3d 1166, 1173-74 (9th Cir. 2000); New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 962-66 (2d Cir. 1983); Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1974).

to the American economic system.” See S. REP. NO. 617, 91st Cong., 1<sup>st</sup> Sess. at 76-78 (1969) (“S. REP. NO. 91-617”); see also Organized Crime Control Act of 1970, Congressional Statement of Findings and Purpose, Section 904(a) of PUB. L. NO. 91-452, 84 Stat. 922, 947.

The Senate Report regarding RICO further found that existing remedies “are inadequate to remove criminal influences from legitimate endeavor organizations.”

S. REP. NO. 91-617 at 78. In that respect, the Senate Report stated:

The arrest, conviction, and imprisonment of a Mafia lieutenant can curtail operations, but does not put the syndicate out of business. As long as the property of organized crime remains, new leaders will step forward to take the place of those we jail.

S. REP. NO. 91-617 at 78 (quoting H.R. Doc. No. 91-105, at 6; the President’s message on “Organized Crime” (1969)).

Accordingly, the Senate Report concluded that:

What is needed here. . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.

. . .

What is ultimately at stake is not only the security of individuals and their property, but also the viability of our free enterprise system itself. The committee feels, therefore, that much can be accomplished here by adopting the civil remedies developed in the antitrust field to the problem of organized crime.

S. REP. NO. 91-617 at 79, 80-81.

**C. Congress Designed 18 U.S.C. § 1964 (a) To Authorize Courts To Impose the Full Panoply of Equitable Relief**

In accordance with the above-referenced legislative history regarding civil RICO, 18 U.S.C. § 1964 vests district courts with authority to impose extensive equitable relief and provides, in relevant part, as follows:

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

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining order or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper. (emphasis added).<sup>17</sup>

Thus, to remedy a civil RICO violation, the plain language of § 1964(a) explicitly authorizes district courts to impose intrusive, structural reforms including, but not limited to, divestiture, “dissolution or reorganization of any enterprise,” “reasonable restrictions on the future activities or investments of **any person**” and “prohibiting **any person** from engaging in

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<sup>17</sup> See United States v. Cappetto, 502 F.2d 1351, 1357 (7th Cir. 1974) (“Section 1964 provides for a civil action in which only equitable relief can be granted. The relief authorized by the section is remedial not punitive and is of a type traditionally granted by courts of equity.”); NSC Int’l Corp. v. Ryan, 531 F. Supp. 362, 363 (N. D. Ill. 1981) (“§ 1964 (a) . . . authorizes only equitable relief.”).

the same type of endeavor as the enterprise engaged in.”(emphasis added).<sup>18</sup>

Indeed, the Senate Committee Report regarding RICO emphasized the expansive and flexible nature of the equitable relief authorized under § 1964(a), stating:

The use of such remedies as prohibitory injunctions and the issuing of orders of divestment or dissolution is explicitly authorized. Nevertheless, it must be emphasized that these remedies are not exclusive, and that [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.

...

Although certain remedies are set out, the list is not exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provisions for the rights of innocent persons.

S. REP. NO. 91-617 at 81 and 160. Accord H.R. REP. No. 1549, 91st Cong., 2d Sess. at 57(1970). Moreover, the Senate Committee Report noted that to achieve RICO's remedial purposes, courts would need broad equitable powers:

Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal law approach . . . or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from illicit

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<sup>18</sup> RICO, 18 U.S.C. § 1961(3), provides that “‘person’ includes any individual or entity capable of holding a legal or beneficial interest in property,” which includes a corporation, union, partnership and a sole proprietorship. See, e.g., United States v. Goldin Indus., Inc., 219 F.3d 1268, 1270-71 (11th Cir. 2000) (en banc); 219 F.3d 1271, 1275-77 (11th Cir. 2000); Living Designs, Inc. v. E.I. DuPont De Nemours & Co., 431 F.3d 353, 362-62 (9th Cir. 2005); Nat’l Elec. Benefit Fund v. Heary Bros. Lightning Prot. Co. Inc., 931 F. Supp. 169, 186-87 (W.D.N.Y. 1965); C& W Constr. Co. v. Bhd. of Carpenters and Joiners of America, Local 745, 687 F. Supp. 1453, 1466 (D. Hawaii 1988).

Moreover, RICO’s definition of “enterprise” (18 U.S.C. § 1961(4)) “includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”

activity.

S. REP. NO. 91-617 at 79.

The Senate Report regarding RICO also quoted approvingly the Department of Justice's view that "these equitable remedies would also seem to have a greater potential than that of the penal sanctions for actually removing the criminal figure from a particular organization and enjoining him from engaging in similar activity," and that "these remedies are flexible, allowing of several alternate courses of action for dealing with a particular type of predatory activity, and they may also be effectively monitored by the court to insure that its decrees are not violated."

S. REP. NO. 91-617 at 82-83. The Senate Report further stated that civil RICO was patterned after the equitable relief available under the antitrust laws, and hence "brings to bear . . . the full panoply of civil remedies . . . now available in the antitrust arena." S. REP. NO. 91-617 at 81.<sup>19</sup>

Moreover, as noted above, Congress stated that the purpose of RICO's remedial provisions was to afford "enhanced sanctions and new remedies," and accordingly mandated that RICO "shall be liberally construed to effectuate its remedial purposes." Section 904(a) of PUB. L. NO. 91-452, 84 Stat. 922, 923, 947. The Supreme Court has similarly characterized Section 1964 as a "far-reaching civil enforcement scheme," Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 483 (1985), and has explained 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 491 n.10. See also Russello v. United States, 464 U.S. 16, 27 (1983); United States v. Turkette, 452 U.S.

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<sup>19</sup> In accordance with this legislative history, the Supreme Court has repeatedly stated that RICO's civil remedies provision, 18 U.S.C. § 1964, was patterned after the equitable relief provisions of the antitrust laws. See e.g., Klehr v. A.O. Smith Corp., 521 U.S. 179, 189 (1997); Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 267-68 (1992); Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 150-52 (1987); Sedima, S.P.R.L. v. Imrex, 473 U.S. 479, 486-90 (1985).



576, 587 & n. 10 (1981).

Thus, Section 1964 's legislative history demonstrates that Congress intended Section 1964(a) to vest district courts with powerful new weapons to eliminate and prevent corruption in organizations, and accordingly authorized district courts to impose the full panoply of equitable relief, including, but not limited to, the intrusive remedies discussed below:

**1. Injunctions** - An injunction is the quintessential equitable order designed “to prevent and restrain” violations of law under 18 U.S.C. § 1964(a). An injunction is a “coercive remedy” whereby the “defendant is enjoined by a prohibitory injunction to refrain from doing specific acts; or he is commanded by a mandatory injunction to carry out specified acts.” DOBBS, Vol. One at 59; see also id. at 223-277. See Section VIII(B)(1) below, which discusses injunctions obtained in civil RICO cases involving labor unions.

**2. Divestiture, Dissolution and Reorganization** - Section 1964(a) explicitly includes the equitable remedies of divestiture, dissolution and “reorganization of any enterprise.” “[D]issolution’ refers to a . . . judgment which dissolves or terminates an illegal combination or association - putting it out of business, so to speak. ‘Divestiture’ is used to refer to situations where the defendants are required to divest or dispossess themselves of specified property in physical facilities, securities, or other assets.” California v. American Stores Co., 495 U.S. 271, 290 n.16 (1990). Divestiture “deprives a defendant of the gains from his wrongful conduct” and “is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project.” Schine Chain Theaters v. United States, 334 U.S. 110, 128 (1948). Both dissolution and divestiture serve to put “an end to the [unlawful] combination or conspiracy” and to “deprive . . . defendants of the

benefits of their conspiracy.” Id. at 129.<sup>20</sup>

The Government has obtained divestiture, dissolution and reorganization of an enterprise in various civil RICO cases involving labor unions. See Sections VIII (B) (2) and (5) below. See also United States v. Cappetto, 502 F.2d 1351, 1358-59 (7th Cir. 1974) (noting that divestiture under 18 U.S.C. § 1964 is an equitable remedy); United States v. Ianniello, 646 F. Supp. 1289, 1297-1300 (S.D.N.Y. 1986) (appointing a receiver for a restaurant that was subject to divestiture for a violation of civil RICO).

**3. Disgorgement** - Although “disgorgement” is not explicitly listed in the remedies set forth in 18 U.S.C. § 1964, it is well established that “disgorgement” is a traditional equitable remedy. See Sections II(A)(1) above and V(C) below. In particular, disgorgement requires a wrongdoer to yield the proceeds derived from his unlawful conduct, and “is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the . . . laws.” SEC v. First City Financial Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989).<sup>21</sup>

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<sup>20</sup> “Divestiture has been called the most important of antitrust remedies.” United States v. E.I. DuPont DeNemours & Co., 366 U.S. 316, 330-31 (1961).

<sup>21</sup> Accord SEC v. Bilzerian, 29 F.3d 689, 697 (D.C. Cir. 1994) (“The primary purpose of disgorgement is not to refund others for losses suffered but rather ‘to deprive the wrongdoer of his ill-gotten gain.’” (citation omitted)); SEC v. Banner Fund Int’l, 211 F.3d 602, 617 (D.C. Cir. 2000); SEC v. First Pacific Bancorp, 142 F.3d 1186, 1191 (9th Cir. 1998); SEC v. Palmisano, 135 F.3d 860, 865-66 (2d Cir. 1998); SEC v. Hughes Capital Corp., 124 F.3d 449, 455 (3d Cir. 1997); SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996); FTC v. Gem Merch. Corp., 87 F.3d 466, 470 (11th Cir. 1996); SEC v. Tome, 833 F.2d 1086, 1096 (2d Cir. 1987); SEC v. Blavin, 760 F.2d 706, 713 (6th Cir. 1985); CFTC v. Hunt, 591 F.2d 1211, 1222 (7th Cir. 1979); SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978); SEC v. Manor Nursing Ctr., Inc., 458 F.2d 1082, 1104 (2d Cir. 1972); SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1308 (2d Cir. 1971).

Because disgorgement of unlawful proceeds merely requires the wrongdoer to “give up only his ill-gotten gains” to which he has no right, such disgorgement is entirely remedial and “is not punishment.” Bilzerian, 29 F.3d at 696. Accord First City Financial Corp., 890 F.2d at 1230-31; SEC v. Tome, 833 F.2d 1086, 1096 (2d Cir. 1987); CFTC v. Hunt, 591 F.2d 1211, 1222 (7th Cir. 1979); see also Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 293 (1960)(equitable remedy of restitution of lost wages for violation of statute is not “punitive”).<sup>22</sup>

As of this writing, there is a conflict among the circuits as to whether disgorgement is a remedy available under 18 U.S.C. § 1964. In United States v. Carson, 52 F.3d 1173, 1181 (2d Cir. 1995), the Second Circuit held that “disgorgement is among the equitable powers available

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<sup>22</sup> Moreover, because “[r]ules for calculating disgorgement must recognize that separating legal from illegal profits exactly may at times be a near-impossible task . . . disgorgement need only be a reasonable approximation of profits causally connected to the violation,” and that once the plaintiff establishes such a “reasonable approximation,” the burden shifts to the defendants “clearly to demonstrate that the disgorgement figure was not a reasonable approximation.” First City Fin. Corp., 890 F.2d at 1231-32. Accord SEC v. Bilzerian, 29 F.3d 689, 697 (D.C. Cir. 1994) (“Calculations of [the causal nexus] are often imprecise – it is impossible to say with certainty what portion of [the defendant’s] profits is attributable to his securities violations. [The Defendant], however, bears the burden of establishing” that the approximation of his unlawful profits was not reasonable.). See also SEC v. First Jersey Sec., 101 F.3d 1450, 1475 (2d Cir. 1996); United States Dep’t of Housing & Urban Dev. v. Cost Control Mktg. & Sales Mgt. of Va., Inc., 64 F.3d 920, 927 (4th Cir. 1995); SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995); SEC v. Kenton Capital, Ltd., 69 F. Supp. 2d 1, 16 (D.D.C. 1998). Moreover, “the causal connection required is between the amount by which the defendant was unjustly enriched and the amount he can be required to disgorge,” not merely the actual money that he wrongfully obtained. SEC v. Banner Fund Int’l, 211 F.3d 602, 617 (D.C. Cir. 2000). Furthermore, “the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty.” First City Fin. Corp., 890 F.2d at 1232. Accord SEC v. Hughes Capital Corp., 124 F.3d 449, 455 (3d Cir. 1997); First Jersey Sec., 101 F.3d at 1475; SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996); Patel, 61 F.3d at 140. See also Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265 (1946) (“The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.”).

to the district court by virtue of 18 U.S.C. § 1964.” However, the Second Circuit also held that since § 1964(a) authorizes district courts “to prevent and restrain violations” of RICO, it creates remedies that are “forward looking, and calculated to prevent RICO violations in the future.” Therefore, the Second Circuit concluded that disgorgement must be limited to the amount designed “solely to ‘prevent and restrain’ future RICO violations,” and hence must be limited to unlawful proceeds that “are being used to fund or promote the illegal conduct, or constitute capital available for that purpose.” *Id.* at 1182.<sup>23</sup>

In United States v. Philip Morris USA Inc., 396 F.3d 1190 (D.C. Cir. 2005), the panel majority ruled that RICO’s grant of judicial authority under 18 U.S.C. § 1964 (a) to “prevent and restrain” statutory violations does not include the power to order equitable disgorgement. Philip Morris, 396 F.3d at 1197-1202. The majority opinion declared that “[t]his language indicates that the jurisdiction is limited to forward looking remedies that are aimed at future violations,” whereas disgorgement, in the majority’s view, “is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo.” *Id.* at 1198.

The United States filed an interlocutory petition for a writ of certiorari, which was denied. See United States v. Philip Morris USA Inc., 126 S. Ct. 478 (2005).<sup>24</sup> Subsequently, the United

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<sup>23</sup> See Section VIII(B)(7) below, which discusses disgorgement in Government civil RICO cases involving labor unions.

<sup>24</sup> The Government’s petition for a writ of certiorari is available at <http://www.supremecourtus.gov/opinions/opinions.html> In its petition for a writ of certiorari, the Government argued, among other matters, that the limitations imposed upon RICO disgorgement in Carson, *supra*, and the majority decision in Philip Morris, *supra*, were inconsistent with: (1) decisions of the Supreme Court and other courts of appeals holding that when a statute confers equitable jurisdiction upon district courts, as does 18 U.S.C. § 1964, it is presumed that all inherent equitable powers of the district courts are granted, unless otherwise provided by statute; (2) decisions of the Supreme Court and lower courts holding that disgorgement serves a crucial

(continued...)

States District Court for the District of Columbia found defendants liable for RICO violations after a nine-month bench trial. See United States v. Philip Morris USA Inc., 449 F. Supp. 2d 1, 851-52, 867-73, 901-07 (D.D.C. 2006). See also Section IX below. As of this writing, that decision is pending appeals to the District of Columbia Circuit. See United States v. Philip Morris USA Inc., Appeal Nos. 06-5267-5272.

**4. Limitations on Future Activities and Removal From Positions In An Entity -**

18 U.S.C. § 1964 (a) explicitly authorizes district courts to impose “reasonable restrictions on the future activities. . . of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in.” Courts have held that this provision empowers courts to remove persons found liable for RICO violations or for violating courts’ judgment orders in Government civil RICO cases from positions in an entity and to prohibit them from holding such positions in the future. See Sections VII (D) and VIII(B)(6) below.

Section 1964 (a)’s legislative history confirms that Congress intended Section 1964 (a) to authorize district courts to impose such relief. For example, the Senate Report regarding civil RICO states:

Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal law approach of fine, imprisonment and forfeiture, or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity.

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<sup>24</sup>(...continued)

deterrent, and hence forward-looking, function; and (3) the text of Section 1964 (a) and its legislative history establishing that Section 1964 (a) is not limited to the relief explicitly listed therein.

Through this new approach, it should be possible to remove the leaders of organized crime from their sources of economic power.

S. REP. NO. 91-617 at 79-80. The Senate Report also quoted with approval the Department of Justice's statement that:

The relief offered by these equitable remedies would also seem to have a greater potential than that of the penal sanctions for actually removing the criminal figure from a particular organization and enjoining him from engaging in similar activity.

S. REP. NO. 91-617 at 82.

**5. Appointment of Court Officers** - Courts have long had the inherent authority to appoint non-judicial persons to assist them in the performance of their judicial duties.

Accordingly, in Government civil RICO cases involving labor unions, courts have appointed "officers" to, among other matters, administer the affairs and operations of corrupted unions and related entities, and assist the courts in monitoring compliance with the courts' orders and in imposing sanctions for violations of the courts' orders. See Sections VII(E) and VIII(B), (3), (4), (5), and (6) below.

**D. Civil RICO, 18 U.S.C. § 1964, is Patterned After Antitrust Laws, and Hence Vests the Attorney General of the United States with the Exclusive Authority to Obtain Equitable Relief, and Vests Private Litigants, But Not the United States, With the Authority to Sue For Treble Damages**

RICO's civil remedies provision, 18 U.S.C. § 1964, authorizes two causes of action: a public enforcement action for equitable relief by the Attorney General and a treble damages action by private parties. The Attorney General's right to sue for equitable relief derives from Sections 1964(a) and (b), and those provisions, in combination, make the Attorney General's right exclusive.

Section 1964(a) grants district courts “jurisdiction to prevent and restrain violations” of RICO by issuing the full range of “appropriate orders” available to courts of equity, 18 U.S.C. § 1964(a). Section 1964(a) does not identify who can seek such relief, but Section 1964(b) does. That provision states that “[t]he Attorney General may institute proceedings under this section” and that, “[p]ending final determination thereof,” the court may enter interim restraining orders or take such other actions as it shall deem proper. 18 U.S.C. § 1964(b).

By empowering the Attorney General to institute proceedings “under this section,” Congress signaled its intent that the district court’s equitable jurisdiction under Section § 1964(a) must be invoked by the Attorney General. Congress further manifested its intent that the Attorney General alone may seek equitable relief by providing in subsection (b) that temporary equitable relief may be awarded “[p]ending final determination” of a proceeding instituted by the Attorney General for permanent equitable relief. There is no corresponding provision that authorizes a private party to institute proceedings “under this section” or to seek temporary equitable relief pending final disposition of a claim. Under Sections 1964(a) and (b), therefore, the sole power to seek final and interim equitable relief against racketeering activities and enterprises is reposed in the Attorney General.

Rather than authorize private civil RICO plaintiffs to seek equitable remedies, Congress in Section 1964(c) granted private parties the right to bring suit to recover treble damages and attorney’s fees. Section 1964(c) provides that “(a)ny person injured in his business or property by reason of a [RICO] violation . . . may sue . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee.” 18 U.S.C. § 1964(c). That provision has been construed to authorize private parties, and not the Government, to seek

treble damages. See United States v. Bonnano, 879 F.2d 20, 22-24 (2d Cir. 1989) (reasoning that the United States is not a “person” under Section 1964(c), and therefore may not sue for treble damages); see also Sedima, S.P.R.L. v. Imrex Co. Inc., 473 U.S. 479, 487 (1985) (observing that Section 1964(c) creates “a private treble-damages action”).

Section 1964’s “inclusion of a single statutory reference to private plaintiffs, and the identification of a damages and fees remedy for such plaintiffs in [Section 1964(c)], logically carries the negative implication that *no other remedy* was intended to be conferred on private plaintiffs.” Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1083 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987). Coupled with the fact that Congress in Section 1964(b) explicitly authorized the Attorney General to initiate proceedings to obtain equitable relief under Section 1964(a), but did not similarly grant private parties that right, the statute makes it clear that Congress did not authorize private parties to bring actions for equitable relief.

2. Section 1964’s legislative history confirms that it vests the Attorney General of the United States with the exclusive authority to bring suits for equitable relief, and authorizes private litigants to bring suits for treble damages. The Supreme Court has repeatedly observed that RICO’s civil remedies provision, 18 U.S.C. § 1964, was patterned after virtually identical provisions of the antitrust laws.<sup>25</sup> In that regard, at a time when Congress had provided no express authority for private antitrust plaintiffs to seek equitable relief, the antitrust laws were construed to preclude such relief. The parallels between the antitrust laws at that time and the

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<sup>25</sup> See, e.g., Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 267-68 (1992); Klehr v. A.O. Smith Corp., 521 U.S. 179, 189 (1997); Agency Holding Corp. v. Malley-Duff & Assocs. Inc., 483 U.S. 143, 150-152 (1987); Sedima, S.P.R.L. v. Imrex, 473 U.S. 479, 486-90 (1985). See also S. REP. No. 91-617 at 81 (RICO’s Section 1964 “brings to bear. . . the full panoply of civil remedies . . . now available in the antitrust area.”).



language of RICO support the same conclusion for RICO — particularly since RICO lacks the explicit provision for private injunctive relief that Congress added to the antitrust laws.

As the Supreme Court has explained, “[a] treble-damages remedy for persons injured by antitrust violations was first provided in § 7 of the Sherman Act and was re-enacted in 1914 without substantial change as § 4 of the Clayton Act.” Pfizer, Inc. v. India, 434 U.S. 308, 311 (1978); accord Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 267 n.13 (1992); Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 644 n.16 (1981).<sup>26</sup> Section 4 of the Sherman Act also authorized courts to issue equitable relief in actions brought by the United States. 26 Stat. 209-10.<sup>27</sup> The Supreme Court repeatedly recognized that those provisions of the Sherman Act did not authorize private parties to bring suit for injunctive relief.<sup>28</sup> Private parties

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<sup>26</sup> Section 7 of the Sherman Act provided that “(a)ny person who shall be injured in his business or property . . . by reason of anything forbidden or declared to be unlawful by this act may sue therefor . . . and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.” 26 Stat. 210.

<sup>27</sup> Section 4 of the Sherman Act provided:

The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. . . . (P)ending [a] petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.”

26 Stat. 209-10.

<sup>28</sup> See General Inv. Co. v. Lake Shore & Mich. S. Ry. Co., 260 U.S. 261, 286 (1922); Geddes v. Anaconda Copper Mining Co., 254 U.S. 590, 593 (1921); Paine Lumber Co. v. Neal, 244 U.S. 459, 471 (1917); D.R. Wilder Mfg. Co. v. Corn Prods. Ref. Co., 236 U.S. 165, 174 (1915); Minnesota v. Northern Sec. Co., 194 U.S. 48, 70-71 (1904).

were not authorized to seek injunctive relief for violations of the antitrust laws until Congress passed Section 16 of the Clayton Act (15 U.S.C. § 26) *explicitly* authorizing such a right.

California v. American Stores Co., 495 U.S. 271, 287 (1990) (“§ 4 of the Sherman Act, which authorizes equitable relief in actions brought by the United States, was reenacted as § 15 of the Clayton Act, while § 16 filled a gap in the Sherman Act by authorizing equitable relief in private actions.”); accord General Inv. Co. v. Lake Shore & Mich. S. Ry., 260 U.S. 261, 287 (1922).

The Sherman Act thus “envisaged two classes of actions,— those made available only to the Government, . . . and, in addition, a right of action for treble damages granted to redress private injury.” United States v. Cooper Corp., 312 U.S. 600, 608 (1941) (holding that the United States may not recover treble damages under the Sherman Act). The Court reached that conclusion despite the fact “that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute, or of courts generally to entertain complaints on that subject.” D.R. Wilder Mfg. Co. v. Corn Prods. Ref. Co., 236 U.S. 165, 174 (1915). The Court explained that “such exclusion must be implied . . . because of the familiar doctrine that ‘where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which that statute prescribes.’” Id. at 174-75 (quoting Farmers’ & Mechs. Nat’l Bank v. Dearing, 91 U.S. 29, 35 (1875)).

Although the Sherman Act authorizes suits in equity in one paragraph (Section 4), while RICO does so in two paragraphs (Section 1964(a) and (b)), the statutes are parallel in the critical respects here. First, both confer on courts “jurisdiction” to prevent and restrain violations through permanent and preliminary equitable relief, but expressly authorize only the Attorney

General to seek such relief. Second, both provide private parties a separate right to recover treble damages and attorney's fees, but no other forms of relief. In light of the Supreme Court's precedents construing the Sherman Act, Congress is presumed to be aware when it enacted RICO that, absent inclusion of an *express* private right to obtain injunctive relief, the language it selected would be construed to exclude such a right. Holmes, 503 U.S. at 268 (construing the term "by reason of" in Section 1964(c) and observing that the Court "may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4").

Indeed, to authorize private antitrust plaintiffs to seek equitable relief, Congress enacted a separate section of the Clayton Act, Section 16. RICO, however, lacks any provision comparable to Section 16 of the Clayton Act. Section 16 expressly provides that private persons "shall be entitled to sue for and have injunctive relief." 15 U.S.C. § 26. Juxtaposed with Congress's explicit modeling of RICO's private treble damages provision "on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act," Holmes, 503 U.S. at 267, the absence of a counterpart to Section 16 makes clear that Congress did not intend to create a private right to equitable relief under RICO.

3. The legislative history of RICO confirms that Congress made a deliberate choice in omitting authority for a private injunctive action. "The civil remedies in the bill passed by the Senate, S.30, were limited to injunctive actions by the United States and became §§ 1964(a), (b), and (d)." Sedima, 473 U.S. at 486-487; Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 152 (1987) (same). "During hearings on S. 30 before the House Judiciary

Committee, Representative Steiger proposed the addition of a private-treble damages action” that was modeled after Section 4 of the Clayton Act. Sedima, 473 U.S. at 487. That Amendment also would have authorized private parties to seek injunctive relief and the government to seek damages, as well as making other procedural changes. 116 CONG. REC. 27,739 (1970). When the Judiciary Committee responded by passing only the private treble damages provision, Representative Steiger complained that the bill did “not do the whole job,” since it “fail[ed] to provide . . . two important substantive remedies included in the Clayton Act: compensatory damages to the United States when it is injured in its business or property, and **equitable relief in suits brought by private citizens.**” Id. at 35,227, 35,228 (emphasis added).

Representative Steiger subsequently offered another amendment, again to authorize a private injunctive action and a public damages action. Sedima, 473 U.S. at 487; 116 CONG. REC. 35,228; 35,346 (1970). Concerned about “the potential consequences that this new remedy might have,” Representative Poff asked Representative Steiger to withdraw the amendment for further study by the Judiciary Committee, and Representative Steiger agreed. Agency Holding Corp., 483 U.S. at 154-55 (citing 116 CONG. REC. at 35,346).

Shortly after RICO was enacted, Senators Hruska and McClellan, RICO’s sponsors, introduced S. 16, a bill that again would have authorized damage actions by the United States and injunctive actions by private persons. Agency Holding Corp., 483 U.S. at 155 (“[T]he purpose of [S. 16] was to broaden even further the remedies available under RICO. In particular, . . . it would have further permitted private actions for injunctive relief.”). The Senate, but not the House, passed S. 16, and therefore it never became law. Wollersheim, 796 F.2d at 1086.

Congress thus passed RICO without authorizing private injunctive actions despite repeated attempts to do so, and despite Congress's explicit grant of such a right in Section 16 of the Clayton Act. Congress shortly thereafter rejected an amendment to RICO that would have added such a right. The clear conclusion to be drawn from the legislative history is that, consistent with RICO's text, Congress intended to create a private right of action only for treble damages.<sup>29</sup>

**E. Equitable Relief Available Under Civil RICO is at Least As Broad as Equitable Relief Under the Antitrust Laws, If Not Broader**

It is clear that civil RICO, 18 U.S.C. § 1964, was patterned after the equitable relief provisions under the antitrust laws. See Section II (C), fn. 19 and Section II (D) above. Indeed,

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<sup>29</sup> As of this writing, there is a conflict among the circuit courts of appeals as to whether 18 U.S.C. § 1964 vests the Attorney General of the United States with the exclusive authority to seek equitable relief. The majority of courts to decide this issue have held that private parties may not obtain equitable relief under 18 U.S.C. § 1964. See Conkling v. Turner, 18 F.3d 1285, 1296 (5th Cir. 1994) (collecting cases); Lincoln House, Inc. v. Dupre, 903 F.2d 845, 848 (1st Cir. 1990); Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1080-89 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987); Sterling Suffolk Racecourse v. Burrillville Racing Ass'n, 802 F. Supp. 662, 671 (D.R.I. 1992), aff'd, 989 F.2d 1266 (1st Cir.), cert. denied, 510 U.S. 1024 (1993); Vietnam Veterans of America v. Guerdon Indus., 644 F. Supp. 951, 960-61 (D. Del. 1986); Volkman v. Edwards, 642 F. Supp. 109, 115 (N.D. Cal. 1986). Cf. Tran Co. v. O'Connor Secs., 718 F.2d 26, 28-29 (2d Cir. 1983); Dan River, Inc. v. Icahn, 701 F.2d 278, 290 (4th Cir. 1983); Kaushal v. State Bank of India, 556 F. Supp. 576, 583 (N.D. Ill. 1983).

In Nat. Org. for Women, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001), reversed on other grounds, 537 U.S. 393 (2003), the Seventh Circuit held that Section 1964 authorizes private litigants to sue for equitable relief. In the course of the Scheidler litigation, the United States filed two *Amicus Curiae* briefs, before the United States Supreme Court, arguing that private litigants lacked such authority and that Section 1964 vests the Attorney General with the exclusive authority to obtain equitable relief. On both occasions, the Supreme Court explicitly refused to decide that issue, and instead reversed the decisions of the Seventh Circuit on other grounds. See Scheidler v. Nat. Org. for Women, Inc., 547 U.S. 9, 16 (2006); Scheidler v. Nat. Org. for Women, Inc., 537 U.S. 393, 411 (2003). The foregoing analysis is derived from the Government's *Amicus* briefs in the Scheidler litigation.

the “prevent and restrain” language under the antitrust laws is virtually identical to the “prevent and restrain” language under RICO’s Section 1964(a).<sup>30</sup> As the Supreme Court has observed, when Congress has used the same words in RICO’s Section 1964 as in the corresponding relief provision of the Sherman Act that later was enacted in the Clayton Act, “we can only assume it intended them to have the same meaning that courts had already given them.” Holmes, 503 U.S. at 268. Therefore, the scope of a district court’s equitable authority under RICO is at least as broad as the scope of its equitable authority under the antitrust laws. Indeed, Congress indicated that it intended the scope of RICO’s equitable relief to be even broader than that available under the antitrust laws. In that respect, Senator McClellan, RICO’s principal sponsor, stressed that the references to antitrust precedents were not meant to “limit the remedies available [under RICO] to those which have already been established. The ability of our chancery courts to formulate a remedy to fit the wrong is one of the great benefits of our system of justice. This ability is not hindered by the bill.” 115 CONG. REC. 9567 (1969).

The Supreme Court and lower courts have repeatedly interpreted the “prevent and restrain” language of the antitrust laws to not only authorize injunctions, dissolution and divestiture, but also to broadly encompass orders designed to ameliorate ongoing and future ill effects of defendants’ past violations. For example, in United States v. United States Gypsum Co., 340 U.S. 76 (1950), the Supreme Court ruled that:

**A trial court upon a finding of a conspiracy in restraint of trade and a monopoly has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects**

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<sup>30</sup> Compare Section 4 of the Sherman Act as originally enacted -- “Courts are hereby invested with jurisdiction to prevent and restrain violations of this act.” (see Section II (D), fn. 27, above) with Section 1964(a) - - courts “shall have jurisdiction to prevent and restrain violations of Section 1962.” (see Section II (C) above).

**of the illegal conduct, and assure the public freedom from its continuance.** Such action is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal. Acts entirely proper when viewed alone may be prohibited. **The conspirators should, so far as practicable, be denied future benefits from their forbidden conduct.**

Id. at 88-89 (emphasis added) (footnote omitted).

Accordingly, in that case the Supreme Court sanctioned a variety of equitable relief that went “beyond the narrow limits of the proven violation,” including ordering the defendants to undertake actions in the future that would cure the ill effects arising from the defendants’ past proven violations.<sup>31</sup> Consistent with the Supreme Court’s decisions in this area, the Eighth

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<sup>31</sup> See also United States v. Glaxo Group Ltd., 410 U.S. 52, 64 (1973) (“The purpose of relief in an antitrust case is ‘so far as practicable, [to] cure the ill effects of the illegal conduct, and assure the public freedom from its continuance’”) (citation omitted); Ford Motor Co. v. United States, 405 U.S. 562, 573 n.8 (1972) (“The suggestion that antitrust ‘violators may not be required to do more than return the market to the *status quo ante*.’ . . . is not a correct statement of the law. . . . Rather, the relief must be directed to that which is ‘necessary and appropriate in the public interest to eliminate the effects of the acquisitions offensive to the statute.’”) (citation omitted); United States v. Ward Baking Co., 376 U.S. 327, 331-34 (1964) (holding that the Government should not be foreclosed from offering evidence at trial justifying its request for relief to “cure the ill effects of the illegal conduct” that violated antitrust laws where the sought relief was “‘connected’ with and ‘related’ to practices which the companies may in the past have followed.”); United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326, 334 (1961) (“courts are. . . required to decree relief effective to redress the [antitrust] violations, whatever the adverse effect of such a decree on private interests,” and may include “complete divestiture.”); Int’l Boxing Club v. United States, 358 U.S. 242, 262 (1959) (holding that antitrust “relief to be effective, must go beyond the narrow limits of the proven violations” and hence may prohibit certain contracts “until the effects of the conspiracy are fully dissipated”) (citation omitted); United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 607 (1957) (antitrust relief must “eliminate the effects” of the unlawful acquisition); United States v. United Liquors Corp., 352 U.S. 126 (1956) (“The defendants have been found to have violated the antitrust laws and the decree has been framed by the judge of the trial court to correct the evils which resulted from the acts found unlawful.”); Schine Chain Theatres v. United States, 334 U.S. 110, 128 (1948) (Divestiture and dissolution “deprives the antitrust defendants of the benefits of their conspiracy”); United States v. Crescent Amusement Co., 323 U.S. 173, 188-89 (1944) (“the Government should not be confined to an injunction against further violations”, and accordingly (continued...)

Circuit has stated:

Upon finding an antitrust defendant guilty of a violation of the Sherman Act, **a district court is “empowered to fashion appropriate restraints on [the defendant’s] future activities both to avoid a recurrence of the violation and to eliminate its consequences.”** National Soc. of Professional Engineers v. United States, 435 U.S. 679, 697 (1978). In fashioning a remedy, a district court should endeavor to ensure that the conspirators “so far as practicable, be denied future benefits from their forbidden conduct” [quoting Gypsum]. Thus, the **district court may consider both the “continuing effects of past illegal conduct,”** [citation omitted], and the possibility of “lingering efforts” by the conspirators to capitalize on the benefits of their past illegal conduct. [citation omitted].

ES Dev., Inc. v. RWM Enters., 939 F.2d 547, 557 (8th Cir. 1991) (emphasis added).<sup>32</sup>

The foregoing antitrust cases establish that equitable relief to prevent and restrain future violations is not limited to relief prohibiting future conduct, but also broadly encompasses relief designed to cure the ill effects of violators’ past and/or ongoing misconduct and to deprive them of the fruits of their misconduct. For the reasons stated above, RICO’s equitable relief must be interpreted to be at least as broad as antitrust equitable relief. Moreover, it is important to bear in

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<sup>31</sup>(...continued)

the court ordered “each corporate exhibitor to divest itself of the ownership of any stock or other interest in any other corporate defendant or affiliated corporation.”); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 724, 726 (1944) (“Equity has power to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole. . . [this Court’s precedents] ‘uphold equity’s authority to use quite drastic measures to achieve freedom from the influence of the unlawful restraint of trade. . . . The test is whether or not the required action reasonably tends to dissipate the restraints and prevent evasions. Doubts are to ‘be resolved in favor of the government and against the conspirators.’”) (citations omitted).

<sup>32</sup> See also Wilk v. American Med. Ass’n, 895 F.2d 352, 367-70 (7th Cir. 1990) (affirming district court’s grant of injunction against antitrust defendant on several grounds, including “lingering effects” of unlawful conduct); In re Multidistrict Vehicle Air Pollution, 538 F.2d 231, 236 (9th Cir. 1976) (“affirmative equitable remedies may be granted to eliminate the harmful residual effects of past [antitrust] violations . . . .”); United States v. Coca-Cola Bottling Co. of Los Angeles, 575 F.2d 222, 229, 231 (9th Cir. 1978).



mind that the Supreme Court has admonished that “once the Government” has established a violation of law, “all doubts as to the remedy are to be resolved in its favor.” United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 334 (1961). Accord United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 726 (1944).

### III

#### ELEMENTS OF GOVERNMENT CIVIL RICO LAWSUITS AND DEFENSES

##### A. Standards For Obtaining Equitable Relief

###### 1. The Government Must Establish a Reasonable Likelihood of Future Violations By a Preponderance of the Evidence

In Government civil RICO suits to obtain equitable relief, the United States need only prove the same elements as in a RICO criminal case, except that criminal intent is not required. See, e.g., United States v. Local 560, Int'l Bhd. of Teamsters, 780 F. 2d 267, 284 (3d Cir. 1985); United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 812 F. Supp. 1303, 1309 (S.D.N.Y. 1993), modified on other grounds, 831 F. Supp. 167 (S.D.N.Y. 1993), aff'd sub nom. United States v. Carson, 52 F.3d 1173 (2d Cir. 1995). Moreover, the burden of proof in Government civil RICO lawsuits for equitable relief is a preponderance of the evidence.<sup>33</sup> Therefore, to obtain equitable relief, the United States must establish by a preponderance of the evidence that unless relief is granted there is a reasonable likelihood of a future violation by the defendant.<sup>34</sup>

Typically, the Government has carried its burden in that regard by, inter alia, proving a pattern of past violations, although such proof of past violations is not necessarily required. Thus, federal

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<sup>33</sup> See United States v. Local 560 of Int'l Bhd. of Teamsters, 780 F.2d 267, 279 n.12 (3d Cir. 1985); United States v. Philip Morris USA, Inc., 449 F. Supp. 2d at 851; United States Local 1804-1, Int'l Longshoremen's Ass'n, 812 F. Supp. 1303, 1311-12 (S.D.N.Y. 1993); United States v. Local 295 of Int'l Bhd. of Teamsters, 784 F. Supp. 15, 19 (E.D.N.Y. 1992); United States v. Local 359, 705 F. Supp. 894, 897 (S.D.N.Y.), aff'd in part and rev'd in part, 899 F.2d 1232 (2d Cir. 1989); United States v. Local 30, United Slate, Tile, etc., 686 F. Supp. 1139, 1165 (E.D. Pa. 1988), aff'd, 871 F. 2d 401 (3d Cir.), cert. denied, 493 U.S. 953 (1989); United States v. Local 560, Int'l Bhd. of Teamsters, 581 F. Supp. 279, 329-30 (D.N.J. 1984) (collecting cases). See also S. Rep. No. 91-617 at 82. Cf., Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491 (1985) (stating that under Section 1964, "[t]here is no indication that Congress sought to depart from [the] general principle" that the "preponderance standard" applies to civil suits).

<sup>34</sup> See cases cited n. 33 above and notes 35 and 36 below.

courts have held that evidence of past violations may establish the requisite reasonable likelihood of future violations in view of the totality of the circumstances, particularly where the defendant's past violations were: (1) "part of a pattern" and not isolated; (2) were "deliberate" and not "merely technical in nature"; and (3) "the defendant's business will present opportunities to violate the law in the future."<sup>35</sup>

The Supreme Court and other federal courts also have emphasized that mere "cessation of violations. . . is no bar to the issuance of an injunction" because past violations are "highly suggestive of the likelihood of future violations."<sup>36</sup>

In accordance with these principles, courts have granted the United States injunctive and other equitable relief in many civil RICO cases based on past violations and have rejected arguments that injunctive relief was not necessary because the unlawful activity had supposedly ceased. In these cases, courts ordered injunctive relief even though many of the wrongdoers had been convicted of crimes and were not in a position to continue their unlawful conduct because

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<sup>35</sup> SEC v. First City Financial Corp., Ltd., 890 F.2d 1215, 1228-29 (D.C. Cir. 1989). Accord SEC v. Bilzerian, 29 F.3d 689, 695 (D.C. Cir. 1994); SEC v. Gruenberg, 989 F.2d 977, 978 (8th Cir. 1993); CFTC v. Hunt, 591 F.2d 1211, 1220-21 (7th Cir. 1979); SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1168 (D.C. Cir. 1978); SEC v. Commonwealth Chemical Securities Inc., 574 F.2d 90, 98-100 (2d Cir. 1978); SEC v. Management Dyn. Inc., 515 F.2d 801, 807-08 (2d Cir. 1975); SEC v. Advance Growth Capital Corp., 470 F.2d 40, 53 (7th Cir. 1972); SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1100-01 (2d Cir. 1972); Pullum v. Greene, 396 F.2d 251, 256-57 (5th Cir. 1968); United States v. Philip Morris USA, Inc., 449 F. Supp. 2d at 909-10; United States v. Philip Morris USA, 316 F. Supp. 2d 6, 10 n. 3 (D.C. Cir. 2004) (collecting cases); United States v. Philip Morris, Inc., 116 F. Supp. 2d 131, 148-49 (D.D.C. 2000).

<sup>36</sup> Hecht Co. Bowles, 321 U.S. 327 (1944); SEC v. Management Dyn., Inc., 515 F.2d 801, 807-08 (2d Cir. 1975). Accord City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 and n.10 (1982); United States v. Parke, Davis & Co., 362 U.S. 29, 47-49 (1960); United States v. Odessa Union Warehouse Co-Op., 833 F.2d 172, 176 (9th Cir. 1987); Campbell v. McGruder, 580 F.2d 521, 540 (D.C. Cir. 1978); SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 98-99 (2d Cir. 1978); Pullum v. Greene, 396 F.2d 251, 256-57 (5th Cir. 1968).

they were imprisoned or removed from office in the corrupt enterprise.<sup>37</sup> Many of these courts found it particularly significant that these cases involved the corrupt influence of organized crime because the threat of future violations “may virtually be presumed” from such organized crime involvement. See United States v. Local 1804-1, Int’l Longshoremen’s Ass’n, 812 F. Supp. 1303, 1316 (S.D.N.Y. 1993) (citing cases).

Moreover, where the United States seeks equitable relief to protect the public against wrongdoing, as is the case in Government civil RICO suits for equitable relief, the United States need not show an inadequate remedy at law, irreparable injury, or that the harm suffered in the absence of injunctive relief outweighs the harm the defendant will suffer if the injunction is granted, as is required for a private litigant to obtain equitable relief. The Seventh Circuit explained in United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 429 U.S. 925 (1975):

It was plainly the intention of Congress in adopting Section 1964 to provide for injunctive relief against violations of Section 1962 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. It is also obvious that Congress did not intend to require a showing of inadequacy of the remedy at law. If as defendants contend the existence of the criminal remedy at law under Section 1963 would defeat an action in equity under Section 1964, the latter Section would be a nullity.

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<sup>37</sup> See United States v. Carson, 52 F.3d 1173, 1183-85 (2d Cir. 1995); United States v. Private Sanitation Indus. Ass’n, 995 F.2d 373, 377-78 (2d Cir. 1993); United States Local 30, United Slate, Tile, 871 F.2d 401, 405-09 (3d Cir. 1989); United States v. Local 295 of Int’l Bhd. of Teamsters, 784 F. Supp. 15, 18, 21-22 (E.D.N.Y. 1992); United States v. Local 30, United Slate, Tile, et al., 686 F. Supp. 1239, 1262-74 (E.D. Pa. 1988), aff’d, 871 F.2d 401 (3d Cir. 1989); United States v. Ianniello, 646 F. Supp. 1289, 1299-1300 (S.D.N.Y. 1986); United States v. Local 560, Int’l Bhd. of Teamsters, 581 F. Supp. 279, 319-26 (D.N.J. 1984), aff’d, 780 F.2d 269, 292-94 (3d Cir. 1986); United States v. Mason Tenders Dist.Council, 1995 WL 679245, at \* 7-13 (S.D.N.Y. Nov. 15, 1995).

[Therefore] 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.

Id. at 1358-59.<sup>38</sup> Also, there is no requirement that before a civil RICO action can be brought, the defendant must have been previously convicted of a RICO violation or a RICO predicate act. Sedima, 479 U.S. at 488-93.

## **2. Making Due Provision for the Rights of Innocent Persons**

Section 1964(a) of RICO provides, in relevant part, that “district courts of the United States shall have jurisdiction” to impose various equitable remedies “making due provision for the rights of innocent persons.” The legislative history to RICO’s Section 1964(a) contains only a passing reference that “due provision for the rights of innocent persons be made.” See S. REP. No. 91-617 at 160; H.R. Rep. No. 91-1549, at 2 (1970). This provision has not been the subject

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<sup>38</sup> It is well established that different standards than apply to private litigants’ request for injunctive relief govern the Government’s request for injunctive relief to enforce laws to protect the public’s interests, and that accordingly the Government is entitled to injunctive relief when it demonstrates a reasonable likelihood that the defendants and/or their cohorts will commit wrongful acts in the future, without any showing of an inadequate remedy at law or of irreparable injury beyond the injury inherent in the unlawful conduct. See generally United States v. City of San Francisco, 310 U.S. 16, 30-31 (1940); Hunt, 591 F.2d at 1220; United States v. Fed. Deposit Ins. Corp., 881 F.2d 207, 210 (5th Cir. 1989); United States v. Odessa Union Warehouse Co-op, 833 F.2d 172, 175-76 (9th Cir. 1987); Gov. of V.I., Dept. of Conservation v. V.I. Paving, 714 F.2d 283, 286 (3d Cir. 1983) (and cases cited thereat); United States V. Siemens Corp., 621 F.2d 499, 505-06 (2d Cir. 1980); SEC v. Management Dyn., Inc., 515 F.2d 801, 808 (2d Cir. 1975); United States v. Diapulse Corp. of America, 457 F.2d 25, 27-28 (2d Cir. 1972); Shafer v. United States, 229 F.2d 124, 128 (4th Cir.), cert. denied, 351 U.S. 931 (1956); SEC v. Stratton Oakmont, Inc., 878 F. Supp. 250, 255 (D.D.C. 1998); F.T.C. v. Virginia Homes Mfg. Corp., 509 F. Supp. 51, 59 (D. Md. 1981); United States v. Ingersoll-Rand Co., 218 F. Supp. 530, 544-45 (W.D. Pa.), aff’d, 320 F.2d 509 (3d Cir. 1963).

of extensive litigation, and therefore courts have not fully explicated its meaning.<sup>39</sup>

For example, in United States v. Sasso, 215 F.3d 283, 291-92 (2d Cir. 2000), the Second Circuit ruled that requiring a corrupt former union official to contribute toward the cost of a court-authorized monitorship of the union to rid it of corruption was within the district court's discretion under Section 1964(a), because, inter alia, it reduced the cost of monitorship to be borne by "innocent" union members. Similarly, in United States v. Local 560 (I.B.T.), 974 F.2d 315, 347-48 (3d Cir. 1992), the Third Circuit held that removing a corrupt union official from a union, and preventing him from associating with union members, made "due provision for the rights of innocent" union members because such relief would help eliminate corruption within the union. Accord United States v. Local 30, United Slate Tile, 871 F.2d 401, 407-08 (3d Cir. 1989) (rejecting the argument that the district court's removal of 13 union officers and members found to have violated RICO did not protect the rights of innocent third parties because it stripped control of the union from its members, because such relief was necessary to eliminate corruption within the union).<sup>40</sup>

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<sup>39</sup> The forfeiture provision under RICO's Section 1963(c), which was enacted at the same time as § 1964(a), similarly provided that "[t]he United States shall dispose of all [forfeited] property as soon as commercially feasible, **making due provision for the rights of innocent persons.**" See S. REP. NO. 91-617, at 23-24 (emphasis added). Under interpretations of the original Section 1963(c), the Attorney General had the exclusive authority to make "due provision for the rights of innocent persons" and provide relief, if any, in a petition for remission or mitigation. However, in 1984, RICO's Section 1963, but not Section 1964(a), was amended to authorize the district court to make due provision for the rights of innocent persons in ancillary proceedings. See United States v. Gilbert, 244 F.3d 888, 909 (11th Cir. 2001); United States v. BCCI Holdings (Luxembourg), S.A. (Petition of Chawla), 46 F.3d 1185, 1190 (D.C. Cir. 1995); S. Rep. No. 98-225 at 205-09 (1990), *reprinted* in 1984 U.S.C.C.A.N. 3182, 3388-92. Therefore, it may be that under § 1964(a) the Attorney General retains the authority to make "due provision for the rights of innocent persons" via a petition for remission or mitigation.

<sup>40</sup> See also Ashland Oil, Inc. v. Gleave, 540 F. Supp. 81, 85 (W.D.N.Y. 1982) (holding (continued...))

## B. Substantive Issues In Proving Government Civil RICO Claims

### 1. A Defendant's Liability For A Racketeering Act May Be Based On "Aiding and Abetting"

To establish the commission of a pattern of racketeering activity, 18 U.S.C. §§ 1961(5) and 1962(c) require that each defendant commit at least two acts of racketeering, "the last of which occurred within ten years . . . after the commission of a prior" racketeering act. See H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237 (1989). The federal circuits have repeatedly held in both criminal<sup>41</sup> and civil<sup>42</sup> RICO cases that a defendant's liability for

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<sup>40</sup>(...continued)

that the "concern expressed for the rights of innocent persons cannot be stretched to include" a private litigant's right to sue for an order of attachment under section 1964(a) since section 1964(a) confers a right only on the Attorney General to bring actions for equitable relief, not private litigants.).

<sup>41</sup> See, e.g., United States v. Coon, 187 F.3d 888, 896 (8th Cir. 1999); United States v. Shifman, 124 F.3d 31, 36-37 (1st Cir. 1997); United States v. Darden, 70 F.3d 1507, 1526 (8th Cir. 1995); United States v. Pungitore, 910 F.2d 1084, 1131-32 (3d Cir. 1990); United States v. Hobson, 893 F.2d 1267, 1269 (11th Cir. 1990); United States v. Hogan, 886 F.2d 1497, 1501-02 (7th Cir. 1989); United States v. Rastelli, 870 F.2d 822, 832 (2d Cir. 1989); United States v. Wyatt, 807 F.2d 1480, 1482-83 (9th Cir. 1987); United States v. Qaoud, 777 F.2d 1105, 1117-18 (6th Cir. 1985); United States v. Cauble, 706 F.2d 1322, 1339-40 (5th Cir. 1983); United States v. Phillips, 664 F.2d 971, 1039 (5th Cir. 1981).

<sup>42</sup> See, e.g., Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1560 (1st Cir. 1994); Cox v. Admin. U.S. Steel & Carnegie, 17 F.3d 1386, 1410 (11th Cir. 1994); McLaughlin v. Anderson, 962 F.2d 187, 192-93 (2d Cir. 1992); Petro-Tech, Inc. v. Western Co. of N. Am., 824 F.2d 1349, 1356-57 (3d Cir. 1987); Armco Indus. Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 485 (5th Cir. 1986); Local 560, 780 F.2d at 283-86. See also Baumer v. Pacht, 8 F.3d 1341, 1347 (9th Cir. 1993); In re American Honda Motor Co. Dealerships Relations Litig., 958 F. Supp. 1045, 1057-59 (D. Md. 1997); Park v. Jack's Food Systems, Inc., 907 F. Supp. 914, 918-19 (D. Md. 1995); Downing v. Halliburton & Assocs., Inc., 812 F. Supp. 1175, 1182 (M.D. Ala. 1993); Wait Radio by Rosenfield v. Price Waterhouse, 691 F. Supp. 102, 108 (N.D. Ill. 1988); Cf. First Am. Corp. v. Al-Nahyan, 17 F. Supp. 2d 10, 23-4 (D.D.C. 1998) (stating, without deciding, that "with respect to RICO, Congress intended there to be aiding and abetting liability in civil actions").

(continued...)

personally committing a predicate racketeering act may be established by proof that the defendant aided and abetted the commission of the racketeering act.

Moreover, such imposition of aiding and abetting liability for racketeering acts does not conflict with Third Circuit's ruling that in a civil action for treble damages brought by "a private plaintiff," a defendant's liability **for an entire RICO violation** may not be based upon aiding and abetting the RICO violations. See, e.g., Pennsylvania Ass'n of Edwards Heirs v. Righenour, 235 F.3d 839, 841-44 (3d Cir. 2000); Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 656-57 (3d Cir. 1998), abrogation on other grounds recognized, Forbes v. Eagleson, 228 F.3d 471 (3d Cir. 2000). The rationale of those cases is that "Congress has not enacted a general civil aiding and abetting statute . . . under which a person may sue and recover damages from a private defendant," and that 18 U.S.C. § 2 "has no application to private causes of action." Rolo, 155 F.3d at 656-57 (quoting Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994)). However, a Government civil RICO suit for equitable relief, in contrast, is not a private action for damages. The Third Circuit itself, and other courts as well, has held that in such **Government** civil RICO suits, liability for predicate acts may be established by aiding and abetting under 18 U.S.C. § 2. See Local 560, 780 F.2d at 283-89. Accord Local 1804-1, 812 F. Supp. at 1338-39; United States v. District Council, 778 F. Supp. 738, 748-49 (S.D.N.Y. 1991). See also cases cited in notes 41 & 42 above. As the court stated in Local 1804, 812 F. Supp. at 1347: "In a civil RICO suit [brought by the United States] the Court applies the

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<sup>42</sup>(...continued)

"To prove aiding and abetting, the evidence must show that the defendant in some way associated himself with the criminal venture as something he wished to bring about and that he sought by his actions to make it succeed." Pungitore, 910 F.2d at 1132 (internal quotations and citation omitted).



criminal standard in determining aiding and abetting liability.” Accord Local 560, 780 F.2d at 284.

Furthermore, Righenour and Rolo, turned on whether a defendant’s liability for **all the elements of a RICO violation** could be based entirely on an aiding and abetting ground. That issue is significantly different from the issue of whether a defendant’s liability for **only** the element involving the commission of racketeering acts may be based on aiding and abetting.<sup>43</sup>

As stated above, every court to decide that narrow issue has held in the affirmative. For example,

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<sup>43</sup> Indeed, thus far the cases holding that aiding and abetting liability does not apply in civil RICO cases have **involved suits for treble damages by private plaintiffs seeking to impose aiding and abetting liability for the entire alleged RICO violations**, and not just the predicate racketeering acts. See, e.g., Righenour, 235 F.3d at 841 (“a **private plaintiff** could not maintain a claim of aiding and abetting an alleged RICO violation”) (emphasis added); Rolo, 155 F.3d at 656-57 (same); In re Mastercard Int’l Inc., Internet Gambling Litig., 132 F. Supp. 2d 468, 493 (E.D. La. 2001) (“it is doubtful that an aiding and abetting liability cause of action exists” for private plaintiffs seeking treble damages); Jubelirer v. Mastercard Int’l, Inc., 68 F. Supp. 2d 1049, 1054 (W.D. Wis. 1999) (“Central Bank’s analysis is controlling and requires dismissal of [private] plaintiff’s claim for aiding and abetting a RICO violation.”); Touhy v. Northern Trust Bank, No. 98-6302, 1999 WL 342700, at \*4 (N.D. Ill. May 17, 1999) (same); Soranno v. N.Y. Life Ins. Co., No. 96-1882, 1999 WL 104403, at \*7-8 (N.D. Ill. Feb. 24, 1999) (same); Ross v. Patrusky, Mintz & Semel, No. 90-1356, 1997 WL 214957, at \*11 (S.D.N.Y. April 29, 1997) (same); Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison, 955 F. Supp. 248, 256 (S.D.N.Y. 1997) (“Following the reasoning in Central Bank, this Court declines to create a **private right of action** for aiding and abetting a RICO violation”) (citation deleted) (emphasis added); La Salle Nat. Bank v. Duff & Phelps Credit Rating Co., 951 F. Supp. 1071, 1088-89 (S.D.N.Y. 1996); Department of Econ. Dev. v. Arthur Anderson & Co., 924 F. Supp. 449, 475 (S.D.N.Y. 1996) (the private plaintiff’s “claim for aiding and abetting a RICO violation must be dismissed because there is no such tort”).

Moreover, Bowdoin Constr. Corp. v. Rhode Island Hosp. Trust Nat. Bank, 869 F. Supp. 1004, 1009 (D. Mass. 1994), does not support preclusion of aiding and abetting liability for racketeering acts in Government civil RICO suits because Bowdoin’s preclusion of aiding and abetting liability was limited to racketeering acts under Section 10(b) of the Securities and Exchange Act of 1934 under a private civil RICO claim for treble damages because “[t]o hold otherwise would enable [private] plaintiffs to use RICO to circumvent the interpreted intent of the Securities Act.”

in Department of Economic Development, the court stated:

[O]ne can commit a primary civil violation of § 1962(a) if one has aided and abetted racketeering activity. But this does not mean that someone who aids and abets another person's violation of § 1962(a) is liable to private parties for damages.

924 F. Supp. at 475.<sup>44</sup>

Furthermore, imposition of aiding and abetting liability for **only** the commission of racketeering acts does not run afoul of the Supreme Court's decision in Reves v. Ernst & Young, 507 U.S. 170, 185 (1993), which held that a defendant is not liable for a substantive RICO violation under 18 U.S.C. § 1962(c) unless the defendant "participate[s] in the operation or management of the enterprise itself." Imposition of aiding and abetting liability for racketeering acts does not eliminate Reves' requirement for proving a substantive RICO offense that the defendant participate in the operation or management of the enterprise. See, e.g., 131 Main Street Associates v. Manko, 897 F. Supp. 1507, 1528 n.17 (S.D.N.Y. 1995) ("We do not read the operation-or-management rule enunciated in Reves as changing the rule that '[c]ivil RICO liability can be predicated on aiding and abetting the commission of the predicate acts by the primary offender.' . . . Clearly, a person can operate or manage an enterprise and yet, through delegation, avoid directly committing predicate acts." (citation omitted)); Fidelity Federal Sav. & Loan Ass'n v. Felicetti, 830 F. Supp. 257, 261 (E.D. Pa. 1993) (aider and abettor liability for

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<sup>44</sup> Moreover, aiding and abetting liability for racketeering acts is not inconsistent with the requirement for a substantive RICO claim that the defendant **personally commit** at least two racketeering acts. Pursuant to 18 U.S.C. § 2, aiding and abetting racketeering activity "makes one punishable as a principal and amounts to [personally] engaging in that racketeering activity"; it does not constitute vicarious liability. See Shifman, 124 F.3d at 36. Accord Pungitore, 910 F.2d at 1131-32; Rastelli, 870 F.2d at 832. If aiding and abetting racketeering acts did not constitute personally committing racketeering acts, then such aiding and abetting liability would not apply in criminal RICO cases. However, numerous decisions have held that aiding and abetting liability applies to racketeering acts in criminal cases. See cases cited above in n. 41.

RICO predicate acts is not inconsistent with Reves' requirement for operation or management of the RICO enterprise).

## **2. Principles of Respondeat Superior**

Government civil RICO suits typically are brought against collective entities such as corporations and labor unions. It is well established that a collective entity, such as a corporation or labor union, may act only through its agents, and hence may be held liable for the acts of its officers, employees, and other agents. This is true in both criminal prosecutions, see United States v. Wise, 370 U.S. 405 (1962); United States v. Najjar, 300 F.3d 466, 483 (4th Cir. 2002); United States v. Sun-Diamond Growers of California, 138 F.3d 961, 970 (D.C. Cir. 1998), aff'd, 526 U.S. 398 (1999), as well as in civil cases. See United States v. Brothers Constr. Co. of Ohio, 219 F.3d 300, 310-311 (4th Cir. 2000). See also Davis v. Mutual Life Ins. Co. of New York, 6 F.3d 367, 378-80 (6th Cir. 1993) (respondeat superior liability in RICO cases permissible, since "corporate principals may act only through their agents."). Accord, United States v. Philip Morris USA, Inc., 449 F. Supp. 2d at 892-93.<sup>45</sup> Therefore, a collective entity may be held liable for the statements or wrongful acts of its agents or employees when they are acting within the scope of their authority or the course of their employment, see Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 756 (1998); Restatement (Second) of Agency § 219 et seq. (1958), so long as the action is motivated, at least in part, to benefit the principal. See Sun-Diamond Growers, 138 F.3d at 970; Local 1814, Int'l Longshoremen's Ass'n v. NLRB, 735 F.2d 1384, 1395 (D.C. Cir.

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<sup>45</sup> See also Oki Semiconductor Co. v. Wells Fargo Bank, 298 F.3d 768, 775-76 (9th Cir. 2002) ("This possibility of respondeat superior liability for an employee's RICO violations encourages employers to monitor closely the activities of their employees to ensure that those employees are not engaged in racketeering. It also serves to compensate the victims of racketeering activity. Vicarious liability based on the doctrine of respondeat superior thereby fosters RICO's deterrent and compensatory goals.") (citations omitted).

1984); Restatement (Second) of Agency § 228 (1958). However, a plaintiff need not show that the agent was acting **exclusively** for the Defendant collective entity; it is enough that the employee was acting in part for the benefit of the collective entity.<sup>46</sup> Likewise, “it is not necessary for agent’s actions to have actually benefited the corporate entity.” Automated Medical Labs., Inc., 770 F.2d at 407 (citing Old Monastery Co. v. United States, 147 F.2d 905, 908 (4th Cir. 1945)); United States v. Carter, 311 F.2d 934, 942 (6th Cir. 1963); United States v. Sun-Diamond Growers of California, 964 F. Supp. 486, 490 (D.D.C. 1997) (citing cases).

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<sup>46</sup> For instance, in United States v. Gold, 743 F.2d 800 (11th Cir. 1984), the defendant (a corporate medical center) was prosecuted for violations of 18 U.S.C. § 1001 and § 371 for defrauding, and conspiring to defraud, the Government through the corporation’s employees. On appeal, the corporation argued that, because the employees were acting primarily for their own benefit, rather than that of the corporation, the company could not be found liable. Rejecting this argument, the court noted that the motivations were not mutually exclusive, and that, in fact, the employees had acted to benefit themselves (via larger bonuses) as well as the corporation (via increased revenue). Moreover, the court reasoned, so long as the employees were acting **in part** for the benefit of the corporation, the corporation may be held liable for their acts. Id. at 823 (citing United States v. Beusch, 596 F.2d 871, 877-78 & n.7 (9th Cir. 1979); United States v. Demauro, 581 F.2d 50, 54 & n.3 (2d Cir. 1978); and Prosser, Torts, § 70 at 461 (4th Ed. 1971)). See also Curtis, Collins & Holbrook Co. v. United States, 262 U.S. 215, 223-24 (1923); United States v. Cincotta, 689 F.2d 238, 241-42 (1st Cir. 1982) (agent must be “performing acts of the kind which he is authorized to perform, and those acts must be motivated – at least in part – by an intent to benefit the corporation” (emphasis added)); United States v. Automated Medical Labs., Inc., 770 F.2d 399, 407 (4th Cir. 1985) (“It would seem entirely possible, therefore, for an agent to have acted for his own benefit while also acting for the benefit of the corporation.”). Likewise, in United States v. 141<sup>st</sup> Street Corp., 911 F.2d 870 (2d Cir. 1990), the Government sought forfeiture from the defendant, 141<sup>st</sup> Street Realty Corporation, of an apartment building that had been used to facilitate narcotics trafficking. At trial, the Government established that the building superintendent, Nahmias, accepted bribes and collected exorbitant rents from drug dealers in exchange for their use of the building for drug-related activities. On appeal, the corporation argued that the agent acted adversely to its interests “and therefore any knowledge that Nahmias may have had of the narcotics trafficking cannot be imputed to the corporation.” Id. at 876. The Court of Appeals for the Second Circuit rejected the corporation’s argument, noting that “Nahmias’ actions were adverse to the corporation only in the sense that his actions contributed to the imputation of knowledge to Realty Corp.,” and that, under the corporation’s faulty logic, imputation of knowledge could never be used to impose liability “because the very actions of the agent that cause an imputation of knowledge are ‘adverse’ to the principal.” Id.

Moreover, in civil actions, “there may be no need to show that the agent acted to further the principal’s interests – a showing of ‘apparent authority’ is often enough.” Sun-Diamond Growers, 138 F.3d at 970 n.9 (D.C. Cir. 1998) (citing American Soc’y of Mech. Eng’rs v. Hydrolevel Corp., 456 U.S. 556, 573-74 (1982)). And, even where the agent’s action is beyond the original express, implied, or apparent authority, an act may be attributed to the principal if it is later ratified, either explicitly or by implication. See Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386, 1409 (11th Cir. 1994); IBJ Schroder Bank & Trust Co. v. Resolution Trust Corp., 26 F.3d 370, 375 (2d Cir. 1994); Yellow Bus Lines, Inc. v. Drivers, Chauffeurs, & Helpers Local Union 639, 883 F.2d 132, 136 (D.C. Cir. 1989), rev’d in part on other grounds, 913 F.2d 948 (D.C. Cir. 1990) (en banc). Indeed, if the act is done within the course of employment and with intent to benefit the collective entity, the collective entity is liable even if the act was unlawful,<sup>47</sup> or was done contrary to instructions or policies.<sup>48</sup>

Furthermore, it is well-established that “the knowledge of the employees is the knowledge of the corporation.” Apex Oil Co. v. United States, 530 F.2d 1291, 1295 (8th Cir. 1976). See, e.g., United States v. Investment Enters., Inc., 10 F.3d 263, 266 (5th Cir. 1993) (corporation liable for offenses arising from interstate transportation of obscenity based on president’s actions); In re Adams Labs. Inc., 3 B.R. 495, 499 & n.2 (Bankr. E.D. Va. 1980) (“The knowledge acquired by a secretary and treasurer who conducts negotiations with a third party

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<sup>47</sup> United States v. American Radiator and Standard Sanitary Corp., 433 F.2d at 204-05; United States v. Automated Medical Labs., 770 F.2d 399, 407 (4th Cir. 1985); Egan v. United States, 137 F.2d 369, 379 (8th Cir. 1943).

<sup>48</sup> Automated Medical Labs., 770 F.2d at 407; United States v. Beusch, 596 F.2d 871, 877 (9th Cir. 1979); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972); United States v. Harry L. Young & Sons, Inc., 464 F.2d 1295, 1296-97 (10th Cir. 1972); Egan, 137 F.2d at 379.

with authority from the corporation to do so will be imputed to the corporation.”); Duplex Envelope Co. v. Denominational Envelope Co., 80 F.2d 179, 182 (4th Cir. 1935) (corporation affected with constructive knowledge “of all material facts of which an officer acquires knowledge while acting in the course of his employment and within the scope of his authority.”); United States v. Josleyn, 206 F.3d 144, 159 (1st Cir. 2000) (citing cases for agent’s knowledge being imputed to the company).<sup>49</sup>

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<sup>49</sup> See also United States v. Josleyn, 206 F.3d 144, 159 (1st Cir. 2000) (there is no requirement that a person be a “central figure” at a corporation in order for that person’s knowledge to be imputed to the corporation); Askanase v. Fatjo, 130 F.3d 657, 666 (5th Cir. 1997) (imputing corporate officer’s knowledge to corporations for statute of limitations purposes); St. Paul Fire and Marine Ins. Co. v. FDIC, 968 F.2d 695, 700-701 (8th Cir. 1992) (“in general, an agent’s actual notice or knowledge may be imputed to the agent’s principal.”); Nat’l Petrochemical Co. of Iran v. M/T Stolt Sheaf, 930 F.2d 240, 243-44 (2d Cir. 1991) (corporation owned by Iranian government imputed with knowledge of its agent, United Arab Emirates intermediary, and therefore had imputed knowledge of illegal nature of shipment of chemicals from United States to Iran); Mallis v. Bankers Trust Co., 717 F.2d 683, 689 & n.9 (2d Cir. 1983) (“It is a basic tenet of the law of agency that the knowledge of an agent, or for that matter a partner or joint venturer, is imputed to the principal.” (citing cases)); Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 590 (9th Cir. 1983) (knowledge of four senior officers of corporation that corporation’s agent had rebated was imputable to corporation; thus, record supported district court’s finding that corporation’s denial that it had engaged in rebating was knowingly false); Am. Standard Credit, Inc. v. Nat’l Cement Co., 643 F.2d 248, 270-71 (5th Cir. 1981) (imputation of joint venturer’s knowledge to entire corporation); Delbrueck & Co. v. Mfrs. Hanover Trust Co., 609 F.2d 1047, 1051-52 (2d Cir. 1979) (notice to bank’s paying and receiving agent imputed to bank); Eitel v. Schmidlapp, 459 F.2d 609, 614-16 (4th Cir. 1972) (where defendant’s agent fraudulently conveyed property to defendant, agent’s knowledge of fraud would be imputed to principal even where no evidence of actual knowledge on part of principal: “the principal cannot claim the fruits of the agent’s acts and still repudiate what the agent knew.”); Ritchie Grocer Co. v. Aetna Cas. & Sur. Co., 426 F.2d 499, 500 (8th Cir. 1970) (knowledge possessed by branch manager for one of corporate insured’s stores that employee had previously committed tire theft was fully attributable to insured within exclusion provision of employee fidelity policy precluding coverage after insured or officer of insured discovers or has knowledge or information that employee has committed any fraudulent or dishonest act in service of insured or otherwise); Bergeson v. Life Ins. Corp. of Am., 265 F.2d 227, 232 (10th Cir. 1959) (corporation necessarily acts vicariously and can acquire knowledge only through its officers and agents and their knowledge is knowledge of corporation); Mollohan v. Masters, 45 App. D.C. 414, 421-22 (D.C. App. 1916) (where promissory notes infected with usury come into the possession of a

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Furthermore, a principal is attributed with the knowledge acquired by its agent even if the information is never communicated to it, see, e.g., New York University v. First Fin. Ins. Co., 322 F.3d 750, 753-54 & n.2 (2d Cir. 2003),<sup>50</sup> or even after termination of the services of that officer, employee, or agent. See Acme Precision Prods., Inc. v. Am. Alloys Corp., 422 F.2d 1395, 1398 (8th Cir. 1970) (knowledge by a corporation, obtained by and through its officers and key employees, of facts of continuing importance to business of the corporation, even after termination of services of that officer or employee, is conclusive upon the corporation).

In affirming corporate criminal liability, the Supreme Court has noted that:

[w]e see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act.

New York Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495 (1909).

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<sup>49</sup>(...continued)

corporation through its agents, who had notice of the usury, the corporation is not in a position to claim that it is an innocent purchaser; notice to the agents being notice to the principal).

<sup>50</sup> See also Bowen v. Mount Vernon Sav. Bank, 105 F.2d 796, 799 (D.C. Cir. 1939) (presumption that a principal knows what his agent knows is irrebuttable, and cannot be avoided by showing that the agent did not in fact communicate his knowledge nor by showing that the agent had such an adverse interest that he would not likely communicate his knowledge); Hand & Johnson Tug Line v. Canada S.S. Lines, 281 F. 779, 783 (6th Cir. 1922) (corporation cannot avoid responsibility by showing that, when a written notice by mail was received in its general office, it was sent to the wrong department).

**3. A Corporation's or Labor Union's Scienter May Be Established By The Collective Knowledge of The Corporation's or Labor Union's Employees and Representatives**

Insofar as a principal can be attributed with the knowledge of a single agent or employee, see Section III (B)(2) above, a corporation, or a labor union, as a collection of employees and agents, “is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.” United States v. T.I.M.E.-D.C. Inc., 381 F. Supp. 730, 738-39 (W.D. Va. 1974). Therefore, such collective entities are liable for the aggregate knowledge of all employees and agents within (and acting on behalf of) the collective entity, and cannot “plead ignorance” by claiming that the representative making the fraudulent statement, or obtaining the knowledge of its falsity, somehow was insulated from the rest of the corporation or labor union.

The seminal case on the “collective knowledge” doctrine is United States v. Bank of New England, N.A., 821 F.2d 844 (1st Cir. 1987). In that case, the bank was convicted of violating the Currency Transaction Reporting Act for failing to report various financial transactions. At trial, the district court stressed that, unlike a natural person, the jury must consider the bank “as an institution.” The trial court instructed the jury as follows:

In addition, however, you have to look at the bank as an institution. As such, its knowledge is the sum of the knowledge of all of the employees. That is, the **bank's knowledge is the totality of what all of the employees know within the scope of their employment.** So, if Employee A knows one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the bank knows them all. So if you find that an employee within the scope of his employment knew that CTRs had to be filed, even if multiple checks are used, the bank is deemed to know it. The bank is also deemed to know it if each of several employees knew a part of that requirement and the sum of what the separate employees knew amounted to knowledge that such a



requirement existed.

Id. at 855 (emphasis added). After conviction, the bank on appeal challenged the trial court's instructions regarding the bank's knowledge and intent, by allowing the jury to consider the aggregate knowledge of various employees, including the tellers at the bank window (who participated in the withdrawals) and the other employees (who might not have even known of the withdrawals). The individual making the withdrawals was acquitted on all counts, and none of the bank employees had been charged with a crime. Id. at 847. Therefore, the bank contended, "it is error to find that a corporation possesses a particular item of knowledge if one part of the corporation has half the information making up the item, and another part of the entity has the other half." Id. at 856.

The First Circuit rejected the bank's argument, noting that "[a] collective knowledge instruction is entirely appropriate in the context of corporate criminal liability. . . . [T]he knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation." Id. at 856. In addition, the court stressed that it would be unjust to allow a corporation to avoid liability merely because it chose to divide its knowledge, thus allowing it to "plead ignorance":

Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of these components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation . . . . Since the Bank had the compartmentalized structure common to all large corporations, the court's collective knowledge instruction was not only proper but necessary.

Id. at 856.

Earlier cases also demonstrate that corporate knowledge should be aggregated, and accordingly notice and knowledge of a fact by an employee-representative is imputed to the corporation-principal. For instance, in Inland Freight Lines v. United States, 191 F.2d 313, 315 (10th Cir. 1951), the court ruled that a corporation could be held responsible for the mistakes and falsification by its drivers in preparation of drivers' logs even where no individual agent or employee was shown to have actual knowledge of discrepancies between the business logs and reports. The court explained:

The logs and the reports did not find their way into the hands of a single agent or representative of the company after they were filed. No single agent or representative in the offices of the company had actual knowledge of their conflicts and falsities. But one agent or representative had knowledge of the material contents of the logs and another had knowledge of the material contents of the reports. And the knowledge of both agents or representatives was attributed to the company.

Id. at 315.<sup>51</sup>

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<sup>51</sup> See also Matter of Pubs., Inc., 618 F.2d 432, 438 (7th Cir. 1980) (collective knowledge of all employees and departments within the corporation is generally imputed to the corporation); Steere Tank Lines, Inc. v. United States, 330 F.2d 719, 721-22 (5th Cir. 1963) (“It is now beyond doubt that a corporation may be held criminally liable. [citing cases]. These cases also settle the proposition that knowledge of employees and agents of the corporation is attributable to the corporation, and that their acts may amount to wilfulness on the part of the corporation.”); United States v. U.S. Cartridge Co., 198 F.2d 456, 464 (8th Cir. 1952) (collective knowledge doctrine case in False Claims Act context); Camacho v. Bowling, 562 F. Supp. 1012, 1025 (N.D. Ill. 1983) (“Other organizations, such as private corporations or partnerships, are held to have constructive notice of the collective knowledge of all the employees and departments within the organization.”); United States v. Sawyer Transport, Inc., 337 F. Supp. 29, 31 (D. Minn. 1971), aff’d, 463 F.2d 175 (8th Cir. 1972) (knowledge of employees may be joined and imputed to the corporation); United States v. E. Brooke Matlack, Inc., 149 F. Supp. 814, 819-20 (D. Md. 1957) (corporation liable for knowingly and wilfully violating ICC regulations even where main office in Philadelphia did not know or suspect that branch agents in Baltimore were violating duties); People v. Amer. Med. Ctrs., 324 N.W.2d 782, 793 (Mich. App. 1982) (“The combined knowledge of those employees may be imputed to the corporation to find it liable for fraudulent

(continued...)

Moreover, in United States v. Shortt Accountancy Corp., 785 F.2d 1448 (9th Cir. 1986), an accounting firm was convicted for making and subscribing false tax returns, in violation of 26 U.S.C. § 7206(1), for preparing and submitting tax returns claiming deductions for illegal “straddle” investments. The firm’s chief operating officer, Ashida, advised the customer about the investment, and provided information to another employee of the firm, Whatley, for the actual preparation of the customer’s return. Id. at 1450-51. At trial, the firm contended that a corporation cannot be guilty of a § 7206 offense “when the person who actually subscribes the false return believes it to be true and correct.” Id. at 1451. The district court denied the motion, and the jury ultimately convicted the firm.

On appeal, the defendant claimed that six of the convictions should be overturned because there was no evidence that Whatley, the preparer and subscriber of these six tax returns, possessed the requisite intent to wilfully make and subscribe a false tax return. The firm conceded that “Ashida, who supplied Whatley with all of his information regarding the straddle losses, did have the requisite intent,” but pointed out that Ashida did not physically subscribe to the return. After considering the argument, the court of appeals concluded that it was “completely meritless”:

If it were accepted by the courts, any tax return preparer could escape prosecution for perjury by arranging for an innocent employee to complete the proscribed act of subscribing a false return. This interpretation of section 7206(1) defies logic and has no support in the case law. A corporation will be held liable under section 7206(1) when its agent deliberately causes it to make and subscribe to a false income tax return.

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<sup>51</sup>(...continued)  
acts.”); Gem City Motors Inc. v. Minton, 137 S.E.2d 522, 525 (Ga. App. 1964) (corporation “chargeable with the **composite knowledge** acquired by its officers and agents” (emphasis added)).

Id. at 1454.

Likewise, since Bank of New England, several other courts have allowed such agents' knowledge to be aggregated and imputed to the corporation as a whole. For example, in United States v. Philip Morris USA, Inc., 449 F. Supp. 2d at 893-98, the district court held in a Government civil RICO lawsuit that the defendants-corporations' knowledge and specific intent to commit fraud were properly established by the collective knowledge of their officers, employees and agents. The district court explained:

There is "every reason in public policy" why a corporation, which can only act through its agents and officers, and which profits by their actions, should be held liable when the totality of circumstances demonstrate that such corporation collectively knew what it was doing or saying was false, by did it or said it nevertheless, even if it is impossible to determine the state of mind of the individual agent or officer at the time. Indeed, if it were otherwise, Defendants could avoid liability by simply dividing up duties to ensure that fraudulent statements were only made by or [sic] uninformed employees.

Id. at 896-97.

Similarly, in United States v. Sun-Diamond Growers, 964 F. Supp. 486 (D.D.C. 1997), the court noted that the defendant "makes much of the fact that purportedly no other corporate officials knew about Mr. Douglas' activities. However, knowledge obtained by a corporate agent acting within the scope of his employment is imputed to the corporation." Id. at 491 n.10. In addition, the Court noted that, under agency principles, the defendant could still be liable for Douglas' actions "even if Mr. Douglas had acted against corporate policy or the corporation's express instructions or even if Sun-Diamond had derived no benefit from Mr. Douglas' actions."

Id.

In CPC Intern., Inc. v. Aerojet-General Corp., 825 F. Supp. 795 (W.D. Mich. 1993), the court stressed that “a corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual employee.” 825 F. Supp at 811-812 (citations and internal quotations omitted); United States v. T.I.M.E. - D.C. Inc., 381 F. Supp. 730, 738-39 (W.D. Va. 1974) (a corporation “cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual employee who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.”); United States v. LBS Bank-New York Inc., 757 F. Supp. 496, 501 (E.D. Pa. 1990) (knowledge from different employees can be joined in order to establish corporate knowledge, but specific intent cannot be so aggregated); United States v. Farm & Home Sav. Ass’n, 932 F.2d 1256, 1259 (8th Cir. 1991) (imputing collective knowledge of employees participating in multiple illegal transactions to employer).

Similarly in United States ex rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 919 (4th Cir. 2003), a False Claims Act case, though not formally needing to reach the “corporate scienter” rule, the court of appeals declined to adopt the defendant’s proposed “single actor” requirement that the same employee know both the certifying requirement and the wrongful conduct. Under that rule, the court reasoned, “corporations would establish segregated ‘certifying’ offices that did nothing more than execute government contract certifications, thereby immunizing themselves against FCA liability.” Id. As acknowledged by the California Supreme Court, the single actor rule is “fraught with danger and would open up avenues of fraud which would lead to incalculable hazards. It would permit a corporation, by not letting its right hand

know what is in its left hand, to mislead and deceive . . . .” Sanders v. Magill, 70 P.2d 159, 163 (Cal. 1937).

Thus, under the collective knowledge doctrine “[t]he knowledge necessary to adversely affect the corporation does not have to be possessed by a single corporate agent; **the cumulative knowledge of several agents** can be imputed to the corporation.” WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 790, at 16 (perm. Ed.) (emphasis added); accord WILLIAM E. KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE DIRECTORS AND OFFICERS, § 1.02, at 4 (Supp. 1992).

Imposing the collective scienter upon the corporation follows equity as well as the extensive legal authority cited above. As the First Circuit noted in Bank of New England, the collective knowledge doctrine prevents a corporation from “plead[ing] innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import.” 821 F.2d at 856 (citing T.I.M.E.-D.C., 381 F. Supp. at 738). Indeed, numerous courts have prevented corporations (and other organizations) from taking advantage of their corporate form by attempting to “ostrich” themselves away from liability by insulating the actors (or spokespersons) of a corporation from those within the organization who have certain information. As one commentator noted:

Given the often complex and decentralized nature of many corporations, it is sometimes difficult, if not impossible, to prove that any single corporate agent acted with the necessary intent and knowledge to commit an offense. Under the judicially created “collective knowledge” doctrine, however, this will not preclude a corporation’s conviction. That doctrine deems a corporation’s knowledge to be the combined knowledge and intent of all of its employees. Thus, even if no single employee has the intent and knowledge necessary to commit a crime, the corporation can be convicted on the basis of its employees [sic] collective knowledge

and intent.

Dan K. Webb et al., Understanding and Avoiding Corporate and Executive Criminal Liability, 49 BUS. LAW 617, 625 (1994).<sup>52</sup>

#### **4. The Prohibition Against Intracorporate Conspiracies Under The Antitrust Laws Does Not Apply To Government Civil RICO Lawsuits**

In Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), the Supreme Court held that a parent corporation “and its wholly owned subsidiary . . . are incapable of conspiring with each other for purposes of § 1 of the Sherman Act,” 15 U.S.C. § 1. 467 U.S. at 752. But, the Supreme Court rested its decision in Copperweld on the Sherman Act’s distinctive intent and purpose. Section 1 of the Sherman Act prevents two or more enterprises from joining

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<sup>52</sup> See also Charles J. Walsh & Alissa Pyrich, Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save its Soul?, 47 RUTGERS L. REV. 605, 625 (1995) (noting that corporations can be convicted of intent-based crimes even where none of their employees possessed the requisite intent); Kevin B. Huff, The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach, 96 COLUM. L. REV. 1252, 1256 n.26 (1996) (“Under the ‘collective knowledge’ doctrine, courts have found the required intent by imputing to the corporation the aggregate knowledge of more than one employee.”); Steere Tank Lines v. United States, 330 F.2d 719, 721 (5th Cir. 1963) (“knowledge of employees’ agents of the corporation is attributable to the corporation, and . . . their acts may amount to wilfulness on the part of the corporation”).

See also FLETCHER, CORPORATIONS, § 790 (absent collective knowledge doctrine, “corporations could avoid the adverse implications of the [imputed knowledge] rule by restricting the intracorporate flow of information.”). As noted by the Fifth Circuit in Continental Oil Co. v. Bonanza Corp., 706 F.2d 1365, 1376 (5th Cir. 1983), “Because a corporation operates through individuals, the privity and knowledge of individuals at a certain level of responsibility must be deemed privity and knowledge of the organization, ‘else it could always limit its liability.’” (citing Coryell v. Phipps, 317 U.S. 406, 410-11 (1943)); Silver Line, Ltd. v. United States, 94 F.2d 776, 780 (9th Cir. 1937) (ship owner may not escape liability by giving management functions to employee acting as agent)). As the Eleventh Circuit emphasized in First Ala. Bank v. First State Ins. Co., 899 F.2d 1045, 1060 n.8 (11th Cir. 1990), the reason that courts impose constructive knowledge upon the principal “is to avoid the injustice which would result if the principal could have an agent conduct business for him and at the same time shield himself from the consequences which would ensue from knowledge of conditions or notice of the rights and interests of others had the principal transacted his own business in person.”

their economic power to restrain trade; it does not apply to unilateral action by a single enterprise. See id. at 771-775. Because Congress recognized that a prohibition on unilateral action could impede the ability of a single enterprise to compete in the marketplace, the Court held in Copperweld that Section 1 of the Sherman Act does not apply to intra-enterprise agreements. Id. at 775 (“Subjecting a single firm’s every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote.”).

In fact, numerous courts have held that these antitrust considerations simply do not apply to RICO. For example, in Haroco v. Am. Nat’l Bank & Trust Co. of Chicago, 747 F.2d 384, 403 n.22 (7th Cir. 1984), aff’d on other grounds, 473 U.S. 606 (1985), the court ruled that Copperweld did not apply to civil RICO conspiracy charges, explaining that “the Sherman Act is premised, as RICO is not, on the ‘basic distinction between concerted and independent action.’ The policy considerations discussed in Copperweld therefore do not apply to RICO, which is targeted primarily at the profits from patterns of racketeering activity.” 747 F.2d at 403 n.22 (citation omitted). Similarly, in Ashland Oil, Inc. v. Arnett, 875 F.2d 1271 (7th Cir. 1989), the court stated:

Since a subsidiary and its parent theoretically have a community of interest, a conspiracy “in restraint of trade” between them poses no threat to the goals of antitrust law – protecting competition. In contrast, intracorporate conspiracies do threaten RICO’s goals of preventing the infiltration of legitimate businesses by racketeers and separating racketeers from their profits.

875 F.2d at 1281 (citations omitted). In accordance with the foregoing reasoning, numerous courts have likewise ruled that the rationale of Copperweld does not apply to civil RICO claims and that, therefore, a civil RICO conspiracy claim properly applies to a conspiracy between a



parent corporation and its subsidiary, between affiliated corporations, or between a corporation and its own officers and representatives.<sup>53</sup>

### **C. Certain Defenses Do Not Apply to Government Civil RICO Actions For Equitable Relief**

#### **1. Laches and Statute of Limitations**

The Supreme Court has repeatedly held that the United States is not bound by a statute of limitations or subject to the defense of laches<sup>54</sup> when it brings a lawsuit in its sovereign capacity to enforce a public right or to protect the public's interest. See, e.g., Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917) ("As a general rule, laches or neglect of duty on the part

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<sup>53</sup> See, e.g., Webster v. Omnitrition Intern., Inc., 79 F.3d 776, 787 (9th Cir. 1996); Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1166-67 (3d Cir. 1989); Fed. Reserve Bank of S.F. v. HK Sys., Inc., No. C-95-1190 MHP, 1997 WL 765952, at \*3-\*4 (N.D. Cal. Nov. 12, 1997); N. Shore Med. Ctr., Ltd. v. Evanston Hosp. Corp., No. 92 C 6533, 1996 WL 435192, at \*3 (N.D. Ill. July 31, 1996); Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., No. 95-1698, 1996 WL 135336, at \*5 (E.D. Pa. Mar. 19, 1996); Bowman v. W. Auto Supply Co., 773 F. Supp. 174, 180 (W.D. Mo. 1991), rev'd on other grounds, 985 F. 2d 383 (8th Cir. 1993); Dun-Rite Tool & Fabricating Co. v. Am. Nat'l Bank of DeKalb, No. 89 C 20370, 1991 WL 293092, at \*5 (N.D. Ill. Apr. 11, 1991); Rouse v. Rouse, No. 89-CV-597, 1990 WL 160194, at \*14 (N.D.N.Y. Oct. 17, 1990); Atlass v. Tex. Air Corp., Civ. A. No. 88-9637, 1989 WL 51724, at \*5 (E.D. Pa. May 10, 1989); Curley v. Cumberland Farms Dairy, Inc., 728 F. Supp. 1123, 1135 (D.N.J. 1989); Pandick Inc. v. Rooney, 632 F. Supp. 1430, 1435 (N.D. Ill. 1986); Callan v. State Chemical Mfg. 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/Am. Express, Inc., 567 F. Supp. 1231, 1241 (S.D.N.Y. 1983).

Moreover, Copperweld's prohibition on intracorporate conspiracies does not apply to criminal RICO conspiracy charges or other criminal conspiracy charges. See, e.g., United States v. Hughes Aircraft Co., 20 F. 3d 974, 979 (9th Cir. 1994) (collecting cases); Crockett, 979 F.2d at 1218 n.12.

<sup>54</sup> For laches to apply, a defendant must establish two elements: (1) unreasonable delay in bringing the claim; and (2) prejudice caused by the delay. See, e.g., Trustees of Centennial State Carpenters Pension Trust Fund v. Centric Corp. (In re Centric Corp.), 901 F.2d 1514, 1519 (10th Cir. 1990); Independent Bankers Ass'n of America v. Heimann, 627 F.2d 486, 488 (D.C. Cir. 1980); Allen v. Carmen, 578 F. Supp. 951, 962-63 (D.D.C. 1983).

of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest.”). Accord Nevada v. United States, 463 U.S. 110, 141 (1983); United States v. California, 332 U.S. 19, 40 (1947); United States v. Summerlin, 310 U.S. 414, 416 (1940); Bd. of County Comm’rs v. United States, 308 U.S. 343, 351 (1939); Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 132 (1938); Davis v. Corona Coal Co., 265 U.S. 219, 222 (1924); Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123, 125 (1919); United States v. Insley, 130 U.S. 263, 266 (1889); United States v. Thompson, 98 U.S. 486, 489 (1878); United States v. Kirkpatrick, 22 U.S. 720, 735-37 (1824). Accord United States v. Angell, 292 F.3d 333, 338 (2d Cir. 2002); Herman v. South Carolina Nat’l Bank, 140 F.3d 1413, 1427 (11th Cir. 1998); United States v. Arrow Transp. Co., 658 F.2d 392, 394 (5th Cir., Unit B, Oct. 1981); United States v. Weintraub, 613 F.2d 612, 618-19 (6th Cir. 1979). “This principle protects public rights vested in the government for the benefit of all from ‘the inadvertence of the agents upon which the government must necessarily rely.’” Herman, 140 F.3d at 1427 (quoting United States v. Alvarado, 5 F.3d 1425, 1427 (11th Cir. 1993)); accord SEC v. Rind, 991 F.2d 1486, 1491 (9th Cir. 1993).

The RICO statute itself does not contain any time limitations upon the United States’ ability to bring civil RICO suits for equitable relief. Indeed, Congress recognized in RICO’s legislative history that “there is no general statute of limitations applicable to civil suits brought by the United States to enforce public policy, nor is the doctrine of laches applicable.” S. REP. No. 91-617 at 160. Therefore, it is clear that, consistent with the general principles discussed above, Congress did not intend to, and affirmatively decided not to, apply a statute of limitations or the doctrine of laches to civil RICO suits for equitable relief brought by the United States.

In accordance with the foregoing authority, every court that has considered the issue has held that a statute of limitations and the doctrine of laches do not apply against claims of the United States to obtain injunctive and other equitable relief under RICO. See United States v. Philip Morris Inc., 300 F. Supp. 2d 61, 72-74 (D.D.C. 2004); United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 793 F. Supp. 1114, 1152 (E.D.N.Y. 1992); United States v. Int'l Bhd. of Teamsters, 708 F. Supp. 1388, 1402 (S.D.N.Y. 1989); United States v. Bonanno Organized Crime Family, 695 F. Supp. 1426, 1430-31 (E.D.N.Y. 1988). Moreover, courts in other analogous enforcement contexts similarly have held that the doctrine of laches does not apply against actions of the United States to enforce the securities laws,<sup>55</sup> antitrust laws,<sup>56</sup> or fair trade laws.<sup>57</sup> Likewise, in various other civil enforcement actions, courts have concluded that limitations periods will not be imposed on suits brought by the United States. See Dole v. Local 427, Int'l Union of Elec. Radio & Mach. Workers, 894 F.2d 607, 610-16 (3d Cir. 1990) (no statute of limitations applies when Secretary of Labor sues under Labor-Management Reporting and Disclosure Act ("LMRDA") to enjoin local union from refusing to allow one of its members to review collective bargaining agreements); Donovan v. West Coast Detective Agency, Inc., 748 F.2d 1341, 1343 (9th Cir.1984) (Secretary of Labor suit to compel filing of requisite reports

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<sup>55</sup> See, e.g., SEC v. Rind, 991 F.2d 1486, 1491 (9th Cir. 1993); SEC v. McCaskey, 56 F. Supp. 2d 323, 327 (S.D.N.Y. 1999); SEC v. Willis, 777 F. Supp. 1165, 1174 (S.D.N.Y. 1991); SEC v. Gulf & Western Indus., Inc., 502 F. Supp. 343, 348-49 (D.D.C. 1980); SEC v. Penn Central Co., 425 F. Supp. 593, 599 (E. D. Pa. 1976).

<sup>56</sup> See, e.g., United States v. Firestone Tire & Rubber Co., 374 F. Supp. 431, 433 (N.D. Ohio 1974).

<sup>57</sup> See, e.g., FTC v. Verity Int'l, Ltd., 194 F. Supp. 2d 270, 286 (S.D.N.Y. 2002); FTC v. Crescent Pub. Group, Inc., 129 F. Supp. 2d 311, 324 (S.D.N.Y. 2001); United States v. Reader's Digest Ass'n, Inc., 464 F. Supp. 1037, 1043 (D. Del. 1978).

under LMRDA); Donovan v. Square D Co., 709 F.2d 335, 341 (5th Cir. 1983) (Secretary of Labor’s anti-retaliation suit under Occupational Safety and Health Act); Marshall v. Intermountain Elec. Co., 614 F.2d 260, 263 (10th Cir. 1980) (same); Nabors v. NLRB, 323 F.2d 686, 688-89 (5th Cir. 1963) (National Labor Relations Board enforcement of National Labor Relations Act); see also United States v. Ali, 7 F.2d 728 (E.D. Mich. 1925) (laches inapplicable to denaturalization proceeding brought by the government); United States v. Brass, 37 F. Supp. 698 (E.D.N.Y. 1941) (same).

## 2. United States’ Civil RICO Claims Cannot Be Implicitly Waived

As a matter of law, the United States cannot be found to have implicitly waived its sovereign capacity to protect public interests through civil RICO suits for equitable relief. In United States v. California, 332 U.S. 19 (1947), the Supreme Court considered a dispute between a state and the federal government over ownership and control of submerged coastal land. The state argued, inter alia, that the federal government’s policies, decisions and actions, as well as the “conduct of its agents” served to waive the United States’ claim to the lands. See id. at 39.

The Supreme Court squarely rejected this analysis:

even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. **The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes . . . .**

Id. at 39-40 (emphasis added); see also cases in Section III (C)(3) below (demonstrating that equitable estoppel does not lie against the United States acting as sovereign to protect the public

interest).<sup>58</sup>

RICO vests the Attorney General with the exclusive authority to bring civil RICO suits for injunctive and equitable remedies to vindicate the public's paramount interests in eliminating corruption from the channels of commerce. See Section II (D) above; United States v. Int'l Bhd. of Teamsters, 3 F.3d 634, 638 (2d Cir. 1993) (when it proceeds under § 1964, "the government sues in its sovereign capacity pursuant to a 'compelling governmental interest' and 'strong congressional policy'" (citations omitted). The public interest vindicated by RICO enforcement actions cannot be understated. The Congressional Statement of Findings and Purpose underlying RICO explains that, among other things, RICO was designed to combat activities that

weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens . . . .

Pub. L. No. 91-452, 84 Stat., at 922, 923. Indeed, Congress created RICO to provide new and expanded criminal and civil remedies to vindicate the public's interest in combating racketeering activity and "to free the channels of commerce" from such unlawful conduct. See Sections II (B) and (C) above.

Consequently, the United States' right to maintain a civil RICO action, so clearly "charged or colored with public interest," Brooklyn Savs. Bank, 324 U.S. at 704, cannot be

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<sup>58</sup> Similarly, the Supreme Court has explained, in the context of a **private** right granted by federal statute, "Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate." Brooklyn Savs. Bank v. O'Neil, 324 U.S. 697, 704 (1945). See also Tompkins v. United Healthcare of New England, Inc., 203 F.3d 90, 97 (1st Cir. 2000) ("[a] statutory right may not be disclaimed if the waiver could 'do violence to the public policy underlying the legislative enactment.'" (internal quotations and citation omitted).

implicitly waived as a matter of law.<sup>59</sup>

### 3. Equitable Estoppel Can Not Lie Against the United States, If Ever, Absent Affirmative Misconduct

\_\_\_\_\_ a. It is well settled that “equitable estoppel will not lie against the Government as it lies against private litigants.” OPM v. Richmond, 496 U.S. 414, 419 (1990). The Supreme Court has succinctly stated the rationale for this rule: “When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined.” Heckler v. Community Health Servs. of Crawford County, Inc., 467 U.S. 51, 60 (1984). See also FDIC v. Hulsey, 22 F.3d 1472, 1489 (10th Cir. 1994) (Where estoppel against the United States would “frustrate the purpose of the statutes expressing the will of Congress or unduly undermine the enforcement of the public

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<sup>59</sup> Even assuming arguendo that the right of the United States to bring a civil RICO claim could be waived, a defendant would have an exacting burden to establish a waiver. “A waiver ‘is ordinarily an intentional relinquishment or abandonment of a known right or privilege.’” United States v. Robinson, 459 F.2d 1164, 1168 (D.C. Cir. 1972) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)); see also United States v. Olano, 507 U.S. 725, 733 (1993); Britamco Underwriters, Inc. v. Nishi, Papagjika & Assocs., Inc., 20 F. Supp. 2d 73, 77 n.2 (D.D.C. 1998). In the context of a right expressly reserved to the United States as sovereign, the waiver must be “unmistakable.” See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982) (“Without regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign’s jurisdiction, and will remain intact **unless surrendered in unmistakable terms.**”) (emphasis added); United States v. Cherokee Nation of Okla., 480 U.S. 700, 707 (1987) (“waiver of sovereign authority [to ensure that navigable waters remain free to interstate and foreign commerce] will not be implied, but instead must be surrendered in unmistakable terms”) (internal quotation and citation omitted); Bowen v. Public Agencies Opposed to Social Sec. Entrapment, 477 U.S. 41, 52 (1986) (“we have declined in the context of commercial contracts to find that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in the contract.” (internal quotation and citation to Merrion omitted)); United States v. Philip Morris Inc., 300 F. Supp. 2d at 69 (“any waiver [of the Government’s right to bring a civil RICO lawsuit] must be made in unmistakable terms”); cf. also United States v. Mitchell, 445 U.S. 535, 538 (1980) (“A waiver of sovereign immunity cannot be implied but must be unequivocally expressed.”) (internal quotation and citation omitted).

laws,” it should not be invoked); Alacare Home Health Servs. Inc. v. Sullivan, 891 F.2d 850, 855 (11th Cir. 1990) (equitable estoppel should not apply when Government acting in its sovereign, rather than proprietary, function); Chapman v. Santa Fe Pac. R. Co., 198 F.2d 498, 519 (D.C. Cir. 1952) (“It is settled law that no estoppel can arise against the Government in the exercise of a public or governmental function as distinguished from a proprietary one.”) (citations omitted).

While the Supreme Court has not absolutely foreclosed the possibility that estoppel could lie against the United States in “extreme circumstances,” it has never applied the doctrine of equitable estoppel against the United States. See OPM v. Richmond, 496 U.S. at 434; see also id. at 422 (“Courts of Appeals have taken our statements as an invitation to search for an appropriate case in which to apply estoppel against the Government, **yet we have reversed every finding of estoppel that we have reviewed.**”) (emphasis added). Accord ATC Petroleum, Inc. v. Sanders, 860 F.2d at 1104, 1111 (D.C. Cir. 1988). For example, in Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917), the Supreme Court stated:

As presenting another ground of estoppel it is said that the agents in the forestry service and other officers and employees of the government, with knowledge of what the defendants were doing, not only did not object thereto, but impliedly acquiesced therein until after the works were completed and put in operation. This ground also must fail. As a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest.

b. Before equitable estoppel could ever lie against the United States, a Defendant would have to present evidence of significant “affirmative misconduct” on the part of the Government. See, e.g., INS v. Hibi, 414 U.S. 5, 8 (1973); Montana v. Kennedy, 366 U.S. 308, 314-15 (1961); Long v. Area Manager, Bureau of Reclamation, 236 F.3d 910, 916 (8th Cir. 2001); Drozd v. INS, 155 F.3d 81, 90 (2d Cir. 1998); City of New York v. Shalala, 34 F.3d 1161, 1168 (2d Cir. 1994).

Such “affirmative misconduct” must consist, at minimum, of active misrepresentation or concealment; negligent, indifferent, or passive conduct by the Government will not suffice. See, e.g., United States v. Marine Shale Processors, 81 F.3d 1329, 1348-51 (5th Cir. 1996); United States v. Harvey, 661 F.2d 767, 775 (9th Cir. 1981); United States v. City of Toledo, 67 F. Supp. 603, 607 (N.D. Ohio 1994); United States v. City of Menominee, 727 F. Supp. 1110, 1121 (W.D. Mich. 1989). For example, in Alaska Limestone Corp. v. Hodel, 614 F. Supp. 642, 647 (D. Alaska 1985), the court rejected an estoppel claim even though Government officials had failed to comply with certain congressionally mandated deadlines. In so doing, the Alaska Limestone court concluded that the party claiming estoppel had offered nothing to show that the Government had “intentionally ignored” its responsibilities or “affirmatively sought to deceive or mislead” others. 614 F. Supp. at 648.

Moreover, “[t]he case for estoppel against the government must be compelling,” and, at a minimum, requires proof of (1) a false representation of fact; (2) a purpose to invite action by the party to whom the representation was made; (3) ignorance of the true facts by that party; (4) reasonable reliance; (5) a showing of injustice; and (6) lack of undue damage to the public interest. ATC Petroleum, 860 F.2d at 1111; Graham, 222 F.3d at 1007; United States v. Philip Morris Inc., 300 F. Supp. 2d at 71-72; Moore v. Blue Cross & Blue Shield of the Nat’l Cap. Area, 70 F. Supp. 2d 9, 31 (D.D.C. 1999). Defendants must demonstrate that all these elements are satisfied in order for equitable estoppel to apply. See, e.g., Heckler, 467 U.S. at 61 (“[H]owever heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present.”); ATC Petroleum, 860 F.2d at 1111; Trustees of Michigan Laborers’



Health Care Fund v. Gibbons, 209 F.3d 587, 591 (6th Cir. 2000); Kennedy v. United States, 965 F.2d 413, 417 (7th Cir. 1992).

**4. The United States Is Not Subject to the Defenses of Unclean Hands or In Pari Delicto**

a. The doctrine of unclean hands derives from the equitable maxim that one “who comes into equity must come with clean hands.” See, e.g., Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945). Just as with waiver, equitable estoppel, and laches, this doctrine generally may not be invoked against the United States when it is “attempting to enforce a congressional mandate in the public interest.” See SEC v. Gulf & Western Indus., Inc., 502 F. Supp. 343, 348 (D.D.C. 1980); Pan-American Petroleum & Transp. Co. v. United States, 273 U.S. 456, 505-506 (1927) (stating that principle that “he who seeks equity must do equity . . . will not be applied to frustrate the purpose of [the United States’] laws or to thwart public policy”); SEC v. Sprecher, 1993 WL 544306, \*2 (D.D.C. 1993) (“an unclean hands defense does not lie in a civil enforcement action brought by a federal agency”).<sup>60</sup> As noted above, Government civil RICO actions for equitable relief seek to enforce Congress’ mandate to protect the public’s interests. Thus, such civil RICO suits “enforc[e] a congressional mandate in the public interest,” Gulf & Western, 502 F. Supp. at 348, thereby precluding the application of the doctrine of “unclean hands” against it. Accord United States v. Philip Morris Inc., 300 F. Supp. 2d at 74-76.

b. The doctrine of in pari delicto, which “literally means ‘of equal fault,’” Pinter v. Dahl, 486 U.S. 622, 632 (1988), is closely related to the defense of “unclean hands.” This defense is

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<sup>60</sup> Accord Kelley v. Thomas Solvent Co., 714 F. Supp. 1439, 1451 (W.D. Mich. 1989); United States v. Vineland Chem. Co., 692 F. Supp. 415, 423-24 (D.N.J. 1988).

not applicable to Government civil RICO lawsuits for the reasons discussed above, but for other legal reasons as well. In order for in pari delicto to apply, “[t]he plaintiff must be an active voluntary participant in the unlawful activity that is the subject of the suit.” Pinter, 486 U.S. at 636. Indeed, “[p]laintiffs who are truly in pari delicto are those who have themselves violated the law in cooperation with the defendant.” Id.

However, an action can only be barred by in pari delicto “if preclusion of suit does not offend the underlying statutory policies.” Id. at 637-38; Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138 (1968) (rejecting in pari delicto defense to private treble damages antitrust suit where nothing in the statutory language indicated that Congress wanted to make in pari delicto defense available, and recognizing “inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes”). It is beyond question that permitting the in pari delicto defense to bar a RICO suit brought by the United States to address alleged violations of RICO and thus protect the American public would offend the important public purposes served by RICO. Accord United States v. Philip Morris Inc., 300 F. Supp. 2d at 76.

Further, the United States is not a “person” within the meaning of the RICO statute. See United States v. Bonanno Organized Crime Family, 879 F.2d 20, 21-27 (2d Cir. 1989); Peia v. United States, 152 F. Supp. 2d 226, 234 (D. Conn. 2001). Thus, the United States cannot, as a matter of law, participate in a RICO Enterprise under 18 U.S.C. § 1962(c) (“It shall be unlawful for any **person** . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs. . . .”) (emphasis added), or participate in a RICO conspiracy to violate 1962(c) under 18 U.S.C. § 1962(d) (“It shall be unlawful for any **person** to conspire to violate

[the RICO statute].”) (emphasis added). Thus, because the United States is not a person within the meaning of RICO, it may not be held liable for a violation of RICO.

#### **D. Collateral Estoppel**

Civil RICO, 18 U.S.C. § 1964 (d), explicitly authorizes the Government to invoke collateral estoppel to prove its civil RICO charges, and provides as follows:

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.

Collateral estoppel “means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” Ashe v. Swenson, 397 U.S. 436, 443 (1970). Accord United States v. Console, 13 F.3d 641, 664 (3d Cir. 1993). Moreover, a party invoking collateral estoppel bears the burden of demonstrating that the issue of fact whose litigation he seeks to foreclose was actually decided in his favor by a valid and final judgment in an earlier proceeding. See Dowling v. United States, 493 U.S. 342, 350-51 (1990) (collecting cases); Console, 13 F.3d at 665, n. 28. To determine whether a party has carried his burden of establishing that a jury in a prior prosecution necessarily resolved a particular fact in his favor, “requires a court to ‘examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.’” Ashe, 397 U.S. at 444 (citation deleted). Accord Dowling, 493 U.S. at 350; Console, 13 F.3d at 665, n.28.

In accordance with the foregoing authority, courts in several Government civil RICO cases have collaterally estopped defendants from contesting issues and facts which underlaid defendants' prior criminal convictions.<sup>61</sup> For example, in United States v. Private Sanitation Indus. Ass'n, 899 F. Supp. 974, 980-81 (E.D.N.Y. 1994), the court held that under principles of collateral estoppel, a defendant's guilty plea in state court to the New York State offense of coercion in the first degree conclusively established that the defendant committed one predicate act of extortion, in violation of the Hobbs Act (18 U.S.C. § 1951), that was charged in the

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<sup>61</sup> However, collateral estoppel does not bar the United States from relitigating in a civil RICO case an issue upon which a defendant was acquitted in a prior criminal prosecution because a lesser standard of proof applies in a civil proceeding. In United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984), the Supreme Court held that a gun owner's acquittal on criminal charges involving firearms did not preclude a subsequent in rem civil forfeiture proceeding against those same firearms, explaining:

[The acquittal did] not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt. . . [T]he jury verdict in the criminal action did not negate the possibility that a preponderance of the evidence could show that [the defendant] was engaged in an unlicensed firearms business. . . It is clear that the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel.

Id. at 361-62. Accord Dowling, 493 U.S. at 349 (“an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof”); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235 (1972) (holding that the Double Jeopardy Clause did not bar a forfeiture action subsequent to acquittal on the underlying offense because “the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel”); Helvering v. Mitchell, 303 U.S. 391, 397 (1938) (ruling that “[t]he difference in degree in the burden of proof in criminal and civil cases precludes application of the doctrine of res judicata”). See also, United States v. IBT, 787 F. Supp. 345, 351 (S.D.N.Y. 1992) (holding that a union officer's acquittal on criminal assault charges did not preclude a subsequent civil disciplinary charge, brought by a court-appointed officer in a Government civil RICO suit, based on the same conduct where the preponderance of evidence standard applied); United States v. Ianniello, 646 F. Supp. 1289, 1290-91 (S.D.N.Y. 1986), aff'd, 824 F.2d 203 (2d Cir. 1987) (holding that the defendant's prior acquittal on a criminal RICO conspiracy charge did not preclude a subsequent Government civil RICO suit based on the same conduct).

Government's civil RICO complaint. The court explained that even though the "state offense of coercion in the first degree does not constitute a RICO predicate act. . . a conviction for the state felony of coercion in the first degree can establish the elements of a Hobbs Act violation." *Id.* at 981. Accord *United States v. Private Sanitation Indus. Ass'n*, 811 F. Supp. 808, 813-15 (E.D.N.Y. 1992), aff'd, 995 F.2d 375 (2d Cir. 1993) (same as to New York State conviction for coercion in the second degree, and also holding that the defendant's prior guilty plea in state court to the New York misdemeanor offense of conspiring to commit the felony of Second Degree Bribery conclusively established in a subsequent Government civil RICO suit that he committed several state bribery offenses that constitute a predicate act of bribery under 18 U.S.C. § 1961 (1)(A)).

Moreover, in *United States v. Local 30, United Slate, Tile*, 686 F. Supp. 1139, 1165-66 (E.D.Pa. 1988), aff'd 871 F.2d 401 (3d Cir. 1989), the district court held that the individual union officials-defendants' prior criminal RICO convictions for conspiring to conduct, and conducting, the Roofers Union through a pattern of racketeering activity "collaterally estop them from denying [in a subsequent Government civil RICO lawsuit] that they conducted the affairs of the Roofers Union through a pattern of racketeering activity." 686 F. Supp. at 1165. The district court also held that:

The statutory estoppel provided in 18 U.S.C. § 1964 (d) operates against the Union defendant as well, because the Union (the principal) is estopped and bound by the actions of its agents (the Union officials and representatives).

686 F. Supp. at 1166.<sup>62</sup>

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<sup>62</sup> See also *United States v. IBT*, 905 F.2d 610, 620-23 (2d Cir. 1990), aff'g, 725 F. Supp. 162 (S.D.N.Y. 1989) (holding that the defendants were collaterally estopped from denying the

(continued...)

As noted above, collateral estoppel bars relitigation of finally resolved issues “between the same parties in any future lawsuit.” Ashe v. Swenson, 397 U.S. at 443. For example, in United States v. IBT, 754 F. Supp. 333, 338 (S.D.N.Y. 1990), the district court rejected a defendant’s argument that disciplinary charges, brought by the Investigations Officer appointed by the district court pursuant to a consent decree in a Government civil RICO lawsuit, were barred by the doctrines of collateral estoppel and res judicata because the General President of the IBT had conducted a trusteeship hearing into the matter. The district court explained that “since the Investigations Officer was neither a party to the trusteeship proceeding nor in privity with the General President, those defenses were unavailable.” 754 F. Supp. at 338.

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<sup>62</sup>(...continued)

facts underlying their state criminal convictions in a disciplinary action brought by a court-appointed officer pursuant to a consent decree in a Government civil RICO lawsuit); United States v. IBT, 777 F. Supp. 1133, 1137 (S.D.N.Y. 1991), aff’d, 970 F.2d 1132 (2d Cir. 1992) (holding in the same Government civil RICO suit that “[b]ecause Parise entered a guilty plea to the criminal charge arising from the September 4, 1987 incident, he is collaterally estopped from contesting the facts underlying the disciplinary charge arising from the same incident.”).

## IV

### JURISDICTION AND VENUE

#### A. Serving the Summons

“[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served.” Mississippi Pub. Corp. V. Murphree, 326 U.S. 438, 444-45 (1946). “[S]ervice of process in a federal action is covered generally by Rule 4 of the Federal Rules of Civil Procedure.” (“Rule 4 ”). Omni Capital Int’l. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104 (1987).

Rule 4(a) sets forth the required contents of a summons, and Rule 4(b) and (c) provides for the manner of issuance and service of a summons. Service of a summons may be waived pursuant to Rule 4(d).<sup>63</sup>

Rule 4(e) authorizes serving an individual within a judicial district of the United States and provides as follows:

- (e) Serving an individual within a Judicial District of the United States.** Unless federal law provides otherwise, an individual -- other than a minor, an incompetent person, or a person whose waiver has been filed -- may be served in a judicial district of the United States by:
- (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or
  - (2) doing any of the following:
    - (A) delivering a copy of the summons and of the complaint to the

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<sup>63</sup> This Section addresses the amendments to the Federal Rules of Civil Procedure, including Rule 4, that absent Congressional action, will go into effect December 1, 2007. These amendments were undertaken to make the Rules more easily understood, and to make style and terminology consistent. The changes are primarily stylistic in content; however, where substantive changes are included, they will be specifically noted. See Memorandum from James C. Duff, Sec’y, Judicial Conference of the U.S., to The Chief Justice of the U.S. and the Assoc. Justices of the Supreme Court (Dec. 21, 2006) (Westlaw).

- individual personally;
- (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
- (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Service of an individual in a foreign country is covered by Rule 4(f), which provides:

**(f) Serving an Individual in a Foreign Country.** Unless federal law provides otherwise, an individual -- other than a minor, an incompetent person, or a person whose waiver has been filed -- may be served at a place not within any judicial district of the United States:

- (1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;
- (2) if there is no internationally agreed means, so if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:
  - (A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;
  - (B) as the foreign authority directs in response to a letter rogatory or letter of request; or
  - (C) unless prohibited by the foreign country's law, by:
    - (i) delivering a copy of the summons and the complaint to the individual personally; or
    - (ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or
- (3) by other means not prohibited by international agreement, as the court orders.

Rule 4(h) provides for serving a corporation, partnership, or association as follows:

**(h) Serving a Corporation, Partnership, or Association.** Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

- (1) in a judicial district of the United States:
  - (A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or
  - (B) by delivering a copy of the summons and of the complaint to



an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and - - if the agent is one authorized by statute and the statute so requires - - by also mailing a copy of each to the defendant; or (2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

Rule 4(m), provides as follows:

**(m) Time Limit for Service.** If a defendant is not served [with a summons] within 120 days after the complaint is filed, the court -- on motion or on its own after notice to the plaintiff -- must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

“[T]he core function of service [of a summons] is to supply notice of the pendency of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections.” Henderson v. United States, 517 U.S. 654, 673 (1996).

Pursuant to Rule 4(m), a summons must be dismissed if it is not served “within 120 days after the complaint is filed,” unless the court either has ordered “that service be made within a specified time” or the court has found that the plaintiff has shown “good causes for the failure” to timely serve the summons.<sup>64</sup> “If good cause exists, the extension must be granted. If good cause does not exist, the district court must consider whether to grant a discretionary extension of time.” Boley v. Kaymark, 123 F.3d 756, 758 (3d Cir. 1997) (internal citations omitted). Accord Troxell v. Fedders of North America, Inc., 160 F.3d 381, 382-83 (7th Cir. 1998); CFTC v. Wall

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<sup>64</sup> See, e.g., Henderson v. United States, 517 U.S. 654, 661-64 (1996); Boley v. Kaymark, 123 F.3d 756, 758-59 (3d Cir. 1997); CFTC v. Wall Street Underground, Inc., 221 F.R.D. 554, 556 (D. Kan. 2004).

Street Underground, Inc., 221 F.R.D. 554, 556 (D. Kan. 2004).

As one court noted, although “good cause” is not defined by Rule 4, it “seems to require a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified in the rules.” Dominic v. Hess Oil V. I. Corp., 841 F.2d 513, 517 (3d Cir. 1988) (quoting WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1165 (2d ed. 1987)).

Courts consider various factors in deciding whether good cause exists, including:

1) whether the inadvertence reflected professional incompetence such as ignorance of rules of procedure, 2) whether an asserted inadvertence reflects an easily manufactured excuse incapable of verification by the court, 3) counsel’s failure to provide for a readily foreseeable consequence, 4) a complete lack of diligence or 5) whether the inadvertence resulted despite counsel’s substantial good faith efforts towards compliance. . . . [6] whether the enlargement of time will prejudice the opposing party.

Dominic, 841 F. 2d at 517 (citations omitted). Accord MacCauley v. Wahlig, 130 F.R.D. 302, 304 (D. Del. 1990).

Likewise, a court may grant a discretionary extension of time within which to serve a summons for a variety of reasons, including, “for example, if the applicable statute of limitations would bar the refiled action.” Boley, 123 F. 3d at 758 (quoting FED.R.CIV.P. 4(m) Adv. Comm. Notes (1993)).

A district court’s decision to dismiss the complaint for failure to comply with Rule 4(m) or whether to extend the time to serve a summons is reviewed under the above of discretion standard.<sup>65</sup>

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<sup>65</sup> See, e.g., Thompson v. Maldonado, 309 F.3d 107, 110 (2d Cir. 2002) (collecting cases); Boley, 123 F.3d at 758; Dominic, 841 F.2d at 516.

## **B. General Principles Governing Subject Matter and Personal Jurisdiction**

### **1. Subject Matter Jurisdiction**

Section 1331 of Title 28, United States Code, provides that “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States,” and hence confers subject matter jurisdiction upon federal district courts to hear a claim arising from an alleged violation of a federal law or statute (i.e., a federal question). See, e.g., Sec. Investor Prot. Corp. v. Vigman, 764 F.2d 1309, 1314 (9th Cir. 1985). Therefore, federal district courts are empowered to hear civil claims arising from an alleged violation of the RICO statute, 18 U.S.C. §§ 1961, et seq. See e.g., Rolls-Royce Motors, Inc. v. Charles Schmitt & Co., 657 F. Supp. 1040, 1055 (S.D.N.Y. 1987).

### **2. Due Process Requirements for State Courts’ Exercise of In Personam Jurisdiction Under the Fourteenth Amendment as to State Claims**

Regarding personal jurisdiction, it is well established that “the judgment of a [state] court lacking [personal] jurisdiction is void” and “violate[s] the Due Process Clause of the Fourteenth Amendment as well.” Burnham v. Superior Court of California, County of Marin, 495 U.S. 604, 608-09 (1990). “The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. . . . It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.” Omni Capital Int’l Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104 (1987) (quoting Ins. Corp. of Ireland v. Campagnie des Bauxities de Guinee, 456 U.S. 694, 702 (1982)).

The Supreme Court has addressed due process limitations upon courts’ exercise of personal jurisdiction under the Due Process Clause of the Fourteenth Amendment as they apply to state courts, but “has never addressed the scope of Due Process Protections under the Fifth

Amendment in the jurisdictional context” in federal suits in federal courts. See Republic of Panama v. BCCI Holdings (Luxembourg), S.A., 119 F. 3d 935, 944 (11th Cir. 1997).<sup>66</sup>

For example, in Burnham v. Superior Court of California, 495 U.S. 604, 608 (1990), the Supreme Court held that consistent with the requirements of due process, California state courts had personal jurisdiction over a non-resident individual, who was personally served with process while temporarily in California, in a suit that was unrelated to his activities in California. The Supreme Court explained:

Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a state have jurisdiction over non-residents who are physically present in the State. . . . [P]ersonal service upon a physically present defendant [is] sufficient to confer jurisdiction, without regard to whether the defendant was only briefly in the state or whether the cause of action was related to activities there.

Id. at 610, 612.

In the seminal case of International Shoe Co. v. State of Washington, 326 U.S. 310 (1945), the Supreme Court set forth due process requirements to obtain personal jurisdiction in state courts over defendants who were not physically present in the forum state. In International Shoe, the State of Washington sought to collect from International Shoe contributions to an unemployment compensation fund required by a state statute to be made by employers, and personally served a notice of assessment for the years in question upon a sales solicitor employed

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<sup>66</sup> On at least two occasions, the Supreme Court has noted that “the question of whether the Due Process Clause of the Fifth Amendment could be satisfied solely by reference to a defendant’s contacts with the nation as a whole was not properly before it.” Republic of Panama, 119 F.3d at 944 n.15, citing Omni Capital Int’l, 484 U.S. at 102 n.5; Asahi Metal Indus. v. Superior Court of California, 480 U.S. 102, 113 n.107 (1987) (plurality opinion). Due Process requirements under the Fifth Amendment regarding federal causes of action in federal courts are somewhat different than those under the Fourteenth Amendment as to causes of action under state law. See Section IV(B)(3) below.

by International Shoe in the State of Washington. International Shoe contended that the assessment violated due process because it “was not a corporation of the State of Washington and was not doing business within the State; that it had no agent within the State upon whom service could be made; and that appellant [International Shoe] is not a employer and does not furnish employment within the meaning of the statute.” Id. at 312.<sup>67</sup>

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<sup>67</sup> The Supreme Court stated that the following facts were not in dispute:

Appellant is a Delaware corporation, having its principal place of business in St. Louis, Missouri, and is engaged in the manufacture and sale of shoes and other footwear. It maintains places of business in several states, other than Washington, at which its manufacturing is carried on and from which its merchandise is distributed interstate through several sales units or branches located outside the State of Washington.

Appellant has no office in Washington and makes no contracts either for sale or purchase of merchandise there. It maintains no stock of merchandise in that state and make there no deliveries of goods in intrastate commerce. During the years from 1937 to 1940, now in question, appellant employed eleven to thirteen salesmen under direct supervision and control of sales managers located in St. Louis. These salesmen resided in Washington; their principal activities were confined to that state; and they were compensated by commissions based upon the amount of their sales. The commission for each year totaled more that \$31,000. Appellant supplies its salesmen with a line of samples, each consisting of one shoe of a pair, which they display to prospective purchasers. On occasion they rent permanent sample rooms, for exhibiting samples, in business buildings, or rent rooms in hotels or business buildings temporarily for that purpose. The cost of such rentals is reimbursed by appellant.

The authority of the salesmen is limited to exhibiting their samples and soliciting orders from prospective buyers, at prices and on terms fixed by appellant. The salesmen transmit the orders to appellant’s office in St. Louis for acceptance or rejection, and when accepted the merchandise for filling the orders is shipped f.o.b. from points outside Washington to the purchasers within the

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The Supreme Court rejected these arguments, finding that International Shoe’s activities in the State of Washington were sufficient to establish in personam jurisdiction over it regarding a cause of action that arose from International Shoe’s activities in the forum state consistent with the requirements of due process under the Fourteenth Amendment. The Supreme Court explained:

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”

326 U.S. at 316 (citations omitted). The Supreme Court added that:

“Presence” in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. . . . Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation’s behalf are not enough to subject it to suit on causes of action unconnected with the activities there. . . . [The Due Process Clause of the Fourteenth Amendment] does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.

326 U.S. at 317, 319 (internal citations omitted).

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<sup>67</sup>(...continued)

state. All the merchandise shipped into Washington is invoiced at the place of shipment from which collections are made. No salesman has authority to enter into contracts or to make collections.

The Supreme Court concluded that International Shoe's activities "in the State of Washington were neither irregular or causal. They were systematic and continuous throughout the years in question," and were sufficient to establish in personam jurisdiction over International Shoe regarding a lawsuit that "arose out of those very activities." 326 U.S. at 320.

In so ruling, the Supreme Court also noted that "there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." 326 U.S. at 318.

Courts have interpreted International Shoe and its progeny to allow in personam jurisdiction in a forum state over a foreign corporation to enforce causes of action not arising out of that corporation's activities in the forum state where the corporation's activities in the forum state are "substantial" and "continuous and systematic," but to disallow in personam jurisdiction where a foreign corporation's activities in the forum state are minimal unless the cause of action at issue arises from those forum contacts. For example, in Wells Fargo & Co. v. Wells Fargo Exp. Co., 556 F.2d 406 (9th Cir. 1977), the court stated:

The rules which emerge from these [Supreme Court] cases may be summarized as follows: If the defendant corporation has sufficient deliberate "minimum contacts" with the forum state, a court may acquire *in personam* jurisdiction over it in actions which arise from those forum contacts. If, however, a corporation's activities in the forum are so "continuous and systematic" that the corporation may in fact be said already to be "present" there, it may also be served in causes of action unrelated to its forum activities.

Id. at 413 (collecting cases). Accord Butcher's Union Local No. 498 v. SDC Inv., Inc., 788 F.2d

535, 540 (9th Cir. 1986).<sup>68</sup>

Moreover, the Supreme Court has explained that the requisite “minimum contacts” with a forum state may be established when a foreign corporation “purposely avails itself to the privilege of conducting activities within the forum State”, such as when a foreign “corporation. . . delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.” World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980) (citations omitted). Accord Asahi Metal Ind. Co. v. Super. Ct. of Cal., Solano Cty., 480 U.S. 102, 111-12 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-77 (1985).

Furthermore, the Supreme Court has stated that even when such minimum contacts are established, due process requires that a state’s exercise of personal jurisdiction over an out of state defendant not offend “traditional notions of fair play and substantial justice.” Asahi Metal Ind., 480 U.S. at 113 (citations omitted). In determining whether the “traditional notions of fair play and substantial justice,” have been satisfied,

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<sup>68</sup> See, e.g., Burnham, 495 U.S. at 620 (stating that where jurisdiction of an absent defendant is based on minimum contacts with the forum state, those contacts must be related to the litigation at issue); Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984) (“When a controversy is related to or ‘arises out of’ a defendant’s contacts with the forum, the Court has said that a ‘relationship among the defendant, the forum, and the litigation’ is the essential foundation of *in personam* jurisdiction. . . . Even when the cause of action does not arise out of or relate to the foreign corporation’s activities in the forum State, due process is not offended by a State’s subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation.” (citations and footnotes omitted)); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447 (1952) (ruling that it does not violate due process to exercise in personam jurisdiction over a foreign corporation when the corporation’s activities in the forum State “was sufficiently substantial. . . . where the cause of action arose from activities entirely distinct from its activities in [the forum State]”).



A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."

Id. at 113 (citations omitted).<sup>69</sup>

### **3. Due Process Requirements Under the Fifth Amendment for Federal Courts' Exercising In Personam Jurisdiction Over Federal Causes of Action**

As noted above in Section IV(B)(2), the Supreme Court has not squarely decided the requirements of due process under the Fifth Amendment as they apply to claims arising under federal law in federal courts. Some courts have ruled that although some of the considerations underlying the Supreme Court's personal jurisdiction jurisprudence under the Fourteenth Amendment are relevant to the dictates of due process under the Fifth Amendment, they are not parallel. For example, in BCCI Holdings (Luxembourg), 119 F. 3d at 945-48, the Eleventh Circuit explained that "contacts with the forum state - the relevant sovereign - are relevant under the Fourteenth Amendment primarily to justify the sovereign exercise of power in asserting jurisdiction [over a foreign defendant]. . . . Because minimum contacts with the United States - the relevant sovereign - satisfy the 'purposeful availment' prong in federal question cases, contacts with the forum state are not constitutionally required." Id. at 946 n.21 (citations omitted). "A court must therefore examine a defendant's aggregate contacts with the nation as a whole rather than his contacts with the forum state in conducting the Fifth Amendment analysis."

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<sup>69</sup> Generally, a district court's dismissal on jurisdictional grounds is reviewed under the *de novo* standard of review. See, e.g., PT United Can Co. Ltd. v. Crown Cork & Seal Co., 138 F.3d 65, 69 (2d Cir. 1998). Moreover, the due process requirements "of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue." Ins. Corp. of Ireland, 456 U.S. at 704.

Id. at 946-47 (collecting cases).

The Eleventh Circuit ruled that where, as under civil RICO, “Congress has provided for nationwide service of process, courts should presume that nationwide personal jurisdiction is necessary to further congressional objectives.” Id. at 948; See Section IV(C)(3) below. The Eleventh Circuit further ruled that a defendant may overcome this presumption and establish a violation of due process under a two-part balancing test. First, “[t]he burden is on the defendant to demonstrate that the assertion of jurisdiction in the forum will ‘make litigation ‘so gravely difficult and inconvenient’ that [he] unfairly is at a ‘severe disadvantage’ in comparison to his opponent.” BCCI Holdings (Luxembourg), 119 F.3d at 948 (quoting Burger King, 471 U.S. at 478). Only if the defendant carries this burden, then the court must determine “if the federal interest in litigating the dispute in the chosen forum outweighs the burden imposed on the defendant.” BCCI Holdings (Luxembourg), 119 F.3d at 948.

The Eleventh Circuit added:

In evaluating the federal interest, courts should examine the federal policies advanced by the statute, the relationship between nationwide service of process and the advancement of these policies, the connection between the exercise of jurisdiction in the chosen forum and the plaintiff’s vindication of his federal right, and concerns of Judicial efficiency and economy.”

Id. at 948.<sup>70</sup>

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<sup>70</sup> Applying this balancing test, the Eleventh Circuit concluded that the defendant did not carry its initial burden of demonstrating “any constitutionally significant inconvenience,” and, therefore, it was not necessary to “balance the federal interest at stake in this lawsuit.” BCCI Holdings (Luxembourg), 119 F.3d at 948. In that respect, the court stated:

First, we note that the First American defendants are large corporations providing banking services to customers in major metropolitan areas along the eastern seaboard. The fact that they

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Other courts, however, have eshewed such balancing tests, ruling that where a federal statute authorizes nationwide service of process, “due process requires only that a defendant in a federal suit have minimum contacts with the United States, ‘the sovereign that has created the court’” FTC v. Jim Walker Corp., 651 F.2d 251, 256 (5th Cir. 1981) (citation omitted). Accord Action Embroidery Corp. v. Atlantic Embroidery, Inc., 368 F. 3d 1174, 1179-80 (9th Cir. 2004); In Re Automotive Refinishing Paint Antitrust, 358 F.3d 288, 297-99 (3d Cir. 2004). Cf. Pinker v. Roche Holdings Ltd., 292 F.3d 361, 369-70 (3d Cir. 2002) (collecting cases). See also cases cited in Section IV (C)(3) below.

### **C. Civil RICO’s Jurisdiction and Venue Provision**

In order for a district court to adjudicate the merits of a lawsuit, it must have personal jurisdiction over the defendants, as discussed above in Section IV(B), and also venue must properly lie in the district where the lawsuit is brought. The Supreme Court has explained the distinction between “personal jurisdiction” and “venue”, stating “personal jurisdiction. . . goes to the court’s power to exercise control over the parties . . . [whereas] venue . . . is primarily a matter of choosing a convenient forum.” Leroy v. Great Western United Corp., 443 U.S. 173, 180 (1979). Accord Sec. Investor Prot. Corp. v. Vigman, 764 F.2d 1309, 1313 (9th Cir. 1985)

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<sup>70</sup>(...continued)

may not have had significant contacts with Florida is insufficient to render Florida an unreasonably inconvenient forum. In addition, the fact that discovery for this litigation would be conducted throughout the world suggests that Florida is not significantly more inconvenient than other districts in this country. The First American defendants have presented no evidence that their ability to defend this lawsuit will be compromised significantly if they are required to litigate in Miami.

Id.

(“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”) (citations omitted). The Supreme Court has admonished that “[i]n most instances, the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial.” Leroy, 443 U.S. at 183-84.

## **1. Overview of Civil RICO’s Jurisdiction and Venue Provision**

Civil RICO’s jurisdiction and venue provision, 18 U.S.C. § 1965, provides as follows:

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agents, or transacts his affairs.

(b) 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.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

Section 1965 was patterned after the antitrust statutes,<sup>71</sup> and it supplements the general federal venue provision set forth in 28 U.S.C. § 1391.<sup>72</sup> Therefore, both 18 U.S.C. § 1965 and 28 U.S.C. § 1391 may provide the basis for venue in a civil RICO lawsuit.<sup>73</sup> Moreover,

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<sup>71</sup> See S. Rep. No. 91-617 at 160-61. See also Cory v. Aztec Steel Bldg., Inc., 468 F.3d 1226, 1231 (10th Cir. 2006); City of New York v. Cyco. Net, Inc., 383 F. Supp. 2d 526, 541 (S.D.N.Y. 2005); Bulk Oil (USA) Inc. v. Sun Oil Trading Co., 584 F. Supp. 36, 39 (S.D.N.Y. 1983); Farmers Bank of State of Del. v. Bell Mtg. Corp., 452 F. Supp. 1278, 1280 (D. Del. 1978).

<sup>72</sup> When federal jurisdiction is premised on a federal question, as is involved in a civil RICO suit, 28 U.S.C. § 1391(b) establishes that venue is proper in:

(1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Moreover, 28 U.S.C. § 1391(c) provides:

For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

<sup>73</sup> See, e.g., Cyco. Net, Inc., 383 F. Supp. 2d at 543-44 (collecting cases); Crenshaw v. Antokol, 287 F. Supp. 2d 37, 41-42 (D.D.C. 2003); Gatz v. Penboldt, 271 F. Supp. 2d 1143, 1158-59 (D. Neb. 2003); Eastman v. Initial Invs., Inc., 827 F. Supp. 336, 338 (E.D. Pa. 1993); Monarch Normandy Square Partners v. Normandy Square Assoc., 817 F. Supp. 899, 904 (D. Kansas 1993); Shuman v. Computer Assocs. Int'l, Inc., 762 F. Supp. 114, 116 (E.D. Pa. 1991); Delta Educ. Inc., v. Langlois, 719 F. Supp. 42, 49 (D. N.H. 1989); Anchor Glass Container Corp.

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“[a]lthough 18 U.S.C. § 1965 is entitled ‘venue and process,’ the fact that it also authorizes service of process makes it relevant to personal jurisdiction because of Federal Rules of Civil Procedure 4 (k)(1)(D).” Esab Group, Inc. v. Centricut, Inc., 126 F.3d 617, 626 (4th Cir. 1997). Accord Cory v. Aztec Steel Bldg., Inc., 468 F.3d 1226, 1229-32 (10th Cir. 2006).

In PT United Can Co. Ltd. v. Crown Cork & Seal Co. Inc., 138 F.3d 65, 70 (2d Cir. 1998), the Second Circuit stated that Section “1965 must be read to give effect to all its sections in a way that renders a coherent whole.” Accordingly, the Second Circuit succinctly explained the different coverage of the subsections of Section 1965 as follows:

First, § 1965(a) grants personal jurisdiction over an initial defendant in a civil RICO case to the district court for the district in which that person resides, has an agent, or transacts his or her affairs. In other words, a civil RICO action can only be brought in a district court where personal jurisdiction based on minimum contacts is established as to at least one defendant.

Second, § 1965(b) provides for nationwide service and jurisdiction over “other parties” not residing in the district, who may be additional defendants of any kind, including co-defendants, third party defendants, or additional counter-claim defendants. This jurisdiction is not automatic but requires a showing that the “ends of justice” so require.

Id. at 71. The Second Circuit added that Section

1965(c) simply refers to service of subpoenas on witnesses. Thus, § 1965(d)’s reference to “[a]ll other process,” means process other than a summons of a defendant or subpoena of a witness. This

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<sup>73</sup>(...continued)  
v. Stand Energy Corp., 711 F. Supp. 325, 327 n.7 (S.D. Miss. 1989); Miller Brewing Co., v. Landau, 616 F. Supp. 1285, 1291 (D. Wis. 1985); So-Comm, Inc. v. Reynolds, 607 F. Supp. 663, 665-66 (N.D. Ill. 1985); Sunray Enterprises Inc. v. David C. Bouza & Assocs., Inc., 606 F. Supp. 116, 119 (S.D.N.Y. 1984); Clement v. Pehar, 575 F. Supp. 436, 443 (N.D. Ga. 1983); DeMoss v. First Artists Prod. Co., 571 F. Supp. 409, 411 (N.D. Ohio 1983); VanShaick v. Church of Scientology of Cal., Inc., 535 F. Supp. 1125, 1133 n.6 (D.MA. 1982); Farmers Bank of State of Del., 452 F. Supp. at 1280.

interpretation, one which gives meaning to the word “other” by reading sequentially to understand “other” as meaning “different from that already stated in subsections (a)-(c),” gives coherent effect to all sections of § 1965, and effectively provides for all eventualities without rendering any of the sections duplicative, without impeding RICO actions and without unnecessarily burdening parties.

Id. at 72.

**2. The Bases for Venue Under Section 1965(a)**

**a. The District In Which Such Person “Resides”**

For venue purposes, a corporation “resides” in the district in which it is incorporated,<sup>74</sup> and a natural person resides in the district wherein he/she maintains his/her domicile.<sup>75</sup>

**b. “Found”**

“The term ‘is found’ has been construed to mean presence and continuous local activity.” Shuman v. Computer Associates International, Inc., 762 F. Supp. 114, 116 (E.D. Pa. 1991).<sup>76</sup> “For a corporate defendant in a private action under [§ 1965(a)] to be ‘found’ in the district within the meaning of this section, it must be present in the district by its officers and agents carrying on the business of the corporation.”<sup>77</sup>

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<sup>74</sup> See, e.g., Wood v. Barnette, Inc., 648 F. Supp. 936, 939 (E.D. Va. 1986); Grappone, Inc. v. Subaru of America, Inc., 403 F. Supp. 123, 127-28 (D. N.H. 1975).

<sup>75</sup> See, e.g., Farmers Bank of State of Del., 577 F. Supp. at 35; 15 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3805 (1986).

<sup>76</sup> Accord Eastman, 827 F. Supp. at 338; Berry v. New York State Dept. of Corr. Services, 808 F. Supp. 1106, 1111 (S.D.N.Y. 1992) (“to be ‘found’ under [§ 1965(a)] demands more than mere occasional physical presence; some acts relevant to the RICO claim must have occurred in the venue sought by plaintiff, some kind of business must have been conducted”).

<sup>77</sup> Van Shaick, 535 F. Supp. at 1133. Accord DeMoss, 571 F. Supp. at 411; Grappone, Inc., 403 F. Supp. at 128.

**c. “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 Antitrust 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).

**d. “Transacts His Affairs”**

The “transacts his affairs’ language of Section 1965(a) has been held to be synonymous with the ‘transacts business’ language of section 12 of the Clayton Act, 15 U.S.C. § 22,” which was the model for Section 1965(a). City of New York v. Cyco. Net, Inc., 383 F. Supp. 2d 526, 542 (S.D.N.Y. 2005). “Moreover, [t]he test for transacting business for venue purposes under the antitrust law is co-extensive with the test for jurisdiction under New York CPLR § 302.” Id. at 542 (citation omitted). Accordingly, “[t]he ‘transacts his affairs’ language in Section 1965(a) has been interpreted to mean that the defendants ‘regularly transact business of a substantial and continuous character within the district.’” Gatz v. Pensoldt, 271 F. Supp. 2d 1143, 1158 (D. Neb. 2003) (citations omitted).<sup>78</sup>

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<sup>78</sup> Accord Eastman, 827 F. Supp. at 338; Shuman, 762 F. Supp. at 116; Dody v. Brown, 659 F. Supp. 541, 545 (W.D. Mo. 1987); Miller Brewing Co., 616 F. Supp. at 1288; Bukoil (USA) Inc., 584 F. Supp. at 39-40.



### 3. Nationwide Service of Process Under Section 1965(b)

The relevant legislative history states that “[s]ubsection (b) [of 18 U.S.C. § 1965] provides Nationwide service of process on parties, if the ends of justice require it,” and that the “broad provisions [of § 1965] are required by the nationwide nature of the activity of organized crime in its infiltration efforts.” S. REP. NO. 91-617 at 161. Thus, “Congress intended [Section 1965(b)] to enable plaintiffs to bring all members of a nationwide RICO conspiracy before a court in a single trial,” and hence Section 1965(b) allows nationwide service of process to defendants residing outside the forum district court provided that the forum district court has “personal jurisdiction over at least one of the participants in the alleged multidistrict conspiracy,” and the ends of justice require such service.<sup>79</sup>

Where, “nationwide service of process is authorized,” as under Section 1965(b), the plaintiff need not establish that each defendant has contacts with the forum state. Rather,

the plaintiff’s **prima facie** burden is met by showing that a defendant has contacts with the United States. Minimum contacts with the forum state, as required under the traditional long-term jurisdiction analysis, is not necessary. A defendant’s contact with the United States is sufficient to satisfy the requirements of due process.

Dooley v. United Technologies Corp., 786 F. Supp. 65, 71 (D.D.C. 1992).<sup>80</sup>

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<sup>79</sup> Butchers Union Local No. 498 v. SDC Inv., Inc., 788 F. 2d 535, 539 (9th Cir. 1986). Accord Cory, 468 F.3d at 1231; PT United Can Co., 138 F.3d at 70-72; Stauffacher v. Bennett, 969 F. 2d 455, 460-61 (7th Cir. 1992); Boon Partners v. Advanced Financial Concepts, Inc., 917 F. Supp. 392, 397 (E.D.NC. 1996); Hawkins v. Upjohn Co., 890 F. Supp. 601, 604 (E.D. Tex. 1994); Magic Toyota, Inc., v. Southwest Toyota Distributors, 784 F. Supp. 306, 311 (D.S.C. 1992); Bridge v. Invest America, Inc., 748 F. Supp. 948, 951 (D. RI. 1990); Rolls-Royce Motors v. Charles Schmitt, 657 F. Supp. 1040, 1055 (S.D.N.Y. 1987).

<sup>80</sup> Accord Cory, 468 F.3d at 1230-31; Boon Partners, 917 F. Supp. at 397; Herbstein v. Bruetman, 768 F. Supp. 79, 81 (S.D.N.Y. 1991); University Sav. Ass’n v. Bank of New Haven,

(continued...)

As noted above, nationwide service of process upon non-resident defendants pursuant to Section 1965(b) is not automatic; rather, “the ends of justice” must require such service. As of this writing, courts have not definitively interpreted the requirements of “the ends of justice.” For example, the Ninth Circuit has ruled that to establish the requisite “ends of justice,” “the plaintiff must show that there is no other district in which a court will have personal jurisdiction over all the alleged co-conspirators.” Butcher’s Union Local No. 498, 788 F. 2d at 539. Other courts, however, have taken a more flexible approach, ruling that the absence of another district having personal jurisdiction over all the defendants is a relevant, but not a dispositive factor. See, e.g., Cory, 468 F.3d at 1231-32; Magic Toyota, Inc., 784 F. Supp. at 311-12; Southmark Prime Plus, L.P. v. Falzone, 768 F. Supp. 487, 490-92 (D.Del. 1991).

Moreover, although Section 1965(b) “authorizes nationwide service of process,” it does not authorize “*international* service. For that the RICO plaintiff must rely on the long-arm statute of the state in which he files his suit.” Stauffacher v. Bennett, 969 F. 2d 455, 460-61 (7th Cir. 1992). Accord Nat’l Asbestos Medical Fund v. Philip Morris, 86 F. Supp. 2d 137, 142 (E.D.N.Y. 2000); Michelson, 709 F. Supp. at 1285.<sup>81</sup>

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<sup>80</sup>(...continued)  
765 F. Supp. 35, 37 (D. Conn. 1991); Bridge, 748 F. Supp. at 951; Rolls-Royce Motors, 657 F. Supp. at 1055; Soltex Polymer Corp. v. Fortex Industries, Inc., 590 F. Supp. 1453, 1458 (E.D.N.Y. 1984); Hodgden v. Needham-Skyles Oil Co., 556 F. Supp. 75, 77 (D.D.C. 1982).

<sup>81</sup> Some courts have indicated that 18 U.S.C. § 1965(d) provides for nationwide service of a summons against defendants. See, e.g., Esab Group, Inc. v. Centricut, 126 F. 3d 617, 626-27 (4th Cir. 1997); Republic of Panama v. BCCI Holdings (Luxembourg), 119 F.3d 935, 942 (11<sup>th</sup> Cir. 1997); Michelson v. Merrill Lynch, Pierce, Fenner & Smith, 709 F. Supp. 1279, 1285 (S.D.N.Y. 1989). However, that position arguably cannot be reconciled with the text of Section 1965 or its legislative history. As the Second Circuit stated in PT United Can Co. Ltd., 138 F.3d at 71-72, because Section 1965(b) refers to the service of a summons and Section 1965(c) refers to the service of a subpoena, Section 1965(d)’s reference to the service of “[a]ll other process,”

(continued...)

#### 4. Transfer of Venue - Forum Non-Conveniens

Even if venue properly lies in a district, the district court has discretion to transfer a civil RICO suit to another district pursuant to the doctrine of forum *non conveniens*. To obtain such a transfer, the defendant has the burden of establishing that “the litigation may be conducted elsewhere against all defendants,” which may include a foreign country. PT United Can Co. Ltd., 138 F.3d at 73. “If there is no adequate alternative forum, the inquiry ends. . . . If the existence of an adequate alternative forum is established,” the district court must consider “private factors includ[ing] the access to sources of proof, cost of obtaining willing witnesses, availability of compulsory process for unwilling witnesses, and other practical concerns,” and “public factors [including] court congestion, interest of forums in deciding local disputes, and interest in issues of foreign law being decided by foreign tribunals.” Id. at 73-74.<sup>82</sup>

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<sup>81</sup>(...continued)

“means process other than a summons of a defendant or subpoena of a witness.” Moreover, as noted above, the Senate Report regarding Section 1965 states that “[s]ubsection (b) [of 1965] provides nationwide service of process on parties,” and not subsection (d). Accord Cory, 468 F. 3d at 1230-31.

<sup>82</sup> Accord Republic of Panama v. BCCI Holdings (Luxembourg), 119 F.3d at 951-53; Transunion Corp. v. Pepsico, Inc., 811 F. 2d 127, 129-30 (2d Cir. 1987); United States v. International Bhd. of Teamsters, 708 F. Supp. 1388, 1404 (S.D.N.Y. 1989); So-Comm, Inc. v. Reynolds, 607 F. Supp. at 665-67; Clement v. Pehar, 575 F. Supp. at 443-46; Hodgdon, 556 F. Supp. at 78-79.

## V

### PROCEDURAL MATTERS

#### A. Expedition of Actions

Section 1966 of Title 18, United States Code, provides as follows:

##### Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

As of this writing, there are no reported decisions interpreting Section 1966. The explicit terms of Section 1966 do not require that the district court give Government civil RICO lawsuits priority over other civil suits. However, its requirement that, upon receipt of the specified certification, a judge shall be designated immediately to hear and determine the action, implies that the action should be expeditiously considered.

#### B. Adequacy of the Pleading and Drafting the Complaint

##### 1. Adequacy of the Pleading

##### a. General Principles

Rule 8(a), FED. R. CIV. P. provides, in relevant part, that:

A pleading which sets forth a claim for relief. . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (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 the

pleader seeks. Relief in the alternative of several different types may be demanded.<sup>83</sup>

Pursuant to Rule 12(b)(6), FED. R. CIV. P., a complaint may be dismissed for “failure to state a claim upon which relief can be granted.” “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations. . . [it] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level” and demonstrate “plausible grounds” for relief. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007). Accord Iqbal v. Hasty, 490 F.3d 143, 155-58 (2d Cir. 2007); Kuhns Brothers, Inc. v. Fushi Int’l, Inc., 2007 WL 2071622 (D. Conn. July 16, 2007); Hyland v. Homeservices of America, Inc., 2007 WL 2407233 (W.D. Ky. Aug. 17, 2007). Moreover, “once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” Bell Atlantic Corp., 127 S. Ct. at 1969..

Furthermore, in considering a motion to dismiss a complaint for alleged failure to state a claim, the court must view the factual allegations in the complaint in the light most favorable to the plaintiff, and those allegations must be presumed to be true. Papasan v. Allain, 478 U.S. 265, 283 (1986). See also Neitzke v. Williams, 490 U.S. 319, 327 (1989) (“What Rule 12(b)(6) does not countenance are dismissals based on a judge’s disbelief of a complaint’s factual allegations”); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Davis v. Sherer, 468 U.S. 183, 191 (1984); Harris, 127 F.3d at 1123; Shear v. National Rifle Ass’n of America, 606 F.2d 1251, 1253 (D.C. Cir. 1979) . As the Supreme Court stated in Scheuer, 416 U.S. at 236:

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<sup>83</sup> The above-quoted version is in effect through November 30, 2007. Rule 8(a) will be amended effective December 1, 2007. This amendment clarifies Rule 8(a) but does not change the substance of the Rule.

When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Accord Caribbean Broad. Sys., 148 F.3d at 1086. Indeed, the United States Court of Appeals for the District of Columbia pointedly stated: “The rule that the allegations of the complaint must be construed liberally and most favorably to the pleader is so well recognized that no authority need be cited.” Sinclair v. Kleindienst, 711 F.2d 291, 293 (D.C. Cir. 1983).

Furthermore, in determining whether the complaint is sufficient, the court is limited to consideration of the four corners of the complaint. Shear, 606 F.2d at 1253; Caudle v. Thomason, 942 F. Supp. 635, 638 (D.D.C. 1996).

Moreover, it is also well established “that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” Conley v. Gibson, 355 U.S. 41, 47 (1957)(quoting Rule 8(a) (2), FED. R. CIV. P.) Accord Sinclair, 711 F.2d at 293 (“notice pleading’ is sufficient”). “[U]nder Rule 8(a), [a] complaint need not state facts or ultimate facts or facts sufficient to constitute a cause of action.” United States v. Private Sanitation Indus. Ass’n, 793 F. Supp. 1114, 1124 (E.D.N.Y. 1992) (internal quotations and citation deleted). Accord Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786,

790 (3d Cir. 1984). All that is required is that the complaint “provides enough factual information to make clear the substance of that claim.” Caribbean Broad. Sys., 148 F.3d at 1086. “Plaintiffs . . . need only ‘adduce a set of facts’ supporting their legal claims in order to survive a motion to dismiss” under Rule 12(b)(6) . Wells v. United States, 851 F.2d 1471, 1473 (D.C. Cir. 1988). For more details and facts, the defendants must rely upon “the liberal opportunity for discovery and other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.” Conley, 355 U.S. at 47-48. Accord Seville Indus. Mach. Corp., 742 F.2d at 790.

Indeed, motions to dismiss pursuant to Rule 12(b)(6) are “viewed with disfavor and [are] rarely granted.” 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 at 321 (1990 ed.); Wilkerson v. United States, 839 F. Supp. 440, 442 (E.D. Tex. 1993). Courts are reluctant to dismiss a case on technical grounds and, consistent with the federal rules, prefer to decide cases on their merits. See, e.g., Kauffman v. Moss, 420 F. 2d 1270, 1276 (3d Cir.) (citing Foman v. Davis, 371 U.S. 178, 181 (1962)) (relying on Conley, court stated “[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of . . . mere technicalities.”); Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 961 (E.D. Tex. 1997); Yeittrakis v. Schering-Plough Corp., 804 F. Supp. 238, 240 (D.N.M. 1992).

In accordance with these principles, courts have repeatedly denied defendants’ motions under Rule 12(b)(6) to dismiss the Government’s civil RICO complaints.<sup>84</sup>

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<sup>84</sup> See, e.g., United States v. Philip Morris Inc., 116 F. Supp. 2d 131, 152-155 (D.D.C. 2000); United States v. Private Sanitation Indus. Ass’n, 793 F. Supp. 1114, 1123-49 (E.D.N.Y. 1992); United States v. Dist. Council of New York, 778 F. Supp. 738, 746-60 (S.D.N.Y. 1991);

(continued...)

**b. Application of Civil Rule 9(b)**

Rule 9(b), FED. R. CIV. P. provides as follows:

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.<sup>85</sup>

This particularity requirement serves two primary interests: “Protecting a defendant from reputational harm and ‘strike’ suits, and providing defendant sufficient information to respond to plaintiff’s claims.” Firestone v. Firestone, 76 F.3d 1205, 1211 (D.C. Cir. 1996) . Generally, Rule 9(b) is satisfied when the complaint “state[s] the ‘time, place and content of the false misrepresentations, the fact misrepresented and what was retained or given up as a consequence of the fraud,’” and the identity of the party making the representation. Firestone, 76 F.3d at 1211 (citations deleted). Accord, Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1068 (5th Cir. 1994).

Although such allegations are sufficient to satisfy Rule 9(b), the Rule does not require such allegations. “Plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud.” Seville Indus. Mach. Corp., 742 F.2d at 791. Accord, Mayer v. Dell, 1991 WL 21567 (D. D.C. 1991) .

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<sup>84</sup>(...continued)

United States v. Int’l Bh’d. of Teamsters, 708 F. Supp. 1388, 1395-1401 (S.D.N.Y. 1989); United States v. Bonanno Organized Crime Family of La Cosa Nostra, 683 F. Supp. 1411, 1422-40 (E.D.N.Y. 1988), aff’d, 879 F. 2d 20 (2d Cir. 1989).

<sup>85</sup> The above-quoted version is in effect through November 30, 2007. Rule 9(a) will be amended effective December 1, 2007. This amendment clarifies Rule 9(a) but does not change the substance of the Rule.



At bottom, the complaint “must provide enough detail about the underlying facts which illustrate that [the defendant’s] statements were fraudulent to allow a court to evaluate the claim in a meaningful way.” Arazie v. Mullane, 2 F.3d 1456, 1465 (7th Cir. 1993). “However, the “plaintiff need not allege specific evidentiary details needed to prove his claim at trial in order to satisfy Rule 9(b) specificity.” Formax, Inc. v. Hostert, 841 F.2d 388, 391 (Fed. Cir. 1988), (citing Seville Indus. Corp., 742 F.2d at 791-92). Cf. Shahmirzadi v. Smith Barney, Harris Upham & Co., 636 F. Supp. 49, 53 (D.D.C. 1985) (“Rule 9 should not be treated as requiring allegations of facts in the pleadings”) (citations deleted). See also Brady v. Games, 128 F. 2d 754, 755 (D.C. Cir. 1942). Rather, “bare bones averments of fraudulent schemes coupled with plaintiff’s allegations that defendant used the mails” in furtherance of the scheme to defraud is sufficient to allege mail fraud and wire fraud predicate acts. Formax, Inc., 841 F.2d at 391.

Although Rule 9(b) explicitly provides that intent and knowledge “may be averred generally,” courts have held that the complaint must allege “specific facts that support an inference of fraud.” Tuchman, 14 F.3d at 1068. See also, Greenstone v. Cambex Corp., 975 F.2d 22, 25 (1st Cir. 1992) (The complaint must allege “specific facts that make it reasonable to believe that defendant knew that a statement was materially false or misleading.”); DiLeo v. Ernest & Young, 901 F.2d 624, 629 (7th Cir. 1990) (“the complaint still must provide a basis for believing that plaintiffs could prove scienter”); Powers v. British Vita, P.L.C., 57 F. 3d 176, 184 (2d Cir. 1995) (the plaintiff must “allege a motive for committing fraud and a clear opportunity for doing so”).

Such inference of fraud and the requisite mental state “can be satisfied by alleging facts that show a defendant’s motive to commit [the charged] fraud. Where a defendant’s motive is

not apparent, a plaintiff may adequately plead scienter by identifying circumstances that indicate conscious behavior on the part of the defendant, though the strength of the circumstantial allegations must be correspondingly greater.” Tuchman, 14 F.3d at 1068. Accord, Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46,50 (2d Cir. 1987), cert. denied, 484 U.S. 1005 (1988), overruled on other grounds by United States v. Indelicato, 865 F.2d 1370 (2d Cir.) (en banc), cert. denied, 493 U.S. 811 (1989).

Moreover, the pleading requirements of Rule 9(b) apply only to RICO predicate offenses sounding in fraud, and not to the other elements of RICO claims.<sup>86</sup>

## **2. Drafting the Complaint**

Of course, the precise content of a civil RICO complaint will depend upon the particular circumstances of each case. However, several guidelines apply to virtually all Government civil RICO complaints. First, although short “notice pleading” is permitted by the Rules of Civil Procedure (see Section V(B)(1) above), it is the policy of OCRS that to the extent feasible, civil RICO complaints at least be as detailed as criminal RICO charges.<sup>87</sup> Therefore, attorneys should consult OCRS’ Criminal RICO Manual, which provides guidance in drafting criminal RICO charges.

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<sup>86</sup> See, e.g., Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 26 n.4 (2d Cir. 1990); Rose v. Bartle, 871 F.2d 331, 366 (3d Cir. 1989); United States v. Dist. Council of New York, 778 F. Supp. at 746-47 (collecting cases); Federal Ins. Co. v. Ayers, 741 F. Supp. 1179, 1185-86 (E.D. Pa. 1990); United States v. IBT, 708 F. Supp. at 1395-96; United States v. Bonnano Organized Crime Family, 683 F. Supp. at 1427-28.

<sup>87</sup> Indeed, most Government civil RICO complaints have included lengthy, detailed allegations in excess of 75 pages.

For example, the complaint should include a distinct section describing the alleged RICO enterprise, including identifying the specific known components of the enterprise.<sup>88</sup> Where the alleged enterprise is an association-in-fact, the complaint should include an allegation, in substance, that the members of the enterprise functioned as a continuing unit over a period of time to achieve a shared objective or objectives of the enterprise. It is also preferable to allege a brief factual basis that supports such allegations.

The enterprise section of the complaint should also allege the principal purposes of the enterprise, the manner and means the members of the enterprise used to carry out its affairs, and a brief description of the enterprise's structure and the roles of the defendants in the enterprise.

Moreover, where the RICO complaint alleges a substantive RICO violation under 18 U.S.C. § 1962(c), the enterprise section should include allegations that satisfy the “operation or management” test of Reves v. Ernst & Young, 507 U.S. 170, 177-83 (1993) (holding that to establish liability for a substantive RICO violation under Section 1962(c), the United States must prove that the defendant participated in the operation **or** management of the enterprise). See OCRS' Criminal RICO Manual's discussion of Reves' “operation or management” test.

A substantive RICO violation under 18 U.S.C. § 1962(a),(b) or (c) should allege, in substance, that the defendant engaged in a pattern of racketeering activity that extended over a substantial period of time and/or posed a threat of continuing unlawful activity and that the alleged predicate racketeering acts were related to each other and/or to the affairs of the enterprise. See H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989); OCRS' Criminal RICO Manual's discussion of pattern of racketeering activity.

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<sup>88</sup> This requirement does not preclude alleging, in appropriate circumstances, that the enterprise included unspecified persons or entities.

Furthermore, where the Government's civil RICO complaint alleges that a defendant is estopped from contesting certain predicate offenses or facts that were the basis of a defendant's prior conviction (see Section III(D) above), it is preferable to plead those offenses, to the extent feasible, just as they were alleged in the criminal indictment and to incorporate those allegations by reference to facilitate the application of collateral estoppel. It is also preferable to attach to the complaint certified copies of the indictment and the defendant's judgment of conviction that provide the basis for application of collateral estoppel.

Moreover, the complaint must allege that there is a reasonable likelihood that the defendant will commit a RICO violation in the future and include supporting factual allegations, as appropriate. For example, the Government's civil RICO complaints involving labor unions (see Section VIII below) typically have included extensive allegations of defendants' past unlawful activities, prior criminal convictions, and systemic corruption of the unions involved, and how the defendants obtained and exercised corrupt influence over the unions involved, that give rise to an inference that the defendants are reasonably likely to engage in similar unlawful activities in the future.

Finally, the complaint should include a separate section for the relief sought which provides, at minimum, a brief description of the specific relief sought.

**C. There is No Right to a Jury Trial on Claims for Equitable Relief**

1. The Seventh Amendment to the United States Constitution provides, in relevant part:

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

The Supreme Court has long held that the Seventh Amendment creates a right to a jury trial only in suits at “common law,” but not in suits within the courts’ equity jurisdiction. Thus, the Court stated in Parsons v. Bedford, 28 U.S. 433, 446 (1830):

The phrase “common law,” found in [the Seventh Amendment], is used in contradistinction to equity, and admiralty, and maritime jurisprudence. . . . It is well known, that in civil causes, in courts of equity and admiralty, juries do not intervene, . . . .

Accord Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41 (1989) (“We have consistently interpreted the phrase ‘Suits at common law’ to refer to ‘suits in which **legal** rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.”)(quoting Parsons v. Bedford, 28 U.S. at 447); Tull v. United States, 481 U.S. 412, 417 (1987) (“The Court has construed [the Seventh Amendment] to require a jury trial on the merits in those actions that are analogous to ‘Suits at common law.’ . . . In contrast, those actions that are analogous to 18<sup>th</sup> - century cases tried in courts of equity or admiralty do not require a jury trial. . . . This analysis applies not only to common-law forms of action, but also to causes of action created by congressional enactment.”); Barton v. Barbour, 104 U.S. 126, 133 (1881) (“[T]he right of trial by jury . . . does not extend to cases of equity jurisdiction.”). See also Colgrove v. Battin, 413 U.S. 149, 155 & n. 9 (1973).

The Supreme Court has adopted a two-pronged test to determine whether a Seventh Amendment right to a jury trial attaches:

To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty, the Court must examine both the nature of the action and of the remedy sought. First, we compare the statutory action to 18<sup>th</sup> - century actions brought in the courts of England prior to the merger of the courts of law and equity. . . . Second, we examine the remedy sought and determine whether it is legal or equitable in

nature.

Tull, 481 U.S. at 417-18 (citations omitted). Moreover, the Court has admonished that “[t]he second inquiry is the more important in [its] analysis.” Teamsters v. Terry, 494 U.S. 558, 565 (1990). Accord Granfinanciera, 492 U.S. at 42; Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 745 (D.C. Cir. 1995) (“the second part of this test (the nature of the remedy) is more important than the first.”).

It is particularly significant that the Supreme Court has repeatedly recognized that civil suits to obtain restitution or “disgorgement” of ill-gotten profits are equitable in nature. See, e.g., Harris Trust & Savings Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 250 (2000) (“an action for restitution of the property (if not already disposed of) or disgorgement of proceeds (if already disposed of), and disgorgement of the third person’s profits derived therefrom” is “appropriate equitable relief”); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 352 (1998) (“we have characterized as equitable, such as actions for disgorgement of improper profits”); Teamsters, 494 U.S. at 570 (“we have characterized damages as equitable where they are restitutionary, such as in actions for disgorgement of improper profits”) (citation and internal quotation omitted); Tull, 481 U.S. at 424 (“[A]n action for disgorgement of improper profits [is] traditionally considered an equitable remedy”); Porter v. Warner Holding Co., 328 U.S. 399, 402 (1946) (restitution of illegally obtained profits is “within the recognized power and within the highest tradition of a court of equity.”). Likewise, the Supreme Court has repeatedly stated that suits to obtain injunctive relief, including to enjoin unlawful conduct, are equitable in nature, and are not “suits at common law.”<sup>89</sup>

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<sup>89</sup> See, e.g., Mertens v. Hewitt Ass’n, 508 U.S. 248, 255 (1993); Tull, 481 U.S. at 423;

(continued...)

In Barton v. Barbour, the Supreme Court noted that such suits for injunctive relief and disgorgement of improperly obtained profits are suits in equity to be tried without a jury, stating:

Thus, upon a bill filed for an injunction to restrain the infringement of letters - patent, and for an account of profits for past infringement, it is now the constant practice of courts of equity to try without a jury issues of fact relating to the title of the patentee, involving questions of the novelty, utility, prior public use, abandonment, and assignment of the invention patented. **The jurisdiction of a court of equity to try such issues according to its own course of practice is too well settled to be shaken.**

104 U.S. at 133-34 (emphasis added).

2. In accordance with the foregoing authority, courts have held that there is no right to a jury trial in Government suits pursuant to 18 U.S.C. § 1964(a). For example, in United States v. Int'l Bhd. of Teamsters, 708 F. Supp. 1388 (S.D.N.Y. 1989), the court stated:

The Government's complaint clearly seeks equitable relief in that it seeks injunctions and the appointment of a "court liaison officer." The only demand for relief that would result in the payment of money is the demand for disgorgement of proceeds derived from alleged RICO violations and attorney's fees. Disgorgement and attorney's fees are incidental to equitable relief, and thus not considered actions at law. . . . As such, the relief is equitable in nature, thereby not giving rise to the right to a jury trial.

Id. at 1408. Accord United States v. Philip Morris Inc., 273 F. Supp. 2d 3 (D.D.C. 2002)

(holding that defendants did not have a right to a jury trial in Government's civil RICO suit for equitable relief, including injunctive relief, disgorgement of unlawful proceeds, appointment of court officers, a medical monitoring fund and other equitable remedies).

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<sup>89</sup>(...continued)

Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 291-92 (1960); United Steelworkers of America v. United States, 361 U.S. 39, 40-41 (1959); Porter, 328 U.S. at 399; Barton, 104 U.S. at 133-34.

Likewise, courts have repeatedly held that a Seventh Amendment right to a jury trial does not attach in suits by the Securities and Exchange Commission (“SEC”) to enjoin violations of the securities laws and to obtain disgorgement of profits, even if paid to the United States, because such suits are clearly “equitable in nature.”<sup>90</sup>

As the Second Circuit explained in SEC v. Commonwealth, *supra*:

The [demand for a jury trial] seems surprising since it has been assumed for decades that a suit for an injunction, whether by the Government or a private party, was the antithesis of a suit “at common law” in which the Seventh Amendment requires that the right to trial by jury “shall be preserved.” In 1791, when the Seventh Amendment became effective, injunctions, both in England and in this country, were the business of courts of equity, not of courts of common law.

...

A historic equitable remedy was the grant of restitution “by which defendant is made to disgorge ill-gotten gains”. . . [for which] there is no right to jury trial. . . Disgorgement of profits in an action brought by the SEC to enjoin violations of the securities laws appears to fit this description; **the court is not awarding damages to which plaintiff is legally entitled but is exercising the chancellor’s discretion to prevent unjust enrichment.**

574 F.2d at 95 (internal quotations and citations deleted) (emphasis added).<sup>91</sup>

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<sup>90</sup> See, e.g., SEC v. Rind, 991 F.2d 1486, 1493 (9th Cir. 1993); SEC v. Tome, 833 F.2d 1086, 1096 & n. 7 (2d Cir. 1987); SEC v. Commonwealth Chem. Sec., 574 F.2d 90, 94-96 (2d Cir. 1978); Bradford v. SEC, 278 F.2d 566, 567 (9th Cir. 1960); SEC v. Asset Mgmt. Corp., 456 F. Supp. 998, 999-1000 (S.D. Ind. 1978); SEC v. Petrofunds, Inc., 420 F. Supp. 958, 959-60 (S.D.N.Y. 1976); SEC v. Associated Minerals, Inc., 75 F.R.D. 724 (E.D. Mich. 1977). Cf. SEC v. Blavin, 760 F.2d 706, 713 (6th Cir. 1985) (“the district court possesses the equitable power to grant disgorgement”); SEC v. Williams, 884 F. Supp. 28, 30-31 (D. Mass. 1995).

<sup>91</sup> Courts have likewise held that a right to a jury trial does not apply to suits by private litigants to obtain a wide variety of equitable relief, including suits for recovery of money. See, e.g., Klein v. Shell Oil Co., 386 F.2d 659, 663-64 (8th Cir. 1967) (suit for specific performance of an executory contract, pursuant to an option agreement); Railex Corp. v. Joseph Guss & Sons, Inc., 40 F.R.D. 119, 123 (D.D.C. 1966) (patent infringement suit for “final injunctions and an

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## **D. Standards Governing Motions for Summary Judgment**

### **1. General Principles**

Under Rule 56, summary judgment on a particular issue is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), FED. R. CIV. P. When “the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citation omitted). A dispute about a material fact is genuine “if the evidence is such that a reasonable [trier of fact] could return a verdict for the non-moving party.” Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986). Whether a fact is “material” is determined by reference to the substantive law – “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” Id.

A court should consider motions for summary judgment “with caution so that no person will be deprived of his or her day in court to prove a disputed material factual issue.” Greenberg v. FDA, 803 F.2d 1213, 1216 (D.C. Cir. 1986); Public Citizen Health Research Group v. FDA, 953 F. Supp. 400, 402 (D.D.C. 1996); Virtual Def. & Dev. Int’l, Inc. v. Republic of Moldova,

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<sup>91</sup>(...continued)  
accounting of profits, with a prayer for incidental legal relief in the form of an award of money damages”), aff’d, 382 F.2d 179 (D.C. Cir. 1967); Gauthreaux v. Baylor Univ. Med. Ctr., 876 F. Supp. 847, 848-49 (N.D. Tex. 1994) (Plaintiff’s suit for backpay for age discrimination under the Rehabilitation Act, 29 U.S.C. § 701 et seq.); Nedd v. Thomas, 316 F. Supp. 74, 76-78 (M.D. Pa. 1970) (suit by retired union members to compel trustees of a union benefit fund to redress a breach of trust by restoring money lost to the fund).

133 F. Supp. 2d 9, 15 (D.D.C. 2001). Consistent with this principle, a court “should review all of the evidence in the record,” Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150 (2000), and must accept the evidence of the nonmoving party as true and draw all reasonable inferences in favor of the nonmovant. Anderson, 477 U.S. at 255.<sup>92</sup> Additionally, “[i]f the evidence presented on a dispositive issue is subject to conflicting interpretations, or reasonable persons might differ as to its significance, summary judgment is improper.” Greenberg, 803 F.2d at 1216. At the summary judgment stage, “the court is not to make credibility determinations or weigh the evidence.” Dunaway, 310 F.3d at 761 (citing Reeves, 530 U.S. at 150).

A party may move for partial summary judgment on particular elements of its claim for liability. See, e.g., United States v. Philip Morris USA, Inc., 327 F. Supp. 2d 13, 18 (D.D.C. 2004) (granting the United States’ motion for partial summary judgment, finding that the Government proved that the RICO defendants were distinct from the alleged RICO enterprise); Virden v. Graphics One, 623 F. Supp. 1417 (C.D. Cal. 1986) (granting plaintiff summary judgment on certain elements of civil RICO claim).

A party also may appropriately seek summary judgment to resolve issues of law. See Philip Morris USA, Inc., 327 F. Supp. 2d at 17 (“summary judgment is appropriate for purely legal questions”); United States v. Philip Morris USA Inc., et al., 263 F. Supp. 2d 72, 76 (D.D.C. 2003) (“In the pending [Summary Judgment] Motions, we are concerned with issues of law, rather than factual disputes.”); see also Crain v. Board of Police Comm’rs, 920 F.2d 1402, 1405-06 (8th Cir. 1990); Adler v. Madigan, 939 F.2d 476, 478 (7th Cir. 1991); Wyoming Outdoor

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<sup>92</sup> See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Dunaway v. Int’l Bhd. of Teamsters, 310 F.3d 758, 761 (D.C. Cir. 2002); Borgo v. Goldin, 204 F.3d 251, 254 (D.C. Cir. 2000).

Council v. Dombek, 148 F. Supp. 2d 1, 7 (D.D.C. 2001) (“When the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate.”) (citing Crain); Swan v. Clinton, 932 F. Supp. 8, 10 (D.D.C.), aff’d, 100 F.3d 973, 976 (D.C. Cir. 1996) (recognizing that district court’s grant of summary judgment “was based on a pure question of law”).<sup>93</sup>

Moreover, summary judgment is appropriate to dispose of affirmative defenses that are insupportable as a matter of law.<sup>94</sup> As a defendant bears the burden of proving his affirmative defenses at trial, Rule 56(c) mandates summary judgment rejecting any such defense where the defendant has “fail[ed] to make a showing sufficient to establish the existence of an element essential to” that affirmative defense. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see also id. at 323-24 (“One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims **or defenses**” (emphasis added). Id. at 327 (Rule 56 must be construed to permit parties opposing affirmative defenses to demonstrate, prior to trial, that the defenses have no factual basis).

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<sup>93</sup> See also Warner v. United States, 698 F. Supp. 877, 880-82 (S.D. Fla. 1988) (resolving legal issue on motion for partial summary judgment to “narrow the issues in the case, advance the progress of the litigation, and provide the parties with some guidance in how they proceed with the case.”).

<sup>94</sup> See, e.g., Paraskevaides v. Four Seasons Washington, 292 F.3d 886 (D.C. Cir. 2002) (statutory defense of D.C. Code § 30-101 unavailable as a matter of law); Gray v. Bell, 712 F.2d 490, 496 (D.C. Cir. 1983) (qualified immunity); Reed Research, Inc. v. Schumer Co., 243 F.2d 602 (D.C. Cir. 1957); United States v. Philip Morris USA Inc., 327 F. Supp. 2d at 6-7 (granting United States’ motion to dismiss several affirmative defenses); United States v. Philip Morris, 263 F. Supp. 2d at 81 (granting United States’ motion for summary judgment, denying defendants’ affirmative defense based on pre-emption); see also United States v. Bailey, 444 U.S. 394, 412-413 n.9 (1980) (“In a civil action, the question whether a particular affirmative defense is sufficiently supported by testimony to go to the jury may often be resolved on a motion for summary judgment.”).

The moving party bears the initial burden of “‘showing’ – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party’s case.” Id. at 325. However, the party opposing summary judgment “may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e); Celotex, 477 U.S. at 323-25. The “mere existence of a scintilla of evidence” is insufficient to oppose a summary judgment motion under Rule 56. Liberty Lobby, 477 U.S. at 252. Indeed, if the evidence presented by the opposing party is “merely colorable” or “not significantly probative,” summary judgment may be granted. Id. at 249-50 (citations omitted); see also Matsushita, 475 U.S. at 586 (party opposing summary judgment “must do more than simply show that there is some metaphysical doubt as to the material facts”). Accordingly, conclusory denials and statements by the party opposing summary judgment are insufficient to preclude summary judgment.<sup>95</sup>

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<sup>95</sup> See, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)(“Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and . . . designate ‘specific facts showing that there is a genuine issue for trial.’”); Ben-Kotel v. Howard University, 319 F.3d 532, 536 (D.C. Cir. 2003)(“If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted); Greene v. Dalton, 164 F.3d 671, 675 (D.C. Cir. 1999) (holding that “conclusory” statements and “unsubstantiated allegations” are not sufficient to defeat a properly supported motion for summary judgment); Harding v. Gray, 9 F.3d 150, 154 (D.C. Cir. 1993) (“a mere unsubstantiated allegation . . . creates no ‘genuine issue of fact’ and will not withstand summary judgment”); Alyeska Pipeline Service Co. v. U.S. E.P.A., 856 F.2d 309, 314 (D.C. Cir. 1988)(“a motion for summary judgment adequately underpinned is not defeated simply by a bare opinion or an unaided claim that a factual controversy persists.”); Gardels v. CIA, 689 F.2d 1100, 1106 n.5 (D.C. Cir. 1982) (affiant’s “views” insufficient to raise triable issue); Dickerson v. SecTek, Inc., 238 F. Supp. 2d 66, 72-73 (D.D.C. 2002) (“the nonmoving party’s opposition must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for trial.”); Williams v. Verizon Washington DC, Inc., 266 F. Supp. 2d 107, 115 (D.D.C. 2003)(“the non-movant may not rely on conclusory allegations, but must present specific facts from which a reasonable jury could conclude in the non-movant’s favor”); Cooper v. First Government Mort. & Investors, 238 F. Supp. 2d 50, 53

(continued...)

## 2. Issues of Intent Generally are Ill-Suited for Summary Judgment

Generally, issues of intent and credibility are inappropriate for summary judgment. See, e.g., Citizens Bank of Clearwater v. Hunt, 927 F.2d 707, 711 (2d Cir. 1991).<sup>96</sup> For example, in a fraud case, the issue of whether a defendant acted with the requisite fraudulent intent is “purely a question of fact.” Id.<sup>97</sup> Likewise, courts have repeatedly held that where the non-movant adduces expert opinions in support of his claims regarding intent summary judgment is inappropriate.<sup>98</sup>

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<sup>95</sup>(...continued)  
(D.D.C. 2002)(“the non-moving party may not rely solely on allegations or conclusory statements”).

<sup>96</sup> Accord Leggett & Platt, Inc. v. Hickory Springs Mfg. Co., 285 F.3d 1353, 1361-62 (Fed. Cir. 2002); Provenz v. Miller, 102 F.3d 1478, 1489-90 (9th Cir. 1996); National Soffit & Escutcheons, Inc. v. Superior Sys., Inc., 98 F.3d 262, 267 (7th Cir. 1996); Kand Med., Inc. v. Freund Med. Prods., Inc., 963 F.2d 125, 127 (6th Cir. 1992); Clements v. County of Nassau, 835 F.2d 1000, 1005 (2d Cir. 1987); ABB Daimler-Benz Transport. (N. Amer.), Inc. v. Nat'l RR Passenger Corp., 14 F. Supp. 2d 75, 86 (D.D.C. 1998); In re McGuirl, 162 B.R. 630, 634 (D.D.C. 1993); Mandelkorn v. Patrick, 359 F. Supp. 692, 697 (D.D.C. 1973).

<sup>97</sup> See also Provenz, 102 F.3d at 1489; Kand Med. Inc., 963 F. 2d at 127; Clements, 835 F. 2d at 1005; In re McGuirl, 162 B.R. at 634. Just as “the mere incantation of intent or state of mind [does not] operate as a talisman to defeat an otherwise valid [summary judgment] motion,” Citizens Bank of Clearwater, 927 F. 2d at 711 (internal quotation and citation omitted), the mere denial of fraudulent intent does not justify granting a defendant’s summary judgment motions in the face of evidence of fraudulent intent.

<sup>98</sup> See, e.g., Hunt v. Cromartie, 526 U.S. 541, 549-54 (1999) (holding that district court erred in granting summary judgment where non-movant provided expert testimony which supported the inference that moving defendant had necessary intent); Provenz, 102 F.3d at 1490-91; In Re Worlds of Wonder Sec. Litig., 35 F.3d 1407, 1425-26 (9th Cir. 1994); See generally Echazabal v. Chevron USA, Inc., 336 F.3d 1023, 1035 (9th Cir. 2003); TFWS, Inc. v. Schafer, 325 F.3d 234, 242 (4th Cir. 2003) (same); Rodgers v. Monumental Life Ins. Co., 289 F.3d 442, 449 (6th Cir. 2002).

## VI

### DISCOVERY

#### A.      Civil Investigative Demands (“CID”)

##### 1. **RICO’s CID Provisions**

Title 18, United States Code, Section 1968 provides as follows:

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall--

(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

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall--

(1) contain any requirement which would be held to be unreasonable if contained in a subpoena (sic) duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by--

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f)(1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available

for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of--

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation,

the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly--

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto,



except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

## **2. Background**

RICO's CID provisions were modeled after the CID provisions of antitrust laws, i.e.,

15 U.S.C. §§ 1311-1314. See H.R. REP. No. 91-1549, 91st Cong., 2d Sess. 58 (1970);

see also Section II(D) above; United States v. Forsythe, 429 F. Supp. 715, 721 (W.D. Pa. 1977), rev'd on other grounds, 560 F.2d 1127 (3d Cir. 1977)(observing in dicta that a RICO civil investigative demand is an “analogy to antitrust litigation”). A CID, while similar to a subpoena, is a pre-litigation discovery tool that the Government may use to compel document production before commencing a civil or criminal investigation. Specifically, pursuant to 18 U.S.C. § 1968(a), the Attorney General<sup>99</sup> is authorized to issue and serve a written CID upon any person and/or enterprise believed to possess or be in control of materials that may be relevant to a civil or criminal RICO investigation.<sup>100</sup> Unlike a federal grand jury subpoena, however, a CID may not compel testimony but, instead, only the production of “documentary materials.” A CID requires the recipient to comply absent a successful challenge for unreasonableness or privilege.<sup>101</sup>

Despite RICO’s enactment in 1970, there is a dearth of case law discussing CIDs’ application in RICO cases. In fact, as of the time of this writing, there are no published cases which squarely analyze CIDs in the RICO context. Instead, the published cases that reference RICO CIDs make only fleeting references to the statute in discussing collateral matters.

See, e.g., Doe v. Ashcroft, 334 F. Supp. 2d 471, 487 (S.D. N.Y. 2004), vacated on other grounds, Doe v. Gonzales, 449 F.3d 415 (2d Cir. 2006)(observing, in dicta, that “the Government may

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<sup>99</sup> 18 U.S.C. § 1961(10) defines the “Attorney General.” (See Section VI(A)(3) below).

<sup>100</sup> See 18 U.S.C. § 1968(a). Although section 1968(a) explicitly authorizes the use of CIDs prior to the institution of a criminal proceeding, CIDs are most often used in civil investigations. Once a criminal investigation has commenced, however, it may be much more expeditious to use a grand jury subpoena to acquire materials, given the power to compel both testimony and physical evidence.

<sup>101</sup> See 18 U.S.C. § 1968(a); see also 18 U.S.C. § 1968(d). These limitations will be discussed below in this section.

issue subpoenas related to criminal investigations even without initiating a formal criminal proceeding” in prosecuting racketeering cases under the RICO statute and that the process is governed by rules that allow for judicial review); Nagle v. Merrill Lynch, 790 F. Supp. 203, 208 (S.D. Iowa 1992)(notes that Section 1968 allows the Attorney General to issue a CID to any “‘person or enterprise’ to produce relevant materials”); Intel Corp. v. Hartford Acc. & Indem. Co., 662 F. Supp.1507, 1510 (N.D. Cal. 1987), abrogated on other grounds, Tafflin v. Levitt, 493 U.S. 455 (1990) (citation omitted); Karel v. Kroner, 635 F. Supp. 725, 730 (N.D. Ill. 1986)(recognizing that Section 1968 authorizes “Attorney General and his designees” to issue CIDs); Kinsey v. Nestor Exploration, Ltd., 604 F. Supp. 1365, 1370 (E.D. Wash. 1985), abrogated on other grounds, Tafflin, 493 U.S. 455 (recognizing that Section 1968 gives Attorney General exclusive power to issue CIDs); United States v. Hossbach, 518 F. Supp. 759, 766 n.1 (E.D. Pa. 1980) (noting, in dicta in a non-RICO narcotics case, that “the Attorney General was granted executive subpoena power in conducting investigations under the [RICO] Act, 18 U.S.C. § 1968 ”).<sup>102</sup> Accordingly, throughout this Section, references will be made to antitrust and grand jury subpoena case law as supporting authority where appropriate and instructive.

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<sup>102</sup> Similarly, the smattering of unpublished cases that involve RICO CIDs provide only cursory observations about statutory language or note the exclusive province of the Attorney General (or his designees) to issue CIDs. See, e.g., Prince v. Schofield, 1999 WL 1007344 (E.D.N.Y. Sept. 23, 1999) (unpublished) (observing that only the Attorney General, and not a private citizen, has power to issue a CID); United States v. Eisenberg, 773 F. Supp. 662, 702 (D.N.J. 1991)(mentions CIDs in a footnote that discusses U.S. Attorney Manual § 9-110.101 noting that before CIDs may issue, prior approval is needed from the Criminal Division); United States v. Benjamin, 1986 WL 15567 (E.D. Cal. May 1, 1986) (same as Eisenberg).

### 3. Issuance of a CID

Under Section 1968(a), the Attorney General may issue a CID when there is “reason to believe”<sup>103</sup> that any person or enterprise may have “documents” relevant to a racketeering investigation.<sup>104</sup> Title 18, United States Code, Section 1961(9) defines “documents” to include recordings as well as books and papers. The “reason to believe” standard has not been defined under RICO and has not been significantly developed under the analogous antitrust case law.

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.” Materials submitted in response to a CID are privileged from disclosure, except for certain statutory exemptions. See 18 U.S.C. § 1968(f)(3). If the civil investigation uncovers evidence of criminal violations, the information can be presented to a grand jury. See 18 U.S.C. § 1968(f)(4). 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. See 18 U.S.C. § 1968(f)(4). 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.<sup>105</sup>

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<sup>103</sup> See, e.g., Australia/Eastern U.S.A. Shipping Conference v. United States, 1981 WL 2212 (D.D.C. Dec. 23, 1981)(Government argued that it was not required to have probable cause in order to investigate with antitrust CID; court did not reach issue.).

<sup>104</sup> Under 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 case or proceeding arising under this chapter.”

<sup>105</sup> Under 18 U.S.C. § 1968(f)(4), the document custodian may deliver CID materials to  
(continued...)

A CID can be served upon any person or enterprise believed to have possession, custody, or control of relevant documents. Because the CID power enables the Government to obtain documents from individuals or companies, which are not targets of the investigation, the Government may often obtain more information than is normally available under civil discovery. See generally FED. R. CIV. P. 26(b).

Pursuant to 18 U.S.C. § 1968(a), the Attorney General must issue the CID. However, 18 U.S.C. § 1961(10) defines the “Attorney General” 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 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.

Thus, pursuant to this provision, the Attorney General, the Deputy Attorney General or any Assistant Attorney General of the United States may issue a CID. Any other employee of the Department of Justice or any other Department may issue a CID **only** if the Attorney General of the United States specifically designates such person to carry out the powers conferred on the Attorney General by the RICO statute.<sup>106</sup>

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(...continued)

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. See H.R. REP. No. 94-1343, 94th Cong., 2d Sess. 11, reprinted in 1976 U.S.C.C.A.N. 2603.

<sup>106</sup> See 18 U.S.C. § 1968(a)(Attorney General may issue a CID in writing).

Moreover, the U.S. Attorney’s Manual, Section 9-110.320, requires the review and approval of the Organized Crime and Racketeering Section before a CID may be issued. The submitting attorney should allow three weeks for review of the CID. Prior to submitting a proposed CID for review, the Government attorney should ensure that the CID does not contravene any other statutes or departmental regulations. For example, a CID should not be issued to an attorney for information relating to representation of a client unless the Assistant Attorney General finds that certain conditions are met.<sup>107</sup> Also, no CID may be issued to a reporter or news media organization except as permitted by 28 C.F.R. § 50.10. Lastly, CIDs should not be used to obtain customer transaction records from a financial institution without complying with the Right to Financial Privacy Act of 1978.<sup>108</sup>

#### **4. Content of a CID**

Section 1968(b) sets forth the criteria for a valid CID. Specifically, the CID must adequately describe, with “definiteness and certainty,” the class of documents sought to be produced.<sup>109</sup> In particular, 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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<sup>107</sup> See United States Attorneys’ Manual § 9-13.410.

<sup>108</sup> See 12 U.S.C. §§ 3401- 422; United States Attorneys’ Manual § 9-13.800.

<sup>109</sup> See 18 U.S.C. § 1968(b)(2). RICO’s 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.C.C.A.N. 4035.

(4) identify the custodian to whom such material shall be made available.<sup>110</sup>

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

The nature of the conduct, under (1) above, need only be generally described. For example, 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.” Gold Bond, 221 F. Supp. at 397.<sup>111</sup> Finally, the CID must identify the custodian for the documents. The custodian is appointed by the Attorney General. See Section VI(A)(6) below for a discussion of the custodian’s duties and responsibilities.

## **5. Proper Service of a CID**

Sections 1968(d) and (e) discuss service and return of service requirements related to CIDs. The CID, and any petitions filed in relation to the CID, may be served upon a person (as

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<sup>110</sup> See 18 U.S.C. § 1968(b).

<sup>111</sup> 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.” See 221 F. Supp. at 397. Several other circuits have followed the Gold Bond decision. See Lightning Rod Mfrs. Ass’n v. Staal, 339 F.2d 346, 347 (7th Cir. 1964); Hyster Co. v. United States, 338 F.2d 183 (9th Cir. 1964); Material Handling Inst. Inc. v. McLaren, 426 F.2d 90 (3d Cir. 1970); Finnell v. United States Department of Justice, 535 F. Supp. 410 (D. Kan. 1982); First Multiple Listing Serv. v. Shenefield, 1980 WL 1962 (N.D. Ga. Sept. 3, 1980); Petition of EniPrise Corp., 344 F. Supp. 319, 322-23 (W.D.N.Y. 1972)

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. See 18 U.S.C. § 1968(d). Any individual may serve the CID.<sup>112</sup> If an individual delivers the CID, proof of service is provided by a verified return that the person served the CID. When a CID is mailed, proof of service is verified by the return post office receipt of delivery.

## **6. Racketeering Documents Custodians**

\_\_\_\_\_ Section 1968(f) addresses the authority, duties and responsibilities of the Attorney General and "racketeering document custodians" in the issuing of CIDs and in receiving, keeping and maintaining any documents compelled to be produced by the CID. Section 1968(f)(1) compels the Attorney General to designate a "racketeering investigator" to serve as document custodian. Title 18, United States Code, Section 1961(7) defines a "racketeering investigator" as "any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter." The Attorney General may appoint additional racketeering investigators as necessary to serve as deputies and assist the document custodian. 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. This is a significant decision as notice of a replacement custodian must be submitted to the producing party in writing if the original document custodian dies, becomes disabled, is separated from service, or is relieved from responsibility.<sup>113</sup> The successor custodian has all of the same duties and responsibilities as

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<sup>112</sup> See 18 U.S.C. § 1968(e) ("by the individual serving any such demand").

<sup>113</sup> This written notice must include the identity and address of the successor. See (continued...)



his predecessor except that he is not responsible for any “default or dereliction which occurred before his designation as custodian.” See 18 U.S.C. 1968(f)(7).

The custodian is charged with responsibility for the documents and takes physical possession of them. 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 representative.<sup>114</sup> The custodian may also make the documents available to any attorney for the United States for use in a court or grand jury proceeding involving the United States. See 18 U.S.C. § 1968(f)(4). Upon the conclusion of any such case, the attorney is required to return to the custodian any provided materials which were not made part of the record of the particular proceeding. See 18 U.S.C. § 1968(f)(4).

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. See 18 U.S.C. §§ 1968(f)(5). If, after a reasonable time, no case or proceeding has been instituted after the completion of the 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. See

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<sup>113</sup>(...continued)  
18 U.S.C. § 1968(f)(7). A senior official should be appointed as custodian because of the strict notice requirements imposed by 18 U.S.C. § 1968(f)(7). 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.

<sup>114</sup> See 18 U.S.C. § 1968(f)(3). Specifically, the statute notes that the Attorney General must proscribe “reasonable terms and conditions” for the CID recipient or her authorized representatives to examine the materials provided while in the government’s custody.

18 U.S.C. § 1968(f)(6). In both cases, the Government is only required to return the submitted documents and need not turn over copies made from the submitted documents. See 18 U.S.C. § 1968(f)(5) & (6) (“other than copies thereof”).

## **7. Enforcement and Litigation of CIDs**

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. See 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.<sup>115</sup> Should difficulties arise with regard to compliance, the statute provides for a district court to intervene to settle any disputes raised in petitions by the parties.

### **a. Petitions by the Attorney General**

A recipient objecting to a CID can either refuse to respond to the CID or file a petition to modify or set aside the CID. See 18 U.S.C. §§ 1968(g)-1968(h). Section 1968(g) outlines the Attorney General’s recourse for compelling compliance. If the person refuses to comply,<sup>116</sup> the

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<sup>115</sup> See 18 U.S.C. § 1968(f)(2). 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, e.g., Finnell, 535 F. Supp. at 415 (antitrust 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).

<sup>116</sup> The statute specifically provides examples of failing to comply to include “wherever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material.” See 18 U.S.C. § 1968(g).

(continued...)

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 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.

**b. Petitions by the CID Recipient**

It is important to note that CID recipients also have explicit rights to challenge their compliance. Specifically, Sections 1968(c) and (h) describe certain limitations that affect the issuance of CIDs and the avenues of relief that may be afforded to an individual upon whom a CID has been served. These limits are similar to those which control the issuance of grand jury subpoenas. Therefore, Government attorneys should rely upon the relevant case law governing the enforcement of grand jury subpoenas. Specifically, § 1968(c) prohibits the Attorney General from making an “unreasonable” demand or to seek the production of documentary evidence that would be otherwise privileged from disclosure “if contained in a subpoena duces tecum before a grand jury [investigating] a racketeering violation.”<sup>117</sup> In addition, it is conceivable that a CID may be attacked on relevance grounds, although it is not likely that such a challenge would be

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<sup>116</sup>(...continued)

<sup>117</sup> See 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.

successful.<sup>118</sup>

The most significant challenges have arisen when there have been claims that complying with the CID would prove too costly. For example, the district court in Multiple Listing Serv. v. Shenefield, 1980 WL 1962 (N.D. Ga. Sept. 3, 1980), enforced an antitrust 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 \* 3.

As a practical matter, the CID recipient may either refuse to respond to the CID or challenge the CID in court. 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),<sup>119</sup> or if the Department does not have jurisdiction to conduct the investigation.<sup>120</sup> Other challenges may become evident as the RICO CID is utilized.<sup>121</sup>

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<sup>118</sup> Accord United States v. R. Enterprises, Inc., 498 US 292, 301 (1991)(in evaluating relevancy challenge to grand jury subpoena, the Supreme Court held that “where subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to general subject of the grand jury’s investigation.”).

<sup>119</sup> See Chattanooga Pharmaceutical Ass’n v. United States Dept. of Justice, 358 F.2d 864, 866-67 (6th Cir. 1966); Petition of Cleveland Trust, 1969 WL 230 (N.D. Ohio March 4, 1969).

<sup>120</sup> See Australia/Eastern U.S.A. Shipping Conference, 1981 WL 2212 (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).

<sup>121</sup> RICO’s CID provision, 18 U.S.C. § 1968, does not explicitly make the Federal Rules of Civil Procedure applicable, see antitrust provision, 15 U.S.C. § 1312(c)(1)(B) and 15 U.S.C.

(continued...)

Section 1968(h) provides a person who has been served with a CID with the right to petition to modify or set aside a CID. Specifically, this section authorizes the served person to file a petition for such relief in the district court for the judicial district in which the person resides, is found or transacts business. Such a motion must be filed within the shorter of the following time periods: (1) twenty (20) days after the service of the demand or (2) at any time before the return date of the demand.<sup>122</sup> This petition must be served upon the racketeering document custodian of the issuer of the CID. The petition must “specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of [Section 1968] or upon any constitutional or other legal right or privilege of such person.” See 18 U.S.C. § 1968(h). Similarly, section 1968(i) permits a person who has complied with a CID by providing documents to a racketeering custodian to compel the custodian to perform a duty imposed upon him by law by petitioning the appropriate district court for such relief and serving a copy of the petition on the racketeering custodian.

**c. Powers of the District Court**

Section 1968(j) explicitly provides that when a CID petition is filed, the district court has jurisdiction to litigate and decide these matters and “to enter such order or orders as may be required to carry into effect the provisions of this section.”

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(...continued)

§ 1314. However, RICO’s 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.C.C.A.N. 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.

<sup>122</sup> Once the petition is filed and is pending with the Court, the time allowed for compliance is stayed. See 18 U.S.C. § 1968(h).

## B. Discovery in General

1. The Federal Rules of Civil Procedure provide for broad avenues of civil discovery, including oral depositions, FED.R.CIV. P. 30, written depositions, FED.R.CIV. P. 31, interrogatories to parties, FED.R.CIV. P. 33, examinations of persons, FED.R.CIV. P. 35, and requests for admission, FED.R.CIV. P. 36.<sup>123</sup> FED.R.CIV. P. 26 sets forth the general provisions governing discovery, and affords “[l]iberal discovery . . . for the sole purpose of assisting in the preparation and trial, or the settlement, of litigation disputes.” Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984). FED.R.CIV. P. 26(a) requires certain discovery “without awaiting a discovery request.”<sup>124</sup> FED.R.CIV. P. 26(b)(1), provides, in relevant part, that unless otherwise limited by a court,

[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence

FED. R. CIV. P. 26(b)(1).

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<sup>123</sup> This Section discusses the rules of discovery that will be effective December 1, 2007. See Section IV, n.63 above.

<sup>124</sup> Such required disclosures includes: the name and address of each individual likely to have discoverable information, FED. R. CIV. P. 26(a)(1)(A); copies of documents or electronic information that the disclosing party will use to support or defend its claim, FED. R. CIV. P. 26(a)(1)(B); a computation of damages and the documents supporting the computation, FED. R. CIV. P. 26(a)(1)(C); insurance agreements, FED. R. CIV. P. 26(a)(1)(D); the identity of all expert witnesses and the basis and reasoning of their opinions, FED. R. CIV. P. 26(a)(2); and the identity and contact information of any potential witnesses - including those presented only through deposition, FED. R. CIV. P. 26(a)(3).

“Under [Rule 26], the only express limitations are that the information sought is not privileged, and is relevant to the subject matter of the pending action.” Seattle Times, 467 U.S. at 30. The phrase “relevant to the subject matter” “has been construed broadly, to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” Oppenheimer Fund Inc. v. Sanders, 437 U.S. 340, 351 (1978). “Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action.” Seattle Times, 467 U.S. at 33. Thus, discovery “is not limited to matters that will be admissible at trial so long as the information sought ‘appears reasonably calculated to lead to the discovery of admissible evidence.’” Seattle Times, 467 U.S. at 29-30. “Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.” Oppenheimer, 437 U.S. at 351. Likewise, “discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues.” Id. at 351.

“While the Federal Rules unquestionably allow broad discovery, [the] right to discovery is not unlimited.” Micro Motion, Inc. v. Kane Steel Co., 894 F.2d 1318, 1322 (Fed. Cir. 1990). Under Rule 26, a court is authorized to limit the frequency or extent of discovery if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

FED. R. CIV. P. 26(b)(2)(C). Moreover, “[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost,” unless the requesting party can show good cause; and, the court may set the conditions for the discovery. FED. R. CIV. P. 26(b)(2)(B). In addition, a trial court may deny discovery requests for matters “relevant only to claims or defenses that have been stricken,” “information for use in proceedings other than the pending suit,” or “when a party’s aim is to delay bringing a case to trial, or embarrass or harass the person from whom he seeks discovery,” Oppenheimer, 437 U.S. at 352, 353 & n.17, or requests based upon a party’s mere suspicion or speculation. Micro Motion, 894 F.2d at 1326. “The discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable without discovery, not to find out if it has any basis for a claim.” Id. at 1327. Furthermore, trial courts may issue protective orders where “civil discovery [is being used] to evade restrictions on discovery in criminal cases.” Degan v. United States, 517 U.S. 820, 826 (1996).<sup>125</sup>

2. Given the potential breadth of discovery, trial courts are vested with wide discretion in handling pre-trial discovery matters and in fashioning appropriate protective orders. See, e.g., Degen, 517 U.S. at 826; Seattle Times Co., 467 U.S. at 36; Cruden v. Bank of New York, 957 F.2d 961, 972 (2d Cir. 1992). Accordingly, a district court’s orders regarding

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<sup>125</sup> For agencies and individuals filing on behalf of the United States, there are additional regulations regarding discovery, to further “promote just and efficient resolution of civil claims.” Exec. Order No. 12,988, 61 Fed. Reg. 4,729, 4,729 (Feb. 5, 1996). Litigation counsel is expected to “streamline and expedite discovery in cases under [his] control.” Exec. Order No. 12,988, 61 Fed. Reg. at 4730. Federal agencies are expected to coordinate discovery procedures within the agency, including “review by a senior lawyer prior to . . . filing of the request in litigation, to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome, or expensive.” Id. Additionally, before petitioning the trial court to resolve discovery motions, “counsel shall attempt to resolve the issue with opposing counsel.” Id.



discovery matters may be reversed only upon a clear showing of an abuse of discretion.<sup>126</sup>

“As a general rule, a district court’s order enforcing a discovery request is not a final order subject to appellate review under 28 U.S.C. § 1291.” Church of Scientology of Cal. v. United States, 506 U.S. 9, 18 n.11 (1992).<sup>127</sup> “Federal appellate jurisdiction generally depends on the existence of a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute judgment.” Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)). “A party that seeks to present an objection to a discovery order immediately to a court of appeals must refuse compliance, be held in contempt, and then appeal the contempt order.” Church of Scientology of Cal., 506 U.S. at 18 n.11; see also Ryan, 402 U.S. at 533.

“However, under the so-called *Perlman* doctrine, see Perlman v. United States, 247 U.S. 7. . . (1918), a discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance.” Church of Scientology of Cal., 506 U.S. at 18 n.11. Moreover, some circuits permit a party to take an immediate appeal from an order

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<sup>126</sup> See, e.g., Ins. Corp. of Ireland Ltd. v. Compagnie des Bauxites, 456 U.S. 694, 707 (1982); Nat’l Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976); Cruden, 957 F.2d at 972.

<sup>127</sup> Accord Bennett v. City of Boston, 54 F.3d 18, 20 (1st Cir. 1995); In re Att’y Gen. of the United States, 596 F.2d 58, 61 (2d Cir. 1979); In re Ford Motor Co., 110 F.3d 954, 958 (3rd Cir. 1997); MDK, Inc. v. Mike’s Train House, Inc., 27 F.3d 116, 119 (4th Cir. 1994); Piratello v. Phillips Elecs. N. Am. Corp., 360 F.3d 506, 508 (5th Cir. 2004); U.S. ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc., 444 F.3d 463, 471 (6th Cir. 2006); Simmons v. City of Racine, PFC, 37 F.3d 325, 327 (7th Cir. 1994); Coleman v. Sherwood Med. Indus., 746 F.2d 445, 446-47 (8th Cir. 1984); Boughton v. Cotter Corp., 10 F.3d 746, 748 (10th Cir. 1993); see also United States v. Ryan, 402 U.S. 530, 532 (1971); Petroleum Prod. Antitrust Litig. v. Standard Oil Co., 747 F.2d 1303, 1305 (9th Cir. 1984).

compelling discovery of alleged privileged materials, provided that the order satisfies the collateral order doctrine.<sup>128</sup> See, e.g., In Re Ford Motor Co., 110 F.3d 954, 963-64 (1997) (appealing an order compelling discovery of documents allegedly protected by attorney-client privilege); United States v. Phillip Morris Inc., 314 F.3d 612, 617-20 (D.C. Cir. 2003) (same); Koch v. Cox, 489 F.3d 384 (D.C. Cir. 2007) (appealing an order compelling discovery of medical records allegedly protected by psychotherapist-patient privilege); Bittaker v. Woodford, 331 F.3d 715, 717-718 (9th Cir. 2003) (appealing an order precluding use of attorney-client privileged documents for proceedings other than litigating the federal habeas corpus petition at issue).

Although a few courts have held that discovery orders involving disclosure of alleged privilege matters are immediately appealable under the collateral order doctrine, most courts have held otherwise, ruling that such orders are not appealable until a final judgment has been rendered. See, e.g., Bennett, 54 F.3d at 20 (order compelling disclosure of various allegedly privileged investigative materials held non-appealable); In re Att’y Gen., 596 F.2d at 61-62 (order compelling disclosure of the identities of several police-informants); MDK, Inc., 27 F.3d at 120-22 (order compelling non-party to disclose trade secrets); Piratello, 360 F.3d at 508-09 (order compelling defendant to submit to depositions and disclose potentially self-incriminating information); Pogue, 444 F.3d at 471-72 (order compelling disclosure of documents allegedly protected by attorney-client privilege); Simmons, 37 F.3d at 327-29 (order compelling discovery

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<sup>128</sup> The collateral order doctrine permits an immediate appeal before final judgment from a “small class” of orders that “conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment.” Coopers & Lybrand, 437 U.S. at 468. See also Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

of informant's identity); Coleman, 746 F.2d at 447 (order imposing attorney's fees on party for failing to comply with discovery order); Boughton, 10 F.3d at 749-50 (order compelling discovery of documents allegedly protected by attorney-client, work-product, and non-testifying expert privilege).

3. A party seeking discovery may move for an order compelling disclosure or discovery. FED. R. CIV. P. 37(a). If a party or a party's officer, director, managing agent, or witness fails to obey an order to provide or permit discovery, the court is authorized to make such orders as are just. FED. R. CIV. P. 37(b)(2). These orders may include:

An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for purposes of the action in accordance with the claim of the party obtaining the order;

\_\_\_\_\_ An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

\_\_\_\_\_ In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

....

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or other circumstances make an award of expenses unjust.

FED. R. CIV. P. 37(b)(2)(A)-(E).

Rule 37 “allows a court all the flexibility it might need in framing an order appropriate to a particular situation.” Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197, 208 (1958); B.F. Goodrich Tire Co. v. Lyster, 328 F.2d 411, 415 (5th Cir. 1964). The District Court has wide latitude in imposing sanctions for failure to obey discovery orders; accordingly, a decision will not be reversed absent a clear abuse of discretion. See, e.g., Ins. Corp. of Ireland, 456 U.S. at 707; see also cases cited n.126 above. For example, permissible sanctions in appropriate circumstances include dismissal of an action,<sup>129</sup> contempt,<sup>130</sup> or other appropriate sanction.<sup>131</sup>

“Although a trial judge’s latitude in framing orders and in penalizing failures to comply is broad, his discretion is not limitless.” BF Goodrich Tire Co., 328 F.2d at 415; see also Indep. Prods., Inc. v. Loew’s, Inc., 283 F.2d 730, 733 (2d Cir. 1960). District courts are not required “to select the least drastic or most reasonable sanction,” Melendez, 79 F.3d at 672; however, courts may only impose sanctions that are just and specifically related to the circumstances surrounding a party’s failure to comply with the discovery rules. Ins. Corp. of Ireland, 456 U.S. at 707; Melendez, 79 F.3d at 672; Daval Steel Prods., 951 F.2d at 1366. “A district court may be found

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<sup>129</sup> See, e.g., Degen, 517 U.S. at 827; National Hockey League, 427 U.S. at 641-42.

<sup>130</sup> See, e.g., Church of Scientology of Cal., 506 U.S. at 18 n.11; see also cases cited n. 127 above.

<sup>131</sup> See, e.g., Daval Steel Prods. v. M/V Fakredine, 951 F.2d 1357, 1365 (2d Cir. 1991) (prohibiting defendant from introducing evidence); Melendez v. Ill. Bell Tel. Co., 79 F.3d 661, 671 (7th Cir. 1996) (sole expert witness barred from testifying); Boardman v. Nat’l Med. Enters., 106 F.3d 840, 843 (8th Cir. 1997) (plaintiff’s witness prohibited from testifying); Marchand v. Mercy Med. Ctr., 22 F.3d 933, 936 (9th Cir. 1994) (defendant ordered to pay plaintiff’s expenses); Orjias v. Stevenson, 31 F.3d 995, 1005 (10th Cir. 1994) (witness testimony excluded); Ins. Corp. of Ireland v. Compagnie Des Bauxites, 456 U.S. 694, 707 (1982) (certain facts taken as established).

to have abused its discretion if the exclusion of testimony results in fundamental unfairness in the trial of the case.” Orjias, 31 F.3d at 1005. “[T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of the case.” Societe Internationale, 357 U.S. at 209. Rule 37 does not authorize severe sanctions such as dismissal of a complaint when failure to comply is “due to inability, and not to wilfulness, bad faith, or any fault” of the offending party. Id. at 212; Nat’l Hockey League, 427 U.S. at 640; Melendez, 79 F.3d at 671; Daval Steel, 951 F.2d at 1367; BF Goodrich Tires, 328 F.2d at 415; Indep. Prods., 283 F.2d at 733. “Bad faith, however, is not required for a district court to sanction a party for discovery abuses.” Melendez, 79 F.3d at 671.

## **C. Privileges**

### **1. Deliberative Process, Presidential Communications and Investigatory Files Privileges**

The United States, but not private litigants, may rely upon several privileges to shield information from discovery, including the deliberative process, Presidential communications and investigatory files privileges.<sup>132</sup>

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<sup>132</sup> For a detailed analysis of the law and procedures governing these and other Government privileges, Government attorneys should consult DOJ’s Civil Division Commercial Litigation Branch’s Monograph “The Governmental Privileges” (September 2006) (hereinafter “The Governmental Privileges Monograph”). Prior approval from the Civil Division is required before a Government attorney may make a formal claim of privilege available only to the Government. See USAM § 4-6.332 (E). This Section of the Manual is derived, in part, from The Governmental Privileges Monograph and is limited to a brief description of the deliberative process, Presidential communications and investigatory files privileges.

**a. The Deliberative Process Privilege**

The deliberative process privilege protects the “decision making process of government agencies” and hence protects from discovery “documents ‘reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’” NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) (citations omitted). Generally, “pre-decisional communications . . . are privileged . . . and communications made after the decision and designed to explain it . . . are not” privileged. Id. at 151-52. Accord Renegotiation Bd. v. Grumman Aircraft Eng’g. Corp., 421 U.S. 168, 184 (1975). See The Governmental Privileges Monograph at 9-27.<sup>133</sup>

As the Supreme Court explained, “the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decision. The quality of a particular agency decision will clearly be affected by the communications received by the decisionmaker on the subject of the decision prior to the time the decision is made.” Sears, Roebuck, 421 U.S. at 151.

Assertion of the deliberative process privilege “requires: (1) a formal claim of privilege by the ‘head of the department’ having control over the requested information; (2) assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, with an explanation why it properly falls within the scope of the privilege.” Landry v. F.D.I.C., 204 F.3d 1125, 1135 (D.C. Cir. 2000). Some courts have interpreted the term “head of the department” broadly to include “supervisory personnel of sufficient rank to achieve the necessary deliberations in assertion of the

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<sup>133</sup> Congress codified the deliberative process privilege under Exemption No. 5 of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. See, e.g., Grumman Aircraft Eng’g. Corp., 421 U.S. at 183-84; EPA v. Mink, 410 U.S. 75, 85-87 (1973).

deliberative process” privilege. Id. at 1135-36. See The Governmental Privileges Monograph at 11.

The deliberative process privilege “is not absolute. After the government makes a sufficient showing of entitlement to the privilege, the district court should balance the competing interests of the parties. The party seeking discovery bears the burden of showing that its need for the documents out-weights the government’s interest.” Redland Soccer Club v. Dept. of Army of the United States, 55 F. 3d 827, 854 (3d Cir. 1995). See also The Government Privileges Monograph at pp. 21-22. In balancing the interests, courts consider various factors, including: “(i) the relevant of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the ‘seriousness’ of the litigation and the issues involved; (iv) the role of the government in the litigation; [and] (v) the possibility of future timidity by government employees who would be forced to recognize that their secrets are violable.” Redland Soccer Club, 55 F. 3d at 854, quoting First Eastern Corp. V. Mainwaring, 21 F.3d 465, 468 n.5 (D.C. Cir. 1994).

**b. The Presidential Communications Privilege**

In United States v. Nixon, 418 U.S. 683, 686 (1974), the President of the United States sought “to quash a third-party subpoena *duces tecum* issued by the United States District Court for the District of Columbia, pursuant to Fed. R. Crim. Proc. 17(c). The subpoena directed the President to produce certain tape recordings and documents relating to his conversations with aides and advisers,” to be used by a Special Prosecutor in a criminal case against third parties. The President argued, among other matters, that the Constitution provided “an absolute privilege of confidentiality for all Presidential communications.” Id. at 703. However, the Supreme Court rejected this claim, holding that confidential Presidential communications are only

“presumptively privileged,” and that such a “privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” The Supreme Court explained:

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications.

Id. at 708.

The Supreme Court found it highly significant that the President did not base his claim of privilege “to protect military, diplomatic, or sensitive, national security secrets,” where the President’s interest in confidentiality is greatest. Id. at 706.<sup>134</sup> The Supreme Court explained:

In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution; he does so on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities. In C. & S. Air Lines v. Waterman

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<sup>134</sup> Pursuant to the state secrets privilege, “matters the revelation of which reasonably could be seen as a threat to the military or diplomatic interests of the Nation - are absolutely privileged from disclosure in the courts . . . . Once the court is satisfied that the information poses a reasonable danger to secrets of state, ‘even the most compelling necessity cannot overcome the claim of privilege . . . .’” Harkin v. Helm, 690 F. 2d 977, 990 (D.C. Cir. 1982) (quoting United States v. Reynolds, 345 U.S. 1, 11 (1953)). The states’ secret privilege also protects against disclosure of information that would impair the Government’s “intelligence - gathering methods or capabilities.” Black v. United States, 62 F. 3d 1115, 1118 (8th Cir. 1995). See also The Governmental Privileges Monograph at 3-5.



S.S. Corp., 333 U.S. 103, 111 (1948), dealing with Presidential authority involving foreign policy considerations, the Court said: “The President, both as Commander-in-Chief and as the Nation’s organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.”

Nixon, 418 U.S. at 710. The Court then weighed “the importance of the general privilege of confidentiality of Presidential communication in performance of the President’s responsibilities against” the interests in the “fair administration of criminal justice,” id. at 711-12, and concluded that the privilege was outweighed by those interests, stating:

when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

Id. at 713.<sup>135</sup> Accord In Re Sealed Case, 121 F.3d 729, 745 (D.C. Cir. 1997) (“the privilege is

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<sup>135</sup> In a related case, Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc), the District of Columbia Circuit held that the Presidential communications privilege protected the President from complying with a subpoena *duces tecum*, directing him to produce original electronic tape recordings of five conversations between the President and his former Counsel, John W. Dean, III, to a Senate Committee investigating “‘illegal, improper or unethical activities’ occurring in connection with the presidential campaign and election of 1972.” Id. at 726. The appellate court held that the Senate Select Committee did not carry its burden of showing that “the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee’s [legislative] functions.” Id. at 731. The court explained that: (1) the Senate Select Committee’s need for the subpoenaed materials to perform its oversight functions was “merely cumulative” since the House Judiciary Committee had copies of the tape recordings at issue, id. at 732; and (2) because “Congress frequently legislates on the basis of conflicting information provided in its hearings,” id. at 732, the Select Committee’s alleged need for the tape recordings “to resolve particular conflicts in the voluminous testimony it has heard,” id. at 731, did not outweigh the presumption of confidentiality.

qualified, not absolute, and can be overcome by an adequate showing of need”).

The Presidential communications privilege “is limited to communications ‘in performance of [a President’s] responsibilities . . . of his office’ . . . and made ‘in the process of shaping policies and making decisions.’” Nixon v. Admin. of Gen. Servs., 433 U.S. 425, 449 (1977) (quoting United States v. Nixon, 418 U.S. at 708, 711, 713 (citations omitted)). However, the privilege is not limited “to direct communications with the President,” but also extends to “communications made by presidential advisers in the course of preparing advice for the President.” In re Sealed Case, 121 F.3d at 746, 751-52. The District of Columbia Circuit explained the scope of the Presidential communications privilege as follows:

Given the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources, the privilege must apply both to communications which these advisers solicited and received from others as well as those they authored themselves. The privilege must also extend to communications authored or received in response to a solicitation by members of a presidential adviser’s staff, since in many instances advisers must rely on their staff to investigate an issue and formulate the advice to be given to the President.

...

Not every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege. In particular, the privilege should not extend to staff outside the White House in executive branch agencies. Instead, the privilege should apply only to communications authored or solicited and received by those members of an immediate White House adviser’s staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate. Only communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers. See AAPS, 997 F.2d at 910 (it is “operational proximity” to the President that matters in determining whether “[t]he President’s confidentiality interest” is implicated) (emphasis omitted).

Of course, the privilege only applies to communications that these advisers and their staff author or solicit and receive in the course of performing their function of advising the President on official government matters. This restriction is particularly important in regard to those officials who exercise substantial independent authority or perform other functions in addition to advising the President, and thus are subject to FOIA and other government statutes.

In Re Sealed Case, 121 F.3d at 752.<sup>136</sup> See also The Governmental Privileges Monograph at 27-30. It is not clear whether the President must assert the privilege personally. See id. at 29.

**c. The Investigatory Files Privilege**

The investigatory files privilege protects from discovery investigatory files compiled for both civil and criminal law enforcement purposes and testimony about the information in the files. See, e.g., In Re Sealed Case, 856 F.2d 268, 271 (D.C. Cir. 1988); Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1341 (D.C. Cir. 1984); McPeck v. Ashcroft, 202

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<sup>136</sup> The court in In re Sealed Case also explained that:

[W]hile the presidential communications privilege and the deliberative process privilege are closely affiliated, the two privileges are distinct and have difference scopes. Both are executive privileges designed to protect executive branch decisionmaking, but one applies to decisionmaking of executive officials generally, the other specifically to decisionmaking of the President. The presidential privilege is rooted in constitutional separation of powers principles and the President's unique constitutional role; the deliberative process privilege is primarily a common law privilege. . . . Consequently, congressional or judicial negation of the presidential communications privilege is subject to greater scrutiny than denial of the deliberative privilege.

. . .

In addition, unlike the deliberative process privilege, the presidential communication privilege applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones.

121 F.3d at 745 (citations omitted).

F.R.D. 332, 335-36 (D.D.C. 2001); The Government Privileges Monograph at 36-41. Congress incorporated the principles underlying this privilege in exemption (b)(7) of the FOIA, 5 U.S.C. § 552 (b)(7), which allows the Government to withhold:

investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

See, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223 (1978); see also, United States Dept. of Justice v. Landano, 508 U.S. 165, 171-72 (1993); John Doe Agency v. John Doe Corp., 493 U.S. 146, 153-54 (1989).

To successfully invoke this privilege, the Government must meet three requirements:

(1) there must be a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege must be based on actual personal consideration by that official; and (3) the information for which the privilege is claimed must be specified, with an explanation why it properly falls within the scope of the privilege.

In re Sealed Case, 856 F.2d at 271. Accord Landry v. F.D.I.C., 204 F.3d 1125, 1135 (D.C. Cir. 2000). The “head of the department” requirement has been broadly interpreted to include, in addition to the head of the department, “supervisory personnel. . . of sufficient rank to achieve the necessary deliberateness in assertion of the [privilege].” Landry, 204 F.3d at 1136.

“[T]he law enforcement privilege is qualified. The public interest in non-disclosure must be balanced against the need of a particular litigant for access to the privileged information.” In re Sealed Case, 856 F.2d at 272. Accord Friedman, 738 F.2d at 1341. The District of Columbia Circuit has ruled that in applying this balancing test the district court should consider:

- (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information;
- (2) the impact upon persons who have given information of having their identities disclosed;
- (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure;
- (4) whether the information sought is factual data or evaluative summary;
- (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question;
- (6) whether the police investigation has been completed;
- (7) whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation;
- (8) whether the plaintiff’s suit is non-frivolous and brought in good faith;
- (9) whether the information sought is available through other discovery or from other sources;
- (10) the importance of the information sought to the plaintiff’s case.

In re Sealed Case, 856 F.2d at 272 (citations omitted). See also The Governmental Privileges Monograph at 39.

## **2. Confidential Informant Privilege**

a. The United States also has the exclusive right to rely upon the confidential informant privilege in both civil and criminal cases regarding information furnished by a confidential informant relating to a violation of the law.<sup>137</sup> Specifically, the confidential

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<sup>137</sup> See, e.g., Gill v. Gulfstream Park Racing Ass’n, Inc., 399 F.3d 391, 401 (1st Cir. 2005) (“The privilege is applicable in both criminal and civil proceedings.”); Lawmaster v. United States, 993 F.2d 773, 774 (10th Cir. 1993) (“the privilege is applicable in civil cases as well”); Dole v. Local 1942, IBEW, AFL-CIO, 870 F.2d 368, 372 (7th Cir. 1989); Suarez v. United States, 582 F.2d 1007, 1011-12 (5th Cir. 1978); In re United States, 565 F.2d 19, 22 (2d

(continued...)

informant privilege allows the United States to shield the identity of those individuals who assist law enforcement officers by providing information about violations of law with the expectation that their identity will remain confidential. See Roviario v. United States, 353 U.S. 53, 60-61 (1957). These individuals are commonly referred to as “confidential informants” (CIs).

“Exemption 7(D) of the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), exempts from disclosure agency records ‘compiled for law enforcement purposes . . . by criminal law enforcement authority in the course of a criminal investigation’ if release of those records ‘could reasonably be expected to disclose’ the identity of, or information provided by, a ‘confidential source.’ § 552(b)(7)(D).” Landano, 508 U.S. at 167. In Landano, the Supreme Court held that the Government is not entitled to a presumption that all sources supplying information to the FBI in the course of a criminal investigation are confidential sources within the meaning of Exemption 7(D). Id. at 171-78. Rather, the Supreme Court held that:

A source should be deemed confidential if the source furnished information with the understanding that the FBI would not divulge the communication except to the extent the Bureau thought necessary for law enforcement purposes.

Id. at 174.

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<sup>137</sup>(...continued)  
Cir. 1977); Mitchell v. Roma, 265 F.2d 633, 635 (3d Cir. 1959); Cofield v. City of LaGrange, 913 F. Supp. 608, 619 (D.D.C. 1996); Michelson v. Daly, 590 F. Supp. 261, 264 (N.D.N.Y. 1984).

The confidential informant privilege, which is broader than Exemption 7(D) of FOIA,<sup>138</sup> is grounded in the United States Supreme Court’s long-standing recognition of the importance of protecting the flow of information about criminal violations to the Government. See, e.g., In re Quarles and Butler, 158 U.S. 532, 535-536 (1895)(observing that “information, given by a private citizen [to law enforcement officials], is a privileged and confidential communication . . . the disclosure of which cannot be compelled without the assent of the government”). As the Second Circuit has observed:

[I]t has been the experience of law enforcement officers that the prospective informer will usually condition his cooperation on an assurance of anonymity, fearing that if disclosure is made, physical harm or other undesirable consequences may be visited upon him or his family. By withholding the identity of the informer, the government profits in that the continued value of informants placed in strategic positions is protected, and other persons are encouraged to cooperate in the administration of justice.

United States v. Tucker, 380 F.2d 206, 213 (2d Cir. 1967); The Governmental Privileges Monograph at 32-33.

It is important to note that, as a general rule, only the identity of the informant is privileged. However, if disclosure of information that the confidential informant provided would reveal his identity, the Government may move to shield that information from disclosure as well. See, e.g., Roviario, 353 U.S. at 60; Simon v. Dep’t of Justice, 980 F.2d 782, 784 (D.C. Cir. 1992);

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<sup>138</sup> Unlike the common law confidential informant privilege, the FOIA Exemption 7(D) is limited to disclosure of “agency records,” and in civil cases, the information need not relate to a crime, but may relate to a violation of a regulatory provision or other civil law. See, e.g., Brennan v. Engineered Prods., Inc., 506 F.2d 299, 302-04 (8th Cir. 1974); Wirtz v. Hooper-Holmes Bureau, Inc., 327 F.2d 939, 961-43 (5th Cir. 1964); Wirtz v. Continental Fin. & Loan Co. of West End, 326 F.2d 561, 563 (5th Cir. 1964); Culinary Foods, Inc. v. Raychem Corp., 150 F.R.D. 122, 126-27 (N.D. Ill. 1993); Schultz v. Farino Excavating Co., 55 F.R.D. 346, 347 (E.D. Mich. 1972).

United States v. Tenorio-Angel, 756 F.2d 1505, 1509-10 (11th Cir. 1985). Of course, this privilege may not apply if the informant testifies at a proceeding. See Banks v. Dretke, 540 U.S. 668, 698 (2004)(stating that the Government may not “examine an informant at trial, withholding acknowledgment of his informant status in the hope that (the) defendant will not catch on”).

Moreover, the confidential informant privilege is not absolute. Lawmaster, 993 F.2d at 774. A district court may reject the Government’s privilege claim where the information sought is essential to the opposition’s case and there is no other manner to acquire the information. See Roviaro 353 U.S. at 60-61 (noting that, if the requested information is “relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way”). Under Roviaro, the courts must apply a balancing test to determine whether disclosure of an informant’s identity and related information is required. As the Supreme Court stated in Roviaro:

We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual’s right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer’s testimony, and other relevant factors.

Roviaro, 353 U.S. at 62.<sup>139</sup> The person seeking disclosure has the burden of showing that “his need for the information outweighs the government’s entitlement to the privilege.” Dole,

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<sup>139</sup> Accord Lawmaster, 993 F.2d at 774; United States v. Alexander, 761 F.2d 1294, 1303 (9th Cir. 1985); Tenorio-Angel, 756 F.2d at 1509; United States v. Grisham, 748 F.2d 460, 462-63 (8th Cir. 1984).



870 F.2d at 372-73.<sup>140</sup> Significantly, a person seeking disclosure of matters protected by the confidential informant privilege may not meet his burden by mere speculation, supposition or conclusory allegations that an informant may be able to provide information helpful to his defense. Rather, such person must make a particularized showing that the confidential informant can provide material evidence that “would significantly aid in establishing an asserted defense” Tenorio-Angel, 756 F.2d at 1511, or establish “a reasonable probability that the evidence would change the outcome,” Elnasher, 484 F.2d at 1053, or “show that the disclosure is vital to a fair trial.” United States v. Weir, 575 F.2d 668, 673 (8th Cir. 1978).<sup>141</sup>

For example, the Supreme Court upheld the Government’s invocation of the confidential informant privilege in a criminal case where a defendant claimed he needed the identity of the informant to properly attack an affidavit in support of a search warrant. See Rugendorf v. United States, 376 U.S. 528, 533-36 (1964). In Rugendorf, the Supreme Court determined that the defendant had failed to meet his burden to show that the informant’s identity was essential to establish his innocence. Id.; see also McCray v. Illinois, 386 U.S. 300, 309-312 (1967)(holding that the Government was not required under either the Due Process Clause or the Confrontation Clause to disclose the identity of an informer during a pretrial probable cause hearing); Scher v.

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<sup>140</sup> Accord Elnasher v. Speedway Superamerica, LLC, 484 F.3d 1046, 1052-53 (8th Cir. 2007); Lawmaster, 993 F.2d at 774; Alexander, 761 F.2d at 1303; Grisham, 748 F.2d at 463-64; In re United States, 565 F.2d at 23.

<sup>141</sup> Accord Carpenter v. Lock, 257 F.3d 775, 779 (8th Cir. 2001); Holman, 873 F.2d at 946; Alexander, 761 F.2d at 1303; United States v. Kerris, 748 F.2d 610, 614 (11th Cir. 1984); Grisham, 748 F.2d at 463; United States v. Aguierre Aguierre, 716 F.2d 293, 301 (5th Cir. 1983); United States v. Diaz, 655 F.2d 580, 588 (5th Cir. 1981); United States v. Manley, 632 F.2d 978, 985 (2d Cir. 1980); United States v. Larson, 612 F.2d 1301, 1304 (8th Cir. 1980); United States v. Gonzales, 606 F.2d 70, 75 (5th Cir. 1979); United States v. Kim, 577 F.2d 473, 478 (9th Cir. 1978); In re United States, 565 F.2d at 23.

United States, 305 U.S. 251, 254 (1938) (holding that a police officer was not required to reveal the identity of a confidential informant who provided information leading to the arrest of the defendant and stating that “public policy forbids disclosure of an informer’s identity unless essential to the defense”).

In civil cases, the Government’s invocation of the confidential informant privilege is similarly tested. However, in civil cases, “the informer’s privilege is arguably stronger, because the constitutional guarantees assured to criminal defendants are inapplicable.”<sup>142</sup>

Applying the foregoing principles, courts have frequently denied disclosure of confidential informant matters where the informant was a mere “tipster” who provided valuable information to law enforcement,<sup>143</sup> or the informant was a witness to a crime but did not actively or substantially participate in it,<sup>144</sup> or where the person seeking disclosure failed to carry his burden of showing that the sought information was material to an asserted defense and necessary

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<sup>142</sup> Lawmaster, 993 F.2d at 774-775; accord Elnasher, 484 F.3d at 1053; United States v. One 1986 Chevrolet Van, 927 F.2d 39, 43 (1st Cir. 1991); Holman v. Cayce, 873 F.2d 944, 947 (6th Cir. 1989); Dole v. Local 1942, Int’l Bhd. of Elec. Workers, 870 F.2d 368, 372 (7th Cir. 1989); In re United States, 565 F.2d at 22 (collecting cases); Westinghouse Elec. Corp. v. Burlington, 351 F.2d 762 (D.C. Cir. 1965); Wirtz, 326 F.2d at 563; Michelson, 590 F. Supp. at 264.

<sup>143</sup> See, e.g., Carpenter, 257 F.3d at 779; United States v. Moore, 129 F.3d 989, 992-93 (8th Cir. 1997); Grisham, 748 F.2d at 463-64; United States v. Buras, 633 F.2d 1356, 1359-60 (9th Cir. 1980); United States v. Arrington, 618 F.2d 1119, 1125-26 (5th Cir. 1980); United States v. Larson, 612 F.2d 1301, 1303-04 (8th Cir. 1980).

<sup>144</sup> See, e.g., United States v. Morales, 908 F.2d 565, 567 (10th Cir. 1990); Holman, 873 F.2d at 946-47; Diaz, 655 F.2d at 588; United States v. Shursen, 649 F.2d 1250, 1254 (8th Cir. 1981); United States v. Anderson, 627 F.2d 161, 164 (8th Cir. 1980); Gonzales, 606 F.2d at 75-76; Suarez v. United States, 582 F.2d 1007, 1012 (5th Cir. 1978).

to secure a fair trial.<sup>145</sup>

Regarding the Government's countervailing interests in maintaining informant confidentiality, such confidentiality is essential to enable the Government to obtain valuable information from informants to carry out its important obligations to uncover unlawful activity. Therefore, the public interest in effective law enforcement strongly supports non-disclosure of confidential informant matters. See, e.g., Roviario, 353 U.S. at 59; Scher, 305 U.S. at 254; Grisham, 748 F.2d at 462.

Moreover, courts frequently have ruled that the likelihood of danger to an informant or others is a crucial factor weighing heavily in favor of non-disclosure of informant information, and accordingly have relied upon such potential danger as a ground to withhold an informant's identity.<sup>146</sup>

b. There appears to be some tension among the federal circuits about whether an interlocutory appeal may be taken from an order denying discovery of privileged matters or granting discovery and rejecting a claim of privilege. Specifically, the First, Second, Fifth, Seventh, Ninth and Tenth Circuits have held that an interlocutory appeal from such orders may not be taken, including from orders upholding assertion of the confidential informant privilege,

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<sup>145</sup> See Alexander, 761 F.2d at 1303 and cases cited in notes 143 & 144 above and accompanying text.

<sup>146</sup> See, e.g., Aguirre Aguirre, 716 F.2d at 300; United States v. Ward, 703 F.2d 1058, 1062 (8th Cir. 1983); United States v. Lanci, 669 F.2d 391, 393 (6th Cir. 1982); United States v. Jiles, 658 F.2d 194, 198 (3d Cir. 1981); United States v. Garcia, 625 F.2d 162, 165-66 (7th Cir. 1980); United States v. Hernandez-Berceda, 572 F.2d 680, 682-83 (9th Cir. 1978); United States v. McLaughlin, 525 F.2d 517, 519 (9th Cir. 1975); United States v. Toombs, 497 F.2d 88, 94 (5th Cir. 1974); United States v. Picard, 464 F.2d 215, 217 (1st Cir. 1972); United States v. Turchick, 451 F.2d 333, 338 (8th Cir. 1971); United States v. Drew, 436 F.2d 529, 534 (5th Cir. 1970); Gonzales v. Beto, 425 F.2d 963, 971 (5th Cir. 1970).

and instead require the litigants to use the contempt or mandamus processes to seek appellate review.<sup>147</sup> See, e.g., Simmons v. City of Racine, PFC, 37 F.3d 325, 327-329 (7th Cir. 1994)(rejecting claim of collateral order doctrine to appeal discovery order denying disclosure of confidential informant information and observing that litigants may use the contempt process or mandamus to receive immediate review of an adverse discovery order); In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 747 F.2d 1303, 1304-06 (9th Cir. 1984) (denying interlocutory review of a discovery order denying disclosure of confidential informant matters); In re Attorney General of the United States, 596 F.2d 58, 61 (2d Cir. 1979) (holding that an order holding the Attorney General of the United States in civil contempt for refusing to disclose certain confidential informant files was not appealable, but granting the Government’s Petition for a Writ of Mandamus); In re United States, 565 F.2d at 21-22 (denying interlocutory appeal of an order requiring in camera inspection of confidential informant files); see also Bennett v. City of Boston, 54 F.3d 18, 20-21 (1st Cir. 1995)(holding that the appellate court did not have jurisdiction to hear an interlocutory appeal of a discovery order denying invocation of privilege against “disclosure of sensitive investigative techniques” and noting that “contempt citation is the ordinary route to appellate review in this context”); Boughton v. Cotter Corp., 10 F.3d 746, 749-751 (10th Cir. 1993)(disallowing interlocutory appeal of a discovery order denying invocation of attorney-client and work product privileges, but noting mandamus relief may be available in some circumstances “to correct a clear abuse of discretion”); Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159, 162-63 (2d Cir. 1992)(holding the court lacked jurisdiction to conduct interlocutory review of district court’s discovery order rejecting

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<sup>147</sup> For a discussion of interlocutory appeals involving privilege matters under the collateral order doctrine, see Section VI(B)(2) above.

invocation of attorney client privilege).

However, some courts have allowed interlocutory appeals from discovery orders rejecting privilege claims other than the confidential informant privilege. See, e.g., Koch v. Cox, 489 F.3d 384, 387-388 (D.C. Cir. 2007) (stating that the court of appeals has “jurisdiction over the interlocutory appeal of an order denying a motion to quash based upon a privilege,” and allowing an interlocutory appeal of a discovery order rejecting an assertion of the psychotherapist-patient privilege); United States v. Phillip Morris Inc., 314 F.3d 612, 617-621 (D.C. Cir. 2003)(allowing interlocutory appeal of a discovery order denying assertion of attorney-client privilege under the collateral order doctrine without requiring the litigants to resort to the contempt process noting that “[i]t would be impossible for a court to sort out and redress the harm caused by the incorrect disclosure,” id. at 619); In re Ford Motor Co., 110 F.3d 954, 957-964 (3<sup>rd</sup> Cir. 1997)(allowing interlocutory appeal of a discovery order denying a claim of attorney-client and work product privileges).

### **3. Fifth Amendment Privilege**

The Fifth Amendment of the United States Constitution provides, in relevant part, that no person “shall be compelled in any criminal case to be a witness against himself.” “The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.” Lefkowitz v. Turley, 414 U.S. 70, 77 (1973). Accord Baxter v. Palmigiano, 425 U.S. 308, 316-17 (1976); McCarthy v. Arndstein, 266 U.S. 34,

40 (1924).<sup>148</sup> “The privilege protects a mere witness as fully as it does one who is a party defendant.” Id. at 40. Accord Malloy v. Hogan, 378 U.S. 1, 11 (1964).

To validly assert the privilege, a witness must establish that he “reasonably believes that the information sought, or discoverable as a result of his testimony, could be used in a subsequent state or federal criminal proceeding.” United States v. Balsys, 524 U.S. 666, 672 (1998). Accord Kastigar v. United States, 406 U.S. 441, 444-45 (1972); Hoffman v. United States, 341 U.S. 479, 486 (1951). In that regard, “[t]o sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the questions or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.” Hoffman, 341 U.S. at 486-87. Accord N.L.R.B. v. Trans Ocean Export Packing, Inc., 473 F.2d 612, 617 (9th Cir. 1973). However, the Fifth Amendment privilege does not apply where the danger of incrimination is “remote, unlikely, or speculative.” McCoy v. Comm. of Internal Revenue, 696 F.2d 1234, 1236 (9th Cir. 1983).<sup>149</sup> Significantly, a witness’ assertion of his Fifth Amendment privilege does not end the inquiry since the court makes the final determination whether the privilege has been properly invoked.<sup>150</sup>

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<sup>148</sup> However, as a general rule, a person who fears only a future criminal prosecution by a foreign country may not invoke the privilege. See United States v. Balsys, 524 U.S. 666, 698-99 (1998). Moreover, the Fifth Amendment privilege against self-incrimination applies only to natural persons, and not to corporations. See Hale v. Henkel, 201 U.S. 43, 74-75 (1906).

<sup>149</sup> See also Mason v. United States, 244 U.S. 362, 367 (1917) (holding that a witness lacked reasonable cause to fear incrimination from his sought testimony about his participation in a card-game that was not itself illegal); Martin-Trigona v. Gouletas, 634 F.2d 354, 360-62 (7th Cir. 1980) (ruling that the Fifth Amendment privilege did not preclude a witness’ testimony about his financial transactions that had “only the most tenuous relationship to any potentially incriminating financial transactions”).

<sup>150</sup> See, e.g., Hoffman, 341 U.S. at 486; Rogers v. United States, 340 U.S. 367, 375

(continued...)

Moreover, in a civil proceeding, unlike in a criminal prosecution,<sup>151</sup> the fact-finder may draw an adverse inference from a party's refusal to testify based on his assertion of his Fifth Amendment privilege against self incrimination. See, e.g., Baxter v. Palmigiano, 425 U.S. at 316-19; United States v. 4003-05 5<sup>th</sup> Ave., Brooklyn, N.Y., 55 F. 3d 78, 83 (2d Cir. 1995); United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 811 F. Supp. 808, 812 (E.D.N.Y. 1992), aff'd, 995 F.2d 375 (2d Cir. 1993); United States v. Bonanno Organized Crime Family, 683 F. Supp. 1411, 1449-50 (E.D.N.Y. 1988), aff'd, 879 F.2d 20 (2d Cir. 1989). Likewise, the fact-finder may draw an adverse inference against a party from the assertion of the Fifth Amendment privilege by a non-party witness whose interests are aligned with a party, such as a party's agents or representatives,<sup>152</sup> current and former employees,<sup>153</sup> and others whose relationships to a party warrant drawing an adverse inference against a party.<sup>154</sup> Indeed, an

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<sup>150</sup>(...continued)  
(1951); Martin-Trigona, 634 F.2d at 360; In re Corrugated Container Antitrust Litig., 662 F.2d 875, 882 (D.C. Cir. 1981).

<sup>151</sup> See Griffin v. California, 380 U.S. 609 (1965) (holding that it violates a defendant's protection against self-incrimination under the Fifth Amendment to instruct a jury in a criminal case that it may draw an adverse influence of guilt from a defendant's failure to testify about facts relevant to his case).

<sup>152</sup> See, e.g., Curtis v. M&S Petroleum, Inc., 174 F. 3d 661, 673-75 (5th Cir. 1999); United States v. Dist. Council of N.Y. City, 832 F. Supp. 644, 651-52 (S.D.N.Y. 1993).

<sup>153</sup> See, e.g., Rad Servs, Inc. v. Aetna Cas. and Sur. Co., 808 F.2d 271, 273-75 (3d Cir. 1986); Brink's Inc. v. City of New York, 717 F. 2d 700, 707-10 (2d Cir. 1983).

<sup>154</sup> See, e.g., LiButti v. United States, 107 F. 3d 110, 123-24 (2d Cir. 1997) (holding that it was proper to draw an adverse inference from the assertion of the Fifth Amendment privilege by a party's father based on considering the nature of the relationship between the party and the witness, the degree of control of the party over the witness, the compatibility of the interests of the party and the witness in the outcome of the litigation and the role of the non-party witness in the litigation); Cerro Gordo Charity v. Fireman's Fund Am. Life Ins., 819 F.2d 1471, 1481-82 (continued...)

opposing party may even call a non-party witness to the stand to invoke his Fifth Amendment privilege before the jury, provided that the probative value of such evidence is substantially outweighed by the danger of unfair prejudice.<sup>155</sup>

Although the fact-finder may draw an adverse inference from a party's or witness' assertion of his Fifth Amendment privilege, such adverse interest standing alone is not sufficient to impose liability<sup>156</sup> or to defeat or carry a motion for summary judgment.<sup>157</sup>

In accordance with the foregoing principles, courts in Government civil RICO cases have drawn an adverse inference against a party or a witness aligned with a party from their assertion of their Fifth Amendment Privilege against self-incrimination.<sup>158</sup>

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<sup>154</sup>(...continued)  
(8th Cir. 1987) (adverse inference from party's brother's assertion of his Fifth Amendment privilege).

<sup>155</sup> See, e.g., Cerro Gordo Charity, 819 F.2d at 1480-82; Brink's Inc., 717 F.2d at 707-10; Farace v. Independant Fire Ins. Co., 699 F.2d 204, 210-211 (5th Cir. 1983). Likewise, a witness' deposition in which he asserted his Fifth Amendment privilege is admissible under some circumstances. See, e.g., Koester v. Am. Republic Invs., Inc., 11 F.3d 818, 823 (8th Cir. 1993); Rad Servs., Inc., 808 F.2d at 274, 280-81.

<sup>156</sup> See, e.g., Baxter v. Palmigiano, 425 U.S. at 317-18; La Salle Bank Lake View v. Seguban, 54 F.3d 387, 390 (7th Cir. 1995); Private Sanitation Indus. Ass'n, 811 F. Supp. at 812; Bonanno Organized Crime Family, 683 F. Supp. at 1451-52.

<sup>157</sup> See, e.g., Curtis, 174 F.3d at 675; 4003-4005 5<sup>th</sup> Ave., Brooklyn, N.Y., 55 F.3d at 83; LaSalle Bank Lake View, 54 F.3d at 392-93; Avirgan v. Hull, 932 F.2d 1572, 1580 (11th Cir. 1991).

<sup>158</sup> See, e.g., Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 995 F.2d at 377; Dist. Council of N.Y. City, 832 F. Supp. at 651-52; United States v. Bonanno Organized Crime Family, 683 F. Supp. at 1449-52; United States v. Ianniello, 646 F. Supp. 1289, 1296-97 (S.D.N.Y. 1986), aff'd, 824 F.2d 203 (2d Cir. 1987).



## VII

### JUDGMENTS, CONSENT DECREES, AND ENFORCEMENT

#### A. Judgments and Consent Decree

##### 1. The General Nature of Consent Decrees and Rules of Their Construction

A consent decree is a voluntary agreement, subject to the court's approval, entered into by consent of the parties to a lawsuit to resolve a lawsuit. "The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation." United States v. Armour & Co., 402 U.S. 673, 681 (1971). As the Supreme Court has explained, consent decrees have a "hybrid nature":

[C]onsent decrees bear some of the earmarks of judgments entered after litigation. At the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts. See United States v. ITT Continental Banking Co., 420 U.S. 223, 235-237 (1975); United States v. Armour & Co., 402 U.S. 673 (1971). . . . [C]onsent decrees "have attributes both of contracts and of judicial decrees," a dual character that resulted in different treatment for different purposes. United States v. ITT Continental Banking Co., *supra*, at 235-237, and n. 10. The question is not whether we can label a consent decree as a "contract" or a "judgment," for we can do both.

Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986)

("Firefighters").<sup>159</sup>

Insofar as consent decrees share attributes of contracts, consent decrees are interpreted like contracts; that is, "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." Armour &

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<sup>159</sup> Accord System Federation v. Wright, 364 U.S. 642, 650-51 (1961); United States v. Local 359, United Seafood Workers, 55 F.3d 64, 68-69 (2d Cir. 1995); EEOC v. Local 580, Int'l Ass'n of Bridge, Structural and Ornamental Ironworkers, 925 F. 2d 588, 592 (2d Cir. 1991). United States v. Int'l Bhd. of Teamsters, 803 F. Supp. 761, 777 (S.D.N.Y. 1992) ("IBT").

Co., 402 U.S. at 682.<sup>160</sup> Accordingly, “reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meanings words may have had to the parties, and any other documents expressly incorporated in the decree.” United States v. ITT Continental Banking Co., 420 U.S. 223, 238 (1975) (“ITT Continental Baking Co.”).<sup>161</sup>

Moreover, a “court is not entitled to expand or contract the agreement of the parties as set forth in the consent decree. . . .” Berger v. Heckler, 771 F.2d 1556, 1568 (2d Cir. 1985). Accord EEOC v. New York Times Co., 196 F.3d 72, 78 (2d Cir. 1999); United States v. Int’l Bhd. of Teamsters, 998 F.2d 1101, 1107 (2d Cir. 1993); IBT, 803 F. Supp. at 777. It follows that a consent decree “should be interpreted in a way that gives effect to what the parties have agreed to, as reflected in the judgment itself,” and courts should reject “restrictive and narrow interpretations of the Consent Decree that would thwart implementation of the parties’ agreement.” IBT, 803 F. Supp. at 778 (citations omitted). Accord Taitt v. Chemical Bank, 810 F.2d 29, 33 (2d Cir. 1987). “[U]ltimately the question for the lower court, when it interprets a consent decree. . . is what a reasonable person in the position of the parties would have thought the language meant.” Richardson v. Edwards, 127 F.3d 97, 101 (D.C. Cir. 1997).

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<sup>160</sup> Accord Firefighters, 478 U.S. at 522; Firefighters v. Stotts, 467 U.S. 561, 574 (1984); ITT Continental Banking Co., 420 U.S. 223, 236-38 (1975); EEOC v. New York Times Co., 196 F.3d 72,78 (2d Cir. 1999); United States v. IBT, 998 F. 2d 1102, 1106 (2d Cir. 1993); United States v. O’Rourke, 943 F.2d 180, 187 (2d Cir. 1991); S.E.C. v. Levine, 881 F.2d 1165, 1178-79 (2d Cir. 1989); Berger v. Heckler, 771 F.2d 1556, 1568 (2d Cir. 1985); IBT, 803 F. Supp. at 777.

<sup>161</sup> Accord United States v. Int’l Bhd. of Teamsters, 998 F.2d 1101, 1106 (2d Cir. 1993); O’Rourke, 943 F.2d at 187; SEC v. Levine, 881 F.2d at 1179; IBT, 803 F. Supp. at 778.

Insofar as consent decrees share attributes of a court judgment, “a District Court’s order denying entry of a consent decree is appealable under 28 U.S.C. § 1292 (a)(1)”;<sup>162</sup> noncompliance with a consent decree is enforceable as a court order through a citation for contempt of court or other sanctions;<sup>163</sup> and, as a general rule, a consent decree binds only the parties to the consent decree.<sup>164</sup>

Moreover, district courts allow parties a wide latitude in the terms of their agreement under a consent decree; and as a general rule, a district court may not reject proposed consent decrees merely because the court might have fashioned different terms or does not believe that

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<sup>162</sup> Firefighters, 478 U.S. at 517. Accord Carson v. American Brands, Inc., 450 U.S. 79, 83-90 (1981); United States v. Microsoft Corp., 56 F.3d 1448, 1455-57 (D.C. Cir. 1995). Moreover, “[a] district court’s interpretation of a consent decree that it has approved deserves ‘substantial deference.’” Ellis v. Gallatin Steel Co., 390 F.3d 461, 473 (6th Cir. 2004) (citation omitted).

<sup>163</sup> See, e.g., Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375, 378, 380 (1994); Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378-79 (1992); Firefighters, 478 U.S. at 518; ITT Continental Baking Co., 420 U.S. at 226 n.2, 236 n.10; United States v. Local 359 United Seafood Workers, 55 F.3d 64, 69 (2d Cir. 1995); E.E.O.C. v. Local 580, 925 F. 2d 588, 592 (2d Cir. 1991); Berger, 771 F.2d at 1568-69; Investigations Officer v. Lanza, 1996 WL 514871 (S.D.N.Y. Sept. 10, 1996) at \* 11.

<sup>164</sup> See, e.g., Firefighters, 478 U.S. at 529; United States v. Ward Baking Co., 376 U.S. 327, 334 (1964); Ashley v. City of Jackson, Miss., 464 U.S. 900, 902 (1983) (Rehnquist, J., dissenting from a denial of certiorari) (stating that “[t]his rule can be traced to an opinion of Chief Justice Marshall in Davis v. Wood, 1 Wheat 6, 8-9 (1816)”). There are “several exemptions” to this general rule. See Sea-Land Services Inc. v. Gaudet, 414 U.S. 573, 593-94 (1974); see also Section VII (C) below, which discusses such exceptions to the general rule that judgments bind only the parties to a lawsuit.

Moreover, “a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefitted by it.” Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 750 (1975).

the agreement is ideal.<sup>165</sup> Indeed, because consent decrees constitute voluntary agreements between parties to a lawsuit, “a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.” Firefighters, 478 U.S. at 525.<sup>166</sup>

However, there are limits on the parties’ voluntary agreements pursuant to a consent decree. As the Supreme Court has explained, “a consent decree must spring from and serve to resolve a dispute within the court’s subject-matter jurisdiction. Furthermore, consistent with this requirement, the consent decree must ‘come within the general scope of the case made by the pleadings’ . . . and must further the objectives of the law upon which the complaint was based.” Firefighters, 478 U.S. at 525 (citations omitted). A “District Court’s authority to adopt a consent decree comes only from the statute which the decree is intended to enforce.” System Federation No. 91, Railway Employees’ Department, AFL-CIO v. Wright, 364 U.S. 642, 651 (1961) (“System Federation No. 91”). Accordingly, “the parties may [not] agree to take action that conflicts with or violates the statute upon which the complaint was based.” Firefighters, 478 U.S. at 526.<sup>167</sup> A district court’s approval of a consent decree that does not satisfy these standards may be overturned as an abuse of discretion.<sup>168</sup>

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<sup>165</sup> See, e.g., United States v. Cannons Engineering Corp., 899 F.2d 79, 84 (1st Cir. 1990); Janus Films, Inc. v. Miller, 801 F.2d 578, 582-83 (2d Cir. 1986).

<sup>166</sup> Accord Swift & Co. v. United States, 276 U.S. 311, 327-31 (1928); Komyatti v. Bayh, 46 F.3d 955, 962 (7th Cir. 1996); Kozlowski v. Coughlin, 871 F.2d 241, 244 (2d Cir. 1989); United States v. Mason Tenders Dist. Council of Greater New York, 1997 WL 97836 (S.D.N.Y. March 6, 1997) at \* 8.

<sup>167</sup> Accord System Federation No. 91, 364 U.S. at 650-51.

<sup>168</sup> See, e.g., System Federation No. 91, 364 U.S. at 650-53; Biodiversity Associates v.  
(continued...)

For example, in Firefighters v. Stotts, 467 U.S. 561, 572-76 (1984) and System Federation No. 91, 364 U.S. at 650-52, the Supreme Court held that district courts had authority “to reject agreed-upon terms as not in furtherance of statutory objectives” and “to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives.” 364 U.S. at 651. See also Firefighters, 478 U.S. at 526-28.<sup>169</sup>

Moreover, a district court has greater authority to review and reject a proposed consent decree that resolves a suit “affecting the public interest,” and accordingly, in such cases should not enter a proposed consent decree unless it “decides that it is fair, reasonable, and equitable and does not violate the law or public policy.” Sierra Club, Inc. v. Electronic Controls Design, Inc., 909 F.2d 1350, 1355 (9th Cir. 1990).<sup>170</sup> Furthermore, as many of the above-referenced cases

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<sup>168</sup>(...continued)  
Cables, 357 F. 3d 1152, 1169-70 (10th Cir. 2004); Komyatti v. Bayh, 96 F.3d 955, 961-62 (7th Cir. 1996); United States v. Charles George Trucking, Inc., 34 F.3d 1081, 1084-85 (1st Cir. 1994); Sierra Club Inc. v. Electronic Controls Design, Inc., 909 F.2d 1350, 1355 (9th Cir. 1990); Kozlowski, 891 F.2d at 244; United States v. Wheeling-Pittsburg Steel Corp., 866 F.2d 57, 59-62 (3d Cir. 1988); United States v. Local 1804-1, Int’l Longshoremen’s Ass’n, 831 F. Supp. 192, 193 (S.D.N.Y. 1993).

Moreover, a proposed consent decree may be rejected where consent of one of the parties is lacking or was procured through fraud. Swift & Co., 276 U.S. at 324; United States v. Ward Baking Co., 376 U.S. 327, 334-35 (1964).

<sup>169</sup> In Firefighters v. Stotts, 467 U.S. at 576-78, the Supreme Court held that the district court exceeded its authority in imposing injunctive relief and modifications to a consent decree because such relief conflicted with, and was prohibited by, the statute underlying the relief. See also Firefighters, 478 U.S. at 527-28.

Similarly, in System Federation No. 91, 364 U.S. at 646-51, the Supreme Court held that the district court abused its discretion in refusing to modify an injunction and related consent decree when a change in law rendered the relief at issue contrary to the governing law. See also Firefighters, 478 U.S. at 526-27.

<sup>170</sup> Accord Charles George Trucking, Inc., 34 F.3d at 1084-89; Cannons Engineering  
(continued...)

indicate, a consent decree also may authorize the district court to retain exclusive jurisdiction over a consent decree to ensure full compliance with it.<sup>171</sup>

## **2. Courts Have Authority to Modify Judgments and Consent Decrees Under Some Circumstances**

Pursuant to Rule 60(b), FED. R. CIV. P., courts are authorized to modify judgments and consent decrees in some circumstances. In that respect, Rule 60(b), FED. R. CIV. P., provides, in relevant part, as follows:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

In accordance with the principles embodied in Rule 60(b), it is well established that courts have the authority to modify a consent decree over the objection of the parties to the consent decree "when a change in law brings those terms in conflict with statutory objectives," or when such a change in law otherwise renders the terms of a consent decree unlawful. System Federation No. 91, 364 U.S. at 651. Accord Firefighters v. Stotts, 467 U.S. at 576, n.9; Biodiversity Assoc. v. Cables, 35 F.3d 1152, 1166-67 (10th Cir. 2004). Modifications of

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<sup>170</sup>(...continued)  
Corp., 899 F.2d at 84-92; Janus Films, Inc. v. Miller, 801 F.2d 578, 582-83 (2d Cir. 1986); Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1126-27 (D.C. Cir. 1983) (collecting cases).

<sup>171</sup> See, e.g., Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375, 381-82 (1994); Firefighters, 478 U.S. at 512; Railway Employees, 364 U.S. at 646-47; Pigford v. Veneman, 292 F.3d 918, 923-25 (D.C. Cir. 2002); Local 359, 55 F.3d at 69; E.E.O.C. v. Local 580, 925 F.2d at 593; Berger v. Heckler, 771 F.2d at 1568; United States v. IBT, 728 F. Supp. 1032, 1044-45 (S.D.N.Y. 1990), aff'd, 907 F.2d 277 (2d Cir. 1990).

consent decrees by district courts are reviewed under an abuse of discretion standard. See Juan F. v. Weicker, 37 F. 3d 874, 878 (2d Cir. 1994).

In Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992), the Supreme Court adopted greater flexibility in determining whether to modify consent decrees in institutional reform litigation. In United States v. Swift & Co., 286 U.S. 106, 119 (1932), the Supreme Court had ruled that “[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.” In Swift, the defendants agreed to a consent decree, resolving anti-trust litigation, that “enjoined them from manipulating the meat-packing industry and banned them from engaging in the manufacture, sale, or transportation of other foodstuffs.” Rufo, 502 U.S. at 379.

However, in Rufo, 502 U.S. at 380-81, the Supreme Court ruled that the Swift “grievous wrong” standard was too rigid, and that the lower courts should employ “a flexible approach” to modifications of consent decrees that “is often essential to achieving the goals of reform litigation.” Accordingly, in Rufo, 502 U.S. at 383, the Supreme Court ruled that “a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstances.” The Supreme Court added that “[m]odification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more onerous” (id. at 384), or when “one or more of the obligations placed upon the parties has

become impermissible under federal law.” Id. at 388.<sup>172</sup>

In the wake of Rufo, the lower courts have approved of<sup>173</sup> and rejected<sup>174</sup> modifications of consent decrees in a wide variety of circumstances.

## **B. Default Judgments**

Rule 55(a), FED. R. CIV. P. provides as follows:

**(a) Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party’s default.

Pursuant to Rule 55(a), a district court may enter an order of default “where the party against whom the judgment is sought has engaged in ‘wilful violations of court rules, contumacious conduct, or intentional delays.’” Forsythe v. Hales, 255 F.3d 487, 490 (8th Cir.

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<sup>172</sup> The Supreme Court cautioned that “[a] proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor. . . [t]he focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances. A court should do no more, for a consent decree is a final judgment that may be reopened only to the extent that equity requires.” Rufo, 502 U.S. at 391. See also Bd. of Educ. of Oklahoma City Pub. Schs. v. Dowell, 498 U.S. 237 (1991) (holding that the Swift “grievous wrong” standard does not apply to injunctions entered in school desegregation cases).

<sup>173</sup> For cases approving of modifications of consent decree, see, e.g., Evans v. Williams, 206 F.3d 1292, 1297-99 (D.C. Cir. 2000); United States v. Western Elec. Co. Inc., 46 F.3d 1198 (D.C. Cir. 1995); Patterson v. Newspaper & Mail Deliveries’Union, 13 F.3d 33, 36-39(2d Cir. 1993); Roadtechs, INC. V. MJ Highway Technology, Ltd., 83 F. Supp. 2d 677, 687-88 (E.D. Va. 2000).

<sup>174</sup> For cases rejecting proposed modifications of consent decrees, see, e.g., Pigford v. Veneman, 292 F.3d 918, 925-26 (D.C. Cir. 2002); N.L.R.B. v. Harris Teeter Supermarkets, 215 F.3d 32, 35-37 (D.C. Cir. 2000); Thompson v. U.S. Dept of H. U. D., 220 F.3d 241 246-50 (4th Cir. 2000); Alexander v. Britt, 89 F.3d 194 (4th Cir. 1996); Building & Const. Trades v. NLRB, 64 F.3d 880, 888-91 (3d Cir. 1995); In Re Midlands Utility, Inc., 253 B. R. 683, 688-90 (Bankr. D.S.C. 2000).



2001) (citation omitted).<sup>175</sup> However, default judgments are disfavored, and should be entered only when clearly supported by the record.<sup>176</sup>

Rule 55(c), FED. R. CIV. P. provides that “[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).”<sup>177</sup> “[T]he standard to set aside an entry of default under Rule 55(c) is essentially the same as the standard for vacating a default under Rule 60(b);”<sup>178</sup> and hence

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<sup>175</sup> Accord Davis v. Hutchins, 321 F.3d 641, 646 (7th Cir. 2003) (“Where it appears that the defaulting party has willfully chosen not to conduct its litigation with the degree of diligence and expediency prescribed by the trial court, this Circuit has repeatedly upheld the trial court’s [refusal to grant relief from the default]”) (quoting C.K.S. Eng’rs, Inc. v. White Mountain Gypsum Co., 726 F. 2d 1202, 1205 (7th Cir. 1984)); Johnson v. Dayton Elec. Mfg. Co., 140 F. 3d 781, 783 (8th Cir. 1988); New York Life Ins. Co. v. Brown, 84 F.3d 137, 141 (5th Cir. 1996) (“A default occurs when a defendant has failed to plead or otherwise respond to the complaint within the time required by the Federal Rules”); Au Bon Pain Corp. v. Artect, Inc., 653 F.2d 61, 65 (2d Cir. 1981) (“failing to appear for a deposition, dismissing counsel, giving vague and unresponsive answers to interrogatories, and failing to appear for trial were sufficient to support a finding [of default]”).

<sup>176</sup> See, e.g., Comiskey v. JFTJ Corp., 989 F.2d 1007, 1009 (8th Cir. 1993); C.K.S. Engineers, Inc., 726 F.2d at 1205; Meehan v. Snow, 652 F.2d 274, 277 (2d Cir. 1981); E.F. Hutton & Co., Inc. v. Moffatt, 460 F.2d 284, 285 (5th Cir. 1972).

<sup>177</sup> Rule 60(b), FED. R. CIV. P. provides, in relevant part, as follows:

On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

<sup>178</sup> Davis v. Hutchins, 321 F.3d at 646 n.2 (citations omitted).

under both Rules 55(c) and 60(b), to have an entry of default vacated, “the moving party must show: (1) good cause for the default; (2) quick action to correct it; and (3) a meritorious defense to the complaint.” Sun v. Bd. of Trustees of Univ. of Illinois, 473 F.3d 799, 810 (7th Cir. 2007).<sup>179</sup> However, “[m]ost decisions . . . hold that relief from a default judgment [under Rule 60(b)] requires a stronger showing of excuse than relief from a mere default order.”<sup>180</sup>

A district court’s decision to impose a default judgment and whether to set aside a default order or default judgment under Rules 55(c) or 60(b) are reviewable under the abuse of discretion standard.<sup>181</sup>

## **C. Scope Of Injunctions, Requisite Specificity, And Their Application To Non-Parties**

### **1. Scope of Injunctions and Requisite Specificity**

The permissible breadth of an injunction depends upon the circumstances of the particular case, “the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts. . . found to have been committed . . . . in the past.” NLRB v. Express Publ’g. Co., 312 U.S. 426, 436-37 (1941). Therefore, courts in equitable actions may not only enjoin unlawful acts, but also may enjoin otherwise lawful conduct to ensure effective relief. As the Supreme Court explained in United States v. Loew’s

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<sup>179</sup> Accord Forsythe v. Hales, 255 F.3d at 490; Robinson Eng’g Co. Pension Plan and Trust v. George, 223 F.3d 445, 453 (7th Cir. 2000); Johnson v. Dayton Elec. Mfg. Co., 140 F.3d at 783-84; Commercial Bank of Kuwait v. Rafidain, 15 F.3d 238, 243 (2d Cir. 1994); Meehan v. Snow, 652 F.2d at 276-77.

<sup>180</sup> Johnson v. Dayton Elec. Mfg. Co., 140 F.3d at 783 (citations omitted).

<sup>181</sup> See, e.g., Sun v. Bd. of Trustees of Univ. of Illinois, 473 F.3d at 810; Davis v. Hutchins, 321 F.3d at 646; Johnson v. Dayton Elec. Mfg. Co., 140 F.3d at 784-85; Inman v. American Home Furniture Placement, Inc., 120 F.3d 117, 118 (8th Cir. 1997); Pretzel & Stouffer v. Imperial Adjusters, 28 F.3d 42, 44-45 (7th Cir. 1994); Commercial Bank of Kuwait, 15 F.3d at 243; Hal Commodity Cycles Management Co. v. Kirsh, 825 F.2d 1136, 1138 (7th Cir. 1987).

Inc., 371 U.S. 38 (1962), abrogated on other grounds by Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28 (2006):

Some of the practices which the Government seeks to have enjoined . . . are acts which may be entirely proper when viewed alone. To ensure, however, that relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined.

Loew's Inc., 371 U.S. at 53.<sup>182</sup>

An injunction, however broad, must satisfy the particularity requirements of Rule 65(d),

FED. R. CIV. P., which provides, in relevant part, as follows:

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained.

This “Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague

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<sup>182</sup> Accord United States v. Gypsum Co., 340 U.S. 76, 88-89 (1950) (Equitable relief in antitrust cases “is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal. Acts entirely proper when viewed alone may be prohibited.”); Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) (“The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case”); EEOC v. Wilson Metal Casket, Co., 24 F.3d 836, 842 (6th Cir. 1994) (“The proper scope of an injunction is to enjoin conduct which has been found to have been pursued or is related to the proven unlawful conduct.”); United States v. Holtzman, 762 F.2d 720, 726 (9th Cir. 1985) (“[F]ederal courts have the equitable power to enjoin otherwise lawful activity if they have jurisdiction over the general subject matter and if the injunction is necessary and appropriate in the public interest to correct or dissipate the evil effects of past unlawful conduct.”); Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 390 (5th Cir. 1977) (“In fashioning relief against a party who has transgressed the governing legal standard, a court of equity is free to proscribe activities that, standing alone would have been unassailable.”).

to be understood.” Marshall v. United States, 414 U.S. 473, 476 (1974).<sup>183</sup>

Accordingly, an injunction when “read as a whole. . . [must provide] people of ordinary intelligence. . . a reasonable opportunity to know what is prohibited.” Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 383 (1997) (citations and internal quotations omitted). Accord Reno Air Racing Ass’n, Inc. V. McCord, 452 F.3d 1126, 1133-34 (9th Cir. 2006); Coca-Cola Co. v. Purdy, 382 F.3d 774, 790-91 (8th Cir. 2004); S.C. Johnson & Son, Inc. v. Clorox Co., 241 F.3d 232, 240-41 (2d Cir. 2001).<sup>184</sup>

Regarding the requisite specificity, “Rule 65(d) requires only that the enjoined conduct be described in reasonable, not excessive, detail.” Reliance Ins. Co. v. Mast Const. Co., 159 F.3d 1311, 1316 (10th Cir. 1998). Rule 65(d) “does not require the impossible. There is a limit to what words can convey. . . . The right to seek clarifications or modification of the injunction provides assurance, if any be sought, that proposed conduct is not proscribed.” Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1431-32 (7th Cir. 1985). Accord Pye v. Teamsters Local Union No. 122, 61 F.3d 1013, 1025 (1st Cir. 1995) (“The requirement that. . . injunctions be clear and specific, Fed. R. Civ. P. 65(d), does not mean that they must read like the working plans for building hydrogen bombs”); Medtronic, Inc. v. Benda, 689 F.2d 645, 649 (7th Cir. 1983) (“It would be impossible for any court to identify every conceivable act that would be

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<sup>183</sup> Accord Reno Air Racing Ass’n, Inc. v. McCord, 452 F.3d 1126, 1132 (9th Cir. 2006); S.C. Johnson & Son, Inc. v. Clorox Co., 241 F.3d 232, 241 (2d Cir. 2001); CPC Intern., Inc. v. Skippy Inc., 214 F.3d 456, 459 (4th Cir. 2000); Reliance Ins. Co. v. Mast Constr. Co., 159 F.3d 1311, 1316 (10th Cir. 1998).

<sup>184</sup> In constructing an injunction “as a whole,” some circuits allow courts to consider materials incorporated by reference (see, e.g., Reno Air Racing Ass’n Inc., 452 F.3d at 1130-32 (collecting cases)); while some circuits do not allow such incorporation. See, e.g., Dupuy v. Samuels, 465 F.3d 757, 758 (7th Cir. 2006) (collecting cases).

covered by [an injunction]”); Sucrs De A. Mayol & Co. v. Mitchell, 280 F.2d 477, 482 (1st Cir. 1960) (“Some compromise must be effected in a decree between the need for articulation, and the need for sufficient comprehensiveness to prevent ‘easy evasion.’”).

Moreover, to determine whether an injunction provides the requisite specific notice, courts evaluate an injunction ““in the light of the circumstances surrounding (the injunction’s) entry: the relief sought by the moving party, the evidence produced at the hearing on the injunction, and the mischief that the injunction seeks to prevent.”” Common Cause v. Nuclear Regulatory Comm., 674 F.2d 921, 927 (D.C. Cir. 1982) quoting United States v. Christie Indus., Inc., 465 F.2d 1000, 1007 (3d Cir. 1972).

In accordance with the foregoing authority, courts in a wide variety of circumstances have held that broad injunctions satisfy the particularity requirement of Rule 65(d).<sup>185</sup> On the other hand, courts have held that “an injunction broadly to obey” a statute or the law, which in essence restrains “the commission of unlawful acts which are . . . dissociated from those which a

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<sup>185</sup> See, e.g., S.C. Johnson & Son, Inc., 241 F.3d at 240-41 (enjoining false and misleading advertisements); Pye, 61 F.3d at 1018, n. 4, 1025 (enjoining “organizing and conducting mass demonstrations. . . where an object thereof is to force or require [named entities] or any other person to cease using, selling, handling, transporting or otherwise dealing in the products of or to cease doing business with August A. Busch & Co.”), and also enjoining “in any manner or by any means, threatening, coercing or restraining [any person]” to achieve the above objectives); Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1021 (9th Cir. 1985) (enjoining the defendant from “using any name, designation or material. . . likely to cause confusion, mistake or deception as to source relative to plaintiff’s trademark”); Pacific Maritime Ass’n v. Int’l Longshoremen’s and Warehousemen’s Union, 517 F.2d 1158, 1162-63, & n. 2 (9th Cir. 1975) (ordering a union and its members “[t]o cease and desist from using any coercion to nullify the right of Container Stevedoring Co., Inc. to use Steady Men or inducing, encouraging or causing such coercion; and [t]o take all necessary action to stop any [such] coercion”); Mitchell, 280 F.2d at 479, 481-82 (enjoining “defendant from violating the minimum wage and overtime provisions of the [Fair Labor Standards Act of 1938]”); F.T.C. v. Think Achievement Corp., 144 F. Supp. 2d 1013, 1017 (N.D. Ind. 2000) (“Defendants may be enjoined from making misrepresentations or false representations” in violation of the F.T.C. Act.).

defendant has committed,” does not satisfy the particularity requirement of Rule 65(d).<sup>186</sup> The Supreme Court, however, has limited the potential breadth of that principle, and has stated that “[a] federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant’s conduct in the past.” NLRB v. Express Pub. Co., 312 U.S. at 435.

For example, in McComb v. Jacksonville Paper Co., 336 U.S. 187, 191-92 (1949), the district court ordered the defendants “to obey the provisions of the [Fair Labor Standards] Act dealing with minimum wages, overtime, and the keeping of records.” The Supreme Court upheld the injunction, stating:

Decrees of that generality are often necessary to prevent further violations where any proclivity for unlawful conduct has been shown. . . [Defendants’] record of continuing and persistent violations of the Act would indicate that that kind of a decree was wholly warranted in this case. Yet if there were extenuating circumstances or if the decree was too burdensome in operation, . . . [defendants] could have petitioned the District Court for a modification, clarification or construction of the order.

Id. at 192.

Similarly, in United States v. Local 1804-1, Int’l Longshoremen’s Ass’n, 831 F. Supp. 177, 191-92 (S.D.N.Y. 1993), following a bench trial, the district court enjoined certain defendants found to have violated RICO: (1) “from committing any acts of racketeering activity defined in [18 U.S.C. § 1961]”; (2) “from having any dealings, directly or indirectly, with any

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<sup>186</sup> See NLRB v. Express Publishing Co., 312 U.S. 426, 435-36 (1941). Accord Belitskus v. Pizzingrilli, 343 F.3d 632, 650 (3d Cir. 2003); Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41, 51 (2d Cir. 1996); Keyes v. School Dist. No. 1, Denver, Colo., 895 F.2d 659, 668-69 (10<sup>th</sup> Cir. 1990).

members or associates of organized crime for any commercial purpose concerning the affairs of the [alleged RICO] Waterfront [Enterprise]. . . or any labor organization”; (3) “from having any dealings, directly or indirectly, with any other defendant in this action for any commercial purpose concerning the affairs of the Waterfront [Enterprise] or any labor organization”; (4) “from participating in any way in the affairs of or having any dealings, directly or indirectly, with (i) any labor organization. . . .(ii) any officer, agent, representative, employee, or member of [several ILA locals], (iii) any other officer, agent, representative, employee, or member of the ILA, or any other labor organization concerning the affairs of such organization or the Waterfront [Enterprise]”; “and (iv) any person or entity that does business on the Waterfront; and (5) from visiting the site of any ILA entity or other labor organization or communicating with any person who is at the site of any ILA entity or other labor organization.”

On appeal, the Second Circuit rejected the argument that this injunction was overly broad. See United States v. Carson, 52 F.3d 1173, 1183-85 (2d Cir. 1995). The Second Circuit explained that this injunction was necessary to prevent future unlawful activity in light of the scope of the defendants’ unlawful activity, involving the creation of a climate of fear and intimidation within the ILA by the defendant and his LCN co-conspirators. Id. at 1185.

Courts have approved similar broad injunctive relief in other Government civil RICO cases involving labor unions, including prohibiting any act of racketeering activity as defined in 18 U.S.C. § 1961(1), where such relief was necessary to prevent future unlawful activity in light of the extensive unlawful activity by the defendants and their co-conspirators. See Sections VIII(B)(1) and (C) below.<sup>187</sup>

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<sup>187</sup> See also McLendon v. Continental Can Co., 908 F.2d 1171, 1174, 1182 (3d Cir. 1990) (continued...)

It is also significant to note that failure to satisfy the requirements of Rule 65 (d) does not render an injunction unenforceable when the error is harmless. See, e.g., Dupuy, 465 F.3d at 759-60; Chathas v. Local 134 IBEW, 233 F. 3d 508, 512-13 (7th Cir. 2000).

## **2. An Injunction May Apply to Non-Parties in Various Circumstances**

a. It has long been the general rule that a non-party is “not bound by a judgment . . . in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.” Hansberry v. Lee, 311 U.S. 22, 40 (1940).<sup>188</sup> “This rule is part of our deep-rooted historic tradition that everyone should have his own day in court.” Martin v. Wilks, 490 U.S. 755, 762 (1989).

There are several exceptions to this general rule. For example, a non-party may be bound by a judgment order, including an injunction, when the non-party “has his interests adequately represented by someone with the same interests who is a party.” Martin, 490 U.S. at 762 n.2.<sup>189</sup>

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<sup>187</sup>(...continued)

(holding that a nationwide injunction barring the defendant from using a particular program of operation to violate Section 510 of the ERISA statute was “not an ‘obey the law’ injunction”); United States v. Miller, 588 F.2d 1256, 1261 (9th Cir. 1978) (holding that “the mere fact that [an] injunction is framed in language almost identical to the statutory mandate does not make the language vague. . . [where] the statutory terms adequately describe the impermissible conduct”); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1103 (2d Cir. 1972) (upholding an injunction “enjoining further violations of the antifraud provisions of the federal securities laws . . . in language virtually identical to that of Rule 10b-5”); Interstate Commerce Comm’n v. Keeshin Motor Exp. Co., 134 F.2d 228, 231 (7th Cir. 1943) (holding that while “courts may not issue a blanket order enjoining *any* violation of a statute upon a showing that the Act has been violated in some particular respects, nevertheless, they do possess authority to restrain violations similar to those already committed”).

<sup>188</sup> Accord Martin v. Wilks, 490 U.S. 755, 761-62 (1989); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969); Pennoyer v. Neff, 95 U.S. 714 (1877).

<sup>189</sup> Accord Hansberry v. Lee, 311 U.S. at 41 (“[T]he judgment in a ‘class’ or ‘representative’ suit, to which some members of the class are parties, may bind members of the  
(continued...)”)



“Additionally, where a special remedial scheme exists foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process.” Martin, 490 U.S. at 762, n. 2.<sup>190</sup>

Rule 65(d), FED. R. CIV. P. also sets forth several exceptions to the general rule that non-parties are not bound by a judgment, and provides, in relevant part, that:

Every order granting an injunction and every restraining order . . . 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.

The Supreme Court stated that this rule:

is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in “privity” with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.

Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14 (1945).

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<sup>189</sup>(...continued)

class or those represented who were not parties to it”); Montana v. United States, 440 U.S. 147, 154-55 (1979) (collateral estoppel barred a non-party, the United States, from relitigating an issue resolved in prior litigation over which the non-party exercised control). See also Section VIII(B)(8) below, which discusses various exceptions to the general rule that non-parties are not bound by judgment in Government civil RICO lawsuits involving labor unions.

<sup>190</sup> See, e.g., NLRB v. Bildisco & Bildisco, 465 U.S. 513, 529 (1984) (“Under the Bankruptcy Code a proof of claim must be presented to the Bankruptcy Court for administration, or be lost when a plan of reorganization is confirmed”); Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 479-80 (1988) (a probate statute that “requires creditors to file claims against an estate within a specified time period. . . .generally bars untimely claims”).

Rule 65(d) establishes two distinct, albeit related, bases of liability for a non-party. Under the first basis, a non-party, who is in “privity” with an enjoined party and hence bears a close relationship with the enjoined party, may be subject to the provisions of an injunction and liable for its violation on the rationale that the enjoined party has adequately represented the interests of the non-party. Whereas under the second basis, the focus is on the non-party’s conduct after an injunction has been imposed - - that is, a non-party, regardless of whether the non-party is otherwise “in privity” with the party, may be held in contempt when the non-party aids and abets an enjoined party’s violation of an injunction. In such circumstances, the non-party is not otherwise compelled to comply with the injunction; rather, such non-party is merely liable for aiding and abetting an enjoined party’s violation of an injunction.<sup>191</sup>

As one court explained, “a non-party may be enjoined under [the “in privity” rationale of] Rule 65(d) only when its interests closely ‘identify with’ those of the defendant, when the non-party and defendant stand in ‘privity,’ or when the defendant ‘represents’ or ‘controls’ the non-party.” Thompson v. Freeman, 648 F.2d 1144, 1147 (8th Cir. 1981). For example, under the first “in privity” rationale, “[p]ersons acquiring an interest in property [such as successors and assigns] that is a subject of litigation are bound by, or entitled to the benefit of, a subsequent judgment”, and are deemed “in privity” with their predecessor for purposes of

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<sup>191</sup> See, e.g., Regal Knitwear Co., 324 U.S. at 13-14; Chase National Bank v. Norwalk, 291 U.S. 431, 436-37 (1934); Goya Foods, Inc. v. Wallack Management Co., 290 F.3d 63, 75-76 (1st Cir. 2002); Microsystems Software, Inc. v. Scandinavia Online AB, 226 F.3d 35, 42-43 (1st Cir. 2000); Chicago Truck Drivers v. Brotherhood Labor Leasing, 207 F.3d 500, 507 (8th Cir. 2000); United States v. Kirschenbaum, 156 F.3d 784, 794-96 (7th Cir. 1998); Additive Controls & Measurement Sys. v. Flowdata, Inc., 96 F.3d 1390, 1395 (Fed. Cir. 1996); Rockwell Graphics Systems, Inc. v. DEV Industries, Inc., 91 F.3d 914, 919 (7th Cir. 1996) (collecting cases); Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 833 (2d Cir. 1930); Paramount Pictures Corp. v. Carol Publ’g Group, Inc., 25 F. Supp. 2d 372, 374 (S.D.N.Y. 1998).

Rule 65(d). Golden State Bottling Co. v. NLRB, 414 U.S. 168, 179-80 (1973). Accord Regal Knitwear Co., 324 U.S. at 13-14; Walling James v. Reuter, Inc., 321 U.S. 671, 674-75 (1944).

Similarly, Rule 65(d)'s application of an injunction to a party's "officers, agents, servants, employees, and attorneys," even though they may be non-parties to a litigation, is grounded in the recognition that such employees and agents are identified with their principal and that because corporations and other business entities can act only through such natural persons, such business entities may easily avoid compliance with an injunction's mandates through the actions of their agents unless the injunction also applied to their agents.<sup>192</sup>

Turning to the aiding and abetting basis of liability under Rule 65(d), a non-party who is not otherwise subject to an injunction may be held in contempt **only** for post-injunction activity of aiding and abetting an enjoined party's violation of an injunction.<sup>193</sup> Moreover, although such a non-party must have actual knowledge of the injunction, personal service of it is not required.<sup>194</sup> It also bears emphasis that under the second basis of liability imposed by Rule 65(d), a district

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<sup>192</sup> See, e.g., Walling, 321 U.S. at 674-75; FTC v. Standard Education Society, 302 U.S. 112, 119 (1937); Ex Parte Lennon, 166 U.S. 548, 553-55 (1897); Doctor's Associates, Inc. v. Reinert & Duree, P.C., 191 F.3d 297, 302-03 (2d Cir. 1999); Petersen v. Fee International, Ltd., 435 F. Supp. 938, 941-42 (W.D. Okla. 1975). Cf. Wilson v. United States, 221 U.S. 361, 376-77 (1911).

However, such a corporate employee, agent, or officer "is bound by an injunction against his corporation *only in his capacity as an officer.*" Saga International, Inc. v. John D. Brush & Co., Inc., 984 F. Supp. 1283, 1287 (C.D. Cal. 1997).

<sup>193</sup> See, e.g., Additive Controls & Measurement Sys., 96 F.3d at 1395; Spindelfabrik Suessen-Schurr v. Schubert & Salzer, 903 F.2d 1568, 1580-81 (Fed. Cir. 1990); G&C Merriam Co., 639 F.2d at 35; Paramount Pictures Corp., 25 F. Supp. 2d at 374-75. See also cases cited *supra* n.191.

<sup>194</sup> See, e.g., Goya Foods, Inc., 290 F. 3d at 75; Chicago Truck Drivers, 207 F.3d at 507; Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 129 (2d Cir 1979) (collecting cases); Reich v. United States, 239 F.2d 134, 137-38 (1st Cir. 1956).

court may not enforce an injunction against all persons having notice of an injunction, or against persons acting independently from an enjoined party, but rather must confine its enforcement to those persons who aid and abet an enjoined party's violation of the injunction.<sup>195</sup>

b. Apart from the authority to enjoin non-parties under Rule 65(d), FED.R.CIV.P., the All Writs Act<sup>196</sup> vests federal courts with the authority to enjoin “non-parties who interfere with the implementation of court orders establishing public rights.” Washington v. Fishing Vessel Ass’n, 443 U.S. 658, 692 n.32 (1979).<sup>197</sup> The Supreme Court has also emphasized that “[t]he power conferred by the [All Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice... and encompasses even those who have not taken any affirmative action to hinder justice.” United States v. New York Telephone Co., 434 U.S. 159, 174 (1977) (citations omitted).

Accordingly, the All Writs Act vests district courts with the authority to issue orders to non-parties “when needed to preserve the court’s ability to reach or enforce its decision in a case over which it has proper jurisdiction.” In re Baldwin-United Corp., 770 F.2d 328, 338 (2d Cir.

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<sup>195</sup> See, e.g., Regal Knitwear Co., 324 U.S. at 13; Chase National Bank v. Norwalk Ohio, 291 U.S. at 436-37; Doctor’s Associates, Inc. v. Reinert & Duree, P.C., 191 F.3d 297, 303 (2d Cir. 1999); Max’s Seafood Café ex rel. Lou-Ann v. Quinteros, 176 F.3d 669, 674-75 (3d Cir. 1999); Heyman v. Klein, 444 F.2d 65 (2d Cir. 1971); Alemite, 42 F.2d at 832 (“a court of equity. . . cannot lawfully enjoin the world at large, no matter how broadly it words its decree”).

<sup>196</sup> In that respect, the All Writs Act, 28 U.S.C. § 1651(a), provides that federal courts “may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”

<sup>197</sup> Accord United States v. Paccione, 964 F.2d 1269, 1274-75 (2d Cir. 1992) (“A court may bind non-parties to the terms of an injunction or restraining order to preserve its ability to render a judgment in a case over which it has jurisdiction.”); Vuitton et Fils S.A., 592 F.2d at 129 n. 6 (same); United States v. Hall, 472 F.2d 262, 265 (5th Cir. 1972) (same); NAACP, Jefferson County Branch v. Brock, 619 F. Supp. 846, 852 (D.D.C. 1985) (same).

1985). Accord United States v. City of Detroit, 329 F.3d 515, 522-24 (6th Cir. 2003); United States v. IBT, 911 F.Supp. 743, 750 (S.D.N.Y. 1996). For example, “[a] court can obtain equitable relief from a non-party against whom no wrong doing is alleged if it is established that the non-party possesses illegally obtained profits but has no legitimate claim to them. Courts have jurisdiction to decide the legitimacy of ownership claims made by non-parties alleged to be [illegal] proceeds.” S.E.C. v. Cherif, 933 F.2d 403, 414 n.11 (7th Cir. 1991).<sup>198</sup> See Section VIII (B)(8) below, which discusses relief against non-parties in Government Civil RICO cases involving labor unions.

**D. Removal Orders and Prohibition of Future Activities May Implicate Property Rights Protected By Due Process**

1. As noted above in Section II (C)(4), civil RICO, 18 U.S.C. § 1964(a), empowers district courts to remove a person from a position of employment with an entity and to prohibit such person from holding that position in the future. This remedy should be carefully considered because it may implicate an individual’s constitutional protection to due process. The Fifth Amendment to the United States Constitution provides, in relevant part, that “[n]o person shall be... deprived of life, liberty, or property, without due process of law.” However, such property interests subject to due process protections “are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits .” Bd. of Regents of State Colleges v. Roth,

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<sup>198</sup> Accord S.E.C. v. Antar, 831 F. Supp. 380, 399 (D.N.J. 1993) (collecting cases); S.E.C. v. Shiv, 379 F. Supp.2d 609, 619 (S.D.N.Y. 2005); F.T.C. v. Think Achievement Corp., 144 F. Supp.2d 1013, 1020 (N.D. Ind. 2000) (collecting cases); S.E.C. v. The Infinity Group Co., 27 F. Supp. 2d 559, 563 (E.D. Pa. 1998).

408 U.S. 564, 577 (1972). Accord Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984).

Federal law, regulations, contractual agreements and licenses may also give rise to property interests protected by due process.<sup>199</sup> Moreover, while the underlying property right may be created by state law or regulation, “federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause.”

Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 9 (1978) (citations omitted).

In accordance with these principles, it has long been recognized that a person has a property right in continued employment when a person has “more than an abstract need or desire for it,” but rather can demonstrate that he has “a legitimate claim of entitlement to it.” Roth, 408 U.S. at 577.<sup>200</sup> For example, in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985), the Supreme Court ruled that a public civil service employee had a property right in his job when a state statute provided that such civil service employees were “entitled to retain their positions ‘during good behavior and efficient service,’ [and] could not be dismissed ‘except... for... misfeasance, malfeasance, or nonfeasance in office.’” (citations omitted).

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<sup>199</sup> See, e.g., Perry v. Sindermann, 408 U.S. 593, 600-01 (1972); Lynch v. United States, 292 U.S. 571, 579 (1934); United States v. Gotti, 459 F.3d 296, 327-28 (2d Cir. 2006); United States v. Granberry, 908 F.2d 278, 279-80 (8th Cir. 1990); United States v. Rastelli, 870 F.2d 822, 831 (2d Cir. 1989); United States v. Local 560 of Int’l Bhd. of Teamsters, 780 F.2d 267, 280-82 (3d Cir. 1985).

<sup>200</sup> Accord Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985); Bishop v. Wood, 426 U.S. 341, 344-45 (1976); Perry v. Sindermann, 408 U.S. 593 599-602 (1972); Greene v. McElroy, 360 U.S. 474, 492 (1959) (“[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable government interference comes within the ‘liberty’ and ‘property’ concepts of the Fifth Amendment.”); DiMartini v. Ferrin, 906 F.2d 465, 466 (9th Cir. 1950) (A person “has a clearly established constitutional right to be free from unreasonable government interference with his private employment.”).

Moreover, in Perry v. Sindermann, 408 U.S. 593, 599-602 (1972), the Supreme Court held that notwithstanding the absence of a formal contractual tenure provision, a college professor “might be able to show from the circumstances of [his service for a number of years] - and from other relevant facts - that he has a legitimate claim of entitlement to job tenure.” 408 U.S. at 602. In particular, the Supreme Court stated that the college teacher at issue could establish such an entitlement from: (1) his college’s “official Faculty Guide” that stated that “the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work,” and (2) upon guidelines that a person “who had been employed as a teacher in the state college and university system for seven years or more has some form of job tenure.” 408 U.S. at 600. The Court remanded the case to allow the petitioner to make such a showing.<sup>201</sup>

2.a. Applying the forgoing authority, an officer or employee of a private corporation or other legitimate private entity may have a property interest in continued employment protected by due process from governmental interference when he demonstrates that he has a legitimate claim of entitlement to it, such as when he has an employment contract guaranteeing continued employment for a term of years, unless removed for just cause, misconduct or malfeasance.

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<sup>201</sup> See also Bishop v. Wood, 426 U.S. 341, 344-45 (1976)(stating that “[a] property interest in employment can, of course, be created by ordinance, or by an implied contract,” but that a property right in employment is not established by a “position [held] at the will and pleasure” of the employer); Bd. of Regents v. Roth, 408 U.S. at 567-68 (holding that a teacher, with no-tenure rights, hired for one year who is not rehired at the end of the one-year period does not have a property right in continued employment); Federal Deposit Ins. Corp. v. Henderson, 940 F.2d 465, 475 (9th Cir. 1991) (“[I]n most states, the general rule is that a public employee terminable at will does not have a property interest in continued employment, while an employee whose contract provides, either expressly or by implication, that he may only be terminated for cause does have such an interest.”) (citations omitted).

For example, in Federal Deposit Ins. Corp. v. Henderson, 940 F.2d 465, 467-70 (9th Cir. 1991), a former bank president sued the Supervisor of Banking for the State of Washington under 42 U.S.C. § 1983, alleging, among other matters, that actions of the Supervisor of Banking pressuring his employer, a private bank, to fire him deprived him of his property interest to continued employment. The Ninth Circuit held that the bank president's employment contract, requiring that he be given ninety days notice if he was to be terminated, created a property interest in his continued employment with the bank for ninety days. 940 F.2d at 476. The Ninth Circuit also held that:

The fact that the private employer and not the governmental officials actually fired the plaintiff did not shield the officials from liability, because they “set in motion a series of acts by others which they knew or reasonably should have known would cause others to inflict the constitutional injury.”

940 F.2d at 476 (citations omitted).

Similarly, in Merritt v. Mackey, 827 F.2d 1368, 1370 (9th Cir. 1987), the plaintiff sued federal and state officials under 42 U.S.C. § 1983, alleging that they caused his termination from employment with a private corporation providing alcohol and drug counseling services without a hearing, thereby depriving him of liberty and property interests without due process, in violation of the Fifth and Fourteenth Amendments. The Ninth Circuit held that the plaintiff had a property interest in continued employment because his employer's “personnel policies stated that permanent employees could be fired only for cause.” Id. at 1371. The Ninth Circuit also held that even though the plaintiff was fired by a private employer, state activity was responsible for the plaintiff's discharge because government officials threatened to cut off state and federal funding for the employer unless it fired the plaintiff. Id. at 1370-72. Accordingly, the Ninth



Circuit concluded that the plaintiff was entitled to “some predeprivation process.” Id. at 1372. See also Stein v. Bd. of City of New York, 792 F.2d 13, 15-17(2d Cir. 1986) (holding that a bus driver’s contract, providing that he could not be discharged except for “good cause,” created a property interest in continued employment, entitling him to adequate notice and a hearing before being discharged); McLaurin v. Fischer, 768 F.2d 98, 102-03 (6th Cir. 1985) (ruling that a reasonable jury could find that the plaintiff had a property interest in his continued employment as the head of the Division of Neurosurgery of a university hospital where there was a mutual understanding between the plaintiff and his employer that his employment was permanent unless he became physically unable to perform his job or he resigned).

b. A labor union official or union employee, likewise, may have a property interest in his continued employment or union position when the terms of his employment contract or his union’s constitution or bylaws guarantee his continued employment or his position for a fixed term, or unless removed for cause.<sup>202</sup> Operation of federal law may also give rise to a union official’s property right in his union office.<sup>203</sup>

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<sup>202</sup> The constitution and bylaws of a union constitute a contract between a union member and his union. See, e.g., Shea v. McCarthy, 953 F.2d 29, 31-32 (2d Cir. 1992); Doty v. Sewall, 908 F.2d 1053, 1060 (1st Cir.1990) (citing cases).

<sup>203</sup> In that respect, 29 U.S.C. § 481(a) provides:

Every national or international labor organization, except a federation of national or international labor organizations, shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.

In turn, 29 U.S.C. §§ 481(h) and (i) provide:

(continued...)

For example, in Brennan v. Silvergate District Lodge No. 50, Int'l Ass'n of Machinists, 503 F.2d 800, 807 (9th Cir. 1974), the court held that an order denying an incumbent union local officer's motion to intervene as a party-defendant in an action by the Secretary of Labor to have the officer's election set aside, did not deprive "him of property, the right to hold his office, without due process, because" the officer had another remedy under 29 U.S.C. § 464(a) to assert his claims.

Moreover, in United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267, 275, 281-82 (3d Cir. 1986), the Third Circuit held that provisions of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411, which guarantee the rights of union members to, inter alia, "nominate candidates, to vote in elections or referendums of the labor organization," gave rise to union members' property rights to participate in internal union democracy. In so ruling, the Third Circuit quoted with approval a statement by another court that:

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<sup>203</sup>(...continued)

**(h) Removal of officers guilty of serious misconduct**

If the Secretary [of Labor], upon application of any member of a local labor organization, finds after hearing in accordance with subchapter II of chapter 5 of Title 5 that the constitution and bylaws of such labor organization do not provide an adequate procedure for the removal of an elected officer guilty of serious misconduct, such officer may be removed, for cause shown and after notice and hearing, by the members in good standing voting in a secret ballot, conducted by the officers of such labor organization in accordance with its constitution and bylaws insofar as they are not inconsistent with the provisions of this subchapter.

**(i) Rules and regulations for determining adequacy of removal procedures**

The Secretary [of Labor] shall promulgate rules and regulations prescribing minimum standards and procedures for determining the adequacy of the removal procedures to which reference is made in subsection (h) of this section.

If a member has a “property right” in his position on the roster. . . . he has an equally enforceable property right in the election of men who will represent him in dealing with his economic security and collective bargaining where that right exists by virtue of express contract in the language of a union constitution.

Id. at 281. See also United States v. Gotti, 459 F.3d 296, 321, 327 (2d Cir. 2006) (stating that “the right of the members of a union to democratic participation in a union election is property,” and upholding a jury instruction that union members have a property right in “union positions.”<sup>204</sup>

3. A person who has such a property interest in continued employment may, nonetheless, be removed from his employment, provided he is afforded “due process.” The Supreme Court has described the process that is due in such circumstances as follows:

An essential principle of due process is that a deprivation of life, liberty, or property “be preceded by notice and opportunity for hearing appropriate to the nature of the case.” . . . We have described “the root requirement” of the Due Process Clause as being “that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.” . . . This principle recognizes “some kind of hearing” prior to the discharge of an employee who has a constitutionally protected property interest in his employment.”

Loudermill, 470 U.S. at 542 (citations omitted). Accord Bd. of Regents v. Roth, 408 U.S. at 570-71.

The Supreme Court has not specified “any minimally acceptable procedures for termination of employment” that govern all such cases. See Davis v. Scherer, 468 U.S. 183, 193 n.10 (1984). Rather, the determination of what process is due “would require a careful balancing of the competing interests - of the employee and the [government] - implicated in the official decision at issue.” Id. at 192 n.10. Accord Bell v. Burson, 402 U.S. 535, 541-42 (1971)

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<sup>204</sup> For a discussion of union members’ property rights to participation in union democracy, see Section VIII(F) below.

(“The hearing required by the Due Process Clause must be ‘meaningful’ . . . and ‘appropriate to the nature of the case’”) (citations omitted); Boddie v. Connecticut, 401 U.S. 371, 377-80 (1971) (same); Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313-15 (1950) (same).

For example, in Arnett v. Kennedy, 416 U.S. 134, 150 (1974), a federal statute created a property right to continued employment by providing that an employee had the right not to be discharged “except for such cause as will promote the efficiency of said service.” The Supreme Court rejected a claim by a covered employee that his discharge for misconduct violated due process because he was not afforded “a right to a trial-type hearing before an impartial officer before he could be removed from his employment.” Id. at 137. The Supreme Court held that due process was satisfied because prior to his discharge, the employee was given notice of the charges and the opportunity to respond orally and in writing. Id. at 140-58.

Similarly, in Davis v. Scherer, 468 U.S. at 192, the Supreme Court held that procedural due process was satisfied where a state highway patrol officer was discharged without a formal pretermination hearing, but was informed several times of the basis for his discharge and had several opportunities to present his reasons for his retention. See also Barry v. Barchi, 443 U.S. 55, 65 (1979) (holding that due process was satisfied where a horse trainer, whose license was suspended without “a formal hearing,” was notified of the basis for suspension “and he was given more than one opportunity to present his side of the story to the state’s investigators.”).

4. Under the forgoing authority, OCRS maintains that under civil RICO, 18 U.S.C. § 1964(a), a person who has a property right to continued employment in a position or office may be removed, and barred from holding such a position or office, in compliance with due process when:

- (1) Such person is a named defendant in a civil RICO action pursuant to 18 U.S.C. § 1964(a), and is found to have violated RICO after due notice and a trial, summary judgment, or other appropriate adjudicatory proceeding, or by default; or
- (2) Such person, whether or not named as a defendant in a civil RICO action, is subject to an injunction issued pursuant to 18 U.S.C. § 1964(a), and is found after due notice and an appropriate adjudicatory proceeding, or by default, to have violated, or aided and abetted one or more named defendant's violation of a provision of a district court's injunction or judgment order that warrants removal; or
- (3) Such person, even though not named as a defendant in a civil RICO action nor otherwise subject to an injunction issued pursuant to 18 U.S.C. § 1964(a), is found after due notice and an appropriate adjudicatory proceeding, or by default, to have aided and abetted an enjoined person's violation of a district court's injunction or judgment order that warrants removal.

See Sections II(C)(4) and VII(D) above and VIII(B)(6) below.

Manifestly, imposition of such a sanction following a full scale trial, as in (1) above, affords more rights than is minimally required by due process to discharge a person from employment or a union office. In the same vein, the adjudicatory procedures typically employed during the enforcement phase of Government civil RICO cases (which often involve notice of the charges, an evidentiary hearing in a trial-like adversary proceeding, a right to counsel, and a right of review by the district court) before removing and barring a person from holding a particular position or office for a violation of an injunction or judgment order issued pursuant to 18 U.S.C. § 1964(a), afford greater rights than the minimum requirements of due process.<sup>205</sup>

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<sup>205</sup> For a discussion of such removal orders, adjudicatory procedures, and due process in Government civil RICO cases involving labor unions, see Sections VIII(B)(4) and (6) below.

## E. Court-Appointed Officers in General

### 1. Courts Have Inherent Authority to Appoint Officers to Assist Them in Executing Their Duties

As discussed in Section II(A)(2) above, courts are vested with broad equitable powers to impose highly intrusive remedies to redress unlawful conduct, especially in institutional reform cases. As a corollary principle,

Courts have . . . inherent power to provide themselves with appropriate instruments required for the performance of their duties. . . . **This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties.** . . . From the commencement of our Government, it has been exercised by the federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters, auditors, examiners and commissioners. To take and report testimony; to audit and state accounts; to make computations; to determine, where the facts are complicated and the evidence voluminous, what questions are actually in issue; to hear conflicting evidence, and make findings thereon; these are among the purposes for which such aids to the judges have been appointed.

Ex Parte Peterson, 253 U.S. 300, 312-13 (1920) (citations omitted) (emphasis added).

One commentator has noted:

These court appointed agents are identified by a confusing plethora of titles: “receiver,” “Master,” “Special Master,” “Master Hearing Officer,” “Monitor,” . . . . “Administrator” . . . . Terminological confusion is compounded by functional confusion. A “Master” may at the same time gather information, make recommendations, and act to implement a decree. While the first two activities are part of the Master’s traditional role, the latter is not.

Special Project: The Remedies Process in Institutional Reform Litigation, 78 COLUM. L. REV. 784, 826-27 (1978) (footnotes omitted) (“Special Project”).

An examination of Rules 53 and 66, FED. R. CIV. P., illustrates this potentially confusing mix of labels and functions. Rule 53 provides, in relevant part, as follows:

- (a) Appointment.
  - (1) Unless a statute provides otherwise, a court may appoint a master only to:
    - (A) perform duties consented to by the parties;
    - (B) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by
      - (i) some exceptional condition,<sup>206</sup> or
      - (ii) the need to perform an accounting or resolve a difficult computation of damages; or
    - (C) address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.
- (d) Evidentiary Hearings. Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence.
- (g) Action on Master's Order, Report, or Recommendations.
  - (1) Action. In acting on a master's order, report, or recommendations, the court must afford an opportunity to be heard and may receive evidence, and may: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions.

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<sup>206</sup> In LaBuy v. Howes Leather Co., 352 U.S. 249 (1957), the Supreme Court held that “an extremely congested calendar” (*id.* at 253) did not satisfy the “exceptional condition” requirement of Rule 53(a), and accordingly ruled that the trial court abused its discretion in appointing a special master to “hear” the case and to conduct hearings and prepare findings of fact and conclusions of law in a civil anti-trust case that was expected to take six weeks to try. “[S]everal cases decided subsequent to LaBuy indicate that the trial court’s authority to appoint special masters is not [unduly] limited” by LaBuy. See United States v. Conservation Chemical Co., 106 F.R.D. 210, 218-222 (W.D. Mo. 1985) (collecting cases). Indeed, the “United States Supreme Court, exercising its original jurisdiction to resolve governmental boundary disputes pursuant to Art. III § 2 of the Constitution, regularly appoints Special Masters to hold and conduct hearings and to submit comprehensive recommendations resolving contested issues.” *Id.* at 218, citing United States v. Louisiana, 470 U.S. 93, 97-101, 115 (1985); United States v. Maine, 469 U.S. 504, 506, 526 (1985); Oklahoma v. Arkansas, 469 U.S. 1101 (1985); Texas v. New Mexico, 465 U.S. 1063 (1984). See also cases cited below in Sections VII(E)(2) and (3) and VIII(B)(3) and (4).

- (2) Time To Object or Move. A party may file objections to - - or a motion to adopt or modify - - the master’s order, report, or recommendations no later than 20 days from the time the master’s order, report, or recommendations are served, unless the court sets a different time.
- (3) Fact Findings. The court must decide de novo all objections to findings of fact made or recommended by a master unless the parties stipulate with the court’s consent that:
  - (A) the master’s findings will be reviewed for clear error, or
  - (B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.
- (4) Legal Conclusions. The court must decide de novo all objections to conclusions of law made or recommended by a master.
- (5) Procedural Matters. Unless the order of appointment establishes a different standard of review, the court may set aside a master’s ruling on a procedural matter only for an abuse of discretion.

Rule 66, FED. R. CIV. P. provides:

An action wherein a receiver has been appointed shall not be dismissed except by order of the court. The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.

Rules 53 and 66 address only some of the functions often assigned to court-appointed officers. Significantly, Rules 53 and 66 do not squarely address the various roles of court-appointed officers to assist the court in devising and implementing remedies<sup>207</sup> or in administering the operations of public or private wrongdoers to carry out court-ordered relief and to prevent future unlawful conduct. See Special Project, 78 COLUM. L. REV. at 826, n.322 (“The terms ‘master’ and ‘receiver’ are used in the federal rules. Fed. R. Civ. P. 53, 66. However, the

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<sup>207</sup> In that regard, Rule 53 specifically addresses only a master’s functions involving making or recommending findings of fact, “accounting” or “difficult computation of damages,” and does not address a court-officer’s broader services in devising appropriate remedies, especially in institutional reform cases. See Sections II(A)(2) above, and VIII(B)(3) below.



use of ‘masters’ as court-appointed agents to administer the remedy bears little relation to the traditional use of masters envisaged in the federal rules”).

More fundamentally, Rules 53 and 66 are not the exclusive bases of authority for appointing officers. Rather, as noted above, “courts have. . . inherent authority. . . to appoint persons. . . to aid judges in the performance of specific judicial duties.” Ex Parte Peterson, 253 U.S. at 312. As Judge Irving Kaufman observed:

Over and above the authority contained in Rule 53 to direct a reference, there has always existed in the federal courts an inherent authority to appoint masters as a natural concomitant of their judicial powers. . . . [R]ule 53 was intended merely as a codification of pre-existing procedures, and it may be assumed that references sanctioned by long usage and practice in the federal courts were not intended to be forever foreclosed by the rule.

Irving R. Kaufman, Masters in the Federal Courts: Rule 53, 58 COLUM. L. REV. 452, 462 (1958).<sup>208</sup>

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<sup>208</sup> See, e.g., Trull v. Dayco Products, LLC, 178 Fed. Appx. 247, at \* 3 (4th Cir. 2006) (unpublished) (“Defendants’ reliance on Rule 53 of the Federal Rules of Civil Procedure is misguided, as the district court appointed the special master based on its inherent authority to fashion appropriate post-verdict relief.”); Jenkins by Agyei v. State of Mo., 890 F.2d 65, 67 (8th Cir. 1989) (“The district court did not rely upon Rule 53 when it created the Monitoring Committee, and we need not decide whether its actions are consistent with that Rule” because “Rule 53 does not terminate or modify the district court’s inherent equitable power to appoint a person, whatever be his title, to assist it in administering a remedy.”)(citation omitted); Reilly v. United States, 863 F.2d 149, 154 n.4 (1st Cir. 1988) (noting that because district court’s authority to appoint a technical advisor “inheres generally in a district court,” court of appeals need not decide whether Rule 53 served as additional source of such authority); Nat’l Org. for the Reform of Marijuana Laws v. Mullen, 828 F.2d 536, 544 (9th Cir. 1987) (ruling that in addition to Rule 53, district court had inherent authority under the All Writs Act to appoint a special master to monitor compliance with an injunction); Ruiz v. Estelle, 679 F.2d 1115, 1161 (5th Cir. 1982), vacated in part on other grounds, 688 F.2d 266 (5th Cir. 1982) (“[R]ule 53 does not terminate or modify the district court’s inherent equitable power to appoint a person, whatever be his title, to assist it in administering a remedy”); Reed v. Cleveland Bd. of Ed., 607 F.2d 737, 743 (6th Cir. 1979) (“[A] judge in equity has inherent power to appoint persons from outside the court system for assistance,” especially “in the remedial phase of a school desegregation or institutional reform

(continued...)

## 2. Court-Appointed Officers Perform Varied Functions

In light of above-referenced concerns regarding confusing titles, OCRS' analysis below focuses on three distinct, albeit related, categories of functions typically performed by court-appointed officers to assist courts in executing their equitable powers, rather than focusing on the titles of such officers: (1) devising remedies; (2) administering operations of an institutional defendant; and (3) monitoring compliance with court-ordered relief and related adjudicatory functions. Of course, in any particular case, a court-appointed officer may perform more than one of these functions and may be given different titles.<sup>209</sup>

### a. Devising Remedies --

Court-appointed officers are often assigned the tasks of gathering information and making recommendations as to appropriate remedies in complex litigation. For example, in Swann v. Bd. of Educ., 402 U.S. at 9-11, 18-32, a court-appointed expert devised a comprehensive school desegregation plan, adopted by the district court, involving re-zoning, busing of students, and re-

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<sup>208</sup>(...continued)  
case”); Schwimmer v. United States, 232 F.2d 855, 865 (8th Cir. 1956) (“Beyond the provisions of Rule 53 . . . for appointing and making references to Masters, a Federal District Court has ‘the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential’”) (citation omitted); United States v. State of Conn., 931 F. Supp. 974, 984 (D. Conn. 1996) (“It is well settled in the law that federal courts have the inherent power to appoint an agent to oversee the implementation of its consent decrees. . . ‘[b]eyond the provisions of [FED. R. CIV. P. 53]’”) (citation omitted); Powell v. Ward, 487 F. Supp. 917, 935 (S.D.N.Y. 1980), aff’d 643 F. 2d 924 (2d Cir. 1981) (“Courts have inherent authority to appoint nonjudicial officers to aid in carrying out their judicial functions.”); Jordan v. Wolke, 75 F.R.D. 696, 701 (E.D. Wis. 1977) (appointing a special master “pursuant to the court’s general equity powers and not under Rule 53 ”). Cf. Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987) (holding that courts have inherent authority to appoint counsel to investigate and prosecute violations of a court’s order).

<sup>209</sup> See Section VIII(B)(3) below, which discusses court-appointed officers’ performance of these functions in Government civil RICO case involving labor unions.

assignment of teachers to different schools.

Similarly, in Sheet Metal Workers v. EEOC, supra, 478 U.S. 421, the district court found that Local 28 of the Sheet Metal Workers Union (“Local 28”) discriminated against non-white workers in recruitment, selection, training and admission to the union. The district court ordered the parties “to devise and to implement recruitment and admission procedures designed to achieve [a goal of 29% non-white membership] under the supervision of the court-appointed administrator.” Id. at 432. The court-appointed administrator proposed, and the district court adopted, an affirmative action program requiring Local 28 to adopt various changes to its practices and policies, including requiring Local 28 “to offer annual, nondiscriminatory journeyman and apprentice examinations, select members according to a white-non-white ratio to be negotiated by the parties, conduct extensive recruitment and publicity campaigns aimed at minorities, secure the administrator’s consent before issuing temporary work permits, and maintain detailed membership records.” Id. at 432-33.

The Supreme Court rejected Local 28's argument that “the District Court’s appointment of an administrator with broad powers to supervise its compliance with the court’s orders [was] an unjustifiable interference with its statutory right to self-governance.” Id. at 481-82. The Supreme Court stated: “While the administrator may substantially interfere with petitioner’s membership operations, such ‘interference’ is necessary to put an end to [Local 28’s] discriminatory ways.” Id. at 482.<sup>210</sup>

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<sup>210</sup> See also EEOC v. Local 638, 532 F.2d 821, 829-30 (2d Cir. 1976) (approving court-appointed administrator with broad powers to develop and enforce detailed plans to remedy racially discriminatory employment practices); Hart v. Cmty. Sch. Bd. of Educ., N.Y. Sch. Dist. #21, 512 F.2d at 42-43, 52 (approving court-appointed master to devise plans for school desegregation); SEC v. Heritage Trust Co., 402 F. Supp. 744, 754 (D. Ariz. 1975) (“appointment (continued...)”)

**b. Administering Operations - -**

Court appointed officers, typically titled “Administrator,” “Trustee” or “Receiver,” are also assigned the duties of taking over the management of all or parts of an institutional defendant’s operations. Such function “extends beyond that of the Master, Monitor, or Mediator.” See generally Special Project, 78 COLUM. L. REV. at 831.<sup>211</sup>

**c. Monitoring Compliance and Adjudicatory Functions --**

The Supreme Court has long recognized the authority of courts in equity to appoint officers “[t]o take and report testimony. . . to hear conflicting evidence, and make findings thereon.” Ex Parte Peterson, 253 U.S. at 313. See also California v. Texas, 459 U.S. 963 (1982) (Mem.) (The Supreme Court approved of the appointment of a Special Master “with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for . . . [and] to submit such

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<sup>210</sup>(...continued)

of a receiver. . . to take charge of all books, records and assets of defendant corporation [found liable for violations of securities laws], and to investigate and make recommendations to the Court as to proceedings to be taken in the interest of and for the protection of all investors and trustors”).

<sup>211</sup> See e.g., Morgan v. McDonough, 540 F.2d 527, 529-35 (1st Cir. 1976) (upholding the power of the district court to appoint a receiver for South Boston High School with broad powers to devise plans to enroll students and to renovate the school, to evaluate the qualifications of personnel and to transfer personnel, and to make other proposals to achieve school desegregation); EEOC v. Local 638, 532 F.2d at 829 (“a court-appointed administrator is granted extensive supervisory power over Local 28” including authority “to develop and enforce” detailed plans to remedy racially discriminatory employment practices); SEC v. Bartlett, 422 F.2d 475 (8th Cir. 1970) (appointing a receiver to liquidate corporate defendant’s assets where the defendant violated securities laws); Turner v. Goolsby, 255 F. Supp. 724, 730 (S.D. Ga. 1966) (receiver appointed to implement a plan to desegregate a school system); see also Section VIII(B)(3) below.

reports as he may deem appropriate.”); Mississippi v. Arkansas, 402 U.S. 926 (1971) (same); Arizona v. California, 347 U.S. 986 (1954) (same); City of Richmond v. United States, 422 U.S. 358, 366-67 (1995) (special master appointed to hold evidentiary hearings and submit recommended findings of fact and conclusions of law regarding the effect of a municipal annexation plan on diluting the right of black persons to vote).

Lower courts, likewise, have sanctioned appointing court-officers to assist district courts in pre-liability adjudication functions, as well as monitoring compliance with court-ordered relief, including performing adjudicatory functions such as investigating allegations of violations of court orders, conducting evidentiary hearings, making factual findings, and recommending sanctions.<sup>212</sup>

### **3. Article III Considerations**

Appointment of a non-Article III officer to perform adjudicatory functions may constitute an unconstitutional delegation of judicial powers in violation of Article III of the Constitution when such a non-judicial officer’s adjudicatory functions usurp the judicial authority of the district court to decide the dispositive issues in a lawsuit.<sup>213</sup> As the Supreme Court stated, absent

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<sup>212</sup> See, e.g., Juan F. v. Weicker, 37 F.3d 874, 879-80 (2d Cir. 1994); In Re Pearson, 990 F.2d 653, 659 (1st Cir. 1993); Nat’l. Org. for the Reform of Marijuana Laws, 828 F.2d at 542-45; United States v. Suquamish Indian Tribe of Washington, 901 F.2d 772, 774-75 (9th Cir. 1990); Williams v. Lane, 851 F.2d 867, 884 (7th Cir. 1988); In Re Armco, Inc., 770 F.2d 103, 105 (8th Cir. 1985); New York State Ass’n For Retarded Children v. Carey, 706 F.2d 956, 962-65 (2d Cir. 1983); Ruiz, 679 F.2d at 1159-62; Rosen v. Tennessee Com’r of Finance and Admin., 204 F. Supp. 2d 1061, 1095 (M.D. Tenn. 2001); United States v. Connecticut, 931 F. Supp. at 984 (collecting cases); Taylor v. Perini, 413 F. Supp. 189 (N.D. Ohio 1976); Bell v. Hall, 392 F. Supp. 274 (D. Mass. 1975); United States v. Conservation Chem. Co., 106 F.R.D. 210, 218-222 (W.D. Mo. 1985) (collecting cases).

<sup>213</sup> See, e.g., Cobell v. Norton, 392 F.3d 461, 476-78 (D.C. Cir. 2004); Stauble v. Warrob, 977 F.2d 690, 695-96 (1st Cir. 1992); In Re Bituminous Coal Operators’ Ass’n, Inc.,

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consent of the parties, Article III bars a district court, “of its own motion, or upon the request of one party,” from “abdicat[ing] its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers.” Kimberly v. Arms, 129 U.S. 512, 524 (1889).

However, the Supreme Court has made clear that, in equitable suits involving “public rights,”<sup>214</sup> “there is no requirement that, in order to maintain the essential attributes of the judicial power, all determination of fact in constitutional courts shall be made by judges.” Crowell v. Benson, 285 U.S. 22, 51 (1932). The Supreme Court added:

In cases of equity and admiralty, it is historic practice to call to the assistance of the courts, without the consent of the parties, masters and commissioners or assessors, to pass upon certain classes of questions, as, for example, to take and state an account or to find the amount of damages. While the reports of masters and commissioners in such cases are essentially of an advisory nature, it has not been the practice to disturb their findings when they are properly based upon evidence, in the absence of errors of law **and the parties have no right to demand that the court shall redetermine the facts.**

Crowell, 285 U.S. at 51-52 (emphasis added).

In Crowell, the Supreme Court rejected an Article III challenge to a statutory scheme that authorized an administrative agency to make initial factual determinations pursuant to a federal

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<sup>213</sup>(...continued)  
949 F.2d 1165, 1168-69 (D.C. Cir. 1991).

<sup>214</sup> In Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 (1982), the Supreme Court stated that “[t]he distinction between public rights and private rights has not been definitively explained in our precedents . . . [but] it suffices to observe that a matter of public rights must at a minimum arise ‘between the government and others’” (citation omitted). Manifestly, civil RICO equitable suits brought by the Government under 18 U.S.C. § 1964(a) to vindicate the public’s interests to reform corrupt institutions involve such “a matter of public rights.” See Section VIII below.

statute requiring employers to compensate their employees for work-related injuries occurring upon the navigable waters of the United States. Id. at 37-45. The Court noted that, under that statutory scheme, “[i]n conducting investigations and hearings, the [Administrative Agency] is not bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, except as the Act provides.” Id. at 43.

In upholding this statutory scheme, the Supreme Court found it significant that the administrative agency had the “limited” role “of determining the questions of fact,” the statute reserved “full authority of the court to deal with matters of law” (id. at 54), and that the administrative agency did not have the power to enforce any of its compensation orders. Rather, “every compensation order was appealable to the appropriate federal district court, which had the sole power to enforce it or set it aside, depending upon whether the court determined it to be ‘in accordance with law’ and supported by evidence in the record.” See Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50, 78 (1982) quoting Crowell, 285 U.S. at 44.

Similarly, in United States v. Raddatz, 447 U.S. 677 (1980), the Supreme Court held that the 1978 Federal Magistrates Act, which permitted district court judges to refer certain pretrial motions, including motions to suppress evidence based on alleged constitutional violations, to a magistrate for initial determination, did not violate Article III of the Constitution. The Act also provided that the district court shall make a “de novo determination” of those portions of the magistrate’s report, findings, or recommendations to which objection is made. Id. at 673. The Supreme Court stated that:

although the statute permits the district court to give to the magistrate’s proposed findings of fact and recommendations “such weight as [their] merit commands and the sound discretion of the judge warrants,” . . . that delegation does not violate Art. III so long

as the ultimate decision is made by the district court.

Id. at 683 (citation omitted; brackets in original).

Moreover, in Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n., 430 U.S. 442 (1977), the Supreme Court held that the Seventh Amendment does not prohibit Congress from assigning to an administrative agency the task of adjudicating violations of the Occupational Safety and Health Act of 1970. The administrative agency's findings of a violation and imposition of sanctions were final, subject to judicial review in the appropriate court of appeals. Id. at 446-47. The Supreme Court explained:

At least in cases in which "public rights" are being litigated - e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact - the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.

...  
In cases which do involve only "private rights," this Court has accepted factfinding by an administrative agency, without intervention by a jury, only as an adjunct to an Art. III court, analogizing the agency to a jury or a special master and permitting it in admiralty cases to perform the function of the special master.

Id. at 450 and n.7.

The foregoing authority demonstrates that it does not violate Article III to assign adjudicatory functions, including making factual findings, to a non-Article III body, when the court retains its authority to decide dispositive issues of liability and remedies. In accordance with the foregoing authority, courts have noted that it did not violate Article III to assign a variety of adjudicatory functions to court-appointed officers, provided that the district court retains sufficient authority to decide the dispositive issues. For example, in Stauble v. Warrob, Inc.,



977 F.2d 690 (1st Cir. 1992), the court stated:

Article III does not require that a district judge find every fact and determine every issue of law involved in a case. In respect to . . . remedy-related issues . . . a master may be appointed to make findings of fact and recommend conclusions of law. As long as the district court discerns sufficient supporting evidence and is satisfied that the master applied the correct legal standards, it may rely on the master's report as part of its own determination of liability.

Id. at 695.

Similarly, in In Re Armco, Inc., 770 F.2d 103 (8th Cir. 1985), the court ruled:

If the district court determines that liability rests with some or all of the parties, it may request the master to conduct evidentiary rehearings with respect to damages and alternative relief and make recommendations with respect to these matters. It may also direct the magistrate to monitor and supervise any injunctive relief granted and to make reports to it with respect to compliance with any decrees entered.

Id. at 105.

Moreover, in United States v. Conservation Chem. Co., 106 F.R.D. 210 (W.D. Mo. 1985), the district court appointed a Special Master with “the power to order and preside over pretrial hearings, the authority to supervise and issue recommendations regarding pretrial matters, and the authority to hold hearings and issue recommendations on the claims for inclusion in any injunctive relief order and appointment of costs.” Id. at 216. The “court expressly reserved its judicial authority and responsibility to make the ultimate determinations on all issues.” Id. The court concluded that the scope of the Special Master's authority “does not violate the constraints of Article III because the ultimate decision making authority clearly

remains with the District Court.” Id. at 234.<sup>215</sup>

## **F. Contempt**

### **1. Determining Whether Contempt is Civil or Criminal in Nature**

Courts have inherent authority to enforce their orders through contempt sanctions and to appoint private attorneys to investigate and prosecute a violation of a court’s order.<sup>216</sup> Moreover, 18 U.S.C. § 401<sup>217</sup> authorizes courts to impose both civil and criminal contempt sanctions<sup>218</sup> under the following principles.

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<sup>215</sup> See also In re Pearson, 990 F.2d 653, 655, 659 (1st Cir. 1993) (holding that Article III was not violated by appointing a special master to assist in the implementation of a consent decree “to analyze ‘the impact of existing and pending legislation on the consent decree’ and on ‘the operation of the Treatment Center’; to study all unresolved claims alleging violations of the consent decrees; and to advise the court concerning the Treatments Center’s operation and the continued viability of the King decrees.”); Jenkins By Agyei, 890 F.2d at 66-67 (authorizing court-appointed officers to decide any dispute involving interpretation of the district court’s desegregation orders did not violate Article III when the district court retained de novo review).

<sup>216</sup> See, e.g., Kokkonem v. Guardian Life Ins. Co. of America, 511 U.S. 375, 380 (1994); Young, 481 U.S. at 793-96; Shillitani v. United States, 384 U.S. 364, 370 (1966); Michaelson v. United States ex rel Chicago, St. P., M., & R. Co., 266 U.S. 42, 65-66 (1924); Armstrong v. Guccione, 470 F.3d 89, 103-106 (2d Cir. 2006).

<sup>217</sup> 18 U.S.C. § 401 provides as follows:

A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as -

- (1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) misbehavior of any of its officers in their official transactions;
- (3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

See also 28 U.S.C. § 1826.

<sup>218</sup> See, e.g., Armstrong, 470 F.3d at 100-05.

**a. The Bagwell Decision**

In Int'l Union, United Mine Workers of America v. Bagwell, 512 U.S. 821 (1994)

(“Bagwell”), the Supreme Court set forth the basic principles to determine whether a contempt sanction is considered civil or criminal, stating:

In the leading early case addressing this issue in the context of imprisonment, *Gompers v. Bucks Stove & Range Co.*, 221 U.S., at 441, the Court emphasized that whether contempt is civil or criminal turns on the “character and purpose” of the sanction involved. Thus, a contempt sanction is considered civil if it “is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.” *Ibid.*

Id. at 827-28.

The Bagwell Court added:

As *Gompers* recognized, however, the stated purposes of a contempt sanction alone cannot be determinative. *Id.*, at 443. “[W]hen a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it also is seeking to give effect to the law’s purpose of modifying the contemnor’s behavior to conform to the terms required in the order.” *Hicks*, 485 U.S., at 635. Most contempt sanctions, like most criminal punishments, to some extent punish a prior offense as well as coerce and offender’s future obedience . . .

The paradigmatic coercive, civil contempt sanction, as set forth in *Gompers*, involves confining a contemnor indefinitely until he complies with an affirmative command such as an order “to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance.” 221 U.S. at 442; see also *McCrone v. United States*, 307 U.S. 61, 64 (1939) (failure to testify). Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of earlier release if he complies. *Shillitani v. United States*, 384 U.S. 364, 370, n.6 (1966) (upholding as civil “a determinate [2-year] sentence which includes a purge clause”). In these circumstances, the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus, ““carries the keys of his prison in his own

pocket.”” *Gompers*, 221 U.S. , at 442, quoting *In re Nevitt*, 117 F. 448, 451 (CA8 1902).

By contrast, a fixed sentence of imprisonment is punitive and criminal if it is imposed retrospectively for a “completed act of disobedience,” *Gompers*, 221 U.S., at 443, such that the contemnor cannot avoid or abbreviate the confinement through later compliance. Thus, the *Gompers* Court concluded that a 12-month sentence imposed on Samuel Gompers for violating an antiboycott injunction was criminal. When a contempt involves the prior conduct of an isolated, prohibited act, the resulting sanction has no coercive effect. “[T]he defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense.” *Id.*, at 442.

Bagwell, 512 U.S. at 828-29.

Thus, affording a contemnor the opportunity to purge his contempt by complying with the order at issue renders a sanction of imprisonment civil in nature. The same principles apply to contempt sanctions involving fines. In that respect, the Bagwell Court stated:

This dichotomy between coercive and punitive imprisonment has been extended to the fine context. A contempt fine accordingly is considered civil and remedial if it either “coerce[s] the defendant into compliance with the court’s order, [or] . . . compensate[s] the complainant for losses sustained.” *United States v. Mine Workers*, 330 U.S. 258, 303-304 (1947). Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge. See *Penfield Co. of Cal. v. SEC*, 330 U.S. 585, 590 (1947). Thus, a “flat, unconditional fine” totaling even as little as \$50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance. *Id.*, at 588.

Bagwell, 512 U.S. at 829. Thus, as in the case of imprisonment, affording the contemnor an opportunity to purge a non-compensatory contempt fine will render the contempt civil in nature.<sup>219</sup>

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<sup>219</sup> See, e.g., Armstrong, 470 F. 3d at 101-02; N.Y. State Nat’l Org. for Women v. Terry,

(continued...)

Applying these principles, the Bagwell Court concluded that the fines involved rendered the contempt criminal in nature. In Bagwell, the trial court enjoined a union and its members from conducting certain unlawful strike-related activities against certain mining companies, and “ordered the union to take all steps necessary to ensure compliance with the injunction, to place supervisors at picket sites, and to report all violations to the court.” 512 U.S. at 823-24. Following a civil contempt hearing, the trial court found that the union and its members committed 72 violations of the injunction. The trial court also stated that “it would fine the union \$100,000 for any future violent breach of the injunction and \$20,000 for any future non-violent infraction.” Id. at 824.

In seven subsequent contempt hearings, the trial court found the union in contempt for more than 400 separate violations of the injunction, many of them violent, and levied approximately \$52 million in fines against the union, payable to the State of Virginia and two counties most affected by the union’s unlawful activity. “The trial court required the contumacious acts to be proved beyond a reasonable doubt, but did not afford the union a right to a jury trial.” Id. at 824.

On appeal, the Supreme Court of Virginia held that “[b]ecause the trial court’s prospective fine schedule was intended to coerce compliance with the injunction and the union could avoid the fines through obedience . . . . the fines were civil and coercive and properly imposed in civil proceedings.” Id. at 826.

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<sup>219</sup>(...continued)  
159 F.3d 86, 94-95 (2d Cir. 1998) (collecting cases). See also cases cited in Section VII(F)(1)(b) below.

The Supreme Court reversed, finding that the “serious” contempt fines were criminal and constitutionally could be imposed only through a jury trial. Id. at 826-39. First, the Court noted that because none of the parties argued that the challenged fines are “compensatory,” they are civil only if they were designed to coerce the defendants into compliance with the Court’s orders and the defendants were afforded an opportunity to purge. Id. at 834. Second, the Court rejected the argument that “the mere fact that the sanctions were announced in advance rendered them coercive and civil as a matter of constitutional law.” Id. at 837. In that regard, the Court reasoned that the trial court’s statement that it would impose “determinate fines of \$20,000 or \$100,000 per violation” for future contempts made them “more closely analogous to fixed, determinate, retrospective criminal fines which [the union] had no opportunity to purge once imposed.” Id. at 837. Finally, the Court stated:

Other considerations convince us that the fines challenged here are criminal . . . [T]he union’s contumacy [did not] involve simple, affirmative acts, such as the paradigmatic civil contempts examined in Gompers. Instead, the Virginia trial court levied contempt fines for widespread, ongoing, out-of-court violations of a complex injunction. In so doing, the court effectively policed petitioners’ compliance with an entire code of conduct that the court itself had imposed. The union’s contumacy lasted many months and spanned a substantial portion of the State. The fines assessed were serious, totaling over \$52 million. Under such circumstances, disinterested factfinding and evenhanded adjudication were essential, and petitioners were entitled to a criminal jury trial.

Id. at 837-38.

**b. Decisions Following Bagwell**

(1.) Following Bagwell, circuit courts have held that various contempt fines and sanctions were civil in nature. For example, in NLRB v. Ironworkers Local 433, 169 F.3d 1217

(9th Cir. 1999), the district court imposed a contempt fine on the Ironworkers union for picketing in violation of a consent decree. The Ninth Circuit held that, although the fine was for past conduct and had a punitive aspect, the fine was civil in nature because it had a remedial purpose to compel future compliance. Id. at 1221-22.

Similarly, in N.Y. State Nat'l Org. for Women v. Terry, 159 F.3d 86, 89-90 (2d Cir. 1998), the district court imposed “coercive civil penalties” in the amount of \$100,000 against anti-abortion protestors for violating a court order which enjoined them from blocking access to abortion clinics. The penalties were subject to a “purge provision” by which the defendants could avoid the contempt penalties if they obeyed the injunction. Id. at 91. The Second Circuit held that the penalties were civil in nature because they had a coercive purpose and allowed the defendants to purge the contempt. Id. at 94.

In Chadwick v. Janecka, 312 F.3d 597 (3d Cir. 2002), Chadwick petitioned the district court for habeas corpus relief from his civil contempt incarceration for failure to pay \$2.5 million in a divorce proceeding. The district court granted the petition, finding that, after petitioner had spent seven years in prison, the incarceration had lost its coercive effect and had become punitive. Id. at 599. The Third Circuit reversed, holding that there was no federal constitutional bar to indefinite confinement for civil contempt, so long as the contemnor could still comply with the order and purge the contempt. Id. at 613.

Finally, in F.T.C. v. Kuykendall, 312 F.3d 1329 (10th Cir. 2002), the district court imposed a \$39 million contempt fine on defendants for violating an injunction relating to telemarketing activities. The fine was payable to the FTC to redress injuries to consumers for the violations. The Tenth Circuit held that consumer redress was a classic remedial sanction, was

“not designed to vindicate the authority of the court, and that therefore the fine was civil in nature.” Id. at 1337.

(2.) Following Bagwell, circuit courts have held that various contempt fines and sanctions were **criminal** in nature. For example, in Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003), the district court found the Secretary of Interior “in civil contempt of court,” id. at 1136, for failing to comply with a court order regarding Native American land trust accounts and failing to disclose information to the court related to these accounts. Although the district court denominated the contempt as “civil,” and there was no “clear sanction,” the Appellate Court held that it was criminal contempt because it was for past conduct and clearly intended to punish for violation of a court order. Id. at 1145-47.

In Evans v. Williams, 206 F.3d 1292 (D.C. Cir. 2000), the district court sanctioned the District of Columbia for violating a consent decree concerning the management of institutions for the mentally retarded, and ordered the defendant to pay over \$5 million in fines. The United States Court of Appeals for the District of Columbia held that this sanction was criminal in nature because of the complexity of the consent decree,<sup>220</sup> the lack of an opportunity to purge, and the fact that the fine was designed more to punish the city agency for past violations, rather than gain compliance with the consent decree. Id. at 1296-97.

In F.J. Hanshaw Enterprises, Inc. v. Emerald River Dev, Inc., 244 F.3d 1128 (9th Cir. 2001), the district court sanctioned Frederick Hanshaw for \$500,000 and ordered \$200,000 in compensatory civil award to the opposing party after Hanshaw attempted to bribe a court receiver

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<sup>220</sup> In that respect, the court stated that the consent “decree governs the administration of an entire governmental program in the District of Columbia. It prescribes a complete code of conduct - originally covering everything from bill payments to staffing to air conditioning - that the district court has enforced for years.” Evans, 206 F.3d at 1297.



in a partnership dissolution. The Ninth Circuit held that the \$500,000 sanction was criminal in nature, because it was “clearly punitive and intended to vindicate the court's authority and the integrity of the judicial process.” Id. at 1138. However, the court held that the \$200,000 award to the opposing party was civil in nature, because it was intended to compensate the opposing party for costs attributable to the bribe attempt. Id. at 1143.<sup>221</sup>

## 2. Different Elements and Procedures Apply to Criminal and Civil Contempt

In Bagwell, the Supreme Court explained the fundamental differences in procedures that apply to civil and criminal contempts, stating:

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<sup>221</sup> See also Jake's, Ltd. v. City of Coates, 356 F.3d 896 (8th Cir. 2004) (the district court enjoined the owner of an adult club from operating in violation of city zoning laws and ordered payment of \$1,000 per day if the operation continued. Id. at 898. The club continued to operate but with clothed dancers in an attempt to comply with zoning. Id. The district court again found the owner in contempt and ordered a \$68,000 contempt fine based on the \$1,000 per-day penalty. The Eighth Circuit held that the \$68,000 fine was criminal in nature, because of the complexity of city zoning laws, the lack of an opportunity to purge, and the non-compensatory nature of payment to the court. Id. at 902-03.); Mellon v. Cessna Aircraft Co., 229 F.3d 1164 (10th Cir. 2000) (the district court found Cessna in contempt for refusing to service plaintiff's aircraft in violation of a court order. The district court ordered Cessna to pay the plaintiff for service by another aircraft company. The Tenth Circuit held that, although the order appears compensatory, the penalty was criminal in nature because it was imposed **before** the plaintiff had actually incurred any losses.); United States v. Ayres, 166 F.3d 991 (9th Cir. 1999) (the district court held the defendant in contempt for failing to testify before the IRS, but allowed a 10-day grace period during which the defendant could testify and purge the contempt. Id. at 994. For each day beyond the grace period, the defendant would be fined \$500. The defendant agreed to testify on the last day of the grace period, but due to scheduling problems attributable to the IRS, he was not able to do so. The district court imposed a contempt fine of \$1500 on the defendant for testifying too late. Id. at 993-94. The Ninth Circuit held that although the contempt was originally intended to coerce compliance, it became punitive when Ayres was not permitted to purge by testifying, thereby invoking the heightened procedural protections of Bagwell. Id. at 997.); Crowe v. Smith, 151 F.3d 217, 221-28 (5th Cir. 1998) (the district court sanctioned defendants \$5 million payable to the court for concealing an insurance policy in a civil RICO case. Id. at 221. The Fifth Circuit held that the fines were criminal in nature because they were not compensatory, and there was no opportunity to purge.)

“Criminal contempt is a crime in the ordinary sense,” *Bloom v. Illinois*, 391 U.S. 194, 201 (1968), and “criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings,” *Hicks v. Feiock*, 485 U.S. 624, 632 (1988). See *In re Bradley*, 318 U.S. 50 (1943) (double jeopardy); *Cooke v. United States*, 267 U.S. 517, 537 (1925) (rights to notice of charges, assistance of counsel, summary process, and to present a defense); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911) (privilege against self-incrimination, right to proof beyond a reasonable doubt). For “serious” criminal contempts involving imprisonment of more than six months, these protections include the right to jury trial. *Bloom*, 391 U.S., at 199; see also *Taylor v. Hayes*, 418 U.S. 488, 495 (1974). In contrast, civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required.

Id. at 862-27.<sup>222</sup>

**a. Principles Governing Criminal Contempt**

To convict a person for criminal contempt for violation of a court’s order, the plaintiff must establish beyond a reasonable doubt that: (1) the contemnor violated the court’s order; (2)

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<sup>222</sup> The Bagwell Court added:

We address only the procedures required for adjudication of indirect contempts, i.e., those occurring out of court. Direct contempts that occur in the court’s presence may be immediately adjudged and sanctioned summarily, see, e.g., Ex parte Terry, 128 U.S. 289 (1888), and, except for serious criminal contempts in which a jury trial is required, Bloom v. Illinois, 391 U.S. 194, 209-210 (1968), the traditional distinction between civil and criminal contempt proceedings does not pertain, cf. United States v. Wilson, 421 U.S. 309, 316 (1975).

Bagwell, 512 U.S. at 826 n.2.

the order was clear and reasonably specific; and (3) the contemnor's violation was willful.<sup>223</sup>

And, as noted above, the full panoply of constitutional rights that apply to criminal proceedings also apply to criminal contempt proceedings. Moreover, a criminal contempt sanction is immediately appealable,<sup>224</sup> and is reviewed under an abuse of discretion standard.<sup>225</sup>

### **b. Principles Governing Civil Contempt**

To establish a person's liability for civil contempt for violating a court's order, the plaintiff must prove by clear and convincing evidence that the contemnor had notice of the court's order and violated the court's order.<sup>226</sup> Significantly, however, the plaintiff need not establish that the contemnor acted willfully or with any other wrongful intent. In McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949), the Supreme Court held that civil contempt did not require wilfulness, explaining:

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<sup>223</sup> See, e.g., Panico v. United States, 375 U.S. 29, 30 (1963); United States v. United Mine Workers of America, 330 U.S. 258, 303 (1947); Cobell v. Norton, 334 F.3d 1128, 1147 (D.C. Cir. 2003); In re Smothers, 322 F.3d 438, 441-42 (6th Cir. 2003); United States v. Mourad, 289 F.3d 174, 188 (1st Cir. 2002); United States v. Vezina, 165 F.3d 176, 178 (2d Cir. 1999); United States v. Rapone, 131 F.3d 188, 192-95 (D.C. Cir. 1997); United States v. Nynex Corp., 8 F.3d 52, 54 (D.C. Cir. 1993); Taberer v. Armstrong World Indus., Inc., 954 F.2d 888, 908 (3d Cir. 1992).

<sup>224</sup> See, e.g., Union Tool Co. v. Wilson, 259 U.S. 107, 110 (1922); S. Railway Co. v. Lanham, 403 F.2d 119, 124 (5th Cir. 1968).

<sup>225</sup> See, e.g., F.J. Hanshaw Enterprises, 244 F.3d at 1135.

<sup>226</sup> See, e.g., United States v. Dist. Council of N.Y. City & Vicinity, 2007 WL 1157143 at \* 3 (2d Cir. April 18, 2007); United States v. Dowell, 257 F.3d 694, 699 (7th Cir. 2001); United States v. Ayres, 166 F.3d 991, 995 (9th Cir. 1999); United States v. Microsoft Corp., 147 F.3d 935, 940 (D.C. Cir. 1998); Local 1804-1 Int'l Longshoremen's Ass'n, 44 F.3d at 1096; Howard Johnson Co., Inc. v. Khimani, 892 F.2d 1512, 1516 (11th Cir. 1990); Perfect Fit Indus., Inc. v. Acme Quilting Co., Inc., 646 F.2d 800, 808 (2d Cir. 1981).

The absence of wilfulness does not relieve from civil contempt . . . Since the purpose [of civil contempt] is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents. It laid on them a duty to obey specified provisions of the statute. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently.

Id. at 191 (footnote and citations omitted). Accord NLRB v. Blevins Popcorn Co., 659 F.2d 1173, 1184 (D.C. Cir. 1981) (holding “the intent of the recalcitrant party is irrelevant”).<sup>227</sup>

“An alleged contemnor may defend against a finding of contempt by demonstrating a present inability to comply.” United States v. Ayres, 166 F.3d 991, 994 (9th Cir. 1999). The contemnor bears the burden of establishing his present inability to comply with a court’s order.<sup>228</sup> However, such “present inability to comply” is not the same as continuing to refuse to comply. In that regard, the Supreme Court has stated that a court may imprison a civil contemnor “indefinitely until he complies with [a court’s order],” Bagwell, 512 U.S. at 828, or he “adduces evidence as to his present inability to comply with that order.” United States v. Rylander, 460 U.S. 752, 761 (1983). Accord Maggio v. Zeitz, 333 U.S. 56, 74, n.7 (1948) (“The defendant can not, of course, be committed for the failure to do something which is beyond his power”) (citation omitted); Shillitani, 384 U.S. at 371 (“[T]he justification for coercive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court’s order . . . Where the grand jury has been finally discharged, a contumacious witness can no

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<sup>227</sup> Moreover, as noted above, a civil contemnor does not have a right to a jury trial or to other procedural constitutional rights that attach to criminal proceedings.

<sup>228</sup> See, e.g., McPhaul v. United States, 364 U.S. 372, 379 (1960); In re Lawrence, 279 F.3d 1294, 1297 (11th Cir. 2002); Chicago Truck Drivers v. Bhd. Labor Leasing, 207 F.3d 500, 506 (8th Cir. 2000); United States v. Jenkins, 760 F.2d 736, 739-40 (7th Cir. 1985); Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 781-82 (9th Cir. 1983).

longer be confined since he then has no further opportunity to purge himself of contempt.”)

The decision in Armstrong v. Guccione, 470 F.3d 89 (2d Cir. 2006), illustrates the distinction between “a present inability to comply” with a court’s order and a contemnor’s persistent refusal to comply with a court’s order notwithstanding his ability to comply with it. In Armstrong, the contemnor was held in civil contempt for his refusal to return to a court-appointed receiver corporate records and assets totaling approximately \$16 million, and was imprisoned until he complied with the court’s order. Id. at 92. Over nearly seven years, the district court afforded the contemnor numerous opportunities to either comply with the court’s orders or demonstrate his inability to comply with them, but he did neither. Id. at 95-96.

On appeal, the contemnor argued, among other matters, that his length of incarceration without compliance with the court’s orders warranted an inference of his inability to comply and rendered any further imprisonment “coercive” in violation of due process. Id. at 110-112. The Second Circuit rejected this argument, explaining that persistence in refusing to comply with a court’s order does not by itself establish a present inability to comply. Id. at 111-12. The Second Circuit added that “[t]he Due Process Clause does not demand that the test of [the contemnor’s] obduracy end today, or for that matter, at any specific time.” Id. at 113. Accordingly, the Second Circuit remanded for a determination of whether the contemnor’s continued failure to comply with the district court’s orders was due to his present inability to comply or to his refusal to comply, notwithstanding his present ability to comply. Id. at 113.

Similarly, in Chadwick v. Janecka, 312 F.3d 597 (3d Cir. 2002), the Third Circuit refused to release a contemnor who had been incarcerated for nearly seven years for refusing to comply with a court’s order, and rejected the contemnor’s claim that he should be released because there

was no substantial likelihood of his compliance with the court's order. The Third Circuit stated:

The Supreme Court has never endorsed the proposition that confinement for civil contempt must cease when there is "no substantial likelihood of compliance" . . . [T]here is no federal constitutional bar to [the contemnor's] indefinite confinement for civil contempt so long as he retains the ability to comply with the order requiring him to pay over the money at issue.

Id. at 613. Accord Wronke v. Madigan, 26 F. Supp. 2d 1102, 1106 (C.D. Ill. 1998) ("a civil contemnor may be incarcerated until he either complies with the court's order or adduces evidence as to his present inability to comply with that order").<sup>229</sup>

Moreover, as a general rule, a party to a lawsuit may not appeal a civil contempt sanction until a final judgment is rendered in the underlying lawsuit. As the Supreme Court stated in Fox v. Capital Co., 299 U.S. 105 (1936):

The rule is settled in this Court that except in connection with an appeal from a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of a civil contempt.

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<sup>229</sup> However, some courts have held that incarceration for civil contempt "cannot last forever," and that a contemnor should be released from prison when a contemnor who has been incarcerated for a substantial period of time persists in his refusal to comply with a court's order and there is no "realistic possibility" that the contemnor will comply with the court's order, notwithstanding his present ability to comply with the court's order. In such circumstances, courts have concluded that "contempt sanctions lose their coercive effect [and] become punitive and violate the contemnor's due process rights." In re Lawrence v. Goldberg, 279 F.3d 1294, 1300 (11th Cir. 2002) (citations omitted). Accord CFTC v. Wellington Precious Metals, Inc., 950 F.2d 1525, 1530-31 (11th Cir. 1992) (collecting cases); United States v. Jenkins, 760 F.2d 736, 740 (7th Cir. 1985).

The Supreme Court has not resolved the tension between the rulings of these cases and the rulings in Armstrong v. Guccione, Chadwick v. Janecka, and Wronke v. Madigan discussed above. Cf. McNeil v. Director, Patuxent Inst., 407 U.S. 245, 251 (1972) (noting that if after a hearing on remand petitioner's confinement, "potentially for life" "were explicitly premised on a finding of contempt, then it would be appropriate to consider what limitations the Due Process Clause places on the contempt power. The precise contours of that power need not be traced here.").

Id. at 107.<sup>230</sup> However, an order holding a non-party in civil contempt is immediately appealable,<sup>231</sup> and a post-judgment, non-contingent order holding a party in contempt is immediately appealable.<sup>232</sup> A civil contempt sanction is reviewable under the abuse of discretion standard.<sup>233</sup>

### **3. A Jury Trial for Criminal Contempt is Required When the Sanction Involves A “Serious Fine” or Imprisonment of More Than Six Months**

In Bagwell, 512 U.S. at 826-27, the Supreme Court stated that “criminal contempts involving imprisonment of more than six months” trigger a constitutional right to a jury trial. Accord Taylor v. Hayes, 418 U.S. 488, 495 (1974); Bloom v. State of Illinois, 391 U.S. 194 (1968).<sup>234</sup> The Bagwell Court also held that the imposition “of serious criminal contempt fines triggers the right to jury trial,” 512 U.S. at 837, n.5,<sup>235</sup> and that the fines imposed in Bagwell, totaling over \$52 million were “serious,” and hence required a jury trial. 512 U.S. at

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<sup>230</sup> Accord United States v. Philip Morris Inc., 314 F.3d 612, 620 (D.C. Cir. 2003); Howard Johnson Co., Inc., v. Khimani, 892 F.2d 1512, 1515 (11th Cir. 1990); S. Railway Co. v. Lanham, 403 F.2d 119, 124 (5th Cir. 1968).

<sup>231</sup> See, e.g., U.S. Catholic Conference v. Abortion Rights Mobilization, 487 U.S. 72, 76 (1988); United States v. Accetturo, 842 F.2d 1408, 1412 (3d Cir. 1988) (collecting cases); Union of Professional Airmen v. Alaska Aeronautical Industries, Inc., 625 F.2d 881, 884 (9th Cir. 1980).

<sup>232</sup> See, e.g., Gates v. Shinn, 98 F.3d 463, 467 (9th Cir. 1999); Combs v. Ryan’s Coal Co., 785 F.2d 970, 976-77 (11th Cir. 1986).

<sup>233</sup> See, e.g., United States v. Local 1804-1, Int’l Longshoremen’s Ass’n, 44 F.3d 1091, 1095 (2d Cir. 1995); Armstrong v. Executive Office of President, 1 F.3d 1274, 1289 (D.C. Cir. 1993).

<sup>234</sup> See also Frank v. United States, 395 U.S. 147 (1969) (holding that a sentence of three years probation for criminal contempt was not a serious offense and did not require a jury trial).

<sup>235</sup> Accord Bloom, 391 U.S. at 210.

837-39.

The Bagwell Court added that “to date [it] has not specified what magnitude of contempt fine may constitute a serious criminal sanction, although it has held that a fine of \$10,000 imposed on a union was insufficient to trigger the Sixth Amendment right to jury trial.” 512 U.S. at 837, n.5, citing Muniz v. Hoffman, 422 U.S. 454, 477 (1975). The Bagwell Court concluded:

We need not answer today the difficult question where the line between petty and serious contempt fines should be drawn, since a \$52 million fine unquestionably is a serious contempt sanction.

512 U.S. at 838 n.5.

Lower courts have held that various fines for contempt were “serious,” which required a jury trial,<sup>236</sup> while other fines were not “serious” and did not require a jury trial.<sup>237</sup>

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<sup>236</sup> See, e.g., Jake’s Ltd. v. City of Coates, 356 F.3d 896, 903 (8th Cir. 2004) (requiring a jury trial for a \$68,000 contempt fine against an adult club owner for violating a court order to comply with city zoning laws, where state law would have provided a jury trial for the city zoning violations); F. J. Hanshaw Enterprises, Inc., 244 F.3d at 1139-41 (requiring a jury trial for a \$500,000 contempt fine for attempted bribery); Evans, 206 F.3d at 1297-99 (requiring a jury trial for a \$5 million contempt fine against the District of Columbia for its failure to comply with a consent decree); Crowe v. Smith, 151 F.3d 217, 228, n. 13 (5th Cir. 1998) (stating that contempt fines of \$75,000 for an individual and \$5 million for a corporation were “non-petty” sanctions, requiring a jury trial); Mackler Productions, Inc. v. Cohen, 146 F.3d 126, 129-130 (2d Cir. 1998) (holding that a \$10,000 punitive sanction on an individual required a jury trial); N.Y. State Nat’l Org. for Women v. Terry, 41 F.3d 794, 798 (2d Cir. 1994) (holding that non-compensatory contempt fines of \$500,000 for defendants’ anti-abortion activities in violation of an injunction required a jury trial).

<sup>237</sup> See, e.g., United States v. Linney, 134 F.3d 274, 280-81 (4th Cir. 1998) (\$5,000 criminal contempt fine for an individual did not require a jury trial); United States v. Troxler Hosiery Co., Inc., 681 F.2d 934 (4th Cir. 1982) (\$80,000 contempt fine for a corporation did not require a jury trial); Musidor, B.V. v. Great American Screen, 658 F.2d 60, 62 (2d Cir. 1981) (\$10,000 contempt fine for a corporation’s violation of a court order did not require a jury trial).



## VIII

### GOVERNMENT CIVIL RICO CASES INVOLVING LABOR UNIONS

#### A. Overview of Government Civil RICO Cases Involving Labor Unions

As of this writing, the United States has obtained relief in 23 civil RICO cases involving labor unions.<sup>238</sup> The initiation of each civil RICO case was prompted by evidence of the La Cosa Nostra's extensive corrupt influence over the labor unions involved.

##### 1. Overview of Labor Racketeering

The La Cosa Nostra ("LCN") gained substantial corrupt influence, and even control in some instances, over labor unions through creating a climate of fear and intimidation by threats and acts of violence. Through such domination, the LCN was able to place its associates in key official positions of various unions, and then use their control over such union officers to place additional LCN associates in union positions, and to use such control over union officials to exploit the unions, and derive illegal proceeds from the operation of the unions' affairs.<sup>239</sup>

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<sup>238</sup> Appendix B ("App." B) includes an index and detailed summary of each of these 23 cases. RICO suits were filed in 22 of these 23 cases. Only one case involving the Laborers' International Union of North America ("LIUNA") was settled before a complaint was filed, which resulted in the United States obtaining relief similar to the relief obtained in the RICO suits that were filed. See App. B at 178-90 and Section VIII(A)(4) and (B) below.

For the sake of brevity, these 23 RICO cases sometimes will be cited by a shorthand reference after the initial full cite, as indicated in summary headings in App. B. For example, the case involving the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America will be cited as the IBT or the Teamsters Union case, and Local 560 of the International Brotherhood of Teamsters case will be cited as the IBT Local 560 case.

<sup>239</sup> See, e.g., United States v. Gotti, 459 F.3d 296, 302-08, 324-30 (2d Cir. 2006); United States v. Bellomo, 176 F.3d 580, 592-93 (2d Cir. 1999); United States v. Local 560 of the Int'l Bhd. of Teamsters, 581 F. Supp. 279, 303-21 (D.N.J. 1984), aff'd, 780 F.2d 267, 278-79 (3d Cir. 1986). See generally, The President's Commission on Organized Crime: THE EDGE: ORGANIZED CRIME, BUSINESS AND LABOR UNIONS (U.S. Government Printing Office,

(continued...)

For example, the LCN was able to use its control and influence over labor unions and their assets to derive illegal proceeds through a variety of typical labor racketeering activities, including the following: (1) obtain illegal payoffs in exchange for loans or vendor contracts from union-related pension, health and welfare, and other benefit funds established for the benefit of union members;<sup>240</sup> (2) extort payments and obtain unlawful payoffs from employers in exchange for labor peace, relaxed enforcement of costly union work rules, and other benefits;<sup>241</sup> (3) obtain no show jobs or superfluous jobs for friends and associates of the LCN through extortion and other illegal means;<sup>242</sup> (4) embezzlement of union funds and other assets;<sup>243</sup> and (5) obtain illegal payoffs for “sweet heart” contracts that reduce costs to the employers and benefits to their union

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<sup>239</sup>(...continued)

Washington, DC 1986) (“PCOC: THE EDGE”) at 1-6, 9-11, 33-40, 72-75, 89-98, 114-127, 146-160. See also cases cited below in Section VIII and accompanying text.

<sup>240</sup> See, e.g., United States v. Norton, 867 F.2d 1354, 1357-59 (11th Cir. 1989); United States v. Cerone, 830 F.2d 938 (8th Cir. 1987); United States v. Robilotto, 828 F.2d 940, 944, 946 (2d Cir. 1987); United States v. Caporale, 806 F.2d 1487, 1495-97 (11th Cir. 1986).

<sup>241</sup> See, e.g., Gotti, 459 3d at 305-12, 331-35; United States v. Cervone, 907 F.2d 332, 336-40 (2d Cir. 1990); United States v. Rastelli, 870 F.2d 822, 826, 828-29 (2d Cir. 1989); United States v. Davidoff, 845 F.2d 1151, 1153 (2d Cir. 1988); United States v. Daly, 842 F.2d 1380, 1383-90 (2d Cir. 1986); Robilotto, 828 F.2d at 942-44; United States v. Kopituk, 690 F.2d 1289, 1294-1305 (11th Cir. 1982); United States v. Provenzano, 688 F.2d 194, 196-98 (3d Cir. 1982); United States v. Provenzano, 620 F.2d 985, 989-91 (3d Cir. 1980).

<sup>242</sup> See, e.g., Bellomo, 176 F.3d at 592; United States v. Presser, 844 F.2d 1275, 1276-77 (6th Cir. 1988); Robilotto, 828 F.2d at 943, 945-46. See generally United States v. Green, 350 U.S. 415, 417, 412 (1956); United States v. Quinn, 514 F.2d 1250, 1257 (5th Cir. 1975); Bianchi v. United States, 219 F.2d 182, 186-87 (8th Cir. 1955).

<sup>243</sup> See, e.g., United States v. Lore, 430 F.3d 190, 197-204 (3d Cir. 2005); Carson, 52 F.3d at 1176-78; United States v. Int’l Bhd. of Teamsters, 753 F. Supp. 1181, 1190-91 (S.D.N.Y. 1990); United States v. Int’l Longshoremen Ass’n, Local 1814, 1993 WL 330578 at \*5-8, 10-11 (S.D.N.Y. Jan. 14, 1993); PCOC: THE EDGE at 12-15.

employees.<sup>244</sup>

Perhaps the most lucrative illegal scheme involving the LCN's corrupt influence over labor unions entails establishing illegal cartels that control awarding contracts and allocation of business in a particular industry or business sector. Such illegal cartels involve conspiracies among LCN members and associates and corrupt labor union officials and businessmen, whereby the conspirators threaten businesses with physical harm and/or labor strife and other forms of economic harm unless they participate in their unlawful scheme to rig bids to control or allocate business in a particular industry. Typically, the LCN and labor union conspirators obtain unlawful payoffs from the proceeds of the ensuing contracts for business and, in exchange, the corrupt businesses receive lucrative contracts, labor peace, relaxed enforcement of costly union work rules and other benefits. For example, the LCN previously established such illegal cartels in the commercial moving and storage industry in Metropolitan New York City,<sup>245</sup> the waste-hauling industry in New York City and Long Island,<sup>246</sup> the construction industry involving concrete pouring contracts in Metropolitan New York City,<sup>247</sup> window replacement<sup>248</sup> and

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<sup>244</sup> See, e.g., United States v. Local 560 of the Int'l Bhd. of Teamsters, 974 F.2d 315, 325-27 (3d Cir. 1992); United States v. Boffa, 688 F.2d 919, 923-24 (3d Cir. 1982); PCOC: THE EDGE at 10, 16-18.

<sup>245</sup> See, e.g., Rastelli, 870 F.2d at 829-30.

<sup>246</sup> See, e.g., Sanitation and Recycling Indus. v. City of New York, 107 F.3d 985 (2d Cir. 1997); United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 793 F. Supp. 1114 (E.D.N.Y. 1992); App. B at 82-94.

<sup>247</sup> See, e.g., United States v. Salerno, 868 F.2d 524, 528-32 (2d Cir. 1989); United States v. Scopo, 861 F.2d 339, 341-42 (2d Cir. 1988); United States v. Persico, 832 F.2d 705, 707-09 (2d Cir. 1987).

<sup>248</sup> See, e.g., United States v. Gigante, 166 F.3d 75, 78-79 (2d Cir. 1999); United States v.  
(continued...)

commercial painting<sup>249</sup> industries in New York City.

## **2. Congress Designed Civil RICO to Combat the LCN's Corrupt Influence Over Labor Unions**

RICO's legislative history makes clear that Congress specifically intended the civil RICO remedies provided in 18 U.S.C. §§ 1964(a) and (b) to be used vigorously by the United States to eliminate organized crime's control and influence over labor unions. See S. REP. No. 91-617 at 77-83; H.R. REP. No. 1574, 90<sup>th</sup> Cong., 2d Sess. at 5-9 (1968); see also Sections II(B) and (C) above; Local 1814, Int'l Longshoremen's Ass'n v. New York Shipping Ass'n, Inc., 965 F.2d 1224, 1236-37 (2d Cir. 1992), cert. denied, 506 U.S. 953 (1992). For example, the Senate Report regarding RICO states:

Closely paralleling its takeover of legitimate businesses, organized crime has moved into legitimate unions. Control of labor supply through control of unions can prevent the unionization of some industries or can guarantee sweetheart contracts in others. It provides the opportunity for theft from union funds, extortion through the threat of economic pressure, and the profit to be gained from the manipulation of welfare and pension funds and insurance contracts. Trucking, construction, and waterfront entrepreneurs have been persuaded for labor peace to countenance gambling, loan sharking and pilferage. As the takeover of organized crime cannot be tolerated in legitimate business, so, too, it cannot be tolerated here.

...

[RICO] recognizes that present efforts to dislodge the forces of organized crime from legitimate fields of endeavor have proven unsuccessful. To remedy this failure, the proposed statute adopts the most direct route open to accomplish the desired objective. Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from

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<sup>248</sup>(...continued)

McGowan, 58 F.3d 8 (2d Cir. 1995); United States v. Gigante, 39 F.3d 42, 44-45 (2d Cir. 1994); United States v. Amuso, 21 F.3d 1251, 1254 (2d Cir. 1994).

<sup>249</sup> See, e.g., People v. Capaldo, 572 N.Y.S.2d 989 (Sup. Ct. N.Y. County 1991).

the organization, either by the criminal law approach of fine, imprisonment and forfeiture, or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity.

S. REP. No. 91-617 at 78-79 (footnote omitted).

It also bears emphasis that, because the public interest is involved in the Government's efforts to reform corrupt institutions through its civil RICO suits involving labor unions, the courts' equitable powers are at their zenith. See Sections II(A)(2) and VII(E) above.

**3. The United States Department of Justice Adopted A Strategy to Eliminate the LCN's Corrupt Influence Over Labor Unions**

In March, 1986, The President's Commission on Organized Crime ("PCOC") issued a report to the President and the Attorney General entitled: THE EDGE: ORGANIZED CRIME, BUSINESS AND LABOR UNIONS (U.S. Government Printing Office, Washington, DC 1986) ("PCOC: THE EDGE"). The PCOC concluded that the LCN had for decades controlled and corruptly influenced major labor unions in the United States, including "the International Brotherhood of Teamsters (IBT), the Laborers International Union of North American (LIUNA), the Hotel Employees and Restaurant Employees International Union (HEREIU), and the International Longshoreman's Association (ILA)." PCOC: THE EDGE at 4.

In particular, the PCOC stated that "since the 1950's," the Teamsters Union had been "The Most Controlled Union" by the LCN, and that during the period 1952-1985, the LCN "exercised substantial influence" over the Teamsters Union through its control of the five persons who served as President of the Teamsters Union during that period. See PCOC: THE EDGE at 89. Similarly, the PCOC found that for many years the LCN, particularly the Chicago LCN Family or "Outfit," had controlled the principal officials of LIUNA, including its

Presidents, as well as officials in many LIUNA Locals. See id. at 145-163, 217-32.

The PCOC also found that since the 1920's, "the International Longshoremen's Association (ILA) has been virtually a synonym for organized crime in the labor movement." Id. at 33. The PCOC added that, "[i]n 1937, New York La Cosa Nostra leader Albert Anastasia muscled into" control of "the Brooklyn Waterfront," and that the ILA did "little, if anything, to disturb La Cosa Nostra influence in its locals." Id. at 36-37. The PCOC further found that, since at least the late 1930's, the LCN had exercised substantial corrupt influence over the HEREIU and its locals, including the selection of Edward Hanley to be President of HEREIU. Id. at 71-85.

The PCOC recommended a national strategy to eliminate the LCN's corrupt domination of labor unions. Id. at 307-59. In particular, the PCOC recommended that the Department of Justice "should use the RICO statute more aggressively in civil and criminal proceeding, and it should pursue more vigorously breaches of fiduciary duty by union officers and employee benefit plan trustees." Id. at 314. In accordance with the PCOC's recommendations, the OCRS, working with the United States Attorneys' Offices in the Eastern and Southern Districts of New York, the District of New Jersey and the Northern District of Illinois, devised a strategy to bring civil RICO lawsuits against the four most corrupt international unions (The Teamsters Union, The LIUNA, the HEREIU, and the ILA) to eliminate the LCN's corrupt influences. See App. B at 42-79, 178-208, 243-55. In addition, the Department of Justice brought 17 civil RICO lawsuits against LCN dominated local unions in New York and New Jersey (see App. B at 1-33, 40-42, 79-178, 220-243), and one civil RICO lawsuit in the Eastern District of Pennsylvania and one in the Northern District of Illinois. See App. B at 33-40, 208-20. These Government civil

RICO lawsuits have achieved considerable success toward eliminating the LCN's corrupt domination of labor unions. See App. B.

#### **4. Overview of Essential Relief**

Although the relief obtained in these civil RICO lawsuits vary somewhat, they typically have involved the issuance of injunctions to prohibit unlawful activities and conduct that might facilitate union corruption. District courts also have appointed officers, usually experienced former prosecutors and law enforcement investigators, to assist the district courts to implement relief designed to eliminate corruption by the defendants and in the alleged RICO enterprises and to prevent future unlawful activity. District courts have authorized such officers to exercise broad powers, subject to review by the district courts, including the following: (1) conduct the legitimate business of the defendants and the RICO enterprises; (2) review and approve hiring, certain contracts and financial expenditures of defendants and affiliated entities; (3) impose and implement various structural reforms in the defendants and entities comprising the RICO enterprises, including union election reform, revised rules and practices for conducting business; (4) impose and implement ethical practices codes governing the defendants and members of the RICO enterprises; (5) investigate, prosecute, and adjudicate in civil proceedings allegations of violations of the consent decrees, judgment orders and related ethical practices codes; and (6) imposition of fines, discipline or removal from the defendants' entities or RICO enterprises and prohibition of certain activities in the future for individuals found guilty of such violations.<sup>250</sup>

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<sup>250</sup> See e.g., United States v. Local 359, United Seafood Workers, 55 F.3d 64 (2d Cir. 1995); United States v. Local 1804-1, Int'l Longshoreman's Ass'n, 44 F.3d 1091, 1093-95 (2d Cir. 1995); United States v. Int'l Bhd. of Teamsters, 948 F.2d 98, 106 (2d Cir. 1991); United States Int'l Bhd. of Teamsters, 907 F.2d 277, 279-81 (2d Cir. 1990); United States v. Int'l Bhd. of Teamsters, 905 F.2d 610, 613-17 (2d Cir. 1990); United States v. Int'l Bhd. of Teamsters,

(continued...)

Such relief has significantly contributed to the Government's success in combating the LCN's corrupt control over labor unions and related businesses, and is discussed in more detail below in this Section.<sup>251</sup>

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<sup>250</sup>(...continued)  
899 F.2d 143, 145-46 (2d Cir. 1990); United States v. Hotel Employees & Rest. Employees, Int'l Union, 974 F. Supp. 411 (D.N.J. 1997); United States v. Dist. Council of New York City, 941 F. Supp. 349, 355 (S.D.N.Y. 1996); United States v. Local 6A, Cement and Concrete Workers, 832 F. Supp. 674 (S.D.N.Y. 1993); United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 831 F. Supp. 192, 193-95 (S.D.N.Y. 1993); United States v. Int'l Bhd. of Teamsters, 803 F. Supp. 761, 766-71 (S.D.N.Y. 1992); United States v. Int'l Bhd. of Teamsters, 782 F. Supp. 243, 248-51 (S.D.N.Y. 1992); United States v. Int'l Bhd. of Teamsters, 723 F. Supp. 203 (S.D.N.Y. 1989), aff'd as modified, 931 F.2d 177 (2d Cir. 1991). See also Sections VIII(B) and (C) below.

<sup>251</sup> In the LIUNA civil RICO matter (see App. B at 178-90), the United States agreed to settle a civil RICO lawsuit before it was filed, and for the first time agreed to allow a union an opportunity to implement a reform program without court supervision and court-appointed officers. The Initial Settlement Agreement provided that if after 90 days "the Assistant Attorney General for the Criminal Division determines, in her sole discretion, that the imposition of a consent decree is necessary or desirable, after having given LIUNA an opportunity to have a meeting to be heard, the parties agree to the filing of the attached complaint and entry and implementation of the attached consent decree." See App. B at 183-84.

The attached consent decree provided for, among other matters: (1) a permanent injunction against LIUNA officers, representatives and members from committing any act of racketeering and other misconduct; (2) court-appointed officers to investigate, prosecute, and discipline LIUNA officers, representatives, employees and members for misconduct; (3) adoption of procedures to conduct investigations and adjudication of disciplinary charges; (4) various reforms in LIUNA's Job Referral Rules and financial practices; and (5) union election reforms. See App. B at 184.

This agreement provided the Government with virtually unlimited discretion to obtain imposition of court-supervision and court-appointed officers if it believed that such relief was "necessary or desirable." However, the United States did not seek such court-supervised relief because LIUNA achieved considerable success in eliminating LCN influence over its affairs through the efforts of experienced, independent attorneys and investigators. See App. B at 185-88. Throughout the period of LIUNA's reform efforts, the Government closely monitored LIUNA's reform efforts through regular meetings and discussions, insisted upon various reforms and provided information and evidence to enable LIUNA's reform team to eliminate corruption. Thus, the United States obtained essentially the same relief regarding LIUNA that it would have

(continued...)



## **B. Specific Relief Obtained in Government Civil RICO Cases Involving Labor Unions**

### **1. Injunctions**

Courts have granted similar broad injunctive relief in 20 of the 22 filed Government civil RICO cases involving labor unions.<sup>252</sup> The injunctive relief granted under a Consent Decree in United States v. Local 69 of the Hotel Employees and Rest. Employees Int'l Union, Civil No. 1733, U.S. District Court for the District of New Jersey (hereinafter "HEREIU Local 69"), is typical of the injunctions granted in those 20 cases, and it provided, in substance, as follows (see App. B at 231-32):

All current and future officers, agents, employees, representatives, members of, and persons holding positions of trust in Local 69 or its affiliated entities (other than representatives of employers) and any and all persons in active concert or participation with any or all of them, were permanently restrained and enjoined from directly or indirectly:

- a. committing any crime listed in 18 U.S.C. § 1961(1);
- b. knowingly associating with any member or associate of any criminal group or with any barred person;
- c. knowingly permitting any member or associate of any criminal group or any barred person to exercise any control or influence, directly or indirectly, in any way or degree, in the conduct of the affairs of Local 69 and its affiliated entities; and

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<sup>251</sup>(...continued)  
obtained through court-supervision. See App. B at 188.

<sup>252</sup> The two exceptions were the John F. Long (see App. B at 40-42) and Vincent Gigante cases (see App. B at 79-82), which imposed limited injunctive relief, barring certain persons from specified union-related activities.

It bears repeating that injunctive relief is not limited to enjoining future unlawful conduct, but also may broadly encompass relief necessary to cure the ill-effects of the defendants' past unlawful conduct, and may also include enjoining otherwise lawful practices connected to the unlawful conduct. See Sections II(E) and VII(C)(1) above.

- d. obstructing or otherwise interfering, directly or indirectly, with the efforts of anyone effectuating or attempting to effectuate the terms of this Consent Decree or in attempting to prevent any criminal groups or barred person from exercising influence on the conduct of the affairs of the Local 69 and its affiliated entities.

As used in the HEREIU Local 69 Consent Decree, the term “knowingly associating” meant that: (a) an enjoined party knows or should know that the person with whom he or she is associating is a member or associate of any criminal group or is a barred person; and (b) the association is more than fleeting.

As used in the HEREIU Local 69 Consent Decree, a “barred person” was defined as: (a) any member or associate of any organized crime family or other criminal group, or (b) any person prohibited from participating in the affairs of any union pursuant to or by operation of this Consent Decree, other court order or statute, and/or a disciplinary disposition or agreement by the HEREIU’s Public Review Board.<sup>253</sup>

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<sup>253</sup> Similar injunctions were also granted in the following additional 19 Government civil RICO cases involving labor unions:

(1) The Teamsters Local 560 Case; see App. B at 6-7; United States v. Local 560, Int’l Bhd. of Teamsters, 581 F. Supp. 279, 337 (D.N.J. 1984), aff’d, 780 F.2d 267 (3d Cir. 1986); United States v. Local 560 Int’l Bhd. of Teamsters, 974 F.2d 315, 324 (3d Cir. 1992);

(2) The Local 6A, Cement and Concrete Workers Case; see App. B at 16-17;

(3) The Bonanno Family Case; see App. B at 22-24;

(4) The Fulton Fish Market Case; see App. 30-31;

(5) The Roofers Union Case; see App. B at 37-38; United States v. Local 30, United Slate, Tile and Composition Roofers, 686 F. Supp. 1139, 1162-74 (E.D. Pa. 1988) (“Local 30 Roofers Union”);

(6) The International Brotherhood of Teamsters Union Case; see App. B at 47, and cases cited in App. B at 51, n. 7;

(7) The Private Sanitation Industry of Long Island Case; see App. B at 85-86, 91; United States v. Private Sanitation Indus. Ass’n of Nassau/Suffolk, Inc., 811 F. Supp. 808, 818 (E.D.N.Y. 1992), aff’d, 995 F.2d 375 (2d Cir. 1993) (“Private Sanitation Indus. Case”); United States v. Private Sanitation Indus. Ass’n of Nassau/Suffolk, Inc., 899 F. Supp. 974, 983-84

(continued...)

## 2. Dissolution, Divestiture and Reorganization

As noted in Section II(C)(2) above, 18 U.S.C. § 1964 (a) explicitly authorizes equitable relief involving divestiture, dissolution and reorganization. Accordingly, courts have approved of such relief in Government civil RICO cases involving labor unions. See, e.g., United States v. Local 30, United Slate, Tile and Composition Roofers and Waterproof Workers Ass'n, 871 F.2d 401, 407 (3d Cir. 1989); United States v. Local 560 of Int'l Bhd. of Teamsters, 780 F.2d 267, 295 (3d Cir. 1985); United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 899 F. Supp. 974, 983-84 (E.D.N.Y. 1994) and 811 F. Supp. 808, 818 (E.D.N.Y. 1992), aff'd, 995 F.2d 375 (2d Cir. 1993); United States v. Bonanno Organized Crime Family of La Cosa Nostra, 683 F. Supp. 1411, 1442-44 (E.D.N.Y. 1988), aff'd, 879 F.2d 20 (2d Cir. 1989).

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<sup>253</sup>(...continued)

(E.D.N.Y. 1994), aff'd 47 F.3d 1158 (2d Cir. 1995) (Table);

(8) The ILA Local 10804-1 Case; see App. B at 98-102; United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 831 F. Supp. 177, 191-92 (S.D.N.Y. 1993), aff'd and vacated in part on other grounds, 52 F.3d 1173 (2d Cir. 1995); (“ILA Local 1804-1”);

(9) The IBT Local 295 Case; see App. at 113-115, 118;

(10) The New York Carpenters Union Case; See App. B at 123-25; United States v. Dist. Council of New York City, 409 F. Supp.2d 439, 442 (S.D.N.Y. 2006);

(11) The HEREIU Local 54 Case; see App. B at 136-38;

(12) The HEREIU Local 100 Case; see App. B at 145;

(13) The Teamsters Local 282 Case; see App. B at 149; United States v. Local 282 of the Int'l Bhd. of Teamsters, 13 F. Supp.2d 401, 402 (E.D.N.Y. 1988); aff'd in part, and vacated and remanded in part on other grounds, 215 F.3d 283 (2d Cir. 2000) (“Teamsters Local 282 Case”);

(14) The Mason Tenders District Council of Greater New York Case; see App. B at 161-62, 173-75; United States v. Mason Tenders Dist. Council of Greater New York, 1994 WL 742637 (S.D.N.Y. Dec. 27, 1994); United States v. Mason Tenders Dist. Council of Greater New York, 1995 WL 679245 (S.D.N.Y. Nov. 15, 1995) (“Mason Tenders District Council”);

(15) The Hotel Employees and Restaurant Employees International Union Case; see App. B at 194-95;

(16) The Chicago District Council of LIUNA Case; see App. B at 211-12;

(17) The LIUNA Local 210 Case; see App. B at 222, 225-26;

(18) The ILA Bellomo Case; see App. B at 241-42; and

(19) The International Longshoremen's Ass'n Case; see App. B at 250-55.

Moreover, in numerous Government civil RICO cases involving labor unions, courts have authorized a wide variety of relief that required wrongdoers to change their business practices and policies, such as adopt new union and job referral rules, and restructure other aspects of their operations. See United States v. Dist. Council of New York City, 409 F. Supp. 2d 439, 442-44 (S.D.N.Y. 2006).<sup>254</sup>

### **3. Court-Appointed Officers**

#### **(a) Officers to Administer the Affairs of a Union**

In 17 of the 22 filed Government civil RICO cases involving labor unions, courts have appointed officers to administer the affairs of unions with broad powers to, among other things, oversee or carryout various aspects of the unions' operations; negotiate, approve or void contracts and expenditures; and discipline union officers and members. For example, in the HEREIU Local 69 civil RICO case, the district court appointed a Monitor with the powers, rights and authority of all officers and other persons holding positions of trust in Local 69 including the powers, rights and authority of the Local 69 President; the Executive Board of Local 69; the union's other committees; the union trustees on Local 69's pension, and health and welfare funds; and any other officer, agent, employee or representative of Local 69. Accordingly, the Monitor was authorized to:

- a. oversee, approve or disapprove of all disbursements and distributions of Local 69 funds and other assets, purchases and financial obligations of Local 69;

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<sup>254</sup> See also, App. B at 3-8, 16-17, 22-24, 37-39, 47-49, 86, 99-102, 107, 115-18, 123-26, 136-38, 142-45, 149-54, 162-174, 195-96, 199-200, 213-15, 218, 223-25, 232-36. See also Section VIII(B)(5) below, which discusses reorganization of unions' election procedures.

- b. approve or disapprove of the hiring, appointment, discharge or reassignment of Local 69 officers and others holding positions of trust in Local 69, employees, agents, representatives, commissioners and committee members of Local 69;
- c. carry on and supervise the legitimate activities of Local 69;
- d. hold (or designate the persons who hold) the positions currently held by Local 69 representatives in Local 69's affiliated entities;
- e. review, oversee and otherwise take action upon all collective bargaining agreements, the processing of grievances, grievance awards, or other matters involving employers with whom Local 69 deals or seeks to deal;
- f. investigate, audit and review all aspects of Local 69 and its affiliated entities. These powers shall include the power of the Monitor to conduct investigatory interviews and sworn depositions;
- g. issue subpoenas and serve such subpoenas in this or any other judicial district pursuant to 18 U.S.C. § 1965(c) without the need for prior application to the district court. Such subpoenas shall be issued only for good cause if the individuals reside in another district at a place more than one hundred miles from the district court;
- h. initiate charges or disallow nominations or elections of persons in accordance with this Consent Decree;
- i. refer matters to the Public Review Board of the HEREIU for disciplinary action or, in the alternative, exercise the disciplinary authority and powers described in this Consent Decree over any person described in Paragraph (3)(a) above;
- j. refer any matter to the United States Attorney for appropriate action or request the United States Attorney or any agency of the United States to provide legal, audit and investigative personnel to assist in the execution of the Monitor's duties;
- k. retain legal, investigative, accounting and other support personnel at Local 69's expense;
- l. attend any and all meetings of Local 69 and its affiliated entities, including, but not limited to, meetings of the Local 69 Executive Board, the membership, committees, negotiation meetings or grievance proceedings regarding Local 69 members involving employers with whom

Local 69 deals or seeks to deal and meetings of employee benefit plans in which Local 69 members participate;

- m. enter into, disapprove or terminate any contract (including, but not limited to, contracts with service providers or vendors), lease, or other obligation of Local 69 or any of Local 69's affiliated entities for which representatives of Local 69 otherwise have authority to enter into, disapprove or terminate;
- n. oversee and monitor all affairs of Local 69, including, but not limited to, any Local 69 elections;
- o. act to preclude actions or inactions that violate the law or otherwise are inimical to the remedial objectives of this Consent Decree;
- p. perform all such functions and duties not specifically enumerated herein in order to fulfill his/her duties as Monitor; and
- q. delegate any of his/her powers or duties to any other person(s).

See Appendix B at 232-34.

The HEREIU Local 69 Consent Decree also provided, in substance, that:

- a. The Monitor was given unfettered access to, and the right to make copies of, all records or documents of officials, agents, employees, and members of Local 69 and its affiliated entities.
- b. The Monitor was required to report to the district court at least every 6 months or when requested by the court regarding the progress of Local 69 and its affiliated entities in achieving the remedial objectives of this Consent Decree.
- c. The term of the Monitor would expire four years from the date the Consent Decree was entered.
- d. The Consent Decree also provided that the Monitor, the United States or the HEREIU may make application to the district court to modify or enforce this Consent Decree and the court may grant such relief as may be equitable and just, having due regard for the purposes of the underlying litigation, the remedial purposes of this Consent Decree and the circumstances at the time of the application.

- e. The district court retained jurisdiction over the parties and signatories to the Consent Decree and the subject matter of the litigation in order to implement the terms of the Consent Decree.
- f. Pursuant to the All Writs Act, 28 U.S.C. § 1651, all parties and non-parties to the Consent Decree were permanently restrained and enjoined from litigating any and all issues relating to the Consent Decree or arising from the interpretation or application of the Consent Decree in any court or forum in any jurisdiction except the United States District Court for the District of New Jersey. Such issues relating to the Consent Decree include, but are not limited to, challenges to actions of the Monitor and/or his delegates and challenges to issuance of or compliance with subpoenas.

See App. B at 236.<sup>255</sup>

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<sup>255</sup> Courts appointed officers with similar or some of the administrative powers granted the Monitor in the HEREIU Local 69 case in the following 16 additional Government civil RICO cases involving labor unions:

(1) The Teamsters Local 560 Case; see App. B at 3-7; Local 560 Int'l Bhd. of Teamsters, 780 F.2d at 295-96; United States v. Sciarra, 851 F.2d 621, 623-24, 632-33 (3d Cir. 1988); Local 560 Int'l Bhd. of Teamsters, 694 F. Supp. 1158, 1160-62 (D.N.J. 1988); see also, Section VIII(C)(1) below.

(2) The Local 6A, Cement and Concrete Workers Case; see App. B at 16-17;

(3) The Bonanno Family Case; see App. B at 22-24;

(4) The Fulton Fish Market Case; see App. B at 30-31, 32; United States v. Local 359 United Seafood Workers Union, 1991 WL 172962 (S.D.N.Y. August 21, 1991);

(5) The Local 30 Roofers Union Case; see App. B at 37-39; United States v. Local 30, United Slate, Tile, 871 F.2d 401, 404-07 (3d Cir. 1989); United States v. Local 30, United Slate, Tile, 686 F. Supp. 1139, 1162, 1169-74 (E.D. Pa. 1988);

(6) The International Brotherhood of Teamsters Union Case; see App. B at 47-51; United States v. Int'l Bhd. of Teamsters, 905 F.2d 610, 613 (2d Cir. 1990); United States v. Int'l Bhd. of Teamsters, 899 F.2d 143, 145 (2d Cir. 1990); United States v. Int'l Bhd. of Teamsters, 765 F. Supp. 1206 (S.D.N.Y. 1991); United States v. Int'l Bhd. of Teamsters, 761 F. Supp. 315, 316-17 (S.D.N.Y. 1991);

(7) The ILA Local 1804-1 Case; see App. B at 99-102;

(8) The IBT Local 295 Case; see App. B at 115-18; United States v. Local 295 of the Int'l Bhd. of Teamsters, 784 F. Supp. 15 (E.D.N.Y. 1992);

(9) The New York Carpenters Union Case; see App. B at 123-26;

(10) The HEREIU Local 54 Case; see App. B at 136-38;

(11) The HEREIU Local 100 Case; see App. B at 142-45;

(12) The Teamsters Local 282 Case; see App. B at 149-54;

(continued...)

**(b) Adjudication Officers**

In most of the Government civil RICO cases involving labor unions, district courts have also appointed officers to carry-out various adjudication functions, including to investigate violations of the district courts' injunctions and judgment orders, other misconduct by union members, and to recommend or impose sanctions for such violations; all subject to the district court's review. For example, in the HEREIU civil RICO case, the district court appointed a Monitor for a 4-year term, subject to extensions. The Monitor's powers included the following:

**(i) General Powers**

- a. To investigate, audit and review all aspects of the HEREIU and its constituent entities to advance the remedial objective of this action. These powers shall include the power of the Monitor to conduct investigatory interviews and sworn depositions to advance the remedial objective of this action;
- b. To request the United States Attorney or any agency of the United States to provide legal, audit and investigative personnel to assist in the execution of the Monitor's duties;
- c. To retain legal, investigative, accounting and other support personnel at the HEREIU's expense and delegate any of his/her powers or duties to such persons, where, in the Monitor's discretion, such personnel and delegation are necessary to execute the Monitor's duties as set forth herein;
- d. To attend all HEREIU Executive Board meetings and HEREIU committee meetings (with the exception of bargaining committee meetings);

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<sup>255</sup>(...continued)

**(13)** The Mason Tenders District Council of Greater New York Case; see App. B at 162-66, 172-74; United States v. Mason Tenders Dist. Council of Greater New York, 1994 WL 742637 (S.D.N.Y. Dec. 27, 1994);

**(14)** The HEREIU Case; see App. B at 195-96;

**(15)** The Chicago District Council of LIUNA Case; see App. B at 218;

**(16)** The LIUNA Local 210 Case; see App. B at 223-25.



- e. To refer matters to the HEREIU or the United States Attorney for appropriate action;
- f. To perform all such functions and duties not specifically enumerated herein in order to fulfill his/her duties as Monitor.

**(ii) Review Authority**

Whenever the Monitor reasonably believes that any of the following actions, proposed actions, or omissions to act (a) may violate the injunctive prohibitions of this Consent Decree, (b) may constitute any crime involving labor organizations or employee benefit plans, or (c) may further the direct or indirect influence of any organized crime group or the threat of such influence now or in the future, he or she has the power to:

- a. disapprove the hiring, appointment, reassignment or discharge of any person or business entity by the HEREIU or its constituent entities; and
- b. disapprove or terminate any contract (including, but not limited to, contracts with service providers or vendors) lease, or other obligation of the HEREIU or its constituent entities.

The HEREIU had a right to appeal any such decision to the district court.

**(iii) Disciplinary Powers**

The Monitor had the right and power to remove, suspend, expel, fine or forfeit the benefits (with the exception of vested employee retirement benefits subject to title I of the Employee Retirement Income Security Act -- 29 U.S.C. § 1001, et seq.) of any officer, representative, agent, employee or person holding a position of trust in the HEREIU and its constituent entities or member of HEREIU when such person engages or has engaged in actions or inactions which (i) violate the injunctive prohibitions of this Consent Decree, (ii) violate any criminal law involving the operation of a labor organization or employee benefit plan, or (iii)

further the direct or indirect influence of any organized crime group or the threat of such influence now or in the future.

See App. B at 195-97.<sup>256</sup>

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<sup>256</sup> Courts appointed officers with similar adjudication powers in the following 17 additional Government civil RICO cases involving labor unions:

- (1) The Teamsters Local 560 Case; see App. B at 4;
- (2) The Local 6A, Cement and Concrete Workers Case; see App. B at 16-17; United States v. Local 6A, Cement & Concrete Workers, Laboreres Int'l Union of North America, 832 F. Supp. 674 (S.D.N.Y. 1993);
- (3) The Bonanno Family Case; see App. B at 22-24;
- (4) The Fulton Fish Market Case; see App. B at 30-31; United States v. Local 359 United Seafood Workers, 55 F.3d 64 (2d Cir. 1995);
- (5) The Local 30 Roofers Union Case; see App. B at 38; United States v. Local 30, United Slate, Tile and Composition Roofers, 686 F. Supp. 1139, 1171 (E.D. Pa. 1988); United States v. Local 20, United Slate, Tile and Composition Roofers, 871 F.2d 401 (3d Cir. 1989);
- (6) The International Brotherhood of Teamsters Union Case; see App. B at 48-51; United States v. Int'l Bhd. of Teamsters, 745 F. Supp. 908 (S.D.N.Y. 1990), aff'd, 941 F.2d 1292, 1294-95 (2d Cir. 1991); United States v. Int'l Bhd. of Teamsters, 743 F. Supp. 155 (S.D.N.Y. 1990), aff'd, 905 F.2d 610 (2d Cir. 1990);
- (7) The Private Sanitation Industry of Long Island Case; see App. B at 86-87;
- (8) The ILA Local 1804-1 Case; see App. B at 99-100; United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 831 F. Supp. 192 (S.D.N.Y. 1993);
- (9) The IBT Local 295 Case; see App. B at 115-118; United States v. Local 295 of the Int'l Bhd. of Teamsters, 784 F. Supp. 15 (E.D.N.Y. 1992);
- (10) The New York Carpenters Union Case; see App. B at 123-26;
- (11) The HEREIU Local 54 Case; see App. B at 136-38;
- (12) The HEREIU Local 100 Case; see App. B at 144-45;
- (13) The IBT Local 282 Case; see App. B at 150-53;
- (14) The Mason Tenders District Council of Greater New York Case; see App. B at 162, 164-66;
- (15) The LIUNA Chicago District Council Case; see App. B at 212-15;
- (16) The LIUNA Local 210 Case; see App. B at 224-25;
- (17) The HEREIU Local 69 Case; see App. B at 232-35.

#### **4. Imposition of Ethical Practices Codes and Disciplinary Procedures**

##### **a. Disciplinary Procedures**

In conjunction with appointing adjudication officers, courts have also approved ethical practices codes and disciplinary procedures designed to prevent future misconduct and to impose appropriate sanctions for violations of the courts' injunctions and other orders. For example, in the HEREIU civil RICO case, the district court approved of the following procedures for imposing disciplinary sanctions (see App. B 196-200):

- i. Disciplinary Procedure. In order to discharge disciplinary duties under this decree, the Monitor shall have the same rights and authority as the HEREIU General President, the HEREIU General Executive Board, and any other officer, agent, employee, or representative of the HEREIU as well as the full authority derived from any and all provisions of law. When exercising his/her disciplinary rights and powers, the Monitor shall afford the subject of the potential disciplinary action written notice of the charge(s) against him/her and an opportunity to be heard. The Monitor shall conduct any hearing on any disciplinary charges, render the final decision regarding whether discipline is appropriate and impose the particular discipline. The charged party shall have 20 days to answer the charges against him/her and may be represented by counsel at any hearing conducted by the Monitor. Any hearing shall be conducted under the rules and procedures generally applicable in labor arbitration proceedings and decisions shall be made using a "just cause" standard. In conducting any hearing, the Monitor shall have the right and power:

- i. to administer oaths. All testimony and other evidence shall be subject to penalties of perjury to the same extent as if such evidence was submitted directly to the district court;
  - ii. to examine witnesses or conduct depositions;
  - iii. to receive evidence. The Monitor may receive evidence withheld from the charged party and the public which contains or constitutes sensitive information provided by a law enforcement agency, and can choose what weight, if any, to give such evidence, but in no case shall the identity of a confidential source of law enforcement information be required to be disclosed; and
  - iv. to issue subpoenas requiring the attendance and presentation of testimony of any person and/or the production of documentary or other evidence. In the case of contumacy or failure to obey a subpoena issued under this Paragraph, the Monitor may: (i) impose discipline upon the person in accordance with this Consent Decree; and/or (ii) seek an order from the Court requiring the person to testify or to produce documentary or other evidence.
- ii. Appeal of Disciplinary Action. Any discipline imposed by the Monitor shall be final and binding, subject to review by the district court. A person disciplined by the Monitor may obtain review of the Monitor's decision regarding such discipline by filing a written appeal of such decision with the Court within thirty (30) days of such decision by the Monitor. The Monitor's decision, all papers or other material relied upon by the Monitor and the papers filed or issued pursuant to this appeal procedure shall constitute the exclusive record for review. The Monitor's decisions pursuant to this Paragraph shall be reviewed by the district court, if necessary, under the substantial evidence standard set forth in 5 U.S.C. § 706(2)(E). Materials considered by the Monitor but withheld from the appellant and the public which contain sensitive information provided by a law enforcement

agency shall be submitted to the district court for ex parte, in camera consideration and shall remain sealed. The person disciplined by the Monitor may appeal the Monitor's decision regarding the discipline imposed against him/her and any decision by the Monitor regarding discipline imposed against a person which is not appealed in accordance with this Paragraph may not be appealed or otherwise challenged. HEREIU or the United States may seek the district court's review of the Monitor's decision not to impose discipline.

- iii. The Public Review Board. The Consent Decree further provided that the HEREIU would create a three-member Public Review Board (PRB) within the HEREIU to enforce an Ethical Practices Code (EPC) attached to the Consent Decree. The PRB and EPC were to be presented to the HEREIU Convention in 1996 for incorporation within the HEREIU Constitution. If these steps were taken by the HEREIU, the Consent Decree further provided that the Monitor would become a member of the PRB and his independent disciplinary authority would expire within 6 months of the date when the PRB became effective, or not later than March 5, 1997. All new matters arising after the Monitor's appointment to the PRB would be jointly investigated and pursued by the Monitor and the two other members of the PRB.

See App. B at 196-200.

Moreover, courts in 13 additional Government civil RICO cases involving labor unions have adopted similar disciplinary procedures, which typically require written notice of the charges, the rights to representation by an attorney and to present a defense at an evidentiary

hearing that is fair, impartial and adversarial in nature, and a right of review by the district court.<sup>257</sup>

**b. Due Process and Article III Considerations**

The disciplinary procedures in these cases do not violate Article III of the Constitution because the district courts retain their authority to decide dispositive issues of liability and sanctions. See Section VII(E)(3) above. Furthermore, even assuming, arguendo, that due

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<sup>257</sup> See:

(1) The Fulton Fish Market Case; see App. B at 30; United States v. Local 359, United Seafood Workers, 55 F.3d 64, 66-69 (2d Cir. 1995);

(2) The International Brotherhood of Teamsters Union Case; see App. B at 48-50. See also the following decisions that are all entitled United States v. Int'l Bhd. of Teamsters: 998 F.2d 1101 (2d Cir. 1993); 998 F.2d 120 (2d Cir. 1993); 968 F.2d 1506 (2d Cir. 1992); 725 F. Supp. 162 (S.D.N.Y. 1989), aff'd, 905 F.2d 610 (2d Cir. 1990); 741 F. Supp. 491 (S.D.N.Y. 1990); 764 F. Supp. 787 (S.D.N.Y. 1991); 775 F. Supp. 90 (S.D.N.Y. 1991), aff'd in part and reversed in part, 948 F.2d 1278 (2d Cir. 1991) (Table); 803 F. Supp. 761 (S.D.N.Y. 1992), aff'd and reversed in part, 998 F.2d 1101 (2d Cir. 1993); 829 F. Supp. 602 (S.D.N.Y. 1993); 842 F. Supp. 1550 (S.D.N.Y. 1994);

(3) The Private Sanitation Industry of Long Island Case; see App. B at 86-88;

(4) The ILA Local 1804-1 Case; see App. B at 99, 106-07; United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 831 F. Supp. 192, 194-198 (S.D.N.Y. 1993);

(5) The IBT Local 295 Case; see App. B at 117-18; United States v. Local 295 of the Int'l Bhd. of Teamsters, 784 F. Supp. 15 (E.D.N.Y. 1992);

(6) The New York Carpenters Union Case; see App. B at 123-26; United States v. Dist. Council of New York City, 409 F. Supp.2d 439, 442-44 (S.D.N.Y. 2006) and 941 F. Supp. 349, 355, 361-64 (S.D.N.Y. 1996);

(7) The HEREIU Local 54 Case; see App. B at 137-38;

(8) The HEREIU Local 100 Case; see App. B at 144-45;

(9) The Teamsters Local 282 Case; see App. B at 150-53;

(10) The Mason Tenders District Council of Greater New York Case; see App. B at 164-171; United States v. Mason Tenders Dist. Council of Greater New York, 1994 WL 742637 (S.D.N.Y. Dec. 27, 1994);

(11) The LIUNA Chicago District Council Case; see App. B at 214-17;

(12) The LIUNA Local 210 Case; see App. B at 224-25;

(13) The HEREIU Local 69 Case; see App. B at 234-35.

process applies to these disciplinary procedures,<sup>258</sup> they afford greater rights than the minimum requirements of due process, and hence do not violate due process. See Section VII(D)(3) above; see also the following cases ruling that the disciplinary and adjudicatory procedures employed in Government civil RICO cases involving labor unions satisfy due process: United States v. Int'l Bhd. of Teamsters, 954 F.2d 801, 807 (2d Cir. 1992); United States v. Int'l Bhd. of Teamsters, 948 F.2d 98, 104-105 (2d Cir. 1991); United States v. Int'l Bhd. of Teamsters, 941 F.2d 1292, 1297-98 (2d Cir. 1991); United States v. Int'l Bhd. of Teamsters, 791 F. Supp. 421, 426 (S.D.N.Y. 1992).

Analogous case law under 29 U.S.C. § 411(a)(5) of the LMRDA also supports the Government's position that the disciplinary procedures adopted in Government civil RICO cases involving labor unions satisfy the requirements of due process. Indeed, it is the policy of OCRS that court-ordered disciplinary procedures in Government civil RICO cases involving labor unions comply with the due process requirements embodied in 29 U.S.C. § 411(a)(5). Section 411(a)(5), which applies to internal union disciplinary procedures, provides as follows:

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

“The ‘full and fair hearing’ requirement of the LMRDA incorporates the ‘traditional concepts of due process.’” United States v. Int'l Bhd. of Teamsters, 247 F.3d 370, 385 (2d Cir. 2001), quoting Kuebler v. Central Lithographers & Photoengravers Union Local 24-P, 473 F.2d

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<sup>258</sup> See Section VIII(E)(1) below, which indicates that due process and other Constitutional protections may not apply to procedures to discipline union members under a Consent Decree because the requisite state action is lacking in some circumstances.

359, 363-64 (6th Cir. 1973).<sup>259</sup> To obtain relief for a violation of a union member's LMRDA rights, it is not enough to establish that an internal union disciplinary hearing violated the union's constitution or bylaws; rather, the union member must also establish that the violation deprived him of a fair trial within the meaning of the LMRDA.<sup>260</sup>

Moreover, Section 411 (a) (5) of the LMRDA "was not intended to authorize courts to determine the scope of offenses for which a union may discipline its members," and therefore unions have wide discretion to decide the scope of proscribed conduct, provided that the union does not violate the protections afforded union members under the LMRDA.

Int'l Bhd. of Boilermakers v. Hardeman, 401 U.S. 233, 244 (1971) ("Hardeman").<sup>261</sup> Indeed, the LMRDA "does not require that these charges to be valid, must be based on activity that the union had proscribed prior to the union member having engaged in such activity." Hardeman, 401 U.S. at 244 (internal quotations and citation omitted).

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<sup>259</sup> Accord N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 194 (1967); Holmes v. Donovan, 984 F.2d 732, 737-38 (6th Cir. 1993); Wellman v. Int'l Union of Operating Engineers, 812 F.2d 1204, 1205 (9th Cir. 1987); Tincher v. Piasecki, 520 F.2d 851, 854 (7th Cir. 1975); Falcone v. Dantine, 420 F.2d 1157, 1163-65 (3d Cir. 1970); Parks v. Int'l Bhd. of Electrical Workers, 314 F.2d 886, 911-12 (4th Cir. 1963); Loekle v. Hansen, 551 F. Supp. 74, 82 (S.D.N.Y. 1982). See generally, Risa L. Lieberwitz, Due Process and the LMRDA: An Analysis of Democratic Rights in the Union and at the Workplace, 29 B. C. L. REV. 21 (1987).

<sup>260</sup> See, e.g., United States v. Int'l Bhd. of Teamsters, 247 F.3d at 387; Wellman, 812 F.2d at 1206; Yager v. Carey, 910 F. Supp. 704, 713 (D.D.C. 1995).

<sup>261</sup> Accord Ferguson v. Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers, 854 F.2d 1169, 1174-75 (9th Cir. 1988); Rosario v. Amalgamated Ladies Garment Cutters Union, 605 F.2d 1228, 1240 (2d Cir. 1979) (collecting cases); Tincher v. Piasecki, 520 F.2d 851, 854 (7th Cir. 1975); Kuebler v. Cleveland, Lithographers & Photo Union Local 24-P, 473 F.2d 359, 363-64 (6th Cir. 1973); Falcone, 420 F.2d at 1163-65; Hurley v. Steamfitters Local Union No. 464, 714 F. Supp. 996, 1001 (D. Neb. 1989).



Regarding the requisite specificity, the “charges must be . . . specific enough to inform the accused member of the offense that he has allegedly committed,”<sup>262</sup> and provide “the information needed to conduct a meaningful investigation and prepare a defense.”<sup>263</sup> Moreover, Section 411(a)(5) of the LMRDA does not specify a time period to satisfy “as reasonable time to prepare [the accused’s] defense.” One court has noted that “[a]t a minimum, however, due process does require that the accused be told [of the charges], far enough in advance of trial to be of some use to him. . . .” Reilly v. Sheet Metal Workers’ Int’l Ass’n, 488 F. Supp. 1121, 1127 (S.D.N.Y. 1980).<sup>264</sup>

The right to a “full and fair hearing” encompasses the rights to be present and “a reasonable opportunity to be heard - including the right to present evidence and the right to confront and cross examine witnesses.” Milne v. Int’l Ass’n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, AFL-CIO Local 15, 156 F. Supp.2d 172, 178 (D. Conn. 2001) (internal quotations and citations omitted).<sup>265</sup> Accordingly, courts have found that an accused was denied a right to a “full and fair hearing” under the LMRDA when: (1) the discipline was

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<sup>262</sup> Hardeman, 401 U.S. at 245 (finding sufficient notice of the charges based on a detailed statement of facts underlying the charges) (internal quotations omitted).

<sup>263</sup> Gleason v. Chain Serv. Rest., 422 F.2d 342, 343 (2d Cir. 1970). See also, Curtis v. Int’l Alliance of Theatrical Stage Emp., 687 F. 2d 1024, 1027 (7th Cir. 1982) (Section 411 (a) (5) “does not require the elaborate specificity of a criminal indictment”) (collecting cases); Null v. Carpenters Dist. Council of Houston, 239 F. Supp. 809, 815 (S.D. Tex. 1965).

<sup>264</sup> See, e.g., Wellman, 812 F. 2d at 1206 (28 days was sufficient notice); Stewart v. St. Louis Typographical Union No. 8, 451 F. Supp. 314, 315-16 (E.D. Mo. (1978) (14 days was sufficient); Null, 239 F. Supp. at 815 (20 days was sufficient).

<sup>265</sup> Accord Ritz v. O’Donnell, 566 F.2d 731, 735 (D.C. Cir. 1977); Parks v. Int’l Bhd. of Electrical Workers, 314 F.2d 886, 912 (4th Cir. 1963); Yager v. Carey, 910 F. Supp. 704, 715 (D.D.C. 1995); Loekle, 551 F. Supp. at 82; Reilly, 488 F. Supp. at 1127; Steward, 451 F. Supp. 316.

unsupported by any evidence;<sup>266</sup> (2) the tribunal was not impartial;<sup>267</sup> (3) the accused was not allowed to record the trial when the union did not do so;<sup>268</sup> and (4) the accused's rights to cross-examination and to present a defense were unduly limited.<sup>269</sup>

However, while courts “apply traditional due process concepts, [courts] recognize that a union has a significant interest in controlling internal discipline, and so do not require the union’s disciplinary proceeding to incorporate the same protections found in criminal proceedings.”

Wellman v. Int’l Union of Operating Eng’rs, 812 F.2d 1204, 1205 (9th Cir. 1987).<sup>270</sup>

## 5. Election Reform

In light of the LCN’s corrupt influence over union officials and union elections (see Section VIII(A) above), union election reform is essential to eliminate such corruption and

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<sup>266</sup> See, e.g., Hardeman, 401 U.S. at 246 (collecting cases).

<sup>267</sup> See, e.g., Murphy v. Int’l Union of Operating Eng’rs, Local 18, 774 F.2d 114, 125 (6th Cir. 1985); Semancik v. United Mineworkers of America, Dist. No. 5, 466 F.2d 144, 159 (3d Cir. 1972); Falcone, 420 F.2d at 1166-67.

<sup>268</sup> See, e.g., Knight v. Int’l Longshoremen’s Ass’n, 457 F.3d 331, 340-42 (3d Cir. 2006); Rosario, 605 F.2d at 1240-42; Tincher, 520 F.2d at 854-56.

<sup>269</sup> See, e.g., Kuebler, 473 F.2d at 362-64; Milne, 156 F. Supp. 2d at 177-81; Loekle, 551 F. Supp. at 82-83.

<sup>270</sup> Accord United States v. Int’l Bhd. of Teamsters, 247 F.3d at 385-86 (rights to compulsory process and to subpoena witness are not required); United States v. Boggia, 167 F.3d 113, 118-19 (2d Cir. 1999) (right to representation of counsel at a disciplinary hearing is not required and reliable hearsay is admissible); Wildberger v. AFGE, 86 F.3d 1188, 1193-95 (D.C. Cir. 1996) (overlap of investigative, prosecutorial, and adjudicatory functions in the union’s president did not violate due process); Curtis, 687 F.2d at 1027-29 (right to counsel at disciplinary hearing is not required) (collecting cases); Yager v. Carey, 910 F. Supp. 704, 714-15 (D.D.C. 1995) (no rights to be represented by counsel or to the application of the “technical rules of pleading, procedure and evidence”) (citations omitted); Hurley v. Steamfitters Local Union No. 464, 714 F. Supp. 996, 1002 (D. Neb. 1988) (union members “need not be provided with the full panoply of procedural safeguards afforded to criminal defendants”); Null v. Carpenters Dist. Council of Houston, 239 F. Supp. 809, 814 (S.D. Tx. 1965).

restore union democracy to rank-and-file union members. Accordingly, in most of the Government civil RICO cases involving labor unions, courts have imposed various union election reforms, including: (1) requiring election of new officers; and (2) appointing court-officers to promulgate election rules, conduct and oversee union elections to guarantee uncoerced and untainted elections, and to review and approve candidates for union office.<sup>271</sup> Indeed, in the International Brotherhood of Teamsters Union Case, the district court approved a consent decree requiring the IBT to amend its Constitution to provide, for the first time, elections of the IBT General President and other International Officers by direct rank-and-file secret balloting. See

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<sup>271</sup> See:

- (1) The Teamsters Local 560 Case; App. B at 3-6; United States v. Local 560 (I.B.T.), 736 F. Supp. 601 (D.N.J. 1990);
- (2) The Local 6A, Cement and Concrete Workers Case; see App. B at 16-17;
- (3) The Bonanno Family Case; see App. B at 22-24;
- (4) The International Brotherhood of Teamsters Union Case; see App. B at 47-51; see also the following decisions all entitled United States v. Int'l Bhd. of Teamsters: 247 F.3d 370 (2d Cir. 2001); 723 F. Supp. 203 (S.D.N.Y. 1989), aff'd as modified, 931 F.2d 177 (2d Cir. 1991); 742 F. Supp. 94 (S.D.N.Y. 1990), aff'd as modified, 931 F.2d 177 (2d Cir. 1991); 764 F. Supp. 787 (S.D.N.Y. 1991); 782 F. Supp. 243 (S.D.N.Y. 1992); 803 F. Supp. 761 (S.D.N.Y. 1992), aff'd and reversed in part, 998 F.2d 1101 (2d Cir. 1993);
- (5) The ILA Local 1804-1 Case; see App. B at 100-02;
- (6) The IBT Local 295 Case; see App. B at 117;
- (7) The New York Carpenters Union Case; see App. B at 125-27; United States v. Dist. Council of New York City & Vicinity of the United Bhd. of Carpenters and Joiners of America, 880 F. Supp. 1051 (S.D.N.Y. 1995);
- (8) The HEREIU Local 54 Case; see App. B at 135-38;
- (9) The Teamsters Local 282 Case; see App. B at 154;
- (10) The Mason Tenders District Council of Greater New York Case; see App. B at 166; United States v. Mason Tenders Dist. Council of Greater New York, 1994 WL 742637 (S.D.N.Y. Dec. 27, 1994); 1997 WL 340993 (S.D.N.Y. June 20, 1997); and 1997 WL 345036 (S.D.N.Y. June 20, 1997);
- (11) The HEREIU Case; see App. B at 200-2001;
- (12) The Chicago District Council of LIUNA Case; see App. B at 214-15, 218;
- (13) The LIUNA Local 210 Case; see App. B at 221-25;
- (14) The HEREIU Local 69 Case; see App. B at 234.

App. B at 47-48; United States v. Int'l Bhd. of Teamsters, 931 F.2d 177 (2d Cir. 1991); United States v. Int'l Bhd. of Teamsters, 803 F. Supp. 761, 767-772, 774-76 (S.D.N.Y. 1992) (the IBT election rules are set forth as exhibit A at 803 F. Supp. at 800-806), aff'd and reversed in part, 998 F.2d 1101 (2d Cir. 1993).

**6. Removal of Persons From Union Office and Membership, and Prohibitions on Holding Union Office or Membership**

As demonstrated in Sections II(C)(4) and VII(D) above, 18 U.S.C. § 1964(a) authorizes district courts to remove a person from a position or office and to bar a person from holding a position or engaging in specified activity in the future when:

- (1) Such person is a named defendant in a civil RICO action pursuant to 18 U.S.C. § 1964(a) and is found to have violated RICO after due notice and a trial, summary judgment, or other appropriate adjudicatory proceeding, or by default; or
- (2) Such person, whether or not named as a defendant in a civil RICO action, is subject to an injunction issued pursuant to 18 U.S.C. § 1964(a), and is found after due notice and an appropriate adjudicatory proceeding, or by default, to have violated, or aided and abetted one or more named defendant's violation of a provision of a district court's injunction or judgment order that warrants removal; or
- (3) Such person, even though not named as a defendant in a civil RICO action nor otherwise subject to an injunction issued pursuant to 18 U.S.C. § 1964(a), is found after due notice and an appropriate adjudicatory proceeding, or by default, to have aided and abetted an enjoined person's violation of a district court's injunction or judgment order that warrants removal.

Accordingly, in many Government civil RICO cases involving labor unions, courts have removed persons found to have violated RICO from membership or holding an office in a labor union, and prohibited such persons from holding membership or office in a labor union in the future, or have otherwise prohibited such person from engaging in activities related to union

matters.<sup>272</sup>

Moreover, in all 22 filed Government civil RICO cases involving labor unions, courts have authorized such sanctions and other sanctions for persons who consented to such sanctions, or who, after an appropriate adjudicatory procedure, were found to have violated the district courts' injunctions or other court orders.<sup>273</sup> But see United States v. Local 30, United Slate, Tile,

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<sup>272</sup> See:

(1) The Teamsters Local 560 Case, see App. B at 3-12; United States v. Local 560 of the Int'l Bhd. of Teamsters, 581 F. Supp. 279, 321, 336-37 (D.N.J. 1984), aff'd, 780 F.2d 267, 295-96 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1988); United States v. Local 560 of the Int'l Bhd. of Teamsters, 694 F. Supp. 1158, 1160-62, 1191-92 (D.N.J. 1988), aff'd, 865 F.2d 252 (3d Cir. 1986) (Table); United States v. Sciarra, 851 F.2d 621, 623-24, 632-33 (3d Cir. 1988);

(2) The Local 6A Cement and Concrete Workers Case, see App. B at 17;

(3) The Local 30, Roofers Union Case, see App. B at 30-32; United States v. Local 30, United Slate, Tile and Composition Roofers, 686 F. Supp. 1139, 1162, 1171-74 (E.D. Pa. 1988), aff'd, 871 F.2d 401, 407-09 (3d Cir. 1989);

(4) The Private Sanitation Industry of Long Island Case, see App. B at 89-94; United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 811 F. Supp. 808, 818 (E.D.N.Y. 1992), aff'd, 995 F.2d 375 (2d Cir. 1993); United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 899 F. Supp. 974, 983-84 (E.D.N.Y. 1994), aff'd 47 F.3d 1158 (2d Cir. 1995) (Table);

(5) The ILA Local 1804-1 Case, see App. B at 101-02, 105-07; United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 831 F. Supp. 177, 191-92 (S.D.N.Y. 1993), aff'd and vacated in part on other grounds, United States v. Carson, 52 F.3d 1173, 1183-85 (2d Cir. 1995);

(6) The IBT Local 295 Case, see App. B at 117-18; United States v. Local 295 of the Int'l Bhd. of Teamsters, 784 F. Supp. 15, 19 (E.D.N.Y. 1992);

(7) The Teamsters Local 282 Case, see App. B at 152-54; United States v. Local 282 of the Int'l Bhd. of Teamsters, 13 F. Supp.2d 401, 402 (E.D.N.Y. 1998), aff'd in part and vacated and remanded on other grounds in part, 215 F.3d 283 (2d Cir. 2000);

(8) The Mason Tenders District Council Case, see App. B at 173-74; United States v. Mason Tenders Dist. Council of Greater New York, 1995 WL 679245 (S.D.N.Y. Nov. 15, 1995).

<sup>273</sup> See: (1) App. B at 3-7; United States v. Local 560 of the Int'l Bhd. of Teamsters, 736 F. Supp. 601 (D.N.J. 1990), United States v. Local 560 of the Int'l Bhd. of Teamsters, 754 F. Supp. 395 (D.N.J. 1991), aff'd 974 F.2d 315 (3d Cir. 1992);

(2) App. B at 16-17; United States v. Local 6A, Cement & Concrete Workers, Laborers Int'l Union of North America, 832 F. Supp. 674 (S.D.N.Y. 1993);

(3) App. B at 23-24;

(continued...)

and Composition Roofers, 686 F. Supp. 1139, 1167-68 (E.D. Pa. 1988), aff'd, 871 F.2d 401 (3d Cir. 1989) (the district court rejected the Government's argument that the court should remove newly elected union officers who were not defendants and who were not found to have violated RICO, because they were close to the defendants found liable for RICO violations and were likely "to follow the course that the old regime did").

## 7. Disgorgement

As noted in Section II(C)(3) above, there is a conflict between the Second Circuit and the District of Columbia Circuit regarding the issue whether disgorgement is an available remedy

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- <sup>273</sup>(...continued)
- (4) App. B at 30;
  - (5) App. B at 37-39;
  - (6) App. B at 41;
  - (7) App. B at 47-51; United States v. Int'l Bhd. of Teamsters, 247 F.3d 370 (2d Cir. 2001) and cases cited at App. B at 51, n. 7;
  - (8) App. B at 81;
  - (9) App. B at 86, 91;
  - (10) App. B at 101-102; United States v. Local 1804-1, Int'l Longshoremen's Ass'n, et al., 831 F. Supp. 192 (S.D.N.Y. 1993);
  - (11) App. B at 115-18;
  - (12) App. B at 123, 126; United States v. Dist. Council of New York City of the United Bhd. of Carpenters and Joiners of America., 941 F. Supp. 349, 364-87 (S.D.N.Y. 1996);
  - (13) App. B at 136-38;
  - (14) App. B at 144-46;
  - (15) App. B at 152, 154-55;
  - (16) App. B at 165, 167-68, 173-75; United States v. Mason Tenders Dist. Council of Greater New York, 1994 WL 742637 (S.D.N.Y. Dec. 27, 1994); Investigations Officers v. Lanza, 1996 WL 514871 (S.D.N.Y. Sept. 10, 1996); United States v. Mason Tenders Dist. Council of Greater New York, 1998 WL 23214 (S.D.N.Y. Jan. 13, 1998);
  - (17) App. B at 196, 201-06; United States v. Hotel Employees and Rest. Employees Int'l Union, 974 F. Supp. 411 (D.N.J. 1997);
  - (18) App. B at 211-14, 219;
  - (19) App. B at 223-25;
  - (20) App. B at 231-34, 236-37;
  - (21) App. B at 241-42;
  - (22) App. B at 250-55.

under 18 U.S.C. § 1964. Courts in the Second Circuit have repeatedly held that disgorgement of a wrongdoer's ill-gotten gains is an equitable remedy available to the United States under 18 U.S.C. § 1964 (a).<sup>274</sup>

## **8. Relief Against Non-Parties**

In accordance with the authority set forth in Section VII(C)(2) above, courts have frequently imposed equitable relief against non-parties in Government civil RICO lawsuits. For example, in the Government's civil RICO suit against the International Brotherhood of Teamsters Union, courts have held that provisions of the Consent Decree entered into by the Government and the International Teamsters Union defendant, involving application of disciplinary rules and related sanctions and rules governing union elections, applied to Teamsters Union members and Teamsters Union affiliated entities that were non-parties and non-signatories to the Consent Decree on the grounds that: (1) the interests of such non-parties were adequately represented by the International Teamsters Union defendant, and (2) because the investigatory and disciplinary powers of the officers appointed under the Teamsters' Consent Decree are proper delegations of the powers of the IBT General President and the IBT's General Executive Board within the scope of the IBT Constitution that binds all members of the IBT.<sup>275</sup>

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<sup>274</sup> See United States v. Carson, 52 F.3d 1173, 1180-82 (2d Cir. 1995); United States v. Private Sanitation Indus. Ass'n, 914 F. Supp. 895, 900-01 (E.D.N.Y. 1996); United States v. Private Sanitation Indus. Ass'n, 899 F. Supp. 974, 983-84 (E.D.N.Y. 1994), aff'd, 47 F.3d 1158 (2d Cir. 1995); United States v. Private Sanitation Indus. Ass'n, 811 F. Supp. 808, 818 (E.D.N.Y. 1992), aff'd, 995 F.2d 375 (2d Cir. 1993); United States v. Int'l Bhd. of Teamsters, 708 F. Supp. 1389, 1408 (S.D.N.Y. 1989); United States v. Bonanno Organized Crime Family, 683 F. Supp. 1411, 1446-49 (E.D.N.Y. 1988), aff'd, 879 F.2d 20 (2d Cir. 1989).

<sup>275</sup> See, e.g., United States v. Int'l Bhd. of Teamsters, 998 F.2d 120, 124 (2d Cir. 1993); United States v. Int'l Bhd. of Teamsters, 964 F.2d 180, 183 (2d Cir. 1992); United States v. Int'l Bhd. of Teamsters, 931 F.2d 177, 184-87 (2d Cir. 1991); United States v. Int'l Bhd. of

(continued...)

Moreover, courts have enforced consent decrees against non-parties and non-signatories under the All Writs Act, 28 U.S.C. § 1651(a), when “necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.” See, e.g., United States v. Int’l Bhd. of Teamsters, 954 F.2d 801, 806-07 (2d Cir. 1992) (affirming district court order directing an employer to comply with the decision of a court officer appointed pursuant to the IBT Consent Decree to reinstate a union employee whom it had dismissed in retaliation for engaging in Teamsters union campaign activity, which was protected by election rules promulgated pursuant to the IBT Consent Decree); United States v. Int’l Bhd. of Teamsters, 948 F.2d 98, 101-105 (2d Cir. 1991) (approving district court’s authority to issue an order affirming a ruling by an officer appointed by the district court pursuant to the Teamsters Consent Decree granting non-employee members of the IBT access to the premises of the employer to campaign for union office, which order was necessary to effectuate the provisions of the Teamsters Consent Decree relating to holding open and fair elections for union officers); United States v. Int’l Bhd. of Teamsters, 907 F.2d 277, 279-281 (2d Cir. 1990) (affirming district court’s order enjoining all members and affiliates of the IBT from litigating issues related to a Consent Decree between the IBT and the Government in any court other than the Southern District of New York, where the Consent Decree was entered, as necessary to aid the Southern District of New York’s jurisdiction because collateral lawsuits in other jurisdictions “created a ‘significant risk of subjecting the

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<sup>275</sup>(...continued)

Teamsters, 905 F.2d 610, 622 (2d Cir. 1990); United States v. Int’l Bhd. of Teamsters, 808 F. Supp. 279, 282 (S.D.N.Y. 1992); United States v. Int’l Bhd. of Teamsters, 777 F. Supp. 1123, 1125-26 (S.D.N.Y. 1991) (collecting cases); United States v. Int’l Bhd. of Teamsters, 764 F. Supp. 787, 789-90 (S.D.N.Y. 1991); United States V. Int’l Bhd. of Teamsters, 745 F. Supp. 908, 912 (S.D.N.Y. 1990); Joint Council 73 v. Int’l Bhd. of Teamsters, 741 F. Supp. 491, 493 (S.D.N.Y. 1990).



Consent Decree to inconsistent interpretations and the Court Officers to inconsistent judgments.”<sup>276</sup>

### **C. Relief Obtained In Contested Civil RICO Cases Involving Labor Unions**

For the most part, the equitable relief discussed in Section VIII(B) above was obtained through consent decrees voluntarily agreed upon by the parties in the litigation. Substantially similar equitable relief also has been obtained in eight contested Government civil RICO cases involving labor unions over the objections of defendants, as discussed below.<sup>277</sup>

#### **1. The IBT Local 560 Case -**

United States v. Local 560 of the Int’l Bhd. of Teamsters, 581 F. Supp. 279 (D.N.J. 1984) (“Local 560”), was the first civil RICO suit brought by the United States against a labor union. In Local 560, 581 F. Supp. at 321, 336-37, following a bench trial, and over the objection of the defendants, the district court imposed an injunction, enjoining two defendants “from any future contacts of any kind with Local 560.” The district court also removed the members of the Local 560 Executive Board, who the court found had violated RICO, ordered a court-supervised election of new officers for Local 560, and appointed a Trustee who conducted the business and operations of Local 560. The trusteeship was imposed in order “to effectively dispel the existing atmosphere of intimidation within Local 560, to restore union democracy, and to ensure (to the

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<sup>276</sup> See also United States v. Sciarra, 851 F.2d 621, 629-633 (3d Cir. 1988) (affirming an order of the district court compelling non-parties to submit to depositions to effectuate the administration of a court imposed trusteeship over the defendant-union).

<sup>277</sup> Moreover, the case law involving equitable relief obtained through consent decrees is also relevant to the issue of what equitable relief is available in contested Government civil RICO cases over the objections of defendants, because a court may not approve a consent decree unless it determines that the terms of the consent decree are consistent with, and do not violate, the governing law, and that they further the objectives of the statute underlying the cause of action. See Section VII(A)(1) above.

extent possible) that racketeers do not obtain positions of trust within the Local.” Id. at 326.<sup>278</sup>

In United States v. Local 560 of the Int’l Bhd. of Teamsters, 780 F.3d 267, 295-96 (3d Cir. 1986), cert. denied, 476 U.S. 1140 (1986), the Third Circuit affirmed the district court’s relief, stating that the power to appoint “a trustee to be in charge of Local 560 . . . falls within the broad equitable powers granted to district courts under Section 1964(a), ” Id. at 296 n. 39, particularly the “broad remedial powers of ‘divestiture’ and ‘reasonable restrictions’ provided for under Section 1964.” Id. at 295.

During the course of the trusteeship, which was in place for over twelve years, the district court authorized the Trustee, subject to review by the district court, to, among other matters, administer the affairs of Local 560, negotiate contracts, hire and discharge employees and investigate acts of wrongdoing within the union.<sup>279</sup>

In particular, the powers of the court-appointed Trustee included, but were not limited to, the following:

- a. All powers accorded to the members of the Local 560 Executive Board, either individually or collectively, by virtue of the bylaws and constitutions of the Local and International Union;

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<sup>278</sup> The district court found that various defendants, including members and associates of the LCN and corrupt Local 560 officials, had created a climate of intimidation that induced Local 560 members to surrender their rights to union democracy through a pattern of racketeering activity involving several murders, extortion and the systematic appointment and re-appointment to union positions of persons with ties to organized crime and/or serious and extensive criminal records. See Local 560, 581 F. Supp. at 284-85, 290-92, 306-19.

<sup>279</sup> See App. B at 3-12. See also United States v. Local 560 of the Int’l Bhd. of Teamsters, Civil No. 82-689 (D.N.J. Opinion and Order dated May 12, 1987); United States v. Local 560 of the Int’l Bhd. of Teamsters, 694 F. Supp. 1158, 1160-62, 1191-92 (D.N.J. 1988), aff’d, 865 F.2d 252 (3d Cir. 1988)(Table); United States v. Sciarra, 851 F.2d 621, 623-24, 632-33 (3d Cir. 1988).

- b. All powers accorded to the offices formerly held by those persons removed from office pursuant to the Judgment Order of March 16, 1984, by virtue of the bylaws and constitutions of the Local and International Union;
- c. The power to enter into negotiations, execute contracts, pursue grievances, conduct organizing campaigns, and otherwise direct and engage in all lawful activities of Local 560;
- d. The power to initiate pursue, defend or settle litigation on behalf of Local 560 or its members in accordance with the lawful powers of the Union;
- e. The power to hire and discharge employees of Local 560 and set the wages, terms and conditions of employment, subject to any limitations that may be created by law or existing written contracts;
- f. The power to appoint and remove business agents, stewards and other representatives of Local 560, subject to any limitations that may be created by the bylaws and constitutions of the Local and International Unions;
- g. The power to retain or terminate any legal counsel, accountants, consultants or other professionals that he may deem necessary to the accomplishment of his duties under such terms and conditions as he may determine appropriate, including the fixing of compensation which shall be paid by Local 560;
- h. The power to make all determinations with respect to the affairs of Local 560 in any and all aspects of its operations; and
- i. The power to participate in the affairs of the Joint Council, the Benefit Plans and other bodies related to Local 560 to the same extent as was customary for Executive Board members prior to the imposition of, the Trusteeship.

See United States v. Local 560 of the Int'l Bhd. of Teamsters, Civ. No. 82-689 (D.N.J.

Opinion and Order dated May 12, 1987) at 6-7.

## **2. The Local 30, Roofers Union Case -**

In United States v. Local 30, United Slate, Tile and Composition Roofers,

686 F. Supp. 1139, 1162-1174 (E.D. Pa. 1988) ("Local 30, United Slate, Tile"), following an

evidentiary hearing, the district court found that defendants had violated RICO and imposed a “Decreeship” over the Roofers Union that included the following equitable relief over the defendants’ objections:

- a. The district court barred defendants who violated RICO “from the roofing industry within the jurisdiction of Local 30/30B.” Id. at 1162.
- b. The district court appointed a Chief Liaison Officer “who will serve as the principal enforcement officer of all provisions of the Decree,” id. at 1171, and “will have the authority, upon application and approval of [the District] Court, to hire such assistants and support services as will be needed to fulfill his responsibilities under the Decree.” Id. at 1169.
- c. The district court ordered an audit of all accounts of Local 30/30B and any affiliated entity by a designee of the Court. Id. at 1169, 1172.
- d. The district court barred all defendants found to have violated RICO “from holding, occupying, or controlling any position of leadership or influence in respect to any matter within the jurisdiction of Local 30/30B or any of its affiliated entities” and “from engaging in employment in the roofing or related construction industries, in any capacity, within the geographical area of the jurisdiction of Local 30/30B”. Id. at 1171.
- e. The district court ordered that Local 30/30B develop with the appropriate employer representative groups an industry-wide grievance/arbitration procedure for resolving contractual disputes between the union and employers, subject to the court’s approval. Id. at 1172-73.
- f. The district court ordered that all face-to-face collective bargaining agreement negotiations take place under the supervision of the Court Liaison Officer. Id. at 1172-73.
- g. The district court prohibited any collective bargaining agreement from taking effect until it was approved by the Court Liaison Officer. Id. at 1173.
- h. The district court established “direct control of all matters within the jurisdiction of the union that require the expenditure of any funds of the Union or any affiliated entity for the transfer of any of its assets” and enjoined defendants “from transferring any funds, property, or interests in any assets of any kind of Local 30/30B or any of its affiliated entities, except in the ordinary course of business without the express written

consent of the court.” Id. at 1172.

- i. The district court ordered that the “Court Liaison Officer shall have the right, without prior notice, to have access to any records, wherever located, at the offices, locations and other property of Local 30/30B or any affiliated entity” and to copy such records. Id. at 1173.
- j. The district court required the union to “provide written notice to the court of all meetings, proceedings, or decisions providing for nominations and/or elections for offices or positions within Local 30/30B, or any affiliated entity.” Id. at 1173.
- k. The district court prohibited the union and any affiliated entity and the individual defendants “in respect to any member within the jurisdiction of Local 30/30B, or any affiliated entity, from intimidating, inflicting violence, fear, or threats of personal or property damage upon any person, corporation or entity, or attempting to do so.” Id. at 1174.
- l. The district court retained jurisdiction of all matters relating to the union and any affiliated entity and ordered that “[a]ll costs incurred in the administration of the Decreeship shall be borne by Local 30/30B and, where appropriate, its affiliated entities.” Id.

In United States v. Local 30, United Slate, Tile and Composition Roofers, 871 F.3d 401, 404 (3d Cir. 1989), the Third Circuit affirmed this equitable relief, noting that “the District Court converted the preliminary injunction into a ‘final decree.’” The Third Circuit concluded that the relief granted was authorized by 18 U.S.C. § 1964(a), and that the District Court did not abuse its discretion in imposing a decreeship against the Roofers Union and deciding that the ordered relief was necessary to eliminate and prevent corruption in the union. Id. at 404-09.

The Third Circuit stated that, under Section 1964 of RICO, “[t]he district court is empowered not only to restrain but also to prevent future violations of § 1962 by ordering reorganization or even dissolution of any enterprise, as long as the court makes due provision for the rights of innocent parties.” Id. at 407. The Third Circuit also explained that the intrusive relief was necessary because the evidence “supports the district court’s finding that the removal

of the thirteen individual defendants would not have eliminated that corrupt influence from the Roofers Union.” Id. at 407. Finally, the court of appeals noted that the evidence showed:

that the newly elected officials are long time associates and allies of the thirteen individual defendants in this case, which indicates that corrupt influences continue to exist within the Union. [Consequently] the district court properly found a likelihood of wrongful acts continuing into the future.

Id. at 409.

### **3. The ILA Local 1804-1 Case -**

In United States v. Local 1804-1, Int’l Longshoremen’s Ass’n, 831 F. Supp. 177, 191-192 (S.D.N.Y. 1993), following a bench trial, the district court enjoined certain defendants found to have violated RICO:

(1) from committing any acts of racketeering, as defined in [18 U.S.C. § 1961]; (2) from having any dealings, directly or indirectly, with any members or associates of organized crime for any commercial purpose concerning the affairs of the Waterfront [Enterprise]. . . or any labor organization; and (3) from having any dealings, directly or indirectly, with any other defendant in this action for any commercial purpose concerning the affairs of the Waterfront [Enterprise] or any labor organization; and (4) from participating in any way in the affairs of or having any dealings, directly or indirectly, with (i) any labor organization. . . (ii) any officer, agent, representative, employee, or member of [several ILA locals], (iii) any other officer, agent, representative, employee, or member of the ILA, or any other labor organization concerning the affairs of such organization or the Waterfront [Enterprise]; and (iv) any person or entity that does business on the Waterfront; and (5) from visiting the site of any ILA entity or other labor organization or communicating with any person who is at the site of any ILA entity or other labor organization.

In United States v. Carson, 52 F.3d 1173, 1183-85 (2d Cir. 1995), the Second Circuit upheld this injunctive relief. The Second Circuit ruled that the above restrictions on the defendants were “reasonable,” not overly broad, were specifically authorized by Section 1964 (a)

that allows “reasonable restrictions on the future activities” of RICO violators (id. at 1183), and did not violate the defendants’ First Amendment rights to freedom of association.

**4. The IBT Local 295 Case -**

In United States v. Local 295 of the Int’l Bhd. of Teamsters, 784 F. Supp. 15 (E.D.N.Y. 1992), over the objection of Local 295, the district court imposed a court - trusteeship to conduct various operations of Local 295 and to conduct investigations to eliminate corruption within Local 295. The district court stated that it had authority to “appoint a trustee to oversee the affairs of a local union under [Section 1964(a) of RICO].” Id. at 19. The district court also quoted a Senate Report stating that “[t]he implementation of trusteeships under civil RICO is no longer a novel, one-time experiment. It is quickly being recognized as an extremely valuable part of effective law enforcement.” Id. at 19.

In a subsequent order, the district court authorized the Trustee, among other matters:

- a. “To conduct, administer and supervise the daily affairs of Local 295, including the power to handle grievances, arbitration and collect and disburse monies (including member dues) on behalf of the Local; [and negotiate, enter, and terminate contracts and leases]”.

. . .

- b. “To investigate corruption and abuse within Local 295, with or without probable cause, and with such investigative assistance as he deems appropriates.”

. . .

- c. To discipline, remove and replace any officer, administrator, organizer, business agent, employee, shop steward, negotiator, or trustee of Local 295, for just cause as follows:
  - i. The Trustee’s decisions with respect to discipline of members shall be final and binding. Any member’s appeal shall be to the United States District Court for the Eastern District of New York within fourteen days of receipt of the Trustee’s decision.

- ii. In any appeal pursuant to paragraph 2(e)(1), the standard of review shall be whether the Trustee’s decision is supported by a preponderance of the evidence. Such evidence may consist of or include hearsay.
  - iii. Any actions of the Trustee pursuant to this subparagraph shall be reviewable, exclusively by this Court, and are not subject to arbitration or other challenge under the IBT Constitution or Local 295 By-Laws.
- . . .
- d. To take possession of and review all current and past books, records, files, accounts and correspondence of Local 295 and the Executive Board.
  - e. [To conduct and supervise union elections].
  - f. “To subpoena witnesses and documents.”
  - g. “To take testimony formally or informally, on the record under oath before a court reporter or otherwise as the circumstances may require in the Trustee’s sole discretion.”
  - h. “To receive assistance of federal and local law enforcement” and to “refer possible violations of criminal law to federal or local law enforcement authorities.”
  - i. “To apply to the [district] Court for such assistance as may be necessary and appropriate to carry out the powers conferred upon the Trustee.”
  - j. To provide periodic written reports to the district court and the government.
  - k. To provide the Trustee with “all powers granted to Trustees of locals pursuant to the IBT Constitution and all powers formerly held by the Executive Board of [Local 295] to the extent that such powers, including the power to conduct hearings, discipline, remove and replace officers, employees and members, are broader than those enumerated [in the district court’s order].”
  - l. To petition the district court for modification of any of the terms of the district court’s order.

See App. B at 117-18.



## 5. The IBT Local 282 Case -

In United States v. Local 282 of the Int'l Bhd. of Teamsters, 13 F. Supp.2d 401 (E.D.N.Y. 1998), aff'd in part, and vacated and remanded in part, by 215 F.3d 283 (2d. Cir. 2000), based on Robert Sasso's guilty plea to a RICO conspiracy charge, the district court granted the Government's motion for summary judgment in its civil RICO action "to the extent of finding Sasso liable in that he 'conspired with the other individual defendants and members of organized crime to conduct the affairs of defendant Local 282 of the International Brotherhood of Teamsters as an enterprise through a pattern of labor racketeering activities, including acts of extortion and illegal receipt of money from employers, from the late 1970s through 1991 in violation of 18 U.S.C. § 1962(c).'" Id. at 402. The district court also permanently enjoined Sasso from: (1) "owning, operating, or working for any business in the construction, demolition, or excavation industries or part of the trucking industry which was engaged in construction, demolition, or excavation"; (2) "working in any capacity for any person or business doing business with the construction, demolition, or excavation industries and from associating for any commercial purpose with any member or associate of organized crime"; and (3) "from visiting the work sites of the International Brotherhood of Teamsters and, with limited exceptions, communicating with any person at these sites." Id. at 402.

The district court also ordered Sasso to pay 15% of the costs of a monitorship (i.e., \$136,000) that the district court had imposed over Local 282 pursuant to a Consent Decree. In so ruling, the district court stated:

The broad discretion in fashioning remedies granted by section 1964(a) affords this Court the power to order Sasso to fund the monitorship which the Consent Judgment created. Ordering Sasso to fund the monitorship does not violate the restraints on district courts'

powers under § 1964(a) emphasized in [*United States v. Carson*, 52 F. 3d 1173 (2d Cir. 1995)]. In *Carson*, the Second Circuit warned that district courts have the power to “prevent and restrain’ *future* conduct” but not the power to “punish *past* conduct.” *Carson*, 52 F.3d at 1182 (emphasis in original). The Second Circuit held that the *Carson* district court overstepped its jurisdiction by ordering Carson to disgorge profits he illicitly acquired eight years before the launch of the civil suit. *Id.* at 1182. Carson’s profits were garnered “too far in the past to be part of an effort to ‘prevent’ and ‘restrain future conduct.’” *Id.* (emphasis in original).

Here, in contrast, the plaintiff does not request that Sasso disgorge profits. Rather, plaintiff only moves the Court to order Sasso to contribute to the funding of the monitorship. As Judge Glasser noted, funding a monitorship furthers the prevention and the restraint of future illegal conduct. *See Private Sanitation Indus. Ass’n.*, 914 F. Supp. at 901, *surpra*. Here, there is no question that additional funding for the Local 282 monitorship will help prevent the illegal conduct Sasso fostered at Local 282. Indeed, the monitorship in this case was created for the express purpose of eradicating the possibility of future labor racketeering by Local 282 officials. Additionally, funding the monitorship will further prevent future illegal conduct by Sasso. Sasso will be deterred from engaging in labor racketeering because a fully funded monitorship is difficult to evade.

Id. at 403.

In *United States v. Sasso*, 215 F.3d 283 (2d Cir. 2000), on appeal of the above-referenced opinion, the Second Circuit held that the district court’s order requiring Sasso to fund a portion of the costs of the court-imposed Monitorship of Local 282 fell within the district court’s broad equitable powers under 18 U.S.C. § 1964. The Second Circuit distinguished its earlier opinion in *United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995), stating:

In *Carson*, we dealt with a disgorgement order, not with an order of contribution to the funding of a monitorship; and we reversed only to the extent that the sums ordered disgorged were not meant for the prevention of future RICO violations. Our remand plainly allowed an order requiring the payment of any amounts that were “intended solely to prevent and restrain future RICO violations.” 52 F.3d at 1182 (internal quotation marks omitted).

In the present case, we deal with an order for Sasso's payment of money into a fund that plainly is to be used to prevent further violations of section 1962.

Sasso, 215 F.3d at 291.

The Second Circuit also rejected Sasso's argument "that ordering contribution from him is inappropriate because he has now been enjoined from engaging in the pertinent activities, thereby preventing him from committing any future RICO offense." Id. at 291. The Second Circuit explained:

First, there was evidence from the Corruption Officer that Sasso, while imprisoned following his RICO conviction, had hundreds of communications with persons associated with organized crime, persons associated with Local 282, persons whose businesses were within the Local's jurisdiction, and persons who had previously made illegal payments to corrupt Local officials. That evidence easily demonstrates that there can be no effective monitorship without attention to Sasso's own current activities. Sasso's suggestion that such attention is unnecessary because he has been enjoined rings hollow in light of his postconviction conduct and in light of the pattern of concealment previously engaged in by the individual defendants, which included clandestine meetings, surreptitious money transfers, and lying under oath. Second, even if Sasso himself had not continued to have suspicious contacts with the persons described above, it would be well within the court's equity powers to conclude that Sasso, having engaged in conduct that corrupted the union, should bear part of the cost of eliminating that corruption.

Id. at 291.

The Second Circuit remanded the matter to the district court to make appropriate findings as to "how it arrived at 15 percent as Sasso's appropriate share of the [monitorship] expense." Id. at 292.

**6. The Mason Tenders District Council of LIUNA Case -**

In United States v. Mason Tenders Dist. Council of Greater New York,

1995 WL 679245 (S.D.N.Y. Nov. 15, 1995), the Government sought permanent injunctive relief against individual defendants Casciano, LaBarbara, Mandragona, Messera, Soussi, and Vario (“the Individual Defendants”), seeking to limit their involvement in organized crime, union affairs, and the construction and asbestos removal industries. Each of these defendants was at one time an official of the Mason Tenders District Council, the Trust Funds, or a constituent local union. Between 1989 and 1992, each had pled guilty to various racketeering charges. At the time the Government’s proposed injunctions were submitted, all of the Individual Defendants either had been recently released from prison for those offenses or were pending imminent release. The District Court rejected defendants’ argument that their guilty plea agreements precluded any relief in this action, noting that “[t]he RICO statute specifically contemplates simultaneous criminal and civil liability for the identical acts of a single defendant.” Id. at \* 21. The district court also rejected defendant Vario’s argument that the conditions of his supervised release subjected him to conditions that made the injunctive relief unnecessary.

The Government’s proposed injunction sought various restraints on the activities of the Individual Defendants, barring them from any further racketeering activity, all contacts with LCN members, all association with labor unions or the trust funds, all commercial activities involving the District Council or its unions, and involvement in the construction and asbestos removal industries. Several defendants filed various objections to the breadth and scope of these proposed restraints, asserting that the terms of the requested relief were vague and overbroad and violated their First Amendment rights. However, the District Court ruled that, under United

States v. Carson, 52 F.3d 1173 (2d Cir. 1995), and other government civil RICO cases, the court's authority to fashion equitable relief in order to accomplish RICO's purposes was very broad. In particular, the District Court enjoined the defendants from:

- a. committing any act of racketeering as defined in 18 U.S.C. § 1961;
- b. knowingly associating for commercial purposes, directly or indirectly, with any member or associate of organized crime, with any defendant in this action, with any member of the MTDC or its constituent locals, or with any owner, officer, agent, or employee of any business employing members of LIUNA, the MTDC, or the MTDC's constituent local unions;
- c. visiting any social clubs where commercial activities are discussed, or which is known to be frequented by members or associates of organized crime;
- d. participating in any way in the affairs of, or continuing as a member of, or having any dealings, directly or indirectly, with any labor organization or employee benefit fund, including, without limitation, any entity or employee benefit fund affiliated with LIUNA, the MTDC, or an MTDC constituent local, provided that nothing in this judgment shall prohibit any one of the Six Individual Defendants from (a) making application for or receiving a pension from the MTDC Pension Fund, or from communicating with the MTDC Pension Fund concerning these pension payments; (b) permitting any business not employing members of LIUNA, the MTDC, or the MTDC constituent local unions, which business employs any one of the Six Individual Defendants, from deducting money from his wages and from remitting such money to a labor organization not affiliated with LIUNA, the MTDC, or any MTDC constituent local; or (c) seeking and receiving benefits provided for by a collective bargaining agreement binding on any business not employing members of LIUNA, the MTDC, or the MTDC constituent local unions, which business employs any one of the Six Individual Defendants, or provided for by an ERISA-protected employee benefit plan established by that business;
- e. knowingly associating for any commercial purpose, directly or indirectly, with any officer, agent, delegate, representative, shop steward, or employee of any labor organization or employee benefit fund, including, without limitation, any labor organization or employee benefit fund affiliated with LIUNA, the MTDC, and the MTDC constituent locals;

- f. owning, operating, having any interest in or control of, doing business with, or having any commercial dealings, directly or indirectly, with any entity that employs members of LIUNA or the MTDC, including, but not limited to, such entities in the construction or asbestos removal industries.

Masson Tenders Dist. Council of Greater New York, 1995 WL 679245 at \* 22-23.

**7. The Private Sanitation Industry Ass'n Case -**

(1.) In United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 811 F. Supp. 808 (E.D.N.Y. 1992), aff'd, 995 F. 2d 375 (2d Cir. 1993), the district court granted the Government's motion for partial summary judgment, providing for broad injunctive relief against defendant Salvatore Avellino, and denied Avellino's request for a continuance to conduct discovery pursuant to FED. R. CIV. P. 56(f).

The complaint alleged, and the district court found, that Avellino, a capo in the Luchese LCN Family and hidden owner in two corporate defendant carting companies, collected extortion payments and tribute from area carters. Avellino divided these illegal proceeds between the Luchese LCN Family and the Gambino LCN Family, which controlled IBT Local 813, the union that represented workers employed by employers engaged in the solid waste industry on Long Island. To control the carting industry, Avellino used and threatened to use force against rebel carters, controlled bidding on certain jobs, and bribed public and union officials to ensure continued control of the carting industry. 811 F. Supp. at 810-11.

The district court rejected Avellino's contention that the broad injunctive relief sought by the Government impermissibly infringed on his constitutional right of association. In that respect, the district court ordered that:

- a. defendant Avellino refrain from participating directly or indirectly in the carting industry, any company engaged in the business of carting, any trade waste association and in the affairs of Local 813;

- b. defendant Avellino be divested of his interests in the carting industry and in PSIA enterprises;
- c. defendant Avellino disgorge the illicit proceeds of his racketeering activity;
- d. defendant Avellino refrain from associating with the other defendants in this action for any commercial purpose; and
- e. defendant Avellino refrain from associating with known members and associates of organized crime for any commercial purpose.

811 F. Supp. at 818.

The district court, citing United States v. Bonanno Organized Crime Family of La Cosa Nostra, 683 F. Supp. 1411, 1441 (E.D.N.Y. 1988), aff'd, 879 F.2d 20 (2d Cir. 1989), ruled that 18 U.S.C. § 1964(a) granted the court authority “to enter reasonable injunctions against violators restricting their future business activities.” 811 F. Supp. at 818. The district court found that the injunction against associating with other defendants and with known members and associates of organized crime was “designed to further the significant governmental interest in eliminating the insidious impact upon a captive community of corruption and racketeering in the Long Island carting industry.” Id.

(2.) In United States v. Private Sanitation Indus. Ass’n of Nassau/Suffolk, Inc., 899 F. Supp. 974 (E.D.N.Y. 1994), aff’d 47 F.3d 1158 (2d Cir. 1995) (table), the district court granted the Government’s motion for summary judgment and broad injunctive relief against defendant Nicholas Ferrante. The complaint alleged, and the district court found, that Ferrante, a reputed associate of the Lucchese LCN Family and owner of two Long Island carting companies, was a close associate of Salvatore Avellino, an alleged Capo in the Lucchese LCN Family, and assisted Avellino on a regular basis in collecting extortion payments and tribute from area carters. In

reaching its conclusion that Ferrante failed to show a genuine issue of fact as to his civil liability, the district court found that under principles of collateral estoppel, Ferrante's guilty plea in state court to coercion in the first degree conclusively established that he had committed one predicate racketeering act and that undisputed evidence submitted by the Government established the second predicate act alleged, second degree bribery under New York State Penal Law Section 200.00. 899 F. Supp. at 980-82. Ferrante's liability for the bribery charge, the district court found, was based on the adverse inference which arises when a defendant invokes the privilege against self-incrimination and "independent corroborative evidence of the matters to be inferred" presented by the Government. *Id.* at 982 (citations omitted).

The district court found Ferrante liable for a RICO violation and enjoined Ferrante from:

(i) engaging in any activities involved in connection with the collection, transportation or disposal of solid waste, (ii) violating, aiding or abetting the violation of, and/or conspiring to violate any of the provisions of Title 18, United States Code Section 1961 *et seq.*, (iii) participating in the affairs of PSIA or other trade waste association, and from participating in the affairs of Local 813 and its Trust Funds, any other union and its trust funds, (iv) associating with any other defendant or member or associate of organized crime for any commercial purpose and (b) ordered to divest his interests in the named enterprises and to disgorge the proceeds derived from his unlawful conduct and participation therein into a Court-administered fund.

899 F. Supp. at 983-84.

(3.) In United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 914 F. Supp. 895 (E.D.N.Y. 1996), the district court granted the Government's motion for summary judgment against defendants Sanitation and U-Need-a-Roll Off. Corp., finding that under principles of collateral estoppel, the corporate-defendants' guilty pleas to criminal charges conclusively established that they committed the racketeering acts charged against them in the



civil RICO suit. Id. at 896-98.

The district court ruled that United States v. Carson, 52 F.3d 1173 (2d Cir. 1995), did not preclude its order requiring Ferrante and the corporate defendants to disgorge the proceeds of their RICO violations because “unlike Carson, the defendants in this case continue to be actively involved in the identical activities upon which this RICO suit is predicated,” and hence “the monies these corporations gained illegally obviously constitute capital available for the purpose of funding or promoting the illegal conduct.” 914 F. Supp. at 901.

The district court also ordered that the defendants were subject to the same equitable relief provided in the Consent Judgment entered by the district court on February 28, 1994. Id. at 901-02. See App. B at 85-87.

**8. The LIUNA Local 6A Case -**

In United States v. Local 6A, Cement and Concrete Workers, Laborers International Union of North America, Complaint No. 86 Civ. 4819 (S.D.N.Y.), in an order entered April 23, 1987, the district court granted the Government’s motion for summary judgment against eight alleged organized crime figures and permanently enjoined them from:

- 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.

See App. B at 17.

**D. Union Officials and Entities As Nominal Defendants**

**1. Evidence of Wrongdoing is Not Required to Obtain Relief Against a Nominal Defendant**

Rule 19 (a), FED. R. CIV. P. provides as follows:

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect the interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

Pursuant to Rule 19(a)(1), FED. R. CIV. P., a person may be joined as a “nominal defendant” when joinder is necessary to afford “complete relief . . . among those already parties,” even though: (1) no cause of action is asserted against the nominal defendant; (2) the nominal defendant is not liable for any wrongdoing; and (3) there is no evidence of wrongdoing by the nominal defendant.<sup>280</sup>

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<sup>280</sup> See, e.g., Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 400 (1982); Int'l Bhd. of Teamsters v. United States 431 U.S. 324, 355-56 n.43 (1977); Providence Bank v. Patterson, 390 U.S. 102, 107-08 (1968); City of Syracuse v. Onondaga County, 464 F.3d 297, 307-11 (2d Cir. 2006); Commodity Future Trading Comm'n v. Kimberlynn Creek Ranch, Inc., 276 F.3d 187, (continued...)

For example, in Teamsters v. United States, 431 U.S. 324 (1977), the United States brought a civil rights suit against a nationwide common carrier and a union that represented many of the company's employees, alleging that the company had engaged in a pattern of discrimination against "Negroes and Spanish-surnamed" persons by giving them lower paying, less desirable jobs than whites. The Supreme Court ruled that the union did not engage in any misconduct and that the injunction against it must be vacated. However, the Court ruled that the union should remain "as a defendant so that full relief may be awarded the victims of the employer's . . . discrimination." Id. at 356 n.43. In that regard, the Supreme Court directed that, on remand, the district court was to determine which minority members were actual victims of discrimination and "balance the equities of each minority employee's situation in allocating the limited number of vacancies that were discriminatorily refused to class members." 431 U.S. at 371-72.

Similarly, in EEOC v. MacMillian Bloedel Containers, Inc., 503 F.2d 1086, 1095-96 (6th Cir. 1974), the Equal Employment Opportunity Commission ("EEOC") sued MacMillian Bloedel Containers, Inc., ("MacMillian") for alleged race and sex discrimination. A union which represented MacMillian's employees argued that it was improperly joined as a nominal defendant under Rule 19(a), FED. R. CIV. P., because it was not charged with any unlawful conduct and that

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<sup>280</sup>(...continued)

191-93 (4th Cir. 2002); Local 1351 Int'l Longshoreman's Ass'n v. Sea-Land Servs. Inc. 214 F.3d 566, 569-70 (5th Cir. 2002); SEC v. Cavanagh, 155 F.3d 129, 136 (2d Cir. 1998); SEC v. Coello, 139 F.3d 674, 675-77 (9th Cir. 1998); Shaw v. Dow Brands, Inc., 994 F.2d 364, 369 (7th Cir. 1993); SEC v. Cherif, 933 F.2d 403, 414 (7th Cir. 1991), EEOC v. MacMillian Bloedel Containers, Inc., 503 F.2d 1086, 1095-96 (6th Cir. 1974); Selfix, Inc. v. Bisk, 867 F. Supp. 1333, 1335-36 (N.D. Ill. 1994); SEC v. Egan, 856 F. Supp. 401, 402 (N.D. Ill. 1993); SEC v. Antar, 831 F. Supp 380, 399 (D.N.J. 1993); Eldredge v. Carpenters 46 N. Cal. Joint Apprenticeship and Training Comm., 440 F. Supp. 506, 518 -524 (N.D. Cal. 1977).

it was “inequitable [to be] put through the expense of hiring an attorney and doing involuntary discovery work for EEOC.” Id. at 1096. The Court of Appeals rejected the union’s arguments, upholding the district court’s finding that it was appropriate to join the union as a nominal defendant “because the decree entered by the court may affect, in some way, its collective bargaining agreement” with MacMillian. Id. at 1095.<sup>281</sup>

Moreover, in Commodity Futures Trading Commission v. Kimberlynn Creek Ranch, Inc., 276 F.3d 187, 191-93 (4th Cir. 2002), the Fourth Circuit rejected nominal defendants’ argument that an injunction, which froze their assets and directed them to transfer those assets to a court appointed receiver, could not be imposed against them because they were not accused of any unlawful conduct. The Fourth Circuit explained that the district court had broad equitable authority to order the transfer of assets alleged to be unlawful proceeds held by the nominal defendants because the nominal defendants were simply holding the alleged proceeds on behalf of the defendants who were charged with unlawful conduct, and hence the relief against the nominal defendants was necessary to effectuate the relief against defendants accused of wrongdoing.

## **2. Nominal Defendants in Government Civil RICO Cases Involving Labor Unions**

In accordance with the above-referenced authority, the Government has often named union entities and union officials as nominal defendants in order to obtain full and effective relief. See App. B at 1, 27-28, 43, 95, 133, 139, 157-58, 243-44. As the court observed in United States v. Local 359, United Seafood Workers, Smoked Fish & Cannery Union,

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<sup>281</sup> The Court of Appeals added that “[a]s a practical matter, the union need not play a role in the litigation until the court finds that MacMillian” had engaged in the alleged violations. 503 F.2d at 1095.

1991 WL 230613, \*2 (S.D.N.Y. Oct. 24, 1991), “it is common practice in [Government] civil RICO cases to add as nominal defendants entities that are not themselves charged with RICO violations but that would be directly affected by the equitable relief sought.”

For example, in United States v. Local 560 of the Int’l Bhd. of Teamsters, 581 F. Supp. 279, 337 (D.N.J. 1984), aff’d, 780 F.2d 267 (3d Cir. 1986), the district court found that various defendants, including corrupt union officials and persons associated with organized crime, had created a climate of intimidation in Local 560 through murder and other acts of violence and misconduct, that induced Local 560 members to surrender their rights to democratic participation in internal affairs. See Section VIII(C)(1) above. The district court ruled that Local 560 and its benefit funds and plans were not liable for violating RICO because, although their employees and representatives had committed the charged racketeering acts in the scope of their employment, such persons were not intending to benefit their principals, as is required to impose liability against a principal under the principles of “Respondeat Superior.” See generally, Section III(B)(2) above. However, the district court retained Local 560 “as a nominal defendant to effectuate the equitable relief heretofore specified and as may be ordered in the future.” Local 560, 581 F. Supp. at 337.

In that regard, the district court removed the Executive Board of Local 560, who were found to have violated RICO, and the district court appointed a trustee to administer and oversee the affairs of Local 560, and ordered new elections for Local 560’s offices. See App. B at 3-4; Section VIII(C)(1) above. Therefore, it was necessary to retain Local 560 as a nominal defendant because the relief granted directly effected Local 560 and was necessary to cure the ill effects on Local 560 caused by the defendants’ wrongdoing.

In United States v. Dist. Council of New York City and Vicinity of the United Bhd. of Carpenters and Joiners of America, 778 F. Supp. 738, 752, n.7 (S.D.N.Y. 1991), the district court rejected a defendant's argument that the RICO complaint should be dismissed against him because he was not charged with committing any racketeering acts. The district court explained that the defendant "is a nominal defendant who must be included to ensure effective relief." Id. at 752, n.7. Similarly, in United States v. Int'l Bhd. of Teamsters, 708 F. Supp. 1388, 1401-02 (S.D.N.Y. 1989), the district court rejected the pre-trial argument of the General Executive Board ("GEB") of the IBT that the RICO complaint should be dismissed against it because the GEB was charged only as a nominal defendant, was not charged with any wrongdoing, and was not a "person" within the meaning of RICO that could be charged as a defendant. The district court explained that if the evidence demonstrated that the GEB is not a proper defendant because it is in fact not a person under 18 U.S.C. § 1963(3), then the GEB could not be included as a nominal defendant, and the RICO complaint would be dismissed against the GEB. Id. at 1402.

In United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 831 F. Supp. 192, 194-99 (S.D.N.Y. 1993), the district court approved a consent decree between the Government and the New York Shipping Association's ("NYSA") employers which imposed equitable relief against the NYSA employers who were nominal defendants, including the appointment of court officers to take necessary actions to remove and prohibit organized crime figures and other corrupt persons from employment on the alleged waterfront RICO enterprise.<sup>282</sup>

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<sup>282</sup> See also United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 812 F. Supp. 1303, 1308, n.2 (S.D.N.Y. 1993) (The district court noted in passing that "[t]he union locals, the waterfront employers, and the employers' organizations were not named as RICO violators, but as nominal defendants in order to effectuate complete relief."); United States v. Local 359, United Seafood Workers, Smoked Fish & Cannery Union, 1991 WL 230613 (S.D.N.Y. Oct. 24, (continued...))

In sum, courts may order relief against unions and other entities that are named as nominal defendants even though they are not accused of, or found liable for, RICO violations in order to enable the United States to obtain full and effective relief against defendants found to have committed RICO violations. This is especially the case when it is necessary to impose relief to cure the adverse effects upon unions by corrupt union officials and their conspirators found to have violated RICO, such as ordering new, untainted elections for union officials and appointing officers to administer and oversee union operations to eliminate corruption and prevent future corruption within unions.

#### **E. Specific Issues in Government Civil RICO Cases Involving Labor Unions**

##### **1. State Action and Due Process Considerations**

a. It is well established that the constitutional guarantees of due process of law and most other constitutional rights “are protected only against infringement by governments,” and such rights afford no protection against purely private conduct. Lugar v. Edmonson Oil Co., 457 U.S. 922, 936 (1982), quoting Flagg Bros, Inc. v. Brooks, 436 U.S. 149, 156 (1978). Accord Blum v. Yaretsky, 457 U.S. 991, 1002-03 (1982); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171-73 (1972); Shelley v. Kraemer, 334 U.S. 1, 13 (1948). Therefore, a person claiming that his constitutional rights have been violated must establish that the alleged violation was “fairly attributable” to “state action” before he is entitled to relief for such violations. See, e.g., Lugar, 457 U.S. at 936-39. Accord Blum, 457 U.S. at 1002-05.

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<sup>282</sup>(...continued)

1991) (denying motion of nominal defendants Benefits Funds for an award of attorneys’ fees and cost, finding that the Government acted with reasonable justification in naming the Benefit Funds as nominal defendants to effectuate the prospective equitable relief it sought).

The Supreme Court has adopted a two-part approach to determine whether an alleged deprivation of a constitutional right is “fairly attributable” to the requisite “state action”:

First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible . . . .  
Second, the party charged with the deprivation must be a person who may fairly be said to be a State actor. This may be because he is a State official, because he has acted together with or has obtained significant aid from State officials, or because his conduct is otherwise chargeable to the State.

Lugar, 457 U.S. at 937.

Moreover, “[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the state for purposes” of establishing the requisite state action.

Blum, 457 U.S. at 1004 quoting Jackson v. Metro Edison Co., 419 US 345, 350 (1974). “The complaining party must also show that ‘there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.’” Blum, 457 U.S. at 1004 quoting Jackson, 419 U.S. at 350-51. Likewise, “[m]ere approval of or acquiescence in the initiative of a private party is not sufficient to justify holding the State responsible for those initiatives” for purposes of establishing the requisite state action. Blum, 457 U.S. at 1004-05. However, “the required nexus may be present if the private entity has exercised powers that are ‘traditionally the exclusive prerogative of the state.’” Blum, 457 U.S. at 1005 quoting Jackson, 419 U.S. at 353.

b. Applying these principles, courts repeatedly have held in the Teamsters Union civil RICO case brought by the United States that various actions by the court-officers appointed by the district court pursuant to the Teamsters Union Consent Decree did not constitute the requisite “state action,” and therefore could not provide the basis for alleged violations of



complainants' constitutional rights. For example, in United States v. Int'l Bhd. of Teamsters, 941 F.2d 1292, 1294-97 (2d Cir. 1991), the Investigations Officer ("IO") appointed by the district court pursuant to the Teamsters Union Consent Decree found, after an evidentiary hearing, that two officials of IBT Locals (Dominic Senese and Joseph Talerico) had violated the IBT Constitution by conducting themselves in a manner to bring reproach upon the IBT in that they, *inter alia*, knowingly associated with members of the LCN. As sanctions, the Independent Administrator ("IA") permanently removed the two officials from all of their IBT positions, expelled them from the IBT, and prohibited them from drawing any money from the IBT or its affiliated entities.

Senese and Talerico argued that the IA's imposition of sanctions violated their First, Fifth, and Eighth Amendment rights under the United States Constitution. The Second Circuit held that Senese and Talerico did not establish the requisite state action, stating:

First, in sanctioning Senese and Talerico, the IA acted pursuant to the IBT Constitution - a private agreement - and not pursuant to a "right or privilege created by the State." Thus, the charges he brought were premised on violations of Article II, section 2(a) of the IBT Constitution, not on violations of any federal or state law. Similarly, the IA's authority to impose the sanctions stemmed from the post-Decree amendments to the IBT Constitution, which established the IA and empowered him to oversee the IBT's internal disciplinary affairs, *see United States v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers, AFL-CIO*, 905 F.2d 610, 622 (2d Cir. 1990), and not from any provision of federal or state law. Thus, Senese and Talerico fail to satisfy the first element of the definition of state action set forth above [in Lugar].

Senese and Talerico are also unable to establish that the IA "may fairly be said to be a state actor." Lugar, 457 U.S. at 937, 102 S. Ct. at 2754. The IA has offices that are provided by the IBT, and the IBT pays his salary. Thus, the position is under the control of the IBT, and remains a private, not a governmental role.

United States v. Int'l Bhd. of Teamsters, 941 F.2d at 1296. The Second Circuit also ruled that the district court's affirmance of the IA's disciplinary action and the "governmental oversight of a private institution does not convert the institution's decisions into those of the State, as long as the decision in question is based on the institution's independent assessment of its own policies and needs." Id. at 1297. The Second Circuit concluded that "because the IA's decision to sanction Senese and Talerico was based on the policies and procedures embodied in the IBT's own Constitution, and not on state or federal law, the decision was not state action." Id. at 1297.<sup>283</sup> In any event, the Second Circuit also ruled that "Senese and Talerico's constitutional claims are entirely without merit." Id.<sup>284</sup>

## **2. First Amendment Issues**

Union members and officers have substantial First Amendment protections, involving their rights to associate together in a union to further their common interests and to participate in internal union affairs. See Section VIII(F) below and cases cited below in this Section.

However, courts have repeatedly held in Government civil RICO cases involving labor unions that such First Amendment rights "may be curtailed" to further the Government's "compelling

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<sup>283</sup> Accord United States v. Int'l Bhd. of Teamsters, 954 F.2d at 806-07; United States v. Int'l Bhd. of Teamsters, 838 F. Supp. 800, 811-12 (S.D.N.Y. 1993) (collecting cases); United States v. Int'l Bhd. of Teamsters, 791 F. Supp. 421, 425-26 (S.D.N.Y. 1992); United States v. Int'l Bhd. of Teamsters, 787 F. Supp. 345, 351 (S.D.N.Y. 1992), aff'd, 970 F.2d 1132 (2d Cir. 1992); United States v. Int'l Bhd. of Teamsters, 777 F. Supp. 1123, 1126, (S.D.N.Y. 1991); United States v. Int'l Bhd. of Teamsters, 777 F. Supp. 1133-1138 (S.D.N.Y. 1991); United States v. Int'l Bhd. of Teamsters, 764 F. Supp. 797, 801 (S.D.N.Y. 1991), aff'd 956 F. 2d 1162 (2d Cir. 1992) (Table).

<sup>284</sup> Other courts have likewise ruled in the alternative that the challenged conduct did not constitute "state action," and in any event did not violate the claimants' rights to due process (see Section VIII(B)(4)(b) above) or rights guaranteed by the First Amendment. See Section VIII(E)(2) below.

interest in eliminating the public evils of crime, corruption, and racketeering in union activity.”

United States v. Int’l Bhd. of Teamsters, 941 F. 2d at 1297 (citations and internal quotations omitted).<sup>285</sup>

For example, courts have upheld, against First Amendment challenges, injunctions prohibiting union members and officials from knowingly associating with union members, organized crime members and others associated with organized crime, or from participating in union affairs,<sup>286</sup> and have upheld disciplinary sanctions for such knowing association and other misconduct, including contempt and removal and permanent bar from holding union membership or union office.<sup>287</sup> Courts have also rejected First Amendment challenges to equitable relief

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<sup>285</sup> See generally Nat’l Society of Prof’l Eng’r v. United States, 435 U.S. 679 (1978), where the Court stated:

“[T]he District Court was empowered to fashion appropriate restraints on the Society’s future activities both to avoid a recurrence of the violation and eliminate its consequences. . . . While the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. . . . The First Amendment does not “make it . . . impossible ever to enforce laws against agreements in restraint of trade.”

Id. at 697 quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (internal citations omitted).

<sup>286</sup> See, e.g., Carson, 52 F. 3d at 1179, 1185; United States v. Private Sanitation Indus. Ass’n, 995 F. 2d 375, 377-78 (2d Cir. 1993); United States v. Local 560 of the Int’l Bhd. of Teamsters, 974 F.2d at 321, 339-46; United States v. Int’l Bhd. of Teamsters, 708 F. Supp. 1388, 1392-94 (S.D.N.Y. 1989); United States v. Mason Tenders Dist. Council of Greater New York, 1995 WL 679245 at \* 11-12 (S.D.N.Y. Nov. 15, 1995).

<sup>287</sup> See, e.g., United States v. Int’l Bhd. of Teamsters, 19 F.3d 816, 819, 823 (2d Cir. 1994); United States v. Int’l Bhd. of Teamsters, 998 F.2d at 124-27, n.4; United States v. Int’l Bhd. of Teamsters, 941 F.2d at 1295, 1297; United States v. Int’l Bhd. of Teamsters, 838 F. Supp. 800, 811-12 (S.D.N.Y. 1993), aff’d, 33 F. 3d 50 (2d Cir. 1994) (Table); United States v.

(continued...)

involving holding new union elections and imposition of union election procedures.<sup>288</sup>

### **3. Equitable Relief in Government Civil RICO Cases Does Not Violate, And Is Not-Pre-empted By, The NLRA, The LMRDA or Other Labor Laws**

#### **a. General Principles**

Courts have repeatedly rejected claims that various federal labor laws pre-empt charges and relief in Government civil RICO cases. The general principles governing such pre-emption claims are well established. “It is a cardinal principle of construction that repeals by implication are not favored. When there are two [federal] acts upon the same subject, the rule is to give effect to both if possible . . . the intention of the legislature to repeal must be clear and manifest.” United States v. Borden Co., 308 U.S. 188, 198 (1939)(citations and internal quotations omitted).

Moreover, to trigger pre-emption the two statutes must:

be in “irreconcilable conflict” in the sense that there is a positive repugnancy between them or that they cannot mutually coexist. It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem. Rather, when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective.

Radzanower v. Touche Ross & Co., 426 U.S. 148, 155 (1976) (citations and internal quotations omitted). Accord United States v. Batchelder, 442 U.S. 114, 122 (1979).

In making these determinations, courts consider various factors, including the primary purposes of the statutes, the degree of overlap in the statutory provisions, evidence of Congress’

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<sup>287</sup>(...continued)

Int’l Bhd. of Teamsters, 764 F. Supp. at 800-801. Cf. Hotel and Rest. Employees & Bartenders v. Read, 597 F. Supp. 1431, 1446-48 (D.N.J. 1984).

<sup>288</sup> See, e.g., United States v. Dist. Council, 778 F. Supp. at 762-64; United States v. Int’l Bhd. of Teamsters, 742 F. Supp. 94, 99-100 (S.D.N.Y. 1990), aff’d as modified, 931 F.2d 177 (2d Cir. 1991). Cf. United States v. Int’l Bhd. of Teamsters, 803 F. Supp. at 784-788.

clear intent to repeal, and whether the statutes are irreconcilably inconsistent such that it is necessary to pre-empt one to make the other work. See, e.g., Batchelder, 442 U.S. at 118-22; Radzanower, 426 U.S. at 155-58; Borden Co., 308 U.S. at 198-203.

These factors weigh heavily against pre-emption of RICO charges. RICO was enacted in 1970 (Pub. L. No. 91-452, 84 Stat. 941 (1970)), and its principal, although not exclusive, purpose was “to seek the eradication of organized crime in the United States . . . by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.” See 84 Stat. 922-23; United States v. Turkette, 452 U.S. 576, 588-89 (1981); see also, Sections II(B) and VIII(A)(2) above. To that end, RICO created new and expansive offenses – participating in the affairs of an enterprise through a pattern of racketeering activity, and conspiring to do so (18 U.S.C. §§ 1962(c) and (d)). By definition, the pattern of racketeering activity includes an extensive list of state and federal offenses, (see 18 U.S.C. § 1961 (1)), thereby indicating that Congress intended RICO to augment existing remedies.

The legislative history to RICO likewise firmly establishes that Congress adopted the civil and criminal remedies of RICO to add to, not subtract from, existing remedies. See Turkette, 452 U.S. at 589 (observing that Congress stated that it intended RICO to provide “enhanced sanctions and new remedies,” which expressly denotes Congress’ intent that RICO add remedies to existing ones.). See generally United States v. Sutton, 700 F.2d 1078, 1080-81 (6th Cir. 1983); United States v. Hartley, 678 F.2d 961, 992 (11th Cir. 1982), abrogated on other grounds, United States v. Goldin Indus, Inc., 219 F.3d 1268 (11th Cir. 2000). Moreover, Congress explicitly mandated that RICO “shall be liberally construed to effectuate its remedial

purposes.” Turkette, 452 U.S. at 587, quoting 84 Stat. 947. In sum, RICO’s broad purposes and legislative history compels the conclusion that, as a general rule, Congress did not intend RICO to be supplanted by other available remedies.<sup>289</sup>

**b. The NLRA Does Not Pre-empt Government Civil RICO Lawsuits**

In San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 240-44 (1959), the Supreme Court held under federal supremacy analysis that Congress intended, as a general rule, to vest the National Labor Relations Board (NLRB) with exclusive authority to decide: (1) whether an employee’s rights under Section 7 of the NLRA (29 U.S.C. § 157) to join a union, “to bargain collectively . . . and to engage in other concerted activities” were violated, and (2) whether an unfair labor practice was committed in violation of Section 8 (29 U.S.C. § 158) of the NLRA. In that regard the Court stated:

When it is clear or may fairly be assumed that the activities which a **State** purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, **due regard for the federal enactment requires that state jurisdiction must yield.**

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<sup>289</sup> See also United States v. Kragness, 830 F.2d 842, 864 (8th Cir. 1987) (“[n]othing in [RICO] shall supersede any provision of Federal . . . law imposing criminal penalties . . . in addition to those provided for in [RICO].”)(quoting Pub. L. No. 91-452, §§ 904(b), 84 Stat. 947); United States v. Deshaw, 974 F.2d 667, 671-72 (5th Cir. 1992)(“RICO’s statutory language reflects congressional intent to supplement, rather than supplant, existing crimes and penalties.”); Nat’l Asbestos Workers Med. Fund v. Philip Morris, 74 F. Supp.2d 221, 235-36 (E.D.N.Y. 1999) (“There are alternative remedies for every injury caused by the predicate acts of racketeers. A victim whose window or arm was broken by racketeering has a number of alternative tort claims from which to choose. The purpose of RICO was to superimpose another layer of remedies in order to deter racketeering. As the statute’s preface states, RICO is designed to ‘seek the eradication of organized crime in the United States . . . by providing **enhanced sanctions and new remedies.**’ Pub.L. No. 91-452, §§ 1, 84 Stat. 922, 923 (1970)”)(emphasis added).

359 U.S. at 244 (emphasis added).<sup>290</sup>

The Supreme Court, however, has cautioned that the doctrine of NLRA pre-emption is grounded in the specific congressional intent underlying the NLRA and “special factors” which do not readily apply to other regulatory schemes. See English v. Gen. Elec. Co., 496 U.S. 72, 86-87, n.8 (1990). Moreover, in United States v. Palumbo Bros. Inc., 145 F.3d 850, 861-76 (7th Cir. 1998), the Seventh Circuit held that well-established pre-emption principles compel the conclusion that the NLRA and other federal labor laws do not pre-empt a **federal** criminal RICO case (as distinguished from pre-empting state law) brought by the United States to vindicate the public’s interest in enforcement of the criminal laws, especially because of the differences in various statutes’ purposes, scope and remedies. Cf. Smith v. Nat’l Steel & Shipbuilding Co., 125 F.3d 751, 755 (9th Cir. 1997)(“the Supreme Court has indicated on several occasions that Garmon pre-emption is not implicated where the potential conflict is with federal law.”); United States v. Int’l Bhd. of Teamsters, 948 F.2d at 105 (“where federal laws and policies other than the NLRA are implicated, the Garmon rule is frequently considered inapplicable”).

In any event, the Garmon pre-emption doctrine is somewhat limited. Under Garmon and its progeny, the NLRA pre-empts a civil RICO charge “only when the Court would be forced to determine whether some portion of the defendant’s conduct violated [the NLRA] before a RICO predicate act would be established.” Tamburello v. Comm-Tract Corp., 67 F.3d 973, 978 (1st Cir. 1995)(citations omitted). Accord Brennan v. Chestnut, 973 F.2d 644, 646 (8th Cir. 1992)(“If the Court must look to the [NLRA] to define the fraud, then pre-emption applies.”).

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<sup>290</sup> The Supreme Court has recognized several exceptions to the general rule announced in Garmon. See Tamburello v. Comm-Tract Corp., 67 F.3d 973, 977 (1st Cir. 1995); Linn v. United Plant Guard Workers, 383 U.S. 53 (1966); Smith v. Evening News Ass’n, 371 U.S. 195 (1962).

Conversely, courts have repeatedly held that the NLRA does not pre-empt a RICO case where either the right or legal duty at issue is derived from law independent of the NLRA or the court is not required to determine whether the charged conduct violated the NLRA, even if the charged conduct violated both the NLRA and RICO's definition of unlawful racketeering activity.<sup>291</sup> Put another way, "civil RICO charges may survive Garmon pre-emption if the predicate acts are violative of federal law independent of the NLRA. However, **if the predicate acts are only illegal because of the proscriptions of the NLRA**, then the civil RICO charge must fail." Mariah Boat, Inc. v. Laborers Int'l Union of North America, 19 F. Supp.2d 893, 899 (S.D. Ill. 1998)(emphasis added).

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<sup>291</sup> See, e.g., Palumbo, Bros. Inc., 145 F.3d at 871-76 (holding that RICO predicate acts of mail fraud, based upon employers' scheme to defraud their employees of monetary benefits obtained through collective bargaining within the ambit of the NLRA, were not pre-empted since the unlawfulness of the charged conduct is determined by "the scope of the mail fraud statute"; the court stated (145 F.3d at 875) that "[t]he unfair labor practices implicated in the indictment cannot be defined solely in relation to federal labor law and policy; rather, that conduct also must be defined and analyzed in the context of the criminal offenses charged in the indictment"); United States v. Boffa, 688 F.2d 919, 930 (3d Cir. 1982)(holding that the NLRA did not pre-empt mail fraud and RICO charges where employees were defrauded of property rights independently derived from their rights under a collective bargaining agreement even though such rights "may have been obtained as a result of employees' exercise of rights guaranteed by section 7 of the NLRA"); United States v. Thordarson, 646 F.2d 1323, 1330-31 (9th Cir. 1981)(holding that the NLRA did not pre-empt RICO predicate acts involving union violence even if "the federal labor laws do reach union violence" where the charged conduct was made unlawful by criminal statutes independent of the NLRA); Mariah Boat, Inc. v. Laborers Int'l Union, 19 F. Supp.2d 893, 899 (S.D. Ill. 1998)(holding that mail and wire fraud predicate acts not pre-empted since the charged conduct was not illegal solely because of the NLRA); A. Terzi Productions, Inc. v. Theatrical Protective Union, 2 F. Supp.2d 485, 502-04 (S.D.N.Y. 1998)(same as to extortion predicate acts); Teamsters Local 372 v. Detroit Newspapers, 956 F.Supp. 753, 761 (E.D. Mich. 1997) ("predicate acts alleging robbery, arson, destruction of property . . . do not require an interpretation of labor law" and are not pre-empted); Nat'l Elec. Benefit Fund v. Heary Bros. Lightning Prot. Co., 931 F. Supp. 169, 185 (W.D.N.Y. 1995)("while these allegations also describe conduct proscribed by the NLRA as unfair labor practices . . . they are not pre-empted by the NLRA because they state RICO claims which do not require the resolution of labor law questions"). See also O'Rourke v. Crosley, 847 F. Supp. 1208, 1212-13 (D.N.J. 1994); Hood v. Smith's Transfer Corp., 762 F. Supp. 1274, 1286-87 (W.D. Ky. 1991).



In accordance with the foregoing authority, in United States v. Int'l Bhd. of Teamsters, 948 F.2d at 105-106, the Second Circuit held that provisions of the NLRA, 29 U.S.C. §§ 157 and 158(a)(1), did not vest exclusive jurisdiction in the NLRA and did not pre-empt a decision by the Independent Administrator, appointed by the district court pursuant to the Teamsters Union Consent Decree, “that granted non-employee members of the IBT access to premises of [an employer] to campaign for union office, and denied [the employer’s] application for declaratory and injunctive relief from that determination.” Id. at 99. See also, United States v. Private Sanitation Indus. Ass’n, 793 F. Supp. 1114, 1153-54 (E.D.N.Y. 1992) (holding that the NLRA did not pre-empt a Government civil RICO lawsuit against a labor union and other defendants); United States v. Int'l Bhd. of Teamsters, 708 F. Supp. 1388, 1394-95 (S.D.N.Y. 1989) (same).

**c. The LMRDA Does Not Pre-empt Government Civil RICO Lawsuits**

The Labor Management Reporting and Disclosure Procedure Act, 29 U.S.C. § 401-531 (“LMRDA”), guarantees union members the rights to vote in secret and to participate in fair and honest union elections, and provides causes of action to vindicate these rights. In particular, 29 U.S.C. §§ 411(a)(1) and (2) provide as follows:

(a)(1) Equal Rights

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization’s constitution and bylaws.

(a)(2) Freedom of Speech and Assembly

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U.S.C. § 412 provides as follows:

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

29 U.S.C. §§ 481(a), (b), (d), and (e) provide as follows:

(a) Officers of national or international labor organizations; manner of election

Every national or international labor organization, except a federation of national or international labor organizations, shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.

(b) Officers of local labor organizations; manner of election

Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

(d) Officers of intermediate bodies; manner of election

Officers of intermediate bodies, such as general committees, system boards, joint boards, or joint councils, shall be elected not less than once every four years by secret ballot among the members in good standing or by labor organization officers representative of such members who have been elected by secret ballot.

(e) Nomination of candidates; eligibility; notice of election; voting rights; counting and publication of results; preservation of ballots and records

In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this subchapter.

29 U.S.C. § 501(a) and (c) provide as follows:

(a) Duties of Officers; exculpatory provisions and resolutions void

The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any manner connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization for any profit received by him in whatever capacity in connection with transactions conducted by him under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(c) Embezzlement of assets: penalty

Any person who embezzles, steals, or unlawfully and willfully abstracts, converts to his own use or, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

Defendants in various Government civil RICO cases involving labor unions have argued that equitable relief in those cases (such as disciplinary procedures and sanctions, ordering new union elections, and procedures governing union elections) contravenes the rights and procedures set forth in the above-referenced provisions of the LMRDA, and that the LMRDA pre-empts such equitable relief because the LMRDA is the exclusive vehicle for vindicating the rights guaranteed by the LMRDA. Courts have uniformly rejected these claims under the pre-emption

principles set forth in Section VIII(E)(3)(a) and (b) above.<sup>292</sup>

**d. Other Labor Laws Do Not Pre-empt Government Civil RICO Lawsuits**

Courts have likewise held that other labor laws do not pre-empt Government civil RICO lawsuits. See, e.g., Local 1814 v. New York Shipping Ass'n, 965 F.2d 1224, 1231-39 (2d Cir. 1992) (holding that the anti-injunction provisions of the Norris-LaGuardia Act (29 U.S.C. §§ 101-115), which divests courts of jurisdiction to issue any injunction in a case involving or growing out of a labor dispute, did not pre-empt injunctive relief to further RICO's civil remedial purposes); United States v. Int'l Bhd. of Teamsters, 954 F.2d 801, 807-10 (2d Cir. 1992) (holding that the binding arbitration provisions of the Labor-Management Relations Act, 29 U.S.C. § 185, did not pre-empt the decisions of the Independent Administrator appointed by the district court pursuant to the Teamsters Union Consent Decree); United States v. Local 560 of the Int'l Bhd. of Teamsters, 694 F. Supp. 1158, 1187 (D.N.J. 1988) (holding that 29 U.S.C. § 504, which prohibits certain persons from holding union office, was not "the exclusive means by which a court can bar a person from holding union office," and hence did not pre-empt such relief in a Government civil RICO suit).<sup>293</sup>

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<sup>292</sup> See, e.g., United States v. Int'l Bhd. of Teamsters, 19 F.3d 816, 823 (2d Cir. 1994); United States v. Local 560 of the Int'l Bhd. of Teamsters, 974 F.2d 315, 346-47 (3d Cir. 1992); United States v. Int'l Bhd. of Teamsters, 931 F.2d 177, 188-89 (2d Cir. 1991); United States v. Local 560 of the Int'l Bhd. of Teamsters, 780 F.2d at 282-83; United States v. Int'l Bhd. of Teamsters, 838 F. Supp. at 812; United States v. Private Sanitation Indus. Ass'n, 793 F. Supp. at 1153-54; United States v. Int'l Bhd. of Teamsters, 782 F. Supp. 243, 249-250 (S.D.N.Y. 1992); United States v. Int'l Bhd. of Teamsters, 708 F. Supp. at 1394.

<sup>293</sup> Cf. United States v. Philip Morris Inc., 263 F. Supp.2d 72 (D.D.C. 2003) (holding that the Government's civil RICO suit against manufacturers of cigarettes and other tobacco-related entities was not pre-empted by Congress' regulatory scheme governing tobacco products, including the Federal Trade Commission Act (15 U.S.C. §§ 1331-40)).

**F. Extortion Of Union Members’ Rights To Free Speech and To Participate In Internal Union Democracy Guaranteed By The LMRDA**

In many of its civil RICO lawsuits involving labor unions, the Government has alleged that LCN figures and corrupt union officials have extorted union members’ rights to democratic participation in internal union affairs, as guaranteed by the LMRDA, in violation of the Hobbs Act, 18 U.S.C. § 1951. See Section VIII(A)(1) above.<sup>294</sup> Such alleged violations raise two significant issues: (1) whether such rights of union members constitute “property” within the meaning of the Hobbs Act; and (2) under what circumstances does a defendant “obtain” or “seek to obtain” such property rights within the meaning of the Hobbs Act.<sup>295</sup>

**1. Union Members’ Rights Under the LMRDA Constitute Intangible Property Within The Meaning of the Hobbs Act**

a. The Hobbs Act, enacted in 1946, was modeled on two New York sources: the Penal Code of New York and the Field Code, a 19<sup>th</sup> Century Model Penal Code.<sup>296</sup> New York law then defined extortion as “the obtaining of property from another, with his consent, induced by a wrongful use of force or fear” and further provided that “[f]ear . . . may be induced by a threat . . . [t]o do an unlawful injury to . . . property.” N.Y. Penal Code §§ 850, 851 (Consol.

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<sup>294</sup> It bears repeating that statutory protections, such as the LMRDA, may create property rights. See Section VII(D) above.

<sup>295</sup> The Hobbs Act, 18 U.S.C. § 1951(b)(2), provides, in relevant part, that:

The term “extortion” means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

<sup>296</sup> See 89 Cong. Rec. 3227 (1943); 91 Cong. Rec. 11, 900, 11, 906, 11, 910 (1945). See Scheidler v. Nat’l Org. For Women, Inc., 537 U.S. 393, 403 (2003); Evans v. United States, 504 U.S. 255, 261-62, 269 n.9, 264 (1992); United States v. Enmons, 410 U.S. 396, 406 n.16 (1973).

1909); accord Commissioners of the Code, Proposed Penal Code of the State of New York §§ 613 and 614 (1865). By the time the Hobbs Act was adopted, it was well-established that the meaning of “property” under New York’s extortion statute broadly extended to “real and personal property, things in action, money, bank bills and all articles of value,” as well as to intangible property; and that an injury to a business in the form of work stoppages occasioned by a strike constituted an “injury to property.” See People v. Barondes, 31 N.E. 240, 241-42 (N.Y. 1892). Accord People v. Hughes, 137 N.Y. 29, 37-39, 32 N.E. 1105 (N.Y. 1893)(head of union who threatened manufacturer that he would compel retail dealers to cease doing business with manufacturer unless the manufacturer hired union apprentices and paid him money threatened the requisite “injury to [manufacturer’s] property” and committed extortion); People v. Weinseimer, 117 A.D. 603, 102 N.Y.S. 579, 614 (1st Dept. 1907)(“an injury to one’s business is an injury to property within the provisions of the Penal Code defining the Crime of extortion, and that a loss resulting from the suspension or interruption of business would constitute an injury to property.”); People ex rel Short v. Warden of City Prison, 145 A.D. 861, 130 N.Y.S. 698, 700 (1st Dept. 1911), aff’d, 206 N.Y. 632 (N.Y. 1912)(“Property” under the extortion statute, Penal Law § 850, “is intended to embrace every species of valuable right and interest whatever tends in any degree, no matter how small, to deprive one of that right, or interest, deprives him of his property.”); People v. Wisch, 58 Misc. 2d 766, 296 N.Y. S. 2d 882, 885-86 (N.Y. Sup. Ct. 1969)(holding that “intangible property may be the subject of Extortion” under N.Y. Penal Law § 850, “[a] milk route which has a pecuniary value is property and may be the subject of an extortion,” and that threats to put milk dealers out of business are sufficient to support a charge of extortion). See also People v. Spatarella, 34 N.Y. 2d 157, 160, 162, 356 N.Y.S. 2d 566 (N.Y.

1994)(stating that the foregoing New York decisions have “consistently held” that the term “property” under the New York extortion statute includes “intangible rights,” such as a demand under threat of force that a business “give up a business customer”).<sup>297</sup>

By using New York extortion law as the model for the Hobbs Act, Congress specifically understood that “[i]t is a cardinal principle of the law, that a law when adopted in another state, or when being construed, it it [sic] be a state law, by a Federal court, carries with it all reasonable constructions placed upon it by the courts of the state of its origins.” See 89 Cong. Rec. 3197 (1943).<sup>298</sup> Therefore, it must be presumed that Congress intended the Hobbs Act to embrace the expansive meaning of property that was within the ambit of New York extortion law as established in the foregoing cases, which includes “everything of value” such as the intangible property rights to conduct one’s business and control its assets free from interruption caused by wrongful threats of force, violence or fear. Indeed, in accordance with the broad meaning of “extortion” under New York State law, federal courts have long interpreted “property” covered

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<sup>297</sup> By 1946, the Supreme Court had likewise held in a variety of contexts that “property” included intangible rights. See, e.g., Dorchy v. State of Kansas, 272 U.S. 306, 311 (1926) (“The right to carry on business - be it called liberty or property - has value. To interfere with this right without just cause is unlawful.”); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 465 (1921) (holding that the “complainant’s business of manufacturing printing presses and disposing of them in commerce is a property right.”). See also Carpenter v. United States, 484 U.S. 19, 26-27 (1987) (holding that property under the mail and wire fraud statutes (18 U.S.C. §§ 1341 and 1343) includes the “right to exclusive use” of confidential business information, including control over the timing of the release of the information, “for exclusivity is an important aspect of confidential business information and most private property for that matter.”). See also fn. 303 below.

<sup>298</sup> See generally Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992) (stating that when Congress enacted civil RICO, it is presumed to know the interpretations courts had given earlier statutes that served as the model for civil RICO); Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 479 (1992) (noting “basic canon of statutory construction that identical terms within an Act bear the same meaning”).



by the Hobbs Act broadly to encompass “any valuable right or interest considered primarily as a source or element of wealth.” Bianchi v. United States, 219 F.2d 182, 189 (8th Cir. 1955) (quoting Webster’s New Int’l Dictionary (2d Ed. 1936)).

b. The LMRDA guarantees the rights of union members to, inter alia, vote in secret in union elections, participate in fair and honest union elections, nominate candidates, attend membership meetings, meet and assemble freely with other members, and to express any views, arguments or opinions in such union meetings and union elections. See Section VIII(E)(3)(c) above. The Second, Third and Sixth Circuits and district courts in the Second and Third Circuits have held that such LMRDA rights constitute intangible “property” within the meaning of the Hobbs Act on the ground that such rights constitute “a source or element of wealth” since the exercise of these rights enable union members to secure financial benefits through collective bargaining, and corrupt deprivation of these rights may cause union members economic deprivation through loss of livelihood and/or reduced benefits.<sup>299</sup>

The rationale underlying these decisions is firmly supported by the scope of New York extortion law that served as the model for the Hobbs Act, discussed above, as well as by the

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<sup>299</sup> See, e.g., United States v. Gotti, 459 F.3d 296, 320-21 (2d Cir. 2006); United States v. Bellomo, 176 F.3d 580, 592-93 (2d Cir. 1999); United States v. Debs, 949 F.2d 199, 201-02 (6th Cir. 1991), cert. denied, 504 U.S. 975 (1992); United States v. Local 560 of the Int’l Bhd. of Teamsters, 780 F.2d 267, 281-282 (3<sup>rd</sup> Cir. 1985), cert. denied, 476 U.S. 1140 (1986), affirming, 581 F. Supp. 279, 311-316 (D.N.J. 1984); United States v. Dist. Council of New York City and Vicinity of the United Bhd. of Carpenters and Joiners of America, 778 F. Supp. 738, 753-56 (S.D.N.Y. 1991), cert. denied, 112 S. Ct. 975 (1992); United States v. International Brotherhood of Teamsters, 708 F. Supp. 1388, 1397-99 (S.D.N.Y. 1989); United States v. Local 560 of the Int’l Bhd. of Teamsters, 694 F. Supp. 1158, 1188-90 (D.N.J.), aff’d, 865 F.2d 252 (3d Cir. 1988), cert. denied, 489 U.S. 1068 (1989); Rodonich v. House Wreckers Union, Local 95, 627 F. Supp. 176, 178-79 (S.D.N.Y. 1985); United States v. Local 560 of the Int’l Bhd. of Teamsters, 550 F. Supp. 511, 513-525 (D.N.J. 1982). But see United States v. DeFries, 129 F.3d 1293, 1304 (D.C. Cir. 1997)(ruling that ‘union members’ right to a fair [union] election is an ‘ethereal’ interest that does not constitute ‘property’ under [the mail fraud statute]”).

LMRDA's legislative history, the Supreme Court's decision noting that union members' LMDRA rights are economic rights designed to secure union members' economic interests, and the common law understanding that extortion broadly encompassed the taking of any "thing of value."<sup>300</sup>

In that respect, both the Senate and House Reports accompanying the LMRDA adopted the same statement of the purpose concerning the election provisions:

It needs no argument to demonstrate the importance of free and democratic union elections. Under the National Labor Relations and Railway Labor Acts the union which is the bargaining representative has power, in conjunction with the employer, to fix a man's wages, hours, and conditions of employment. The individual employee may not lawfully negotiate with his employer. He is bound by the union contract. In practice, the union also has significant role in enforcing the grievance procedure where a man's contract rights are enforced. The Government which gives the union this power has an obligation to insure that the officials who wield it are responsive to the desires of the men and women who they represent. The best assurance which can be given is a legal guaranty of free and periodic elections.

SEN. REP. NO. 187, 86th Cong., 1st Sess., at 20 (1959); H.R. REP. No. 741, 86th Cong., 1st Sess., at 15 (reprinted in 1 National Labor Relations Board, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 417, 773 (1959)). Further, in floor debate,

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<sup>300</sup> 1 W. Russell, *Crimes and Misdemeanors*, 573-574 (8th ed. 1923) ("Extortion . . . signifies the unlawful taking by any officer, by colour of his office, of any money or thing of value."); 2 J. Bishop, *Criminal Law* § 401, at 331-332 (9th ed. 1923) ("In most cases, the thing obtained is money . . . . But probably anything of value will suffice."); 3 F. Wharton, *A Treatise on Criminal Law* § 1898, at 2095 (1912) ("it is enough if any valuable thing is received"); 2 E. Coke, *Institutes of the Laws of England* pt. 1, at 368b (1832) ("Extortion . . . is a great misprision, by wresting or unlawfully taking by any officer, by colour of his office, any money or valuable thing."); 4 W. Blackstone, *Commentaries* \*141 (extortion is "an abuse of public justice, which consists in an officer's unlawfully taking, by colour of his office, from any man, any money or thing of value."). The phrase "thing of value" is a term of art that includes intangible rights. See, e.g., United States v. Girard, 601 F.2d 69, 71 (2d Cir. 1979); cf. Bell v. United States, 462 U.S. 356, 360 (1983).

senators specifically underscored the economic nature of the rights created by the LMRDA:

Sen. Carroll: They are economic rights, as I have said. They arise from economic problems and deal with economic democracy. They are not constitutional rights arising under the 14th amendment, dealing with political democracy.

Sen. Kennedy: The Senator is correct.

105 CONG. REC. 5919 (daily ed. April 22, 1959)(reprinted in 1 National Labor Relations Board, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 1111 (1959)).

Moreover, in Finnegan v. Leo, 456 U.S. 431, 435-36 (1982), the Supreme Court stated that the LMRDA protects “the rights of union members to freedom of expression without fear of sanctions by the union, which in many instances could mean the loss of union membership and in turn loss of livelihood.” See also Rodonich v. House Wreckers Union, 627 F. Supp. 176, 179 (S.D.N.Y. 1985)(court rejected defendants’ contention that union members’ rights were “any less a ‘source of wealth’ than ordinary rights to do business. To the contrary, it would appear that LMRDA rights provide union members with a source of livelihood.”). It is also particularly significant that by the time the Hobbs Act was enacted in 1946, New York law recognized that union members’ rights to union democracy constituted “property.” For example, in Dusing v. Nuzzo, 177 Misc. 35, 29 N.Y.S. 2d 882 (N.Y. Sup. Ct.), aff’d, 263 A.D. 59, 31 N.Y.S. 2d 849 (3d Dept. 1941), the court held that union members’ right to union elections constituted a “property” right which entitled the union members to an injunction mandating that a proper election be held. The court explained:

[A] labor union is not a social club. It is an economic instrumentality conceived in the necessity of making a living . . . The right to membership in a union is empty if the corresponding right to an election guaranteed with equal solemnity in the

fundamental law of the union is denied. If a member has a “property right” in his position on the roster, I think he has an equally enforceable property right in the election of men who will represent him in dealing with his economic security and collective bargaining where that right exists by virtue of express contract in the language of a union constitution. Where an election is required by the law of a union, the member denied the right to participate is denied a substantial right which is neither nebulous nor ephemeral.

29 N.Y.S.2d at 884. Accord United States v. Local 560 of the Int’l Bhd. of Teamsters,

780 F.2d at 281.<sup>301</sup>

In sum, union members’ rights guaranteed by the LMRDA constitute economic rights and “a source or element of wealth,” and hence constitute intangible property within the meaning of the Hobbs Act.

c. In McNally v. United States, 483 U.S. 350 (1987), the Supreme Court held that a citizen’s intangible right to honest state government did not constitute “property” under the mail fraud statute, 18 U.S.C. § 1341. The Supreme Court explained that it read the mail fraud statute narrowly in that case to avoid adverse effects upon the due regard for federalism, stating:

Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights.

McNally, 483 U.S. at 360.

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<sup>301</sup> See also Carroll v. Electrical Workers, IBEW, Local 269, 133 N.J. Eq. 144, 147, 31 A.2d 223, 225 (N.J. 1973) (the court stated that without union democracy union members “would be deprived of their constitutional right to earn a livelihood.”); Dorrington v. Manning, 135 Pa. Super. 194, 201, 4 A.2d 886, 890 (Pa. Sup. Ct. 1939)(“The right to work . . . constitutes a property right” which union officials may not interfere with); Bianco v. Eisen, 190 Misc. 609, 610, 75 N.Y.S.2d 914, 916 (N.Y. Sup. Ct. 1944) (holding that the right to be elected to a union’s executive board constitutes property since the executive board has authority to “make decisions affecting . . . the economic interests of its members.”).

McNally, however, involved an interpretation of the mail fraud statute, and did not address the scope of “property” under the Hobbs Act. More fundamentally, union members’ rights under the LMRDA are significantly different from a citizen’s “political” right to fair and honest elections for public officials involved in McNally because LMRDA rights are essentially “economic rights” which constitute “a source or element of wealth,” which has long been recognized to be an important attribute of a “property” right.

Moreover, the federalism concerns that were paramount in the Supreme Court’s analysis in McNally are not implicated by a ruling that union members’ LMRDA rights constitute property under the Hobbs Act. As one court perceptively ruled, rejecting McNally’s application to the Hobbs Act and LMRDA rights:

First, assuming property carries the same meaning in the mail and wire fraud statutes as in the Hobbs Act, in McNally the Supreme Court was clearly concerned with federalism. The Court read the statute narrowly in order to prevent the federal government from “setting standards of disclosure and good government for local and state officials.” [483 U.S. at 360].

McNally’s federalism rationale has no analogue in the union arena. With regard to the federal-state balance in this case, there is no doubt that Congress has had a longstanding interest in regulating the affairs of labor unions. McNally therefore cannot control the federal government’s obligations toward the conduct of union business.

Second, the intangible right to honest government at issue in McNally is substantially different from the right to participate in union elections. Honest government is subject to control by an informed electorate operating in a vital two-party system. The federal government need not impose its will where a regime of political accountability is already in place.

By contrast, union politics is more like one-party government. The statutory right to participate in union government is not held accountable by anything remotely like a thriving two-party system.

Here, the federal legislature and courts have a greater duty to combat labor corruption and electoral vice. The Hobbs Act is an important instrument in service of this democratic objective. For all of these reasons, LMRDA rights are property under the Hobbs Act.

United States v. Debs, 949 F.2d 199, 201-02 (6th Cir. 1991).<sup>302</sup>

**2. A Defendant “Obtains” or Seeks to “Obtain” Intangible Property Rights From A Victim Within The Scope of the Hobbs Act When He Uses Extortionate Means In Order to Exercise Those Rights For Himself or a Third Party in a Way That Would Profit Them Financially**

a. In Scheidler v. Nat. Org. for Women, Inc., 537 U.S. 393 (2003), the Supreme Court reversed the Seventh Circuit’s holding that the plaintiffs (an organization that supports availability of abortion services and two clinics that provide medical services including abortions) were entitled to a permanent injunction against the defendants (individuals and organizations engaged in anti-abortion activities) and treble damages under RICO’s civil remedies, 18 U.S.C. § 1964. The Seventh Circuit ruled that the defendants had committed a

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<sup>302</sup> Accord, United States v. Int’l Bhd. of Teamsters, 708 F. Supp. at 1399, where the court stated:

Even assuming McNally . . . were to apply in the Hobbs Act context, the court finds that the rights guaranteed by the LMRDA to union members are “property” within the meaning of the Hobbs Act . . . . The holding of McNally is limited to the “standards of disclosure and good government for local and state officials.” McNally, *supra*, 107 S.Ct at 2881. In the instant case, there is no doubt as to the standards to which labor officials ought to be held; the LMRDA sets forth with particularity the standards of disclosure to which labor leaders must adhere and the fiduciary nature of labor leaders position. Thus, characterizing those rights created by the federal labor statutes as “property” does not involve the federal government in setting arbitrary standards for conduct in the way that the same characterization of the ethereal and changeable notions of “good government” or “honest and faithful services” would.

pattern of Hobbs Act and state extortions arising from their use of force, violence and fear to cause the plaintiffs “‘to give up’ property rights, namely, ‘a woman’s right to seek medical services [i.e., abortion services] from a clinic, the right of the doctors, nurses or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion and fear.’” *Id.* at 400 n.4, quoting the jury instructions. The Seventh Circuit had also ruled that “as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required.” *Id.* at 399-400 (citation and internal quotations omitted).

The Supreme Court granted *certiorari* to decide two questions: (1) whether private litigants may obtain injunctive relief in a civil RICO action pursuant to 18 U.S.C. § 1964; and (2) whether the defendants “obtained” or sought to obtain “property” in violation of the Hobbs Act, 18 U.S.C. § 1951. The Supreme Court explicitly stated that it need not address the first question because it reversed the Seventh Circuit’s decision on the second question. *Scheidler*, 537 U.S. at 397.

Regarding the Hobbs Act question, the Supreme Court also did not decide whether the matters the defendants sought constitute “property” within the meaning of the Hobbs Act. *Id.* at 401-02. The Court then decided that the defendants did not “obtain” or seek to obtain property within the meaning of the Hobbs Act, stating:

But even when [the defendants’] acts of interference and disruption achieved their ultimate goal of “shutting down” a clinic that performed abortions, such acts did not constitute extortion because [defendants] did not “obtain” [plaintiffs’] property. [Defendants] may have deprived or sought to deprive [plaintiffs] of their alleged property right of exclusive control of their business assets, but they did not acquire any such property. [Defendants] neither pursued nor received “something of value from” [plaintiffs] that they could exercise, transfer, or sell. *United States v.*

Nardello, 393 U.S. 286, 290, 89 S. Ct. 534, 21 L.Ed. 2d 487 (1969). To conclude that such actions constituted extortion would effectively discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion.

Scheidler, 537 U.S. at 404-05. The Court further explained that:

Eliminating the requirement that property must be obtained to constitute extortion would not only conflict with the express requirement of the Hobbs Act, it would also eliminate the recognized distinction between extortion and the separate crime of coercion -- a distinction that is implicated in these cases. The crime of coercion, which more accurately describes the nature of [defendants'] actions, involves the use of force or threat of force to restrict another's freedom of action. Coercion's origin is statutory, and it was clearly defined in the New York Penal Code as a separate, and lesser offense than extortion when Congress turned to New York law in drafting the Hobbs Act. New York case law applying the coercion statute before the passage of the Hobbs Act involved the prosecution of individuals who, like [defendants], employed threats and acts of force and violence to dictate and restrict the actions and decisions of businesses. See, e.g., People v. Ginsberg, 262 N.Y. 556, 188 N.E. 62 (1933)(affirming convictions for coercion where defendant used threatened and actual property damage to compel the owner of a drug store to become a member of a local trade association and to remove price advertisements for specific merchandise from his store's windows); People v. Scotti, 266 N.Y. 480, 195 N.E. 162 (1934)(affirming conviction for coercion where defendants used threatened and actual force to compel a manufacturer to enter into an agreement with a labor union of which the defendants were members); People v. Kaplan, 240 App. Div. 72, 269 N.Y.S. 161 (1934)(affirming convictions for coercion where defendants, members of a labor union, used threatened and actual physical violence to compel other members of the union to drop lawsuits challenging the manner in which defendants were handling the union's finances).

Scheidler, 537 U.S. at 405-06 (footnotes omitted).

The Court explained the distinction between "extortion" and "coercion," stating:

Under the Model Penal Code § 223.4, Comment 1, pp. 201-202, extortion requires that one "obtains [the] property of another" using threat as "the method employed to deprive the victim of his property." This "obtaining" is further explained as "bring[ing] about a transfer or purported transfer of a legal interest in the property, whether to the obtainer or another." Id., § 223.3, Comment 2, at 182, Coercion, on the other hand, is defined as



making “specified categories of threats . . . with the purpose of unlawfully restricting another’s freedom of action to his detriment.” Id., § 212.5, Comment 2, at 264.

Scheidler, 537 U.S. at 408 n.13. The Court added that:

[W]hile coercion and extortion certainly overlap to the extent that extortion necessarily involves the use of coercive conduct to obtain property, there has been and continues to be a recognized difference between these two crimes, see, e.g., ALI, Model Penal Code and Commentaries §§ 212.5, 232.4 (1980) . . . and we find it evident that this distinction was not lost on Congress in formulating the Hobbs Act.

Id. at 407-08. Accordingly, the Supreme Court concluded that the defendants “did not obtain or attempt to obtain property from [the plaintiffs].” Id. at 409.

Scheidler establishes a general rule that a defendant does not “obtain” or seek to obtain property within the meaning of the Hobbs Act by merely interfering with or depriving someone of property, or by merely depriving or seeking to deprive someone of his “exclusive control of [his] business assets.” Id. at 404-05. However, the Supreme Court did not foreclose the view that a violation of the Hobbs Act may be based upon a defendant’s obtaining or attempting to obtain for himself or a third party the exercise of a victim’s intangible property rights in such a way that would profit the defendants or his cohorts financially.

For example, the Court stated:

We need not now trace what are the outer boundaries of extortion liability under the Hobbs Act, so that liability might be based on obtaining something as intangible as another’s right to exercise exclusive control over the use of a party’s business assets.

...

Accordingly, the dissent is mistaken to suggest that our decision reaches, much less rejects, lower court decisions such as United States v. Tropiano, 418 F.2d 1069, 1076 (1969), in which the Second Circuit concluded that the intangible right to solicit refuse collection accounts “constituted property within the Hobbs Act

definition.”

Id. at 402 and n.6.<sup>303</sup>

These statements indicate that the Scheidler Court did not necessarily reject Tropiano's holding. In Tropiano, the defendants, who were partners in C&A Refuse Removal Company (“C&A”), were convicted of attempted and completed Hobbs Act extortion offenses arising from their threats of force, violence and fear to competitor refuse removal dealers, including one

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<sup>303</sup> It was settled when Congress passed the Hobbs Act in 1946 that the term “property” includes the exclusive right to control the use of business assets, such as buildings and equipment, in any legitimate manner. It is “elementary” that “[p]roperty is more than the mere thing which a person owns,” and “consists of the free use, enjoyment, and disposal of a person’s acquisitions without control or diminution save by the law of the land.” Buchanan v. Warley, 245 U.S. 60, 74 (1917) (citing 1 W. Blackstone, *Commentaries* 127 (Cooley’s Ed. 1872)). In other words, the “bundle of rights,” Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979), that constitutes property includes the exclusive “power over [the] use” of physical assets. Marsh v. Nichols, Shepard & Co., 128 U.S. 605, 612 (1888).

Because “[t]here can be no conception of property aside from its control and use,” 73 C.J.S. *Property* § 5, at 170 (1983), the Supreme Court has recognized in a variety of contexts that the intangible right to use property is itself property. See, e.g., United States v. Craft, 535 U.S. 274, 280 (2002) (observing that “essential property rights” include “the right to use the property”); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (“Property rights in a physical thing have been described as the rights ‘to possess, use, and dispose of it.’”) (quoting United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945)); Crane v. Comm’r of Internal Revenue, 331 U.S. 1, 6 (1947) (observing that “ordinary, everyday” understanding of “property” includes “the aggregate of the owner’s rights to control and dispose of [a physical] thing”); Dobbins v. City of Los Angeles, 195 U.S. 223, 236 (1904) (describing constitutional rights “to use and enjoy property”); Carpenter v. United States, 484 U.S. 19, 26-27 (1987) (holding that property under the mail and wire fraud statutes includes the ‘right to exclusive use’ of confidential business information).

Accordingly, federal courts have repeatedly held that “property” within the ambit of the Hobbs Act includes intangible rights to conduct one’s business and to control it free from the wrongful use or threat of force, violence, or fear. See, e.g., United States v. Gigante, 39 F. 3d 42, 45-46 (2d Cir. 1994); United States v. Lewis, 797 F.2d 358, 363-64 (7th Cir. 1986); United States v. Zemek, 634 F.2d 1159 (9th Cir. 1980); United States v. Santoni, 585 F.2d 667, 673 (4th Cir. 1978); United States v. Franks, 511 F.2d 25, 31-32 and n. 8 (6th Cir. 1975); United States v. Glasser, 443 F.2d 994, 1007 (2d Cir. 1971).

Leonard Caron, to induce Caron to stop attempting to take away any of the defendants' customers and to stop competing with the defendants in soliciting any business in Milford, Connecticut.

The defendants conceded that "rubbish removal accounts which are purchased and sold are probably property," but argued that "the right to solicit business" did not constitute "property." Tropiano, 418 F. 2d at 1075. The Second Circuit rejected this argument, stating:

Obviously, Caron [the victim] had a right to solicit business from anyone in any area without any territorial restrictions by the [defendants] and only by the exercise of such a right could Caron obtain customers whose accounts were admittedly valuable. Some indication of the value of the right to solicit customers appears from the fact that when the C&A accounts were sold for \$53,135, C&A's agreement not to solicit those customers was valued at an additional \$15,000.

Id. at 1076.

Tropiano is distinguishable from Scheidler in that the defendants in Tropiano sought to "obtain" or "acquire" for themselves "property" from the victim -- i.e., "the right to solicit customers," -- and that "property" was "something of value. . . that [the defendants] could exercise, transfer or sell." The interpretation of "obtain" under Scheidler, therefore, was satisfied. In contrast, the defendants in Scheidler did not seek to obtain for themselves something of value from the plaintiffs' abortion clinics; rather they merely wanted to shut down the clinics and interfere with the clinics' business.

b. In United States v. Gotti, 459 F.3d 296, 320-26 (2d Cir. 2006), the Second Circuit held that Tropiano was still good law in light of the Scheidler decision, and that union members' rights guaranteed by the LMRDA constitute "property" within the ambit of the Hobbs Act. The Second Circuit also held that the defendants, members and associates of the LCN, "obtained"

union members' LMRDA rights when the defendants used extortionate means to cause "the relinquishment of the union members' LMRDA rights . . . in order to exercise those rights for themselves . . . in a way that would profit them financially." Gotti, 459 F.3d at 325.

The Second Circuit ruled that the indictment alleged facts which satisfied Scheidler's requirement that a defendant must obtain or seek to obtain property for himself or a third party.

For example, the Second Circuit stated:

[T]he indictment alleged that the defendants sought to obtain, and did obtain, the union members' LMRDA rights to free speech and democratic participation in union affairs as well as their LMRDA rights to loyal representation by their officers, agents, and other representatives. It further stated that the defendants sought to exercise those rights themselves, by telling various delegates whom to vote for in certain leadership positions, and by controlling various elected officials' performance of their union duties. We believe that these allegations satisfy our interpretation of Scheidler II.

. . .

Similarly, as to the MILA-related extortion counts, the indictment alleges that the defendants sought to obtain, and did obtain, the MILA participants' and beneficiaries' rights to have the MILA trustees contract with the service provider of prescription drugs of the trustees' choice, and to have MILA trustees and fiduciaries discharge their duties in MILA's best interest. The indictment further asserts that the defendants sought to exercise these rights for themselves by telling the MILA trustees which service provider to support, and thereby ensuring the selection of a Gambino-associated enterprise (GPP/VIP) that would pay kickbacks. Here, too, the allegation is that the defendants exercised the rights in question in order to profit themselves. Thus, the MILA-related Hobbs Act extortion counts satisfy the dictates of Scheidler II.

Gotti, 459 F.3d at 325-26. The Second Circuit also stated:

[T]he indictment alleges that the defendants obtained Alayev's intangible property rights to make various business decisions (such as whether to keep illegal gambling machines on the premises) free from outside pressure. As the government aptly states in its brief, "[t]he defendants did not seek merely to 'shut down' Alayev's

business but essentially made themselves his silent partners and exercised his rights to their own advantage.” Because here the allegation is that the defendants sought to exercise for themselves Alayev’s rights in a manner that would profit them, the Alayev Counts survive Scheidler II.

...

Finally, the Seagal Counts also satisfy the Scheidler II standard. Here it is alleged that the defendants sought to exercise for themselves Seagal’s right to make his own business decisions, by threatening him with possible violence unless he worked with Jules Nasso again. Thus, here the defendants sought to exercise for themselves Seagal’s intangible right to decide with whom to work, in order to secure profit for themselves. This constitutes Hobbs Act extortion under Scheidler II.

Id. at 327.

The Second Circuit also held that the district court’s jury instructions satisfied the requirements of Scheidler. In that respect, the district court identified the alleged property that was the subject of the extortion charges, and instructed the jury, among other matters, that:

[Y]ou should find the defendant guilty of extortion provided the government has proven that as a consequence thereof the defendant obtained money or something else of value from the victims that the defendant could exercise and transfer or sell.

In other words, merely interfering and depriving someone of property is insufficient to constitute extortion. You have to be [sic] the obtaining of money or something else of value from the victims that the defendant could exercise, transfer or sell as well.

...

Before you can find the defendant guilty of extortion under these sub parts, you must find the government has proven that as a result of wrongfully inducing the victim to part with the property right identified in those sub parts, the defendant obtained money as [sic] something else of value from the victim that the defendant could exercise, transfer or sell. So, in other words, it is not enough just to discourage somebody or coerce somebody from not selling his business, you have to get something because of that type of activity.

Gotti, 459 F. 3d at 327-28.

OCCRS agrees with the Second Circuit's analysis in Gotti. Moreover, the ruling of Gotti is supported by the legislative history to RICO and the Hobbs Act, which makes clear that Congress intended those statutes to provide new and expansive remedies to eliminate organized crime's corrupt control and influence over labor unions, which the LCN obtained through extortion. See Sections VIII(A)(1) and (2) and VIII(F)(1)(a) above.

## IX

### GOVERNMENT CIVIL RICO CASES NOT INVOLVING LABOR UNIONS

The United States has brought at least seventeen civil RICO cases seeking equitable relief that did not involve labor unions.

1. For example, in United States v. Philip Morris, Civ. No. 1:99 CV 02496 (filed September 22, 1999, D.D.C.), the United States brought a civil RICO suit against nine tobacco companies and two affiliated entities, alleging a pattern of mail and wire fraud predicate offenses from the early 1950's to the date the complaint was filed to defraud consumers of tobacco products through false and misleading information about, among other matters, the health effects of smoking, tobacco products' addictiveness and the targeting of underage consumers to buy tobacco products.

Following a nine month non-jury trial, the district court issued its 945-page final opinion. See United States v. Philip Morris USA, Inc., 449 F. Supp.2d 1 (D.D.C. 2006). Regarding liability, the district court found that the Government established the alleged enterprise and that each defendant was liable for a substantive RICO violation (18 U.S.C. § 1962(c)) and that each defendant, except for one defendant, was liable for conspiring to violate RICO (18 U.S.C. § 1962(d)). Id. at 851-52, 867-73, 901-907. The district court found that the Government proved an overarching scheme to defraud the public, stating:

[O]ver the course of more than 50 years, Defendants lied, misrepresented, and deceived the American public, including smokers and the young people they avidly sought as “replacement smokers,” about the devastating health effects of smoking and environmental tobacco smoke, they suppressed research, they destroyed documents, they manipulated the use of nicotine so as to increase and perpetuate addiction, they distorted the truth about low tar and light cigarettes so as to discourage smokers from

quitting, and they abused the legal system in order to achieve their goal -- to make money with little, if any, regard for individual illness and suffering, soaring health costs, or the integrity of the legal system.

...

In order to carry out this scheme, Defendants made the following false and fraudulent statements in a number of areas, including: (1) deceiving consumers into starting and continuing to buy and smoke cigarettes by misrepresenting and concealing the adverse health effects caused by smoking and exposure to environmental cigarette smoke, by maintaining that there was an “open question” as to whether smoking cigarettes causes disease and other adverse effects, despite the fact that Defendants knew otherwise, and by ensuring that their research, development, and marketing of cigarettes remained consistent with these core public positions (see Findings of Fact V(A)); (2) deceiving consumers into becoming or staying addicted to cigarettes by maintaining that neither smoking nor nicotine is addictive, despite the fact that Defendants knew these positions were false (see Findings of Fact V(B)); (3) deceiving consumers into becoming or staying addicted to cigarettes by manipulating the design of cigarettes and the delivery of nicotine to smokers, while at the same time denying that they engaged in such efforts (see Findings of Fact V(C)); (4) deceiving consumers, particularly parents and young people, by denying that they marketed to youth, while engaging in such marketing and advertising with the intent of addicting young people and enticing them to become lifelong smokers (see Findings of Fact V(F)); and (5) deceiving consumers through deceptive marketing and cigarette design modifications to exploit smokers’ desire for less hazardous and “low tar” cigarettes which Defendants knew to be no safer than full-flavor cigarettes (see Findings of Fact V(G)).

Id. at 852-53.

The district court ordered various injunctive relief against all but three of the defendants,<sup>304</sup> including the following:

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<sup>304</sup> The district court ruled that remedies were not available against defendants The Liggett Group, Inc. (“Liggett”), The Council for Tobacco Research - U.S.A., Inc. (“CTR”), and the Tobacco Institute, Inc. (“TI”). See Philip Morris USA, Inc., 449 F.Supp. 2d at 915-19. The district court reasoned that corporate defendants CTR and TI had been dissolved and were no

(continued...)



(1) Finding that the defendants fraudulently marketed certain cigarettes as “low tar,” “light,” “mild” and similar terms as being less harmful than other “full flavor” cigarettes, id. at 923-24, the district court “prohibited [defendants] from using any descriptors indicating lower tar delivery -- including, but not limited to, “low tar,” “light,” “mild,” “medium,” and “ultra light” -- which create the false impression that such cigarettes are less harmful to smokers.” Id. at 925.

(2) Finding that defendants made numerous false and deceptive public statements regarding smoking and health issues, the district court ordered defendants “to make corrective statements about addiction (that both nicotine and cigarette smoking are addictive); the adverse health effects of smoking (all the diseases which smoking has been proven to cause); the adverse health effects of exposure to ETS [Environmental Tobacco Smoke] (all diseases which exposure to ETS has been proven to cause); their manipulation of physical and chemical design of cigarettes (that Defendants do manipulate design of cigarettes in order to enhance the delivery of nicotine); and light and low tar cigarettes (that they are no less hazardous than full-flavor cigarettes).” Id. at 928; see also id. at 938-41.

(3) Defendants were required to “create and maintain document depositories and websites which provide the Government and the public with access to all industry documents disclosed in litigation from this date forward.” Id. at 928. This requirement included: (a) making “public the documents [defendants] produce or use in future litigation or administrative actions”, id. at 929; (b) maintaining previous depository obligations in other litigation (the Minnesota and Guildford Depositories) for an additional 15 years (id. at 930); (c) maintaining public websites

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<sup>304</sup>(...continued)  
longer able to continue their past RICO violations. See id. at 915-18. The district court also found that there was no reasonable likelihood of defendant Liggett’s committing future violations because it had withdrawn from the RICO conspiracy. See id. at 906-07, 918-19.

for all documents which have been produced in litigation for fifteen years, id. at 930-31; (d) requiring defendants “to provide accurate and updated indices of all documents they are withholding on grounds of privilege or confidentiality” and “regularly-updated information concerning all waivers and losses of privilege and confidentiality.” id. at 931; (e) to prevent defendants from youth marketing, requiring “Defendants to provide their disaggregated marketing data to the Government according to the same schedule on which they provide it to the FTC.” Id. at 932; see also id. at 941-44.

(4) The district court also entered an injunction stating:

Defendants will be ordered to refrain from engaging in any act of racketeering, as defined in 18 U.S.C. § 1961(1) relating in any way to manufacturing, marketing, promotion, health consequences or sale of cigarettes in the United States.

Defendants will also be ordered not to participate in the management and/or control of any of the affairs of CTR, TI, CIAR, or any successor entities.

Defendants will also be ordered not to reconstitute the form or function of CTR, TI, or CIAR.

Finally, because this is a case involving fraudulent statements about the devastating consequences of smoking, Defendants will be prohibited from making, or causing to be made in any way, any material, false, misleading or deceptive statement or representation concerning cigarettes that is disseminated in the United States.

Id. at 932-33, 938.

The district court also required Defendants to pay costs pursuant to Rule 54,

FED. R. CIV. P. Id. at 937.<sup>305</sup>

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<sup>305</sup> The district court refused to impose several other proposed remedies, including the appointment of court officers. See Philip Morris USA, Inc., 449 F. Supp.2d at 933-37. Appeals from the district court’s decision by the defendants and the United States are pending before the  
(continued...)

2. In United States v. International Boxing Federation (IBF), Civ. No. 99-5442 (JWB) (filed November 22, 1999, D.N.J.), the United States brought a civil RICO lawsuit against the International Boxing Federation, United States Boxing Association (“USBA”) and the Executive Committee of the International Boxing Federation (“IBF”)/United States Boxing Association, as nominal defendants, and against Robert W. Lee, Sr., Robert W. Lee, Jr., Don William Brennan and Francisco Fernandez. The alleged enterprise was a group of entities associated in fact consisting of the USBA, the IBF non-profit, IBF for-profit and the IBF International, including its leadership, members and associates. The complaint alleged that the defendants falsely represented that the enterprise maintained fair and unbiased systems for ratings of boxers and, based on these false representations, the defendants obtained annual dues from the IBF - USBA memberships, registration fees from boxing promoters, sanction fees from boxers and their promoters and other contributions. However, in truth, the defendants solicited and accepted bribes from certain boxing promoters and managers and others in order to alter these ratings and to provide other favorable treatment to those who paid bribes.

The suit sought a permanent injunction and an order requiring the defendants to divest their interests in the enterprise and to disgorge all the proceeds of their violations. On January 12, 2000, the district court granted a preliminary injunction restraining the defendants from, among other matters, committing any act of racketeering, and the court appointed a monitor to conduct the legitimate business of the enterprise.

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<sup>305</sup>(...continued)

United States Court of Appeals for the District of Columbia. See United States v. Philip Morris USA, Inc., Appeal Nos. 06-5267-5272.

Subsequently, the district court entered a Consent Decree permanently barring Robert W. Lee, Sr. and Robert W. Lee, Jr., from affecting the affairs of the IBF and any other boxing organization or entity. Whereupon, the IBF installed new leadership and worked with the IBF Monitor to eliminate corruption within the IBF.

On September 29 2004, the district court entered a Consent Decree that dissolved the IBF Monitorship, finding that “the IBF has substantially improved its internal financial and accounting controls and has instituted many reforms including a Code of Conduct, compliance with extant Congressional enactments and regulations including the implementation of a fair and honest rating system (with grievance rights for boxers), a corporate restructuring, regularly scheduled open annual meetings of members, Board of Directors’ meetings, Director and Officer elections and updated its corporate documentation with new Articles of Incorporation and new By-Laws.” Consent Decree at 3, United States v. Int’l Boxing Fed., Civ. No. 99 CV5442 (filed September 29, 2004 D.N.J.).

The district court retained jurisdiction over the parties and signatories to the Consent Decree which was binding on the “current and future officers and others holding positions of trust in the IBF, current and future employees, agents, representatives, members, committee members of the IBF and any and all persons in active concert or participation with any or all of them.” Id. at 4.

The Consent Decree also provided that:

- [1] The IBF shall hereafter be operated exclusively as a not-for-profit entity under the laws of the State of New Jersey.
- [2] The IBF shall permanently maintain and enforce its Code of Conduct as well as its Internal Control Procedures in substantially the same form as they currently exist.

- [3] The IBF shall promptly establish and maintain for a minimum of five (5) years from its establishment, an Independent Review Board (the “Board”). The purpose of the Board shall be to review complaints and conduct hearings whenever necessary regarding, (a) all matters arising under the IBF’s Code of Conduct, and (b) all matters relating to compliance with the injunctive provisions of this Consent Decree. The Board shall be comprised of three individuals who are independent of the IBF (for example, persons who are not officers, Executive Board members, agents, employees, representatives and/or other persons holding positions of trust in the IBF). The IBF, upon prior notice to the United States, shall have the power to appoint persons to the Board, provided, that the United States shall have the power to veto any appointment to the Board. The Board shall have the right and power, inter alia, to impose discipline including removal, suspension or expulsion. The IBF shall be responsible to fund the activities of the Board, including providing reasonable compensation to its members. The Board or any member thereof shall have the power to refer matters to the United States Attorney for appropriate action. The Board shall also have the power to refer matters to the IBF for appropriate action. The Board shall provide the IBF and the United States a comprehensive written report of its activities at least once per year for the next three (3) years.
- [4] The Board, the IBF, as well as its directors, officers, agents, employees, representatives, other persons holding positions of trust in the IBF or members of the IBF shall have the power to refer matters to the United States Attorney’s Office for the District of New Jersey for appropriate action at any time.

Id. at 4-5.

The Consent Decree also permanently enjoined all persons bound by the Consent Decree from directly or indirectly:

- a. committing any crime under the laws of the State of New Jersey and of the United States, including, but not limited to any crime listed in 18 U.S.C. § 1961(1);

- b. soliciting, accepting, or attempting to accept any money, fee, compensation, commission, credit, gift, gratuity, and/or any other thing of value or of any kind whatsoever for any official action of the IBF, including, but not limited to, actions which have any direct or indirect relation to ranking of boxers;
- c. soliciting, accepting, or attempting to accept any money, fee, compensation, commission, credit, gift, gratuity, and/or any other thing of value or of any kind whatsoever where such actions may directly or indirectly (i) be adverse to the interests of the IBF, or (ii) be contrary to the remedial objectives of this Consent Decree;
- d. permitting any “barred person”<sup>306</sup> to exercise any control or influence, directly or indirectly, in any way or degree, in the conduct of the affairs of the IBF; and
- e. obstructing or otherwise interfering, directly or indirectly, with the efforts of anyone effectuating or attempting to effectuate the terms of this Consent Decree.

Id. at 6.

The Consent Decree also provided that: (1) if any person bound by the Consent Decree violates it, “in addition to other sanctions or penalties, be subject to removal, suspension or expulsion from office and/or the IBF by the Court,” and be subject to contempt; and (2) “Upon a showing to the Court pursuant to any application by the United States that probable cause exists to believe that: (a) the IBF’s Independent Review Board (as described [above]) has ceased to function, is functioning ineffectively or is otherwise not functioning as set forth [above], (b) there

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<sup>306</sup> The Consent Decree provided that: “As used in this Consent Decree, a ‘barred person’ is: (a) Robert W. Lee, Sr., Robert W. Lee, Jr., Don Brennan and/or Francisco Fernandez, (b) any person prohibited from participating in the affairs of the IBF pursuant to or by operation of an Order in this matter or other court order, administrative order or statute, or (c) any person under disciplinary suspension or other action or order by any federal or state boxing commission or other similar authority, including authorities that may come into existence under the laws of the United States or any state.” Id. at 7.

exists corruption in the IBF and/or (c) the remedial objectives of this Consent Decree are not being met, the Court may order such relief as is necessary and proper, including reinstatement of the Monitorship.” Id. at 7-8.

3. Other civil RICO lawsuits brought by the United States to obtain equitable relief include suits to enjoin illegal gambling businesses,<sup>307</sup> to recover money obtained through defrauding the United States,<sup>308</sup> and to enjoin defendants from operating restaurants and to divest their interests in a restaurant (Umberto’s Clam House) from which they skimmed proceeds.<sup>309</sup>

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<sup>307</sup> See: (1) United States v. Leonard L. Cappetto, Civ. No. 74-C-503 (filed February 22, 1974, N.D. Ill.); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975); (2) United States v. Winstend, Civ. No. 76-C-2513 (filed July 1976, N.D.Ill.); and (3) United States v. Lummi Indian Tribe, Civ. No. C83-94C (filed January 27, 1983, W.D. Wash.).

<sup>308</sup> See United States v. Larry D. Barnette, Civ. No. 85-0754-Civ-J-16 (filed May 16, 1985, M.D. Fla.); United States v. Barnette, 10 F.3d 1553 (11th Cir.), cert. denied, 513 U.S. 816 (1994).

<sup>309</sup> See United States v. Ianniello, Civ. No. 86 Civ. 1552 (LSH) filed February, 1986, S.D.N.Y.); United States v. Ianniello, 646 F. Supp. 1289 (S.D.N.Y. 1986), aff’d, 824 F.2d 203 (2d Cir. 1987).

## MISCELLANEOUS ISSUES

## A. Prior or Parallel Criminal Proceeding

Although a defendant's prior criminal conviction for a RICO violation or a predicate racketeering offense is not required before a civil RICO action may be filed against a defendant,<sup>310</sup> Congress contemplated that the United States likely would bring civil RICO lawsuits against defendants following a defendant's conviction on related offenses or simultaneously with criminal prosecutions for related criminal conduct. In that regard, the Senate Report regarding RICO states that civil RICO was designed to provide new and powerful civil remedies to augment criminal remedies, especially where prior criminal prosecutions had not fully succeeded in eliminating corruption within an organization or enterprise. See, e.g., S. REP. No. 91-617 at 78-83. The Senate Report added that:

Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal law approach of fine, imprisonment and forfeiture, or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity.

Id. at 79. See also cases cited n.289 in Section VIII(E)(3)(b) above.

Moreover, 18 U.S.C. § 1964(d) explicitly authorizes the Government to invoke collateral estoppel to prove its civil RICO charges by providing that a defendant's prior criminal conviction "shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States." See Section III(D) above. Therefore, Congress clearly contemplated that, under some circumstances, civil RICO charges would be

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<sup>310</sup> See Sedima, 479 U.S. at 488-93.



brought against a defendant following a defendant's conviction on a related criminal offense.

In accordance with the foregoing authority, the Government may bring either civil or criminal RICO actions, or both, against a defendant for the same or overlapping unlawful conduct. See, e.g., Dist. Council of N.Y. City and Vicinity, 778 F. Supp. at 763; United States v. Bonanno Organized Crime Family of La Cosa Nostra, 683 F. Supp. 1411, 1450 (E.D.N.Y. 1988); see also cases cited Section III(D) above.

## **B. Use of Court-Ordered Electronic Surveillance**

Procedures for the interception and use of wire, oral or electronic communications (hereinafter "court-authorized electronic surveillance") are set forth in 18 U.S.C. §§ 2510-2522.<sup>311</sup> Court-authorized electronic surveillance is an extremely important source of evidence in both criminal and civil RICO cases brought by the United States. In that respect, 18 U.S.C. § 2516 empowers the Government to obtain court-authorized electronic surveillance when "such interception may provide or has provided evidence of" violations of the RICO statute ("Section 1963 (violations with respect to racketeer influenced and corrupt organizations")) and many criminal violations that are also predicate acts of racketeering under RICO (18 U.S.C. § 1961(1)).

Title 18, United States Code, Section 2517(1) and (2) provide as follows:

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

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<sup>311</sup> A comprehensive discussion of the law governing electronic surveillance is beyond the scope of this Manual. Rather, this Section is limited to a brief discussion of the use of court-authorized electronic surveillance in Government civil RICO cases.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

Pursuant to these provisions, duly authorized Government attorneys and law enforcement officers<sup>312</sup> who are handling a civil RICO matter may, without a court-disclosure order, use evidence derived from court-authorized electronic surveillance and disclose such evidence “to another investigative or law enforcement officer” to the extent that such use or disclosure “is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.”<sup>313</sup>

However, such a duly authorized Government attorney or other law enforcement officer may not disclose evidence derived from such court-authorized electronic surveillance while giving testimony in a civil RICO proceeding without a court-order authorizing such disclosure. In that respect, 18 U.S.C. §§ 2517(3) and (5) provide as follows:

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while

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<sup>312</sup> See 18 U.S.C. § 2516 which specifies the Government attorneys authorized to apply to the district court for an electronic surveillance order and which provides that such authorized interceptions may be made “by the Federal Bureau of Investigation, or a federal agency having responsibility for the investigation of the offense as to which the application is made.” See also 18 U.S.C. § 2510 (7) which defines “Investigative or law enforcement officer.”

<sup>313</sup> 18 U.S.C. § 2518(8)(a) requires the judge issuing an electronic surveillance order to seal the original recordings of intercepted conversations “[i]mmediately upon the expiration of the period of the order.” However, that section also provides that “[d]uplicate recordings may be made for subsections (1) and (2) of Section 2517 of this chapter for investigations.” See United States v. Maldonado-Rivera, 922 F.2d 934, 954 (2d Cir. 1990)(“duplicate tapes need not be judicially sealed”).

giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

. . .

(5) When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

First, Section 2517(3) of Title 18 authorizes the use of evidence derived from court-authorized electronic surveillance by an authorized Government official “while giving testimony under oath or affirmation **in any proceeding** held under the authority of the United States or of any state or political subdivision thereof,” which includes a civil proceeding. (emphasis added). See, e.g., In Re Electronic Surveillance Evidence, 990 F.2d 1015, 1018-20 (8th Cir. 1993) (holding that 18 U.S.C. § 2517 authorizes Government officials to use evidence derived from court-authorized electronic surveillance in civil proceedings, but does not authorize pretrial disclosure of such evidence to private civil RICO litigants); Nat’l Broad. Co. v. United States Dept. of Justice, 735 F.2d 51, 53-55 (2d Cir. 1984) (same);<sup>314</sup> S. Rep. No. 91-617 at 161 (stating that “18 U.S.C. § 2517 [permits] evidence obtained through the interception of wire or oral

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<sup>314</sup> But see In Re High Fructose Corn Syrup Antitrust Litig., 46 F. Supp.2d 819, 828-32 (C.D. Ill. 1999).

communications under court order to be employed in civil actions.”)<sup>315</sup>

However, a disclosure order is required to disclose evidence obtained from court-ordered electronic surveillance while giving testimony in a civil RICO proceeding because 18 U.S.C. § 2516 authorizes electronic surveillance only to obtain evidence of criminal offenses specified in Section 2516, and not to obtain evidence of civil violations. Therefore, a civil RICO violation constitutes an offense “other than those specified in the order of authorization or approval” within the meaning of Section 2517(5) and a disclosure order is required.

Moreover, one court has held that private plaintiffs in a civil action were entitled to subpoena the Government to obtain tape recordings that were derived from court-authorized electronic surveillance which “were admitted into evidence and played in open court” on the rationale that “[o]nce the material has been [publicly] revealed, however, the purpose of Section 2517(3) ceases and the requirements of that section no longer govern.” County of Oakland by Kuhn v. City of Detroit, 610 F. Supp. 364, 368 (E.D. Mich. 1984).

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<sup>315</sup> See United States v. Private Sanitation Indus. Ass’n, 811 F. Supp. 808, 815-17 (E.D.N.Y. 1992) (admitting evidence derived from court-authorized electronic surveillance in a Government civil RICO lawsuit). Moreover, courts have allowed evidence derived from lawful court-authorized electronic surveillance to be used in civil tax enforcement proceedings. See, e.g., Dickens v. United States, 671 F.2d 969 (6th Cir. 1982); Griffin v. United States, 588 F.2d 521, 523-26 (5th Cir. 1979); Fleming v. United States, 547 F.2d 872, 873-75 (5th Cir. 1977); United States v. Iannelli, 477 F.2d 999, 1001 (3d Cir. 1973). See also Matter of Electronic Surveillance, 596 F. Supp. 991 (E.D. Mich. 1984) (allowing disclosure of evidence derived from court-authorized electronic surveillance to the Grievance Administrator of the Michigan Attorney Grievance Commission).

## C. Federal Rule of Criminal Procedure 6(e)

### 1. A Government Attorney May Not Disclose “A Matter Occurring Before the Grand Jury” Unless It Falls Within An Exception Set Forth in Rule 6(e)(3)

Rule 6(e)(2)(B)(vi), FED. R. CRIM. P. prohibits “an attorney for the government” from disclosing “a matter occurring before the grand jury,” unless such disclosure falls within one of the exceptions set forth in Rule (6)(e)(3). Rule 6(e) does not define “a matter occurring before the grand jury.” Courts have noted that the phrase “a matter occurring before the grand jury” “encompasses ‘not only what has occurred and what is occurring, but also what is likely to occur,’ including ‘the identities of witnesses or jurors, the substance of testimony as well as actual transcripts, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.’” In Re Sealed Case No. 99-3091, 192 F.3d 995, 1001 (D.C. Cir. 1999), quoting In Re Motions of Dow Jones & Co., 142 F.3d 496, 500 (D.C. Cir. 1998). Accord In Re Special Grand Jury 89-2, 450 F.3d 1159, 1175-77 (10th Cir. 2006).

However, courts have warned that the above-quoted phrase from Rule 6(e) should not be given an unduly broad reading, and that Rule 6(e) does not require a “veil of secrecy to be drawn over all matters occurring in the world that happen to be investigated by a grand jury.” In Re Sealed Case No. 99-3091, 192 F.3d at 1001-02, quoting Securities & Exch. Comm. v. Dresser Indus., Inc., 628 F.2d 1368, 1382 (D.C. Cir. 1980)(en banc). The majority of courts that have considered the issue have held that Rule 6(e) does not per se prohibit disclosure of records subpoenaed by or presented to the grand jury which were created independently of the grand jury. In a leading case, United States v. Interstate Dress Carriers, Inc., 280 F.2d 52 (1960), the Second Circuit explained:

[I]t is not the purpose of the Rule [6(e)]to foreclose from all future revelation to proper authorities the same information or documents which were presented to the grand jury. Thus, when testimony or data is sought for its own sake – for its intrinsic value in the furtherance of a lawful investigation – rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury.

Id. at 54.

The above-referenced rationale of the majority rule is especially true of normal business records that are routinely created independently of a grand jury investigation and maintained in the normal course of business.<sup>316</sup> However, the courts have not taken a uniform approach to this issue, and have indicated that in some circumstances disclosure of such records subpoenaed by or presented to the grand jury may be prohibited by Rule 6(e), in the absence of an appropriate

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<sup>316</sup> The following cases adopted the majority rule, finding that normal business records and other documents that were created independently of a grand jury investigation and were not sought to learn what took place before the grand jury were not protected from disclosure under Rule 6(e): First Circuit Cases: Capitol Indem. Corp. v. First Minn. Constr. Co., 405 F. Supp. 929, 930-31 (D. Ma. 1975); In Re Grand Jury Proceedings, 505 F. Supp. 978, 982 (D. Me. 1981); Second Circuit Cases: United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960); DiLeo v. Commissioner of IRS, 959 F.2d 16, 19-20 (2d Cir. 1992); Third Circuit Cases: In Re Grand Jury Matter, 640 F. Supp. 63, 65 (E.D. Pa. 1986); United States v. OMT Supermarket, Inc., 995 F. Supp. 526, 531-32 (E.D. Pa. 1998); In Re Grand Jury Investigation, 630 F.2d 996, 1000-01 (3d Cir. 1980); United States v. Chang, 47 Fed. Appx. 119, 121-22 (3d Cir. 2002); Fourth Circuit Cases: United States v. Reiners, 934 F. Supp. 721, 723-24 (E.D. Va. 1996); Sixth Circuit Cases: Matters of Grand Jury Investigation, (90-3-2), 748 F. Supp. 1188, 1208 (E.D. Mich. 1990); Rugiero v. United States Department of Justice, 257 F.3d 534, 549 (6th Cir. 2001); Seventh Circuit Cases: Dexia Credit Local v. Rogan, 395 F. Supp. 2d 709, 715-19 (N.D. Ill. 2005); United States v. Sandford, 589 F.2d 285, 290-91 (7th Cir. 1978); In the Matter of Special March 1981 Grand Jury, 753 F.2d 575, 577-79 (7th Cir. 1985); Ninth Circuit Cases: United States v. Dynavac, Inc., 6 F.3d 1407, 1411-14 (9th Cir. 1993); Kersting v. United States, 206 F.3d 817, 821 (9th Cir. 2000); Tenth Circuit Cases: United States ex rel. Woodard v. Tynan, 757 F.2d 1085, 1087-88 (10th Cir. 1985); District of Columbia Circuit Cases: SEC v. Dresser Indus., 628 F.2d 1368, 1382-83 (D.C. Cir. 1980)(en banc).

disclosure order.<sup>317</sup>

**2. A Government Attorney Who Has Had Lawful Access to a Matter Occurring Before a Grand Jury May Use Such Matter in Handling a Civil RICO Action, But May Not Disclose Such Matter, Without a Court-Disclosure Order, to Another Person to Assist in Handling a Civil Action**

It is not unusual for a Government attorney to participate in both a criminal prosecution and a related civil action, and hence the question arises whether and under what circumstances may a Government attorney use information or evidence that is protected from disclosure by Rule 6(e), FED. R. CRIM. P., in connection with a civil RICO investigation or lawsuit. In sum, a Government attorney who has had lawful access to matters protected from disclosure by Rule 6(e) may use such matters without a court-disclosure order in connection with a civil RICO investigation or lawsuit, but may not disclose such matter, without a court-disclosure order, to another person to assist in handling a civil RICO investigation or lawsuit.

In United States v. Sells Eng'r, Inc., 463 U.S. 418 (1983) (“Sells”), after a defendant pled guilty to participating in a conspiracy to obstruct the Internal Revenue Service (“IRS”), the Government moved under Rule 6(e) for disclosure of all grand jury materials relating to the case to attorneys in the Civil Division of the Justice Department and their staff assistants for use in preparing and conducting a possible civil suit against the defendant. The district court granted the Government’s motion on the ground that Government attorneys in the Civil Division were

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<sup>317</sup> See, e.g., Fourth Circuit Cases: In Re Grand Jury Disclosure, 550 F. Supp. 1171, 1176-77 (E.D. Va. 1982); Sixth Circuit Cases: In Re Grand Jury Subpoenas, 454 F.3d 511, 522 (6th Cir. 2006); In Re Grand Jury Proceedings, 851 F.2d 860, 862-67 (6th Cir. 1988); FDIC v. Ernst & Whinney, 921 F.2d 83, 87 (6th Cir. 1990); Eighth Circuit Cases: In Re Milk Products Antitrust Litigation, 84 F. Supp. 2d 1016, 1026-27 (D. Minn. 1997), aff’d on other grounds, 195 F.3d 430 (8th Cir. 1999); In Re Grand Jury Proceedings Relative To Perl, 838 F.2d 304, 307 (8th Cir. 1988); Eleventh Circuit Cases: In Re May 6, 1997 Grand Jury, 76 F. Supp. 2d 1262, 1268-69 (M. D. Ala. 1999).

entitled to automatic disclosure as a matter of right without a court-disclosure order under Rule 6(e)(3)(A)(i), which authorized disclosure of a grand jury matter to “an attorney for the government for use in performing such attorney’s duty.” See Sells, 463 U.S. at 421-22, 426.

The Supreme Court rejected the Government’s contention that all attorneys in the Justice Department qualify for automatic disclosure of grand jury materials under Rule 6(e)(3)(A)(i) regardless of the nature of the litigation in which they intend to use the materials. The Supreme Court stated:

We hold that (A)(i) disclosure is limited to use by those attorneys who conduct the criminal matters to which the materials pertain. This conclusion is mandated by the general purposes and policies of grand jury secrecy, by the limited policy reasons why Government attorneys are granted access to grand jury materials for criminal use, and by the legislative history of Rule 6(e).

Sells, 463 U.S. at 427. The Supreme Court added that “Rule 6(e) was never intended to grant free access to grand jury materials to attorneys not working on the criminal matters to which the materials pertain.” Id. at 429. Accordingly, the Supreme Court concluded:

“Federal prosecutors” are given a free hand concerning use of grand jury materials, at least pursuant to their “duties relating to criminal law enforcement;” but disclosure of “grand jury-developed evidence for civil law enforcement purposes” requires a (C)(i) court order . . . . Congress did not intend that “attorneys for the government” should be permitted free civil use of grand jury materials.

Id. at 441-42.

Subsequently, in United States v. John Doe, Inc. I, 481 U.S. 102 (1987) (hereafter “John Doe, Inc. I”), the Supreme Court held that a Government attorney who had conducted a criminal anti-trust investigation before a grand jury could, without prior court-authorization, continue to utilize the evidence obtained by the grand jury in a subsequent civil anti-trust and False Claims



Act investigation. In John Doe, Inc. I, attorneys from the Anti-Trust Division of the Department of Justice conducted a grand jury investigation into alleged price fixing by three corporations. At the conclusion of the investigation, the attorneys concluded that, although there had been violations of the Sherman Anti-Trust Act, these violations were not sufficient to warrant criminal prosecution. Thereafter, without seeking a court order authorizing them to do so, the same attorneys reviewed the evidence they had developed in the grand jury for the purpose of determining whether a civil suit should be filed and took various steps pursuant thereto. In the course of their review of the grand jury evidence, the attorneys concluded that in addition to the Sherman Act violations, there were potential violations of the False Claims Act and other statutes. Therefore, they obtained court orders pursuant to Rule 6(e), authorizing the disclosure of the grand jury material to additional Anti-Trust Division Attorneys and to Civil Division Attorneys. The team of attorneys, including the attorneys who had conducted the grand jury investigation, thereafter prepared and filed a civil complaint against the three corporations and various individuals. Significantly, the complaint did not contain or refer to any of the grand jury materials. See John Doe, Inc. I, 481 U.S. at 104-110.

Upon the defendants' claim that the use of the evidence developed in the grand jury to prepare the civil case violated Rule 6(e), the Second Circuit held that review of the evidence by the attorneys who conducted the grand jury investigation for the purpose of determining whether a civil suit should be filed constituted a further "disclosure" of matters occurring before the grand jury under Rule 6(e) and that the Government had not made a sufficient showing of particularized need to warrant the additional disclosure to the new Anti-Trust and Civil Division attorneys. The Second Circuit therefore, held that the civil suit should be dismissed. United

States v. John Doe, Inc., 774 F.2d 34 (2d Cir. 1985).

In reversing the decision of the Second Circuit, the Supreme Court held that the Government's attorneys who had conducted the grand jury investigation could lawfully review and continue to use the evidence developed in the grand jury, provided the attorneys did not disclose any matter occurring before the grand jury to others not authorized by Rule 6(e) to have access to such evidence. The Supreme Court stated:

Rule [6(e)] does not contain a prohibition against the continued use of information by attorneys who legitimately obtained access to the information through the grand jury investigation. The Court of Appeals' reasoning is unpersuasive because it stretches the plain meaning of the Rule's language much too far.

John Doe, Inc. I, 481 U.S. at 108.

The Supreme Court also rejected the argument that the Government attorneys, who had conducted the grand jury investigation, had violated Rule 6(e) by using the grand jury material in drafting the civil complaint, since the attorneys' consideration of the grand jury material did not involve any further disclosure of grand jury matters to others. Noting that the complaint did not refer to any grand jury material, the Supreme Court stated:

A Government attorney may have a variety of uses for grand jury material in a planning stage, even though the material will not be used, or even alluded to, in any filing or proceeding. In this vein, it is important to emphasize that the issue before us is only whether an attorney who was involved in a grand jury investigation (and is presumably familiar with the "matters occurring before the grand jury") may later review that information in a manner that does not involve any further disclosure to others.

John Doe, Inc. I, 481 U.S. at 110-11 (footnote omitted).

Thus, John Doe, Inc. I makes clear that a Government attorney who participated in a grand jury investigation may continue to review and consider grand jury materials for civil law

enforcement purposes. However, the Supreme Court emphasized that under “Sells [such attorney] could not disclose [grand jury] information to previously uninvolved attorneys from the Civil Division or the United States Attorney’s office without a court order pursuant to Rule 6(e)(3)(C)(i).”<sup>318</sup> John Doe, Inc. I, 481 U.S. at 111.

Courts following Sells and John Doe, Inc. I, have allowed Government personnel to use lawfully obtained grand jury evidence and information in civil matters, without a court-disclosure order, provided that such use did not involve disclosure of grand jury matters to another person who did not have lawful access to such grand jury matters. For example, in DiLeo v. Commissioner of Internal Revenue, 959 F.2d 16, 21 (2d Cir. 1992), the Second Circuit held that a Special Agent of the Criminal Investigations Division of the IRS who had participated in a grand jury investigation leading to a criminal prosecution could also participate in a later trial before the Tax Court regarding the civil tax liability of the same defendants and assist attorneys for the Commissioner during that civil tax trial. The Second Circuit stated that the defendant’s claim that the participation of the IRS Special Agent in the Tax Court proceeding violated Rule 6(e):

is inconsistent with the principle that a government employee who has participated in a criminal prosecution may participate in the civil phase of the dispute without obtaining a court order to do so under Rule 6(e).

...

There is no evidence that [the IRS Special Agent] disclosed any Rule 6(e) information to counsel for the Commissioner. There was therefore nothing improper about his presence as a representative of the Commissioner at the trial.

DiLeo, 959 F.2d at 21.

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<sup>318</sup> Former Rule 6(e)(3)(C)(i) is set forth in Rule 6(e)(3)(E)(i) without material change.

In In Re of Grand Jury Subpoena of Rochon, 873 F.2d 170 (7th Cir. 1989), the Seventh Circuit held that the Attorney General, who was named as a defendant in his official capacity in a civil suit, could participate in a related civil rights grand jury investigation and could use the information lawfully disclosed to him in the course of the grand jury investigation in the defense of the civil suit so long as there was no disclosure to the Government's civil attorneys not otherwise lawfully entitled to have the information disclosed to them. In this regard, the Seventh Circuit stated:

Nor do we believe that [the Attorney General's] participation in the grand jury investigation will inevitably result in a Rule 6(e) violation. Rule 6(e) prohibits those participating in a criminal investigation from disclosing grand jury information to others not authorized to receive it under the rule. . . . It does not prevent an attorney from using information that he or she legitimately obtained during a grand jury investigation

873 F.2d at 175. See also In Re Grand Jury Sub. February 28, 2002, March 26, 2003 and October 4, 2004, 472 F.3d 990, 996-1000 (8th Cir. 2007) (holding that simultaneous work by a federal special agent, as lead agent in a grand jury investigation of a corporation and head of a related civil investigation into one of the corporation's companies, did not in itself violate Rule 6(e)); United States v. Archer-Daniels-Midland Co., 785 F.2d 206, 211-13 (8th Cir. 1986) (holding that assignment of Justice Department attorneys to a civil antitrust suit against two corporations after those attorneys participated in a grand jury investigation of the corporations and the attorneys' use of grand jury matters in the civil suit without first obtaining a court-disclosure order did not violate Rule 6(e), absent evidence that those attorneys disclosed a grand jury matter to someone not authorized to obtain such access).

Based on the foregoing analysis, OCRS concludes that under Rule 6(e)(3)(A)(i), a

Government attorney who has had lawful access to grand jury material protected from disclosure by Rule 6(e) may:

- (1) without a court-disclosure order continue to review and use such grand jury material for his own deliberative process in connection with a civil RICO investigation or lawsuit; and
- (2) without a court-disclosure order may disclose such grand jury material to an attorney for the Government to assist such attorney's duties in handling a criminal matter which pertains to the grand jury matter, but may not disclose such grand jury material to a Government attorney or other Government personnel to assist in a civil proceeding without a prior court-disclosure order.

Accordingly, any Government personnel participating in a civil RICO investigation or lawsuit who either did not participate in a related grand jury investigation or was not otherwise authorized to have access to such grand jury matters, should be shielded from such grand jury matters, unless a prior court-disclosure order is obtained.<sup>319</sup>

**3. A District Court May Order Disclosure of a Grand Jury Matter Preliminary to or in Connection With a Judicial Proceeding**

a. Rule 6(e)(3)(E)(i), provides as follows:

(E) The court may authorize disclosure -- at a time, in a manner, and subject to any other conditions that it directs -- of a grand-jury matter: (i) preliminary to or in connection with a judicial proceeding.

In United States v. Baggot, 463 U.S. 476, 480-81 (1983), the Supreme Court held that an

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<sup>319</sup> In Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), the Supreme Court stated:

[A] knowing violation of Rule 6 may be punished as a contempt of court. See Fed. R. Crim. Proc. 6(e)(2). In addition, the court may direct a prosecutor to show cause why he should not be disciplined and request the bar or the Department of Justice to initiate disciplinary proceedings against him. The court may also chastise the prosecutor in a published opinion.

Id. at 263. Accord McQueen v. Bullock, 907 F.2d 1544, 1551 & n.20 (5th Cir. 1990).

IRS investigation to determine a taxpayer's civil tax liability was not "preliminary to or in connection with a judicial proceeding" within the meaning of Rule 6(e). The Court explained:

[T]he purpose of the audit is not to prepare for or conduct litigation, but to assess the amount of tax liability through administrative channels. Assuming, *arguendo*, that this audit will inevitably disclose a deficiency on Baggot's part . . . there is no particular reason why that must lead to litigation, at least from the IRS's point of view. The IRS's decision is largely self-executing, in the sense that it has independent legal force of its own, without requiring prior validation or enforcement by a court. The IRS need never go into court to assess and collect the amount owed; it is empowered to collect the tax by nonjudicial means (such as levy on property or salary, 26 U.S.C. §§ 6331, 6332), without having to prove to a court the validity of the underlying tax liability. Of course, the matter may end up in court if Baggot chooses to take it there, but that possibility does not negate the fact that the primary use to which the IRS proposes to put the materials it seeks is an extrajudicial one - the assessment of a tax deficiency by the IRS.

Id. at 480-81 (footnote omitted).

By contrast, a Government civil RICO investigation is not a "self-executing," independent administrative proceeding, but rather is a preliminary step necessary to decide whether to file a civil RICO lawsuit, and hence falls within the scope of Rule 6(e)(3)(E)(i), and, therefore, a district court may issue a Rule 6(e) disclosure order in connection with a civil RICO investigation.<sup>320</sup> Moreover, Rule 6(e)(3)(E)(i) authorizes a district court to issue a disclosure order in connection with a filed civil RICO lawsuit since such a suit manifestly constitutes a "judicial proceeding" within the meaning of Rule 6(e)(3)(E)(i).<sup>321</sup>

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<sup>320</sup> See, e.g., John Doe, Inc. I, 481 U.S. at 111-117 (approving a 6(e) disclosure order to provide grand jury materials to Justice Department attorneys in the Civil Division to decide whether to proceed with a civil suit).

<sup>321</sup> See, e.g., Atlantic City Elec. Co. v. A.B. Chance Co., 313 F.2d 431, 434 (2d Cir. 1963); In Re Grand Jury Investigation, 55 F.3d 350, 353-55 (8th Cir. 1995); In Re Grand Jury

(continued...)

b. The Supreme Court requires “a strong showing of particularized need for grand jury materials before any disclosure will be permitted.” Sells, 463 U.S. at 443 (collecting cases).

In particular, the Supreme Court has ruled that:

Parties seeking grand jury [material] under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.

Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979). Accord Sells, 463 U.S. at 443; United States v. Campbell, 294 F.3d 824, 827 (7th Cir. 2002)(the person seeking disclosure must demonstrate “a compelling need for the material”). The Supreme Court explained that:

Such a showing must be made even when the grand jury whose transcripts are sought has concluded its operations. . . . For in considering the effects of disclosure on grand jury proceedings, the courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries. Persons called upon to testify will consider the likelihood that their testimony may one day be disclosed to outside parties. Fear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties. Concern as to the future consequences of frank and full testimony is heightened where the witness is an employee of a company under investigation. Thus, the interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities.

Douglas Oil Co., 441 U.S. at 222.

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<sup>321</sup>(...continued)  
Proceedings GJ-76-4 & GJ-75-3, 800 F.2d 1293 (4th Cir. 1986). See generally In Re North, 16 F.3d 1234, 1244 (D.C. Cir. 1994) (“A judicial proceeding [under Rule 6(e)] includes every proceeding of a judicial nature before a competent court or before a tribunal or officer clothed with judicial or quasi-judicial powers”) (citations omitted).

Significantly, the Supreme Court has noted that “[t]he Douglas Oil standard is a highly flexible one” and “accommodates any relevant considerations, peculiar to Government movants, that weigh for or against disclosure in a given case.” Sells, 463 U.S. at 445. For example, the Supreme Court explained that “a district court might reasonably consider that disclosure to Justice Department attorneys poses less risk of further leakage or improper use than would disclosure to private parties or the general public;” or “the district court may weigh the public interest, if any, served by disclosure to a governmental body. . . .” Sells, 463 U.S. at 445 (citation omitted). Moreover, in John Doe, Inc. I, 481 U.S. at 113, the Supreme Court sanctioned disclosure of grand jury materials to Justice Department attorneys in the Civil Division “to make a decision on whether to proceed with a civil action,” where the disclosure “could have had the effect of saving the Government, the potential defendants, and witnesses the pains of costly and time-consuming depositions and interrogatories which might have later turned out to be wasted if the Government decided not to file a civil action after all.”

Applying the foregoing standards, courts have authorized disclosure of grand jury materials to be used by Government attorneys and others in connection with civil proceedings. See, e.g., John Doe, Inc. I, 481 U.S. at 111-17; In Re Grand Jury Proceedings Relative to Perl, 838 F.2d 304, 306-08 (8th Cir. 1988); In Re Grand Jury Proceedings GJ-76-4 & GJ-75-3, 800 F.2d at 1298-1305; In Re of Petitions for Disclosure of Documents, 617 F. Supp. 630, 631-32 (S.D. Fla. 1985).



**APPENDIX A**

**United States Attorneys'**  
**Manual Sections**  
**9-110.010 to 9-110.400**

# 9-110.000 ORGANIZED CRIME AND RACKETEERING

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- 9-110.010 Introduction
  - 9-110.100 Racketeer Influenced and Corrupt Organizations (RICO)
  - 9-110.101 Division Approval
  - 9-110.200 RICO Guidelines Preface
  - 9-1 10.2 10 Authorization of RICO Prosecution -- The Review Process
  - 9-110.300 RICO Guidelines Policy
  - 9-110.310 Considerations Prior to Seeking Indictment
  - 9-110.320 Approval of Organized Crime and Racketeering Section Necessary
  - 9-1 10.330 Charging RICO Counts
  - 9-1 10.400 RICO Prosecution (Pros) Memorandum Format
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## **9-110.010 Introduction**

This chapter focuses on investigations and prosecutions involving RICO, (18 U.S.C. §§ 1961-1968), illegal gambling (18U.S.C. § 1511 and 1955), loansharking(18 U.S.C. § 891-896), violent crimes in aid of racketeering (18 U.S.C. § 1959), and gambling ships (18 U.S.C. §§ 108 1-1083). The Organized Crime and Racketeering Section of the Criminal Division supervises prosecutions of each of these statutes. For an additional discussion of RICO, see "Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors," available from OCRS.

## **9-110.100 Racketeer Influenced and Corrupt Organizations (RICO)**

On October 15, 1970, the Organized Crime Control Act of 1970 became law. Title IX of the Act is the Racketeer Influenced and Corrupt Organizations Statute (18 U.S.C. § § 1961-1968), commonly referred to as the "RICO" statute. The purpose of the RICO statute is "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S.Rep. No. 617, 91st Cong., 1st Sess. 76 (1969). However, the statute is sufficiently broad to encompass illegal activities relating to any enterprise affecting interstate or foreign commerce.

Section 1961(10) of Title 18 provides that the Attorney General may designate any department or agency to conduct investigations authorized by the RICO statute and such department or agency may use the investigative provisions of the statute or the investigative power of such department or agency otherwise conferred by law. Absent a specific designation by the Attorney General, jurisdiction to conduct investigations for violations of 18 U.S.C. § 1962 lies with the agency having jurisdiction over the violations constituting the pattern of racketeering activity listed in

18 U.S.C. § 1961.

### **9-110.101 Division Approval**

No RICO criminal indictment or information or civil complaint shall be filed, and no civil investigative demand shall be issued, without the prior approval of the Criminal Division. *See* RICO Guidelines at USAM 9-110.200.

### **9-110.200 RICO Guidelines Preface**

The decision to institute a federal criminal prosecution involves balancing society's interest in effective law enforcement against the consequences for the accused. Utilization of the RICO statute, more so than most other federal criminal sanctions, requires particularly careful and reasoned application, because, among other things, RICO incorporates certain state crimes. One purpose of these guidelines is to reemphasize the principle that the primary responsibility for enforcing state laws rests with the state concerned. Despite the broad statutory language of RICO and the legislative intent that the statute ". . . shall be liberally construed to effectuate its remedial purpose," it is the policy of the Criminal Division that RICO be selectively and uniformly used. It is the purpose of these guidelines to make it clear that not every proposed RICO charge that meets the technical requirements of a RICO violation will be approved. Further, the Criminal Division will not approve "imaginative" prosecutions under RICO which are far afield from the congressional purpose of the RICO statute. A RICO count which merely duplicates the elements of proof of traditional Hobbs Act, Travel Act, mail fraud, wire fraud, gambling or controlled substances cases, will not be approved unless it serves some special RICO purpose. Only in exceptional circumstances will approval be granted when RICO is sought merely to serve some evidentiary purpose.

These guidelines provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

### **9-110.210 Authorization of RICO Prosecution --The Review Process**

The review and approval function for all RICO matters has been centralized within the Organized Crime and Racketeering Section of the Criminal Division. To commence the review process, the *final* draft of the proposed indictment or information and a RICO prosecution memorandum shall be forwarded to the Organized Crime and Racketeering Section. Separate approval is required for superseding indictments or indictments based upon a previously approved information. Attorneys are encouraged to seek guidance from the Organized Crime and Racketeering Section by telephone prior to the time an investigation is undertaken and well before a final indictment and prosecution memorandum are submitted for review. Guidance on preparing the RICO prosecution memorandum is in the Criminal Resource Manual at 2071 et seq.

RICO reviews are handled on a first-in-first-out basis. Accordingly, the submitting attorney must allocate sufficient lead time to permit review, revision, conferences, and the scheduling of the grand jury. *Unless there is a backlog, 15 working days is usually sufficient.* The review process will

not be dispensed with because a grand jury, which is about to expire, has been scheduled to meet to return a RICO indictment. Therefore, submitting attorneys are cautioned to budget their time and to await receipt of approval before scheduling the presentation of the indictment to a grand jury.

If modifications in the indictment are required, they must be made by the submitting attorney before the indictment is returned by the grand jury. Once the modifications have been made and the indictment has been returned, a copy of the indictment filed with the clerk of the court shall be forwarded to Organized Crime and Racketeering Section. If, however, it is determined that the RICO count is inappropriate, the submitting attorney will be advised of the Section's disapproval of the proposed indictment. The submitting attorney may wish to redraft the indictment based upon the Section's review and submit a revised indictment and/or prosecution memorandum at a later date.

### **9-110.300 RICO Guidelines Policy**

It is the purpose of these guidelines to centralize the RICO review and policy implementation functions in the section of the Criminal Division having supervisory responsibility for this statute.

### **9-110.310 Considerations Prior to Seeking Indictment**

Except as hereafter provided, a government attorney should seek approval for a RICO charge only if one or more of the following requirements is present:

1. RICO is necessary to ensure that the indictment adequately reflects the nature and extent of the criminal conduct involved in a way that prosecution only on the underlying charges would not;
2. A RICO prosecution would provide the basis for an appropriate sentence under all the circumstances of the case in a way that prosecution only on the underlying charges would not;
3. A RICO charge could combine related offenses which would otherwise have to be prosecuted separately in different jurisdictions;
4. RICO is necessary for a successful prosecution of the government's case against the defendant or a codefendant;
5. Use of RICO would provide a reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct;
6. The case consists of violations of State law, but local law enforcement officials are unlikely or unable to successfully prosecute the case, in which the federal government has a significant interest;
7. The case consists of violations of State law, but involves prosecution of significant or government individuals, which may pose special problems for the local prosecutor.

The last two requirements reflect the principle that the prosecution of state crimes is primarily the responsibility of state authorities. RICO should be used to prosecute what are essentially violations of state law only if there is a compelling reason to do so. See also the Criminal Resource Manual at 2070.

### **9-110.320 Approval of Organized Crime and Racketeering Section Necessary**

A RICO prosecution memorandum and draft indictment, felony information, civil complaint, or civil investigative demand shall be forwarded to the Organized Crime and Racketeering Section,

Criminal Division, The John C. Keeney Building, 1301 New York Avenue, NW, 7<sup>th</sup> Floor, Washington, DC 20005, *at least 15 working days prior to the anticipated date of the proposed filing or the seeking of an indictment from the grand jury.*

No criminal or civil prosecution or civil investigative demand shall be commenced or issued under the RICO statute without the prior approval of the Organized Crime and Racketeering Section, Criminal Division. Prior authorization from the Criminal Division to conduct a grand jury investigation based upon possible violations of 18 U.S.C. § 1962 is not required.

A RICO prosecution memorandum and draft pleading or civil investigative demand shall be forwarded to the Organized Crime and Racketeering Section. It is essential to the careful review which these factually and legally complex cases require that the attorney handling the case in the field not wait to submit the case until the grand jury or the statute of limitations is about to expire. Authorizations based on oral presentations will not be given. See the Criminal Resource Manual at 2071 *et seq.* for specific guidance.

These guidelines do not limit the authority of the Federal Bureau of Investigation to conduct investigations of suspected violations of RICO. The authority to conduct such investigations is governed by the FBI Guidelines on the Investigation of General Crimes. However, the factors identified here are the criteria by which the Department of Justice will determine whether to approve the proposed RICO. The fact that an investigation was authorized, or that substantial resources were committed to it, will not influence the Department in determining whether an indictment under the RICO statute is appropriate.

Use of RICO in a prosecution, like every other federal criminal statute, is also governed by the Principles of Federal Prosecution. *See* USAM 9-27.000, *et seq.* Inclusion of a RICO count in an indictment solely or even primarily to create a bargaining tool for later plea negotiations on lesser counts is not appropriate and would violate the Principles of Federal Prosecution.

### **9-110.330 Charging RICO Counts**

A RICO charge where the predicate acts consist only of state offenses will not be approved except in the following circumstances:

- A. Local law enforcement officials are unlikely to investigate and prosecute otherwise meritorious cases in which the Federal government has significant interest;
- B. Significant organized crime involvement exists; or
- C. The prosecution of significant political or governmental individuals may pose special problems for local prosecutors.

### **9-110.400 RICO Prosecution (Pros) Memorandum Format**

A well written, carefully organized prosecution memorandum is the greatest guarantee that a RICO prosecution will be authorized quickly and efficiently. See the Criminal Resource Manual at 2071 *et seq.* for specific guidelines on drafting the RICO prosecution memorandum.

Once a RICO indictment has been approved by the Organized Crime and Racketeering Section and has been returned by the grand jury, a copy of a file-stamped copy of the indictment shall be provided to the Section. The Section shall also be notified in writing of any significant rulings which affect the RICO statute--for example, any ruling which results in a dismissal of a RICO count, or any ruling affecting or severing any aspect of the forfeiture provisions under RICO. In addition, copies of RICO motions, jury instructions and briefs filed by the United States Attorney's Office (USAO), as well as the defense, should be forwarded to the Organized Crime and Racketeering Section for retention in a central reference file. The government's briefs and motions will provide assistance to other USAOs handling similar RICO matters.

Once a verdict has been obtained, the USAO shall forward the following information to the Section for retention: (a) the verdict on each count of the indictment; (b) a copy of the judgment of forfeiture; (c) estimated value of the forfeiture; and (d) judgment and sentence(s) received by each RICO defendant.

## **1. TEAMSTERS LOCAL 560**

### **A. CASE NAME:**

United States v. Local 560 of the International Brotherhood of Teamsters, Chauffeurs Warehousemen, and Helpers of America (IBT), et al., Civil Action. No. 82-689, United States District Court for the District of New Jersey. Complaint filed March 9, 1982 and amended September 20, 1982.

### **B. DEFENDANTS:**

The complaint named as “nominal” defendants Local 560 of the International Brotherhood of Teamsters, Chauffeurs Warehousemen, and Helpers of America (IBT) and its Welfare Fund and Severance Pay Fund, their officers, and five persons in their individual capacity. Five of the individual defendants formed the “Provenzano Group,” allegedly an ongoing criminal confederation controlled by the Genovese LCN Family. The Provenzano Group included Genovese “made” member Anthony Provenzano, his brother Nunzio Provenzano, Thomas Andretta, Stephen Andretta, and Gabriel Briguglio, also an alleged member of the Genovese LCN. The seven remaining personal defendants, all members of the Local 560 Executive Board, were charged with aiding and abetting the Provenzano Group. The Executive Board consisted of President Salvatore Provenzano, Anthony Provenzano’s brother; Vice-President Joseph Sheridan; Secretary-Treasurer Josephine Provenzano Septembre, Anthony Provenzano’s daughter; Recording Secretary J.W. Dildine; and employee trustees, Thomas Reynolds, Michael Sciarra, and Stanley Jaronko.

### **C. SUMMARY OF THE COMPLAINT:**

The complaint alleged that the RICO enterprise consisted of an association-in-fact comprised of the nominal defendants, Local 560, together with its Welfare and Pension Fund and its Severance Pay Plan (Local 560 Enterprise). The complaint also alleged that the Local 560

Enterprise had become “a captive labor organization,” which, continuously since the 1950s, the Provenzano Group had infiltrated, dominated, and exploited through a pattern of racketeering that included murder, systematic extortion, bribery and fraud. By the use of actual and threatened force, violence and fear of economic and physical injury, the Provenzano Group, aided and abetted by incumbent and former members of Local 560’s Executive Board, created within Local 560 a climate of intimidation, which induced its members to surrender valuable property--their rights to union democracy guaranteed by 29 U.S.C. §§ 157 and 411.<sup>1</sup>

Specifically, members of the Provenzano Group, headed by Anthony Provenzano, ordered the murders of political rivals in Local 560. The Provenzano Group with the concurrence of the Executive Board appointed known convicted felons, known murderers, and those with indictments pending, to positions of trust in Local 560 and allowed convicted felons and reputed members of organized crime to frequent Local 560. In addition, members of the Provenzano Group extorted money and property from local businesses in return for “labor peace,” stole, converted, or embezzled Local 560 funds, schemed to commit mail fraud, voted unlawfully for an increased salary for Provenzano, took kickbacks in return for influencing the affairs of Local 560, and made or took loans and investments of Local 560 funds in return for labor peace. The Executive Board at the behest of the Provenzano Group unlawfully contributed Local 560 funds to the Provenzano and Sciarra defense funds. The complaint alleged that these acts, set forth in thirty-three predicate acts, violated 18 U.S.C. §§ 1962(b) and (c), and in addition, the defendants conspired to violate Section 1962(b) and (c), in violation of 18 U.S.C. § 1962(d).

**D. RELIEF SOUGHT:**

The Government sought to preliminarily enjoin the Provenzano Group from any dealings, direct or indirect, with the Local 560 Enterprise, its officers or employees and to remove the Local 560 Executive Board and replace it temporarily with one or more court-appointed trustees

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<sup>1</sup> On September 20, 1982, the Government amended the original complaint to add additional similar predicate acts alleged to have created the climate of intimidation that induced the Local 560 members to surrender their rights to union democracy.



to discharge all duties and responsibilities of the Executive Board of Local 560. The Government also sought court-ordered supervised free elections to select a new Executive Board and to permanently enjoin the individual defendants and the Provenzano Group from any participation in the affairs of Local 560 or any other labor organization.

**E. OUTCOME OF CASE:**

1. Prior to trial, on June 15, 1982, the district court entered an order approving a consent decree between Anthony Provenzano and the United States. Anthony Provenzano was permanently enjoined from any form of association with any enterprise seeking to dominate, control, conduct, or otherwise influence the affairs of any labor organization or any employee benefit plan.

2. On September 15, 1982, a similar consent decree was approved between Nunzio Provenzano and the United States.

3. On January 14, 1983, Thomas Andretta entered into a similar consent decree.

4. Following a fifty-one day bench trial, the district court by an order entered March 16, 1984, enjoined Stephen Andretta and Gabriel Briguglio from any future dealings with Local 560, removed the Executive Board of Local 560 (Salvatore Provenzano, J.W. Dildine, Joseph Sheridan, Josephine Provenzano, Michael Sciarra, Stanley Jaronko, and Thomas Reynolds), who were found to have violated RICO, and appointed in its place a trustee to administer and oversee the affairs of Local 560 during a curative period, presumptively eighteen months, to be followed by a supervised election to restore union democracy to Local 560. The district court stayed its order granting injunctive relief pending appeal. See United States v. Local 560, (I.B.T.), 581 F. Supp. 279, 321, 337 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986).

In United States v. Local 560 of Intern. Broth. of Teamsters, 780 F.3d 267, 295-96 (3d Cir. 1986), cert. denied 476 U.S. 1140 (1986), the Third Circuit affirmed the district court's relief, stating that the power to appoint "a trustee to be in charge of Local 560 . . . falls within the

broad equitable powers granted to district courts under Section 1964(a)” (*id.* at 296 fn. 39), particularly the “broad remedial powers of ‘divestiture’ and ‘reasonable restrictions’ provided for under Section 1964.” *Id.* at 295.

During the course of the trusteeship, the district court authorized the trustee, subject to review by the district court, to among other matters, administer the affairs of Local 560, negotiate contracts, hire and discharge employees and to investigate acts of wrongdoing within the union. See United States v. Local 560, et al., Civ. No. 82-689, Opinion and Order dated May 12, 1987; United States v. Local 560 (I.B.T.), 694 F.Supp. 1158, 1160-62, 1191-92 (D.N.J. 1988); United States v. Sciarra, 851 F.2d 621, 623-24, 632-33 (3d Cir. 1988).

5. On January 28, 1988, defendant Stanley Jaronko entered into a consent decree with the Government wherein he was permanently enjoined from any direct or indirect participation in or dealings with Local 560, its benefit plan, or any other I.B.T. local or affiliates of any I.B.T. locals. In addition, Jaronko was enjoined from any association with any member or associate of the Provenzano Group.

6. On August 11, 1989, Joseph Sheridan, a member of Local 560’s Executive Board at the time the complaint was filed and who initially attempted to remain active in the affairs of Local 560, entered into a consent decree permanently enjoining him from holding any position within or otherwise endeavoring to influence Local 560 or any of its benefit plans.

7. In July 1988, twenty-five months into the trusteeship and prior to a trustee-supervised election, the Government sought additional equitable relief, a permanent bar to Michael Sciarra’s participation in the affairs of Local 560, one of the two temporarily suspended Executive Board defendants still active in union politics. See United States v. Local 560 (I.B.T.) and Sciarra, 754 F. Supp. 395 (D.N.J. 1991). On March 27, 1991, the district court entered an unpublished final order of injunction, and denied the stay. Sciarra and Local 560 appealed the March 27, 1991, order. On May 13 1991, in an unpublished opinion, the Third Circuit denied defendants’ motion to grant a stay.

8. On February 6, 1992, the district court signed a consent decree approving and implementing the terms of an interim settlement agreement reached between the Government and defendants Local 560 and its Executive Board, resolving motions filed by Local 560 on September 10, 1991, seeking dissolution of the trusteeship and the government's cross motion for additional equitable relief.

The Government's cross motion alleged that the Executive Board had abdicated its responsibilities since taking office in December 1988; that the Board had allowed former President Michael Sciarra to usurp its powers despite his twice adjudicated status as a conspirator of the Genovese LCN Family; and that Michael Sciarra's de facto domination of the Local had eroded many of the remedial accomplishments of the trusteeship and threatened to return the union to racketeer domination.

The Government's proof demonstrated that the Local's business agent, long-time Sciarra associate Freddy Mezzina who controlled job allocations in construction, had given preferential treatment in job assignments to a Sciarra relative who had twenty-five drug-related arrests over a ten-year period. When the relative died of a drug overdose in February 1991, Mezzina pressured two major construction companies to falsify their records and to fraudulently certify that the deceased had worked for a requisite period, thereby enabling the widow to collect on a \$20,000 union insurance policy.

The consent decree mandated a restructuring of the Executive Board that included the following provisions: (1) President Daniel Sciarra, who ran in the place of his brother Michael Sciarra after Michael Sciarra was enjoined by the district court from seeking elective office during the 1988 elections, was removed from his position as President and was permanently barred from holding any position higher than that of shop steward; (2) of three outgoing incumbents, one--Trustee James Bartolomeo--was selected by the incumbents to remain as a carryover officer for the reconstituted board; the two remaining vacancies were filled by the court-appointed trustee; (3) the position of President was to remain vacant until such time as the

district court ordered an election. In addition, the agreement empowered the district court, upon the motion of the trustees or the Government, to remove any member of the Executive Board for misconduct which threatens to undermine the remedial objectives of the trusteeship or otherwise discredits Local 560 under standards established by the IBT Independent Administrator.

The agreement also provided that Local 560 devise and implement a comprehensive plan for job referrals in the construction field to be reviewed by the Government and the court-appointed trustee. The agreement ordered that former business agent Freddy Mezzina, who resigned immediately prior to the signing of the agreement, was permanently barred from appointment to any position of trust within the union, and was replaced by a court-appointed officer to control the new construction referral system.

9. In January 1999, the court-appointed trustee issued a report recommending that the court-appointed trusteeship, which was imposed in 1987, be terminated. The report noted that in 1998, Local 560 members had elected an Executive Board who were not controlled by organized crime.

10. On February 25, 1999, the district court issued a Consent Decree stating that the objectives of the trusteeship had been substantially achieved and ordering the following matters:

- a. The court trusteeship was terminated and all powers of the court-appointed trustee were restored to the officers and Executive Board of Local 560.
- b. The district court retained jurisdiction over the subject matter and the parties.
- c. All current and future officers, agents, employees, representatives, and persons holding positions of trust in Local 560 and all current and future members of Local 560 were permanently enjoined from committing any crime listed in 18 U.S.C. § 1961(1), knowingly associating with any member or associate of organized crime or with any barred person, and from knowingly permitting any member or associate of organized crime or

any barred person to exercise any control or influence, directly or indirectly, in the conduct of the affairs of Local 560.

- d. Any person who violated the injunctive provisions of the Consent Decree were subject to sanctions, including removal, suspension and/or expulsion from office or the union.
- e. The district court retained jurisdiction to modify the Consent Decree, and upon a showing of systematic corruption or organized crime influence in Local 560 to order any relief that was necessary and proper.
- f. The Consent Decree was to remain in effect for four years.

**F. LEADING COURT DECISIONS:**

- 1. United States v. Local 560 (I.B.T.), 550 F. Supp. 511 (D.N.J. 1982).

The Government charged that I.B.T. Local 560 was a “captive labor organization” and sought to place Local 560 under a trusteeship, to divest individual defendants of their interests in the union, and to prohibit their future involvement in the union’s affairs. Prior to trial, the district court dismissed the defendants’ motion under Fed. R. Civ. P. 12 (b)(6) to dismiss the complaint for failure to state a claim.

The complaint alleged that defendant Anthony Provenzano and other defendants either associated with the Provenzano organized crime group (the Provenzano Group) or aided and abetted them, in violation of RICO, 18 U.S.C. § 1962(b). The complaint also charged the predicate offenses of murder and Hobbs Act extortion, 18 U.S.C. § 1951, as the pattern through which defendants unlawfully acquired and maintained a controlling interest in the “Local 560 Enterprise.” The specific property alleged to have been extorted consisted of union members’ rights guaranteed by 29 U.S.C. §§ 157 and 411 of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA). The defendants’ acts, which allegedly created a climate of intimidation and thus induced the surrender of members’ rights to union democracy, included several murders, the appointment of convicted felons and members of organized crime to important union positions, and the extortion by these officials of union funds.

The district court held that Section 411 rights to union democracy constituted “property” within the scope of 18 U.S.C. § 1951, which encompasses both tangible and intangible property rights. The district court also held that the extortion charges were not pre-empted by 29 U.S.C. §§ 530 and 610 on the ground that those labor law prohibitions were not the exclusive remedies for the alleged extortionate conduct. The court noted that RICO and the LMRDA were intended to supplement the remedies to reach such unlawful racketeering.

- 2. United States v. Local 560, I.B.T., 581 F. Supp. 279 (D.N.J. 1984), aff’d, 780 F.2d 267 (3d Cir. 1985), cert. denied, 476 U.S. 1141 (1986).

This lengthy decision constitutes the district court’s findings of facts and conclusions of law following a fifty-one day bench trial on the Government’s civil RICO claims.

The district court found that the Provenzano brothers (Anthony, Nunzio and Salvatore) and the Provenzano Group (Anthony & Nunzio Provenzano, Andrettas and Gabriel Briguglio) betrayed the membership of Local 560, and along with the remaining individual defendants, violated 18 U.S.C. §§ 1962(b), (c), and (d). The district court enjoined defendants Andretta and Briguglio from any future contacts of any kind with Local 560 and removed current members of Local 560's Executive Board found to have violated RICO in favor of a trusteeship. In that regard, the district court found it particularly significant that the members of the Executive Board aided and abetted the creation and maintenance of a climate of intimidation by knowingly appointing and reappointing associates of the Provenzano Group with criminal records and/or propensity for violence. The court ordered the trusteeship to continue as long as necessary, presumptively for a period of eighteen months, to bring about free supervised elections and to ensure during this time the protection of union funds. The court, however, stayed injunctive relief and deferred the naming of trustees pending appeal.

The district court concluded that "there is no basis for retaining either Local 560, the Funds or the Plan as a defendant in this action" because they were the victims of the individual defendants' actions. *Id.* at 537. However, the district court retained "Local 560 as a nominal defendant to effectuate the equitable relief heretofore specified and as may be ordered in the future." *Id.*

The district court's evidentiary and legal rulings included the following: (1) the Government's burden of proof is measured by a preponderance of the evidence standard because the defendants did not face criminal sanctions or significant deprivation of liberty or stigma, and the relief sought was equitable and remedial in nature, not punitive; (2) the business agent of Local 560 was a managing agent within the meaning of Fed. R. Civ. P. 32(a)(2) and also a conspirator, and therefore, his deposition was admissible under Fed. R. Evid. 801(d)(2)(D) and (E); (3) the RICO conspiracy agreement element does not require an agreement by each defendant to personally commit two predicate acts, but only a showing that the defendant agreed to the commission of two predicate acts by any of the conspirators and proof is sufficient, therefore, if it shows agreement through a defendant's aiding and abetting in at least two predicate offenses; (4) there is no overt act requirement under 18 U.S.C. § 1962(d); and (5) that conscious avoidance of knowledge, while knowing the consequences of such inaction, can satisfy the intent element under aiding and abetting, if the defendant had some interest in the successful accomplishment of the crime being committed.

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

The Third Circuit affirmed the district court's decision enjoining certain defendants from future contacts with Local 560 and removing current members of the Executive Board and dissolved the stay pending appeal of the above and made the following evidentiary rulings: (1) the district court abused its discretion by admitting into evidence certain newspaper and magazine articles, spanning a period of twenty years, and FBI testimony concerning a survey offered to prove that the Local 560 membership feared their union leadership, because the Government failed to establish that members of Local 560 actually read the articles in question (only one witness testified that he had ever read anything in the papers about the Provenzano Group), but found the error harmless in light of independent testimony to support the district judge's finding that the Provenzano Group and Executive Board had extorted LMRDA rights of a substantial number of Local 560 members; (2) the failure of the Government to establish a scientific basis for its proof and FBI "survey," consisting of interviews with Local 560 members known to be opposed to the Provenzano Group and purporting to show that several current and former Executive Board members had a reputation for violence and economic retribution, went

to its weight, not its admissibility; and (3) “preponderance of the evidence” is the standard of proof to be applied in a Government civil RICO action.

The Third Circuit further held that: union members’ intangible property right to democratic participation in the affairs of the union is “property” within the meaning of the Hobbs Act, and that 29 U.S.C. § 530 is not the exclusive sanction for criminal violations of union member rights and that the criminal standard for aiding and abetting applies to government civil RICO charges. The Third Circuit also upheld the district court’s ruling that the Executive Board defendants aided in extorting member’s rights to union democracy by: (1) making certain appointments and reappointments of persons with criminal records or propensity for violence to union officers; (2) failing to remove certain appointees from office; (3) spending union assets for Anthony Provenzano; (4) permitting access to Local 560’s offices by known or reputed criminals; and (5) being recklessly indifferent to the above-mentioned systematic misconduct by follow incumbent officers. *Id.* at 283.

The Third Circuit also held that the district court’s injunction removing temporarily the Executive Board and replacing it with a trustee fell within the broad remedial powers of “divestiture” and “reasonable restrictions” permitted under Section 1962(a); *Id.* at 295-96 and n.39.

The Third Circuit also held at the district court correctly found the Provenzano Group to be a “person,” and Local 560 the “enterprise” in which the Provenzano Group acquired an interest for purposes of Section 1962(b), and that under Section 1962(c), the named Provenzano Group defendants--as individuals--were “persons” and the Provenzano Group, as a separate entity, represented an “enterprise.” The Third Circuit found that even though the district court took a somewhat different view than that presented in the complaint, the defendants had notice of this alternative theory, and it was litigated with the implied consent of the defendants. Furthermore, the Third Circuit reasoned that the complaint specifically charged that the Provenzano Group defendants “associated together in fact as an enterprise (the Provenzano Group) within the meaning of Section 1961,” that ample evidence supported the district’s court’s factual conclusion that the Provenzano Group was an ongoing enterprise, that the district court’s findings of individual and vicarious liability for acts of coconspirators fully supported its ultimate holding that individual Provenzano Group associates (“persons” within the meaning of RICO) violated both Section 1962 (b) and (c), thereby obviating the need for the Third Circuit to rely on the finding of an ongoing Provenzano Group. *Id.* at 294-95.

The Third Circuit also concluded that the district court’s findings of liability on the part of each Provenzano Group defendant supported liability under the Government’s original theory--that is, Local 560 was the relevant enterprise--and there was no doubt that the district court found in substance that these individual defendants violated Section 1962(c) by conducting the affairs of Local 560, undoubtedly a Section 1961(4) enterprise, through a pattern of racketeering activity. The Third Circuit concluded that the term “Provenzano Group” was used by the district court as a simple designation for the collective defendants--a conspiracy of seven identifiable, culpable individuals--and was not intended to represent a “person” within the meaning of Section 1962(b) and these individuals, not the Provenzano Group as a separate entity, had been identified as “persons” under Section 1962(b). *Id.* at 294-95.

4. United States v. Sciarra, 851 F.2d 621 (3d Cir. 1988).

The Government sought information from Sciarra, Sheridan, and former defendant Stanley Jaronko, who were non-parties, regarding Local 560’s operation, which the

Government believed would form the basis for additional relief to prevent future racketeering activities, domination and exploitation of Local 560.

The Third Circuit ruled as follows: (1) non-party witnesses may obtain appellate review of a discovery order without first being held in contempt if there is no underlying judicial action; (2) Sciarra and Sheridan were non-parties since they were no longer parties to the original action, no subsequent actions had been instituted against them, and the Government sought additional information related to continued racketeering activities in the union; (3) the ongoing maintenance and protection of the trusteeship remained an action for purposes of Rule 30(a), Fed.R.Civ.P. and that the Government remained a party within the meaning of the Rule to take subsequent investigative activities necessary to effectuate the objectives of the 1984 judgment; and (4) the RICO statute empowers district courts to compel non-parties to submit to depositions deemed necessary to protect and maintain the trusteeship--even in the absence of a criminal or civil proceeding.

The district court also addressed, apparently for the first time in any reported decision, whether 28 U.S.C. § 455 confers standing upon non-party witnesses who have not been adjudged in contempt to challenge the partiality of a federal judge. The court held that they lacked standing.

5. United States v. Local 560, I.B.T. v. Michael Sciarra, Joseph Sheridan, 694 F. Supp. 1158 (D.N.J.), aff'd, 865 F.2d 252 (3d Cir. 1988) (Table).

The United States attempted to modify and extend equitable relief of the original Judgment Order, entered March 16, 1984, by rejoining Michael Sciarra and Joseph Sheridan as party defendants and by enjoining them from further participation in the affairs of Local 560. The original order, in part, removed from office the entire Executive Board of Local 560, of which Sciarra and Sheridan were members, and imposed a trusteeship, but did not become effective until after the district court's order was affirmed and *certiorari* was denied. On June 23, 1986, two court-appointed trustees assumed the administration and management of Local 560. The Government alleged that in the time between the 1984 order, the May 1986 denial of *certiorari* by the Supreme Court, and the June 23, 1986 implementation of the trusteeship, Sciarra and Sheridan, in spite of the district court's orders, failed to renounce participation in the racketeering conspiracy and acted instead to perpetuate the control of the Genovese LCN Family over Local 560. Three taped recordings of conversations in November and December of 1984 between members of the Genovese LCN Family established that the group intended to maintain control over Local 560 during the pendency of the appeal, during the trusteeship, and thereafter. Of immediate concern was their plan to regain control of Local 560 in the November 1988 election of officers and to thereafter exercise control through Sciarra and Sheridan.

Preliminarily, the district court ruled that Sciarra and Sheridan, who were no longer parties to the original suit, could not be rejoined as the Government requested, but were subject to the Government's request by virtue of Fed. R. Civ. P. 15(a) and (d), permitting the Government to supplement and amend the complaint on the underlying action on the basis of new facts. The court enjoined Sciarra and Sheridan from running for union office in the forthcoming election until a hearing could be held to determine whether additional relief was required.

In addition, the district court ruled as follows: (1) the Government's request was not barred by the doctrines of *res judicata* or collateral estoppel; (2) 29 U.S.C. § 504 was not the exclusive means by which a court can bar a person from holding union office; (3) the depositions of Sciarra and Sheridan were not tainted by Judge Ackerman's disqualification and could be used



in the instant proceeding; and (4) the rule of United States v. McNally, 483 U.S. 350 (1987), should not be extended to Hobbs Act cases, thereby rejecting defendants' claim that McNally undermines the trusteeship, and holding that extortion of teamsters' rights to democratic participation in the union constituted a deprivation of union members' property rights covered by the Hobbs Act.

6. United States v. Local 560 (I.B.T.), 736 F. Supp. 601 (D.N.J. 1990), aff'd, 974 F.2d 315 (3d Cir. 1992).

In earlier phases of this litigation, the district court found at trial that Michael Sciarra, a member of Local 560's Executive Board, had violated RICO, and the court removed the entire Executive Board, including Sciarra, and imposed a trusteeship. In 1988, the court-appointed trustee scheduled an election for officers of Local 560 and its Executive Board. Following an evidentiary hearing, the district court granted the Government's motion for a preliminary injunction, enjoining Sciarra from running for office in that election and from holding any position of trust within Local 560 or its benefit plan system. The evidence adduced at the hearing established that Sciarra, through his position as business agent for Local 560, was asserting de facto control over the union, which was inconsistent with the purposes of the earlier injunction removing Sciarra from Local 560's Executive Board.

7. United States v. Local 560 (I.B.T.) and Michael Sciarra, 754 F. Supp. 395 (D.N.J. 1991), aff'd, 974 F.2d 315 (3d Cir. 1992).

The district court in United States v. Local 560 (I.B.T.), 694 F. Supp. 1158 (D.N.J. 1988), issued a Judgment Order on March 16, 1984, that removed the Executive Board including Michael Sciarra and barred Michael Sciarra and Joseph Sheridan, former officers and Executive Board members of Local 560, from running for office in upcoming court-supervised elections. However, the Teamsters for Liberty party circumvented the court's order by substituting as its candidates Sciarra's brother and Sheridan's nephew, who were elected to the Executive Board, as were its other candidates. Thereafter, the new Executive Board appointed Michael Sciarra and Joseph Sheridan to fill business agent positions. The district court denied the Government's initial application to have the two barred from any appointed position in Local 560, but directed the Trustee to continue monitoring the Union's management. Sheridan eventually resigned and agreed to no longer participate in the affairs of Local 560.

On February 6, 1990, the Government again moved to bar Sciarra from holding any position in the Union. After another hearing, the district court concluded that Sciarra had become the de facto President of Local 560 and permanently enjoined him from holding any position of trust with the union. The court also found that since the original order in 1984, the Genovese LCN Family had used Sciarra to regain control of Local 560 and that without Sciarra's removal, he would continue to control Local 560 on behalf of the Genovese LCN Family.

The district court also rejected Sciarra's argument that "to succeed the government must prove a new RICO offense based on conduct which occurred after" the district court's March 16, 1984, Judgment Order removing Michael Sciarra from the Executive Board. Id. at 403. The district court reasoned that "[t]his is not a new case, beginning with a clean slate. Rather, it is a facet of the original case. . . ." Id. In so ruling, the district court rejected Sciarra's claim that a permanent injunction prevented him from pursuing his only means of livelihood in violation of the Fifth Amendment, and found that under Section 1964 and United States v. Local 560, 780 F.2d 267 (3d Cir. 1985), such relief was proper and constitutional, and, the district court found that a permanent injunction was a necessary and reasonable restriction within the meaning of 18 U.S.C. § 1964(a).

8. United States v. Local 560 (I.B.T.), 974 F.2d 315 (3d Cir. 1992), aff'g, 754 F. Supp. 395 (D. N.J. 1991).

The Third Circuit's ruling included the following matters: (1) the evidence was sufficient to establish that Michael Sciarra was controlled by the Genovese LCN Family and to support the issuance of the injunction against Michael Sciarra that modified an earlier injunction, and that the government was not required to prove a new violation of 18 U.S.C. § 1962(c) that occurred after the entry of the March 1984 injunction; (2) the required burden of proof was a preponderance of the evidence; (3) Local 560 had standing to assert that the injunction violated its members' rights under the First Amendment and the LMRDA; (4) that the restrictions on union members' exercise of their First Amendment rights were justified by a compelling government interest in the eradication of organized crime from labor unions and that the injunction was sufficiently narrowly tailored to pass constitutional scrutiny; and (5) that the injunction did not violate union members' rights under the LMRDA.

## 2. LOCAL 6A, CEMENT AND CONCRETE WORKERS

### A. CASE NAME:

United States v. Local 6A, Cement and Concrete Workers, Laborers International Union of North America (LIUNA), et al., Civil Action No. 86 Civ. 4819, United States District Court for the Southern District of New York. Complaint filed June 19, 1986, and amended complaints filed on July 21, 1986 and January 15, 1987, respectively.

### B. DEFENDANTS:

\_\_\_\_\_The complaint named thirty-two defendants, separated into five different classifications. Two of the classes of defendants were labor union entities, LIUNA Local 6A (Local 6A) and the District Council of Cement and Concrete Workers (District Council), which consisted of four LIUNA local unions, Local 6A, Local 18A, Local 20, and Local 1175, all located in the New York City area. The next two classes of defendants were the respective Executive Boards of Local 6A and the District Council and their individual members numbering ten from Local 6A and twelve from the District Council. The final class of defendants was the Colombo Family of La Cosa Nostra (LCN) and four of its alleged members: Carmine Persico, the boss, Gennaro Langella, the acting boss while Persico was in prison, Dominic Montemarano, a capo, and Ralph Scopo, a member who was business manager of the District Council and, at various times, an employee of Local 6A.

### C. SUMMARY OF THE COMPLAINT:

The alleged RICO enterprise consisted of an association-in-fact of Local 6A and the District Council.

The complaint alleged that the Colombo LCN Family exercised control over and influenced the decisions of the Executive Boards of Local 6A and the District Council, so as to make them captive labor organizations. The Colombo LCN Family allegedly used their control of these union entities to extort cash payments from construction companies based upon an

exploitation of the construction company owners' fear of economic harm resulting from threats of labor unrest.

The complaint set forth four claims for relief: two are based upon a claim that the defendants conducted the affairs of the enterprise through a pattern of racketeering activity, and a conspiracy to do so, in violation of 18 U.S.C. §§ 1962 (c) and (d). The alleged pattern of racketeering activity consisted of multiple acts of extortion, in violation of 18 U.S.C. § 1951 and some of the same conduct constituting Taft-Hartley violations, in violation of 29 U.S.C. § 186(b). Specifically, the first two claims for relief in the complaint alleged that the defendants extorted payments from various construction companies that ranged up to one percent or more of the amount of each concrete pouring contract. Pursuant to the scheme, defendants allegedly rigged the awarding of concrete pouring contracts and enforced the rules of the scheme by threatening disobedient contractors with labor problems, stoppage of concrete deliveries, and other punishment. The complaint also alleged several acts of embezzlement of labor union funds, in violation of 29 U.S.C. § 501 (c). Fourteen of the defendants, including all of the Colombo LCN Family defendants and ten of the individual members of the two Executive Boards, were charged with participating in this pattern of racketeering activity.

The other two claims for relief in the complaint were the obtaining of control of the enterprise through a pattern of racketeering activity and a conspiracy to do so, in violation of 18 U.S.C. §§ 1962 (b) and (d). The central claim was that the Colombo LCN Family defendants, aided and abetted by some of the union official defendants, violated the Hobbs Act, 18 U.S.C. § 1951, by extorting the members of Local 6A and the District Council of their rights to free speech and participation in union affairs as guaranteed by the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 411. The racketeering act based on this so-called intangible property right extortion theory specifically alleged an economic loss to the labor organizations constituting the enterprise and, therefore, its members. The alleged loss was a

severance payment of \$200,000.00 (which was the entire corpus of the District Council's severance fund) to Ralph Scopo after he was indicted and resigned his positions in the union.

The complaint incorporated two indictments by reference, which were then pending in the United States District Court for the Southern District of New York. (United States v. Carmine Persico, et al., No. 84 Cr. 809, the so-called "Colombo LCN Family case," and United States v. Anthony Salerno, et al., No. 85 Cr. 139 (RO), the so-called "Commission case.").

**D. RELIEF SOUGHT:**

The relief sought in this case included a demand for a preliminary injunction which would do the following: (1) enjoin the Colombo LCN Family defendants from participating in any way in the affairs of Local 6A or any affiliated organization, employee, officer, or benefit plan; (2) enjoin and restrain the Executive Board of Local 6A and its individual members from taking any action on behalf of the Local; (3) enjoin and restrain the Executive Board of the District Council and its individual members from taking any action on behalf of the District Council; (4) appoint a trustee, pendente lite, to discharge all of the duties of the Executive Board of Local 6A and the District Council; (5) enjoin and restrain the members, officers and employees of Local 6A, the District Council and of any affiliated benefit plan from taking any action which would interfere with the trustee in the discharge of his duties; (6) appoint one or more trustees, pendente lite, to administer any benefit plan found to have been improperly controlled or influenced by any of the individual defendants; and (7) to grant such other relief as may be necessary and proper in order to prevent, pendente lite, continuing violations of RICO with respect to Local 6A or the District Council.

The complaint also sought that following a report by the trustee, elections for officers and officials of Local 6A and the District Council be held, and that these elections be structured in such a way as to prevent intimidation of union members in the exercise of their rights.

The complaint further sought a permanent injunction barring all the individual defendants and all persons in active concert or participation with them from having anything to do with the

affairs of either Local 6A or the District Council, with any officer, agent, representative or employees of Local 6A, the District Council or any other labor organizations, 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. Finally, the Government sought that the district court grant such other relief as it finds to be just and proper.

**E. OUTCOME OF THE CASE:**

1. On September 30, 1986, the district court granted the Government's request for a preliminary injunction as to those defendants charged in the Persico indictment. See opinion below in Section F (1).

2. On March 18, 1987, the Government and Local 6A and the District Council and their executive boards entered into a Consent Decree that included the following provisions: Various defendants were permanently enjoined from seeking or holding any position as an officer, agent, representative, employee or laborer of Local 6A, the District Council, LIUNA or any other local that is or becomes a part of LIUNA, from attending any meeting or voting in any election of the District Council, LIUNA or any of its constitutional locals, and from participating in the control, management, governance, administration, internal operations or affairs of the District Council, LIUNA or any of its constituent locals. Several defendants were permanently enjoined from engaging in some of the above listed activities. Several defendants were allowed to remain as officers of Local 6A and/or the District Council subject to the powers of the court-appointed trustees, described below.

The Consent Decree provided that the district court shall appoint a Trustee to oversee the operations of Local 6A and the District Council, whose authority included the following: (1) the authority, subject to review by the district court, to remove any officer, agent, representative or employee of Local 6A or the District Council for engaging in any act of

racketeering or malfeasance, knowingly associating with any member of the La Cosa Nostra or any other organized crime group, or for violating any provision of the Consent Decree; (2) subject to review by the district court, to veto any expenditure, or gift or contract that the Trustee reasonably believes constitutes an act of racketeering or malfeasance; (3) to review all other proposed actions by Local 6A and the District Council; (4) to have complete access to all the books and records of Local 6A and the District Council; (5) to issue reports to the district court and/or member of Local 6A and the District Council; (6) to hold new elections for officers of Local 6A and the District Council; and (7) and to employ personnel necessary to assist the Trustee to carry out the Trustee's duties.

The compensation and expenses of the Trustee were to be paid by Local 6A and the District Council.

3. On April 23, 1987, the district court entered summary judgement against the Colombo LCN family defendants, enjoining them from participating in any manner in the affairs of either Local 6A or the District Council.

**F. LEADING COURT DECISIONS:**

1. United States v. Local 6A, Cement & Concrete Workers, 663 F. Supp. 192 (S.D.N.Y. 1986).

The district court held that the Government did not impermissibly delay its request for preliminary relief even though a conviction upon which the request rested had been entered more than three years prior to the filing of the complaint because the case was virtually unprecedented and was unique. Second, the district court also held that there was no need for a hearing on the request for preliminary relief even though some facts were in dispute because the Government had demonstrated the need for expeditious action and had based its claim upon a prior criminal conviction and consequently those convicted defendants were collaterally estopped from challenging the acts underlying their convictions. The district court also noted that even though some of the defendants were not parties to that earlier criminal action, the court could rely on evidence produced in that criminal case in considering whether preliminary relief was warranted.

2. United States v. Local 6A, Cement & Concrete Workers (Appeal of Madera), 832 F. Supp 674 (S.D.N.Y. 1993).

This case involved the appeal of an order of the Trustee appointed by the district court pursuant to the Consent Decree which suspended Thomas Madera as President of the District Council and trustee of the District Council fringe benefit funds based upon conduct occurring after the entry of the Consent Decree.

The Trustee found that Madera had committed three acts of “malfeasance,” which justified Madera’s temporary removal from his position. First, Madera had failed to report, or respond forthrightly to the Trustee’s inquiry concerning an embezzlement of slightly more than \$5,000.00 of fees paid by new union members by a clerical employee of the District Council. Madera had fired the clerical employee upon learning of the embezzlement, but had concealed the circumstances of the employee’s departure from the District Council from the Trustee.

Second, the Trustee found that Madera had influenced the Board of Trustees to redirect money from the Legal Services Fund to an Equitable Retirement Investment Account (RIA) on which Madera’s son received a commission. The Trustee had found that this constituted a party-in-interest transaction within the meaning of ERISA.

Third, Madera, without the approval of the District Council Executive Board, caused money from the dues escrow account maintained by the District Council to be invested in the RIA sold by Madera’s son. The Trustee found that this was a wilful violation of the District Council constitution which commits such decisions to a vote of the Executive Board.

The district court ruled that these three acts of malfeasance violated Madera’s duty of fair representation to the members of the union; and that both the Consent Decree and various provisions of law, including LMRDA and RICO, contemplate a means of immediate intervention in the operations of a labor organization where necessary to prevent the influence of racketeering in the affairs of the labor organization.

The district court also held, based on United States v. International Brotherhood of Teamsters, 970 F. 2d. 1132, 1137 (2d Cir. 1992), that the decision of the court-appointed Trustee is entitled to great deference. Applying this standard, the district court ruled that its review was limited to whether the determination of the Trustee was arbitrary and capricious.

The district court also noted that the Trustee had exercised proper restraint in allowing Madera to remain in office for a time after learning about the clerical embezzlement incident and by allowing Madera to run for union office on two occasions while the Trustee had Madera’s conduct under investigation. The court said that a precipitous denial of a right to run for union office would constitute an infringement on the sovereignty of the members of the union. The court ruled that the doctrine of laches did not bar the Trustee’s final action because no prejudice was shown to have affected Madera.

Finally, the district court upheld the ruling of the Trustee to allow Madera to apply to the court for reinstatement to union office six months after the entry of the decree. The court noted that after this opinion the Trustee’s term had expired and the Trustee was relieved of all further duties.



### 3. BONANNO FAMILY CASE

#### A. CASE NAME:

United States v. The Bonanno Organized Crime Family of La Cosa Nostra, Philip Rastelli, et al. , No. CV-87-2974, United States District Court for the Eastern District of New York. Complaint filed August 25, 1987, Second Verified Complaint filed April 19, 1988, and Third Verified Complaint filed October 20, 1988.

#### B. DEFENDANTS:

The original and Second Verified Complaint named several groups of individuals as defendants in the civil RICO action, including the “Bonanno Organized Crime Family of La Cosa Nostra.” In the Third Verified Complaint, the remaining defendants in the action consisted of: (1) alleged members of the Bonanno Organized Crime LCN Family including: Philip Rastelli (Boss of Bonanno Family), Joseph Massino (Capo), Anthony Spero (Consigliere), Louis Attanasio (Capo), Alfred Embarrato (Capo), Gabriel Infanti (Capo), Frank Lino (Capo), Nicholas Marangello (Capo), Anthony Riela (Soldier), Michael Sabella (Capo/Soldier), Anthony Graziano (Soldier/Made Member), Benjamin Ruggiero (Soldier/Made Member); and William Rodini (Associate of Bonanno/DeCavalcante LCN families; (2) Officers of the Executive Board of the International Brotherhood of Teamsters Local 814 Van Drivers, Packers and Furniture Handlers, Warehousemen’s and Appliance Home Delivery union (Local 814) including: Ignatius Bracco (President), James Vincent Bracco (former President and alleged LCN associate), Vito Gentile (Secretary-Treasurer); and (3) Local 814 and various components of Local 814, the Executive Board, the Union Welfare Fund, Union Pension Fund and the Union Annuity Fund.

#### C. SUMMARY OF THE COMPLAINT:

The complaint alleged two enterprises: (1) the Bonanno Organized Crime Family and (2) an enterprise consisting of Local 814, its Executive Board, and its employee benefit funds.

The third complaint alleged a total of 327 racketeering acts<sup>2</sup>, including the following: (1) six acts involving illegal gambling and three acts of narcotics distribution conducted by members and associates of the Bonanno LCN Family; (2) three acts involving, separately, trafficking in untaxed contraband cigarettes, theft from interstate shipments, and robbery by members and associates of the Bonanno LCN Family; and (3) numerous acts involving the collections of unlawful debts, using extortionate means to collect debts and other acts of extorting money from various persons and businesses by members and associates of the Bonanno LCN Family.

The complaint charged various officers and employees of Local 814 and its related benefit funds and members and associates of the Bonanno LCN Family with 209 racketeering acts that had been charged in an indictment against those defendants which led to their convictions on those charges.<sup>3</sup> Those racketeering acts involved charges that the LCN members and corrupt union officer defendants used their control over Local 814 to do the following: (1) extort payoffs from employers in the moving and storage industry in the New York City area in exchange for labor peace and relaxed enforcement of collective bargaining agreements, in violation of 18 U.S.C. § 1951 and 29 U.S.C. § 186(b)(1); (2) receive payoffs from employers to influence the decisions and operation of Local 814's benefit funds, in violation of 18 U.S.C. § 1954; (3) commit arson to induce employers to make payoffs and otherwise comply with the demands of the conspirators; and (4) to engage in an extortionate bid rigging scheme whereby various LCN members, corrupt employers and union officials fixed bids and eliminated competition for moving and storage contracts in the New York City area.

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<sup>2</sup> Indictments that corresponded to some of the alleged racketeering acts were attached to the complaint.

<sup>3</sup> Certified copies of that indictment and judgement and commitment orders were attached to the complaint. These convictions were affirmed in United States v. Rastelli, 870 F.2d 822 (2d Cir. 1989).

The complaint also charged that various LCN figures and union officer defendants conspired to murder and murdered persons to control labor activities and also obstructed justice through intimidating witnesses.

\_\_\_\_\_The complaint set forth seventeen claims for relief alleging that the defendants acted through various associated-in-fact enterprises, including the Bonanno Family Enterprise, in violation of 18 U.S.C. §§ 1962(a)(b) and (c) to cause Local 814 to be a captive labor organization through which the defendants could infiltrate, dominate, control and exploit labor organization and victimize the moving and storage industry.

**D. RELIEF SOUGHT:**

The relief sought in the complaint included requests for preliminary and permanent injunctions: (1) enjoining named defendants from participating in the conduct of the affairs of the Bonanno Family and from associating together for any business or commercial purpose; (2) enjoining individual defendants and Local 814 and its components from violating racketeering acts enumerated in 18 U.S.C. § 1961, from participating in gambling illegal businesses, and from participating in extortionate credit transactions; (3) enjoining defendants from participating in any of the affairs of Local 814 and its welfare funds or any other labor organization; (4) that the district court retain jurisdiction over the Consent Decree and to oversee the affairs of Local 814 and its benefit funds; (5) that the district court supervise general elections run by court-appointed Trustees appointed pursuant to any Consent Decree; (6) enjoining defendants from transferring interest in certain businesses and appointing receivers to oversee certain businesses; (7) that the district court award monetary damages against named defendants; (8) that the district court order disgorgement of all defendants' proceeds of violations; (9) ordering divestiture of defendants' interests in certain properties acquired by various defendants with income and proceeds derived from racketeering activities and collections of unlawful debts; (10) ordering forfeiture of specified businesses, properties and legal entities to the United States; and (11) and ordering such

other relief as may be necessary and appropriate to prevent and restrain future violations, plus award the United States the costs of the suit and attorneys fees.

**E. OUTCOME OF THE CASE:**

1. On March 24, 1988, the treble damages claims by the Government and the suit against the Bonanno LCN family and many of the claims against its members were dismissed by the district court. See United States v. Bonanno Organized Crime Family of La Cosa Nostra, et al., 683 F. Supp 1411 (E.D.N.Y. 1988), aff'd, 879 F. 2d 20 (2d Cir. 1989).

2. On October 9, 1987, the district court entered a Consent Decree with respect to Local 814, its Executive Board and two members of the Executive Board. This Consent Decree generally granted injunctive relief against these defendants. The injunctive relief contained the following provisions: the immediate resignation of the entire Executive Board; and a five year ban on, involvement in the affairs of any labor union, except mere membership, for Ignatius Bracco, the President and Vito Gentile, the Vice President.

The Consent Decree designated a five member Interim Executive Board; directed an election of officers to be held no later that December 15, 1988, in which any qualified person other than Bracco and Gentile could stand as candidates; and, established a grievance committee to restore union democracy.

The Consent Decree also appointed a Trustee to oversee the affairs of Local 814 and granted him broad powers including the following:

- a. To participate fully in the day-to-day activities, meetings and discussions of the Interim Executive Board and Interim Board of Trustees.
- b. To have complete and unfettered access to all books, records, files accounts and correspondence of Local 814, the Local 814 Executive Board and Local 814 Funds.
- c. In the event that any vote taken by the Interim Executive Board results in a tie, to cast the deciding vote.

- d. In the event that the court-appointed Trustee discovers any evidence of corruption within Local 814, the Local 814 Executive Board or the Local 814 Funds, to petition the district court to grant to the court-appointed Trustee such additional powers as the court-appointed Trustee deems necessary to remove such corruption or to seek from the Court such remedies or relief the court-appointed Trustee deems necessary. For purposes of the Consent Decree “corruption” means bribery, embezzlement, extortion, loansharking, any criminal Taft-Hartley or Hobbs Act violations, bid rigging, or domination, control or influence by the Bonanno Organized Crime Family of La Cosa Nostra, any other Organized Crime Family or other organized crime element.
- e. To petition the district court to enjoin any expenditure in excess of \$5,000 upon a finding that such expenditure was arbitrary or capricious.
- f. To obtain an accounting of the assets of Local 814 and the Local 814 Funds.
- g. To seek recovery of any and all assets of Local 814 and the Local 814 Funds which may have been unlawfully misappropriated.
- h. To withhold to the extent permitted by law the payment of any and all funds, salaries or benefits of whatever kind or description from any claimant who has defrauded or misappropriating assets of Local 814 or the Local 814 Funds.
- i. To expend the funds of Local 814 and the Local 814 Funds for all expenses which are reasonable and necessary in order to implement this agreement.
- j. To apply to the district court for such assistance as it deems necessary and appropriate to carry out the intent of this agreement.

- k. To conduct a study of the job referral system utilized by Local 814 to determine whether job referrals are made under the Local 814 collective bargaining agreement and are made through the official referral hall.
- l. To recommend to the Interim Executive Board the removal from his or her position of any officer, supervisor, agent, representative or employee of Local 814 or the Local 814 Funds upon a determination that such person has engaged in conduct which constitutes corruption or who is derelict in his or her duties as set forth in the Local 814 Constitution and Bylaws, provided that the employment status of current Local 814 employees will not be affected by this agreement other than in accordance with this provision. In the event that the Interim Executive Board does not approve the recommendation of removal, the court-appointed Trustee has the right to petition the district court for removal of such individual.
- m. In the event that a vacancy occurs in the Interim Executive Board, to fill such vacancy from the recommendations made by the remaining Interim Executive Board member, if any.
- n. To approve of the hiring of any business agent or employee of Local 814, which consent shall not be unreasonably withheld.

**F. LEADING COURT DECISIONS:**

- 1. United States v. Bonanno Organized Crime Family of La Cosa Nostra, 119 F.R.D. 625 (E.D.N.Y. 1988).

The Government applied for review of a United States Magistrate's Order which granted a motion by the defendant Spero for a protective order to preclude production of Spero's income tax returns. The district court held that the Magistrate had committed clear error in holding Spero's tax returns to be protected from discovery because such a request had never been presented to the Magistrate. The court further ruled that even if such a request had been presented to the Magistrate, it should not have been granted because tax returns are subject to discovery even though judicial policy directs caution when ordering the production of such returns.

2. United States v. Bonanno Organized Crime Family of La Cosa Nostra, et al., 683 F. Supp. 1411 (E.D.N.Y. 1988), aff'd, 879 F.2d 20 (2d Cir. 1989).

This opinion is the district court's ruling on the defendants' motions to dismiss the complaint, for a more definite statement, and to strike redundant, immaterial or scandalous matter.

The district court held the following: (1) that Teamsters Union Local 814, its Executive Board, and its funds collectively constituted an association-in-fact "enterprise" for purposes of a RICO suit; (2) that the allegations in a civil RICO complaint that individual and union defendants participated in the conduct of an organized crime family's affairs and that the organized crime family, along with the individual defendants, infiltrated and exploited the enterprise did not erroneously assert that the organized crime family fulfilled the role of a RICO "enterprise" and a "person" who had violated RICO; (3) that Rule 9(b), Fed.R.Civ.P., requiring that fraud be pleaded with particularity, did not apply to RICO claims based on predicate acts not "sounding" in fraud; (4) that broad allegations that each defendant had aided and abetted the commission of all of the predicate act were insufficient to satisfy RICO's requirement that at least two acts of racketeering per defendant be alleged; (5) that general references that a defendant was a member of an organized crime family was insufficient to attribute a predicate act to the defendant; (6) that general allegations that certain defendants had violated New York gambling laws was insufficient to plead a racketeering act where New York law included both felony and misdemeanor offenses; (7) that an allegation that a defendant had been convicted of violating 18 U.S.C. § 1951 was sufficient to plead a racketeering act; (8) that the court was entitled to draw adverse inferences from a defendant's assertion of his Fifth Amendment privilege; (9) that disgorgement was an available equitable remedy under civil RICO and that the purpose of "disgorgement" was to prevent unjust enrichment regardless of whether any victims would be entitled to damages; (10) that an organized crime family which existed only as an association in fact was not a "person" under RICO and hence could not be a RICO defendant; and; (11) that the United States lacked standing to sue for treble damages to its business or property under RICO; (12) allegation that a defendant was convicted of a specified offense set forth in attached exhibits of the indictment and judgement and commitment order was sufficient to plead a predicate act for a civil RICO claim; (13) motion to dismiss on grounds that injunctive relief was unconstitutional was premature prior to the Government's proof in the civil RICO action; (14) that the granting of injunction and other equitable relief did not necessarily render the appointment of a receiver unnecessary; (15) allegations that divestiture would deprive innocent third parties of their property interests were premature prior to establishing defendants' wrong doing at trial; and (16) the doctrine of laches does not apply to the Government's civil RICO suit seeking equitable relief such as injunctions and divestiture.

3. United States v. Bonanno Organized Crime Family La Cosa Nostra, 695 F. Supp. 1426 (E.D.N.Y. 1988).

This case involved the district court's ruling on the motion of various of the individual defendants to dismiss the second amended complaint as to them. The district court held: (1) that predicate acts which were alleged to have violated a statute which was enacted subsequent to the time the alleged conduct occurred did not constitute a "racketeering act" in a civil RICO suit; (2) that the civil four year statute of limitations and the doctrine of laches were inapplicable to the Government's equitable claims under RICO; (3) that venue was proper under the ends of justice standards set forth in 18 U.S.C. § 1965 (b); and, (4) that RICO's pattern requirement was satisfied by the allegation of at least two offenses of extortion.

4. United States v. Bonanno Organized Crime Family of La Cosa Nostra, 879 F. 2d 20 (2d Cir. 1989), aff'g, 683 F. Supp. 1411 (E.D.N.Y. 1988).

The court of appeals held that the United States was not a “person” entitled to sue for treble damages under the provisions of 18 U.S.C. § 1964 (c) and that the Bonanno LCN Family was not a “person” subject to suit under RICO.



#### 4. FULTON FISH MARKET CASE

**A. CASE NAME:**

United States v. Local 359, United Seafood Workers, Smoked Fish and Cannery Union, United Food and Commercial Workers International Union, AFL-CIO, CLC, et al. Complaint No. 87 Civ. 7351 (TPG), United States District Court for the Southern District of New York. Complaint filed October 15, 1987, and amended on June 4, 1988.

**B. DEFENDANTS:**

The original complaint named several groups of defendants: (1) “union defendants”-i.e., Local 359, United Seafood Workers, Smoked Fish and Cannery Union, its Executive Board and certain officers of Local 359, including Anthony Cirillo, President and Dennis Faicco, Secretary-Treasurer; (2) the union welfare and pension funds-the Fulton Fish Market Welfare Fund and the Fulton Fish Market Pension Fund-and Anthony Cirillo and Dennis Faicco, in their capacities as trustees of those funds. Nina Andrew, Executive Administrator of the funds, was also named as a defendant; (3) the Genovese Organized Crime Family of La Cosa Nostra, and five members and 24 associates of the Genovese Crime Family, including Thomas Contaldo (allegedly a “capo” of the family), and the following four made soldiers, Carmine Romano, Colombo Saggese, Rosario Gange and Alfonso Malangone; and (4) the Fulton Market Employers Association and Associated Purveyors.

**C. SUMMARY OF THE COMPLAINT:**

The original complaint, filed on October 15, 1987, alleged that the RICO enterprise consisted of an association-in-fact comprised of “certain members of the Genovese LCN Family; the Genovese Family itself, acting through those members and associates; Local 359 and its Executive Board; and the businesses operating in or out of the Fulton Fish Market,” which was referred to as the “Fulton Fish Market Enterprise.” The complaint also alleged that the Genovese LCN Family had controlled the Fulton Fish Market Enterprise, and Local 359 since the 1930’s and that commencing in the 1970’s, Carmine Romano, an officer of Local 359, acted for the

Genovese LCN Family in controlling the Fulton Fish Market. Specifically, the complaint alleged that in 1981 Carmine Romano and Peter Romano were convicted of criminal RICO violations and given prison sentences, and that Local 359 was also convicted under RICO and was fined. The complaint alleged that, despite these criminal convictions, the influence of the Genovese LCN Family in the Fulton Fish Market continued, and that Vincent Romano succeeded his brother Carmine as the principal Genovese representative in the Market. The complaint contained various allegations of criminal activities by the Genovese LCN Family in the Fulton Fish Market—extortion, loansharking, gambling, and theft.

The complaint alleged that Local 359 is controlled by the Genovese LCN Family and that this union “is a vital part” of Genovese LCN Family’s control of the Fulton Fish Market, since the union can be used to threaten employers with labor problems. It was also alleged that Anthony Cirillo was merely the “nominal” president of Local 359, and that he was handpicked by the Genovese LCN Family for this office, and that Vincent Romano was the actual head of Local 359.

Specifically, the original complaint alleged that: (1) the defendants extorted payments from businesses that used the Fulton Fish Market, including wholesalers in the Fulton Fish Market, retailers who purchased fish there and trucking firms that transported fish into the Fulton Fish Market; (2) the defendants stole merchandise from interstate shipments; (3) the defendants ran an illegal numbers gambling operation at the Fulton Fish Market; (4) the defendants through their control of Local 359 extorted payments in exchange for labor peace and relaxed enforcement of the terms of collective bargaining agreements; (5) the defendants made extortionate extensions of credit and used extortionate means to collect extensions of credit; (6) the defendant committed murder; and (7) the defendants deprived members of Local 359 of their property rights to free speech and democratic participation in internal union affairs through intimidation and threats.

On June 4, 1988, the Government filed an amended complaint directed solely against the union defendants-Local 359 and various officers, including Anthony Cirillo, President, and Dennis Faicco, Secretary-Treasurer. The amended complaint basically repeated the original complaint's allegations and alleged various types of criminal activity committed by Cirillo and Faicco, acting in conjunction with the Genovese LCN Family. The complaint also alleged that the union itself illegally received money, in violation of the Taft Hartley Act, (29 U.S.C. §1186) for which the union was convicted in 1981.

**D. RELIEF SOUGHT:**

The relief sought under the original complaint included the following: (1) enjoining various defendants from participating in the affairs of the Genovese LCN Family, Local 359 and its related Welfare and Pension Funds; (2) appointment of one or more trustees to discharge all duties and responsibilities of the Executive Board of Local 359; (3) enjoining officers and employees of Local 359 and its related Welfare and Pension Funds from interfering with the court-appointed trustees; (4) ordering the court-appointed trustees to conduct free elections of the officers and Executive Board of Local 359; (5) appointing an administrator to oversee the operation of the Fulton Fish Market and to prevent racketeering acts there; (6) enjoining the Genovese LCN Family and its members charged as defendants from participating in or having any dealings with Local 359, its officers and employees and its related Pension and Welfare Funds and the Fulton Fish Market; and (7) that the district court award the United States the costs of the suit and such other and further relief as may be necessary and appropriate.

The amended complaint requested, as did the original complaint, that certain officers of Local 359 be removed, that a Trustee be appointed for the union and that election of new officers be held sometime in the future.

**E. OUTCOME OF THE CASE:**

1. On December 1, 1987, the United States stipulated to dismiss the complaint as to the Welfare Fund, the Pension Fund and against Nina Andrew and Anthony Cirillo and Dennis Faicco in their capacity as trustees of the funds.

2. On April 15, 1988, a default judgment was entered against the Genovese LCN Family and three of its alleged members and associates, Thomas Contaldo, Colombo Saggese and Robert Gillio. These defendants were enjoined from having any dealings with Local 359 and from having any business dealings in the Fulton Fish Market or in any commercial seafood business in the Southern District of New York or elsewhere.

3. On April 15, 1988, 25 other individual defendants named as being connected with the Genovese LCN Family entered into a consent judgment which enjoined them from having dealings with Local 359, but did not enjoin them from engaging in business in the Fulton Fish Market. All those defendants were made subject to injunctive provisions forbidding extortion, gambling and loansharking, and also forbidding them from dealing with Local 359 in any illegal manner. The consent judgment provided for the appointment of an administrator for the Fulton Fish Market whose duty it is to ensure compliance with the consent judgment and the default judgment.

4. The action was dismissed as to the Fulton Market Employers Association and Associated Purveyors by order dated July 6, 1988, consented to by the Government.

5. On January 29, 1989, the district court dismissed the complaint against defendant Cirillo and Faicco.

6. On appeal November 15, 1989, the Second Circuit remanded the case for reconsideration on the Taft-Hartley charges and affirmed the dismissal of the complaint in other respects. (see Section F below).

7. On remand, the parties agreed by stipulation that when the Administrator's term is completed, the Government would dismiss the pending charges against Cirillo and Faico.

**F. LEADING COURT DECISIONS:**

1. United States v. Local 359, 705 F. Supp. 894 (S.D.N.Y.), aff'd in part and remanded in part, 889 F.2d 1232 (2d Cir. 1989).

This opinion constitutes the district court's findings of fact and conclusions of law following the non-jury trial of the union defendants, Anthony Cirillo, President of Local 359, and Dennis Faicco, Secretary-Treasurer of Local 359, who were the only remaining defendants. The district court found that "the Genovese Crime Family was at one time in control of Local 359." Id. at 900. However, the district court found insufficient evidence to support the wire fraud charges against Cirillo which were premised on telephone conversation between Cirillo and Vincent Romano, an employer, about the status of ongoing negotiations for a new collective bargaining agreement. The district court reasoned that neither Romano nor the Genovese LCN Family directed or influenced Cirillo in the negotiations, that the information conveyed to Romano and the Genovese Family was not confidential, and that the union members were not disadvantaged as a result of the disclosed information. Id. at 902-906.

The district court also dismissed the wire fraud charges based on Cirillo's alleged efforts to find a job at the Fulton Fish Market for Steve Melfi on the ground that there was no evidence that Cirillo played any role in obtaining the job for Melfi.

The district court further dismissed the Taft-Hartley racketeering acts (29 U.S.C. § 186(b)(1)) that alleged that Cirillo and Faicco, officers of Local 359, aided and abetted by the Genovese LCN Family, received payoffs from Fulton Fish Market employers of Local 359 members on the ground that there was no evidence that Cirillo and Faicco committed their unlawful acts on behalf of the Genovese LCN Family, or that the Genovese LCN Family was involved in these acts or received any of the funds Cirillo and Faicco obtained from the employers. Id. at 906-908.

The district court also found the evidence insufficient to support other extortion charges on a wide variety of grounds. Thus, the district court dismissed the RICO complaint against Cirillo and Faicco. Id. at 908-917.

2. United States v. Local 359, United Seafood Workers Union, 889 F.2d 1232 (2d Cir. 1989).

The Second Circuit affirmed the district court's dismissal of the RICO complaint against Cirillo and Faicco in all respects, except that it remanded for reconsideration the dismissal of the Taft-Hartley charges on the ground that the district court applied an erroneous legal standard. In that respect, the Second Circuit held that the Government was not required to prove that the Genovese LCN Family participated in, or benefited from, the Taft-Hartley offenses. The Second Circuit stated:

We hold that Genovese involvement is irrelevant to the Taft-Hartley charges against Cirillo and Faicco. If Cirillo and Faicco committed multiple violations of the Taft-Hartley Act in conducting the union's affairs, they violated RICO whether or not the Genovese Family was involved . . .

[W]e hold also that proof of a Taft-Hartley violation does not require a showing that the money unlawfully paid to Local 359 passed ultimately into the hands of the Genovese Family.

Id. at 1235-36

The court also stated that “we do not pass upon the ultimate question whether the injunctive relief requested by the Government should be granted”. Id. at 1237.

3. United States v. Local 359 United Seafood Workers Union, 1991 WL 172962 (S.D.N.Y. August 27, 1991).

The district court granted the court-appointed Administrator’s request for an order compelling several persons who were non-parties to provide testimony and to produce records on the ground that there was evidence that those non-parties were acting in concert with various defendants in activities which might constitute violations of the Consent Decree. The district court stated that “[i]t should be emphasized that the authority to appoint the Administrator emanated from the statute [RICO] not merely from the fact that certain defendants gave their consent.”

4. United States v. Local 359 United Seafood Workers Union, 1991 WL 230613 (S.D.N.Y. October 24, 1991).

The district court denied several defendants’ motion for an award of attorney’s fees.

5. United States v. Local 359 United Seafood Workers Union, 1994 WL 38679 (S.D.N.Y. Feb. 4, 1994), aff’d, 55 F.3d 64 (2d Cir. 1995).

The district court affirmed: (1) the findings of the court-appointed Administrator that several defendants violated the Consent Decree by conspiring to allocate unloading of deliveries among themselves and which companies could make deliveries to the Fulton Fish Market and (2) the imposition of fines ranging from \$20,000 to \$60,000.

6. United States v. Local 359 United Seafood Workers Union, 55 F.3d 64 (2d Cir. 1995).

The Second Circuit affirmed the imposition of sanctions in the above opinion, stating that “the factual findings of an administrator [appointed under a consent decree] are ‘entitled to great deference’”, and “that consent judgment called for district court to apply ‘same standard of review applicable to review of final agency action under the Administrative Procedure Act.’” Id. at 68, *quoting*, United States v. IBT, 998 F.2d 120, 134 (2d Cir. 1993).

## 5. ROOFERS UNION CASE

### A. CASE NAME:

United States v. Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, et al., Civil Action No. 87-7718, United States District Court for the Eastern District of Pennsylvania. Complaint filed December 2, 1987.

### B. DEFENDANTS:

The complaint named fifteen defendants: two union entities and thirteen individual defendants. The two union entities were Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association (Local 30), and Residential Reroofers Local 30B, United Slate etc. (Local 30B), an affiliated labor organization. Local 30 and Local 30B are collectively referred to as “the Roofers Union.” The individual defendants were all officers and/or employees of the Roofers Union.

### C. SUMMARY OF THE COMPLAINT:

The complaint alleged that the enterprise consisted of the Roofers Union and its affiliated employee benefit plans. The complaint alleged that the defendants had participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity, and conspired to do so, in violation of 18 U.S.C. §§ 1962 (c) and (d), respectively. The complaint charged the defendants with fifteen violations of the Hobbs Act, 18 U.S.C. § 1951, which were allegedly committed by extorting employers into entering collective bargaining agreements with the Roofers Union and paying the defendant officers and employees. The extortion consisted of threats and acts of physical violence as well as threats of economic harm caused by labor unrest and threats of violence against persons doing business with non-union roofing companies.

The complaint also charged that the defendants collected extensions of credit by extortionate means, in violation of 18 U.S.C. § 894. The debtors primarily were contractors having collective bargaining relationships with the Roofers Union. These extortionate acts were also alleged to be violations of Pennsylvania law. Two of the defendants were charged with

derising a scheme to defraud an insurance company by filing a fraudulent claim on an automobile owned by the Roofers Union, in violation of 18 U.S.C. § 1341. Each of the individual defendants had been convicted in an earlier criminal RICO case alleging many of the same racketeering acts were are alleged in this civil case, and the complaint alleged that those defendants were collaterally estopped from contesting those charges.

Four Roofers Union officers, who were also trustees of affiliated employee benefit plans, were charged with accepting kickbacks from a law firm for retention by the union's pre-paid legal services plan, in violation of 18 U.S.C. § 1954. These four officers also were accused in separate racketeering acts of embezzling money from this pre-paid legal services plan, in violation of 18 U.S.C. § 664.

The complaint also alleged that a wide ranging scheme to bribe public officials was carried on by the officers of the Roofers Union. Stephen Traitz, Jr., the Business Manager and principal officer of the Roofers Union, was charged with 46 separate violations of Pennsylvania laws relating to bribery by engaging in a scheme to bribe judges of the Philadelphia Court of Common Pleas. Other defendants were alleged to have participated in some of these bribes. Twenty additional Pennsylvania bribery violations were alleged to have been committed by Traitz and other officers of the Roofers Union.

**D. RELIEF SOUGHT:**

The Government sought injunctive relief that would do the following:

1. Enjoin and restrain the individual defendants, and all other persons in active concert or participation with them, from participating in any way in the affairs of the Roofers Union or any employee benefit plans with which the Roofers Union is affiliated or associated, from having any dealings, directly or indirectly, with any officer, agent, attorney or employee of the Roofers Union or its affiliated benefit plans or any other labor organization about any matter which relates directly or indirectly to the affairs of the Roofers Union, and from in any way participating



in, or profiting from, any roofing business in the Eastern District of Pennsylvania or elsewhere;

2. Enjoin and restrain the current Executive Board members and officers of the Roofers Union from taking or causing to be taken any action for or on behalf of nominal defendants Locals 30 and 30B;
3. Appoint one or more trustees, pendente lite, to discharge all duties and responsibilities of the officers and Executive Board of Local 30 and 30B, including but not limited to the following:
  - a. To protect the rights of the members of Locals 30 and 30B, consistent with the provisions of Title 29 of the United States Code and the constitution and by-laws of Locals 30 and 30B;
  - b. To administer and supervise the daily affairs of Locals 30 and 30B;
  - c. To remove and/or appoint new employees and officials to oversee the administrative functions of Locals 30 and 30B, including but not limited to business agents, organizers, dispatchers and office personnel;
  - d. To administer, conserve and obtain an accounting of the assets of Locals 30 and 30B, and any associated or affiliated employee benefit plans;
  - e. To seek recovery of any and all assets of Locals 30 and 30B and any associated or affiliated employee benefit plans 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 Locals 30 and 30B, or any associated or affiliated employee benefit plans 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 Locals 30 and 30B, or any associated or affiliated employee 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 Locals 30 and 30B for all expenses which are reasonable and necessary in order to execute the mandate of the district court;
  - i. To apply to the district court for such assistance as may be necessary and appropriate in order to carry out the mandate of the district court; and
  - j. To furnish the district court with a complete report concerning the financial stability of Locals 30 and 30B, and associated or affiliated benefit plans as well as the status of the members' rights under 29 U.S.C. §§ 157 and 411 and their entitlements under the various collective bargaining agreements;
- 4. Enjoin and restrain the members, officers and employees of Locals 30 and 30B and the fiduciaries, employees and beneficiaries of any associated or affiliated employee benefit plan from any interference with the said trustee(s) in the execution of their duties as aforesaid;
  - 5. Enjoin Locals 30 and 30B, and all elected or appointed officials thereof, from violating the provisions of 18 U.S.C. §§ 1962, 201, 894, 1951, 1954, and 664;
  - 6. 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 18 U.S.C. § 1962 involving control over and exploitation of Locals 30 and 30B by the individual defendants;

7. That, at an appropriate time following the submission and review of the Trustee(s)' report, the district court order the trustee(s), with such assistance from the Department of Labor and the Department of Justice as may be necessary or practicable, to conduct general elections to elect officers and an Executive Board of Locals 30 and 30B, respectively, said election to conform to the provisions of Title IV of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401, 481-484.
8. That, following the election, unless the pre-liminary injunction is extended upon a showing of good cause, the district court issue a permanent injunction prohibiting all of the defendants herein and all persons in active concert or participation with them from participating in or having any future dealings of any nature whatsoever, with any officer, agent, representative or employee of Locals 30 and 30B about any matter which relates directly or indirectly to the affairs of Locals 30 and 30B and from owning, operating or participating in any way in, or profiting from, any roofing business in the Eastern District of Pennsylvania or elsewhere; and
9. That the district 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 of 18 U.S.C. § 1962.

**E. OUTCOME OF THE CASE:**

See Section F Below.

**F. LEADING COURT DECISIONS:**

1. United States v. Local 30, United Slate, Tile and Composition Roofers, 686 F. Supp. 1139, 1162-1174 (E.D. Pa. 1988).

Following an evidentiary hearing, the district court found that the defendants had violated RICO and imposed a “Decreeship” over the Roofers Union that included the following equitable relief over the defendants’ objections:

- (1) The district court barred defendants who violated RICO “from the roofing industry within the jurisdiction of Local 30/30B.” Id. at 1162.

- (2) The district court appointed a Chief Liaison Officer “who will serve as the principal enforcement officer of all provisions of the Decree” Id. at 1171 and “will have the authority, upon application and approval of [the District] Court, to hire such assistants and support services as will be needed to fulfill his responsibilities under the Decree.” Id. at 1169.
- (3) The district court ordered an audit of all accounts of Local 30/30B and any affiliated entity by a designee of the Court. Id. at 1169, 1172.
- (4) The district court barred all defendants found to have violated RICO “from holding, occupying, or controlling any position of leadership or influences in respect to any matter within the jurisdiction of Local 30/30B or any of its affiliated entities” and “from engaging in employment in the roofing or related construction industries, in any capacity, within the geographical area of the jurisdiction of Local 30/30B.” Id. at 1171.
- (5) The district court ordered that Local 30/30B develop with the appropriate employer representative groups an industry-wide grievance/arbitration procedure for resolving contractual disputes between the union and employers, subject to the court’s approval. Id. at 1172-73.
- (6) The district court ordered that all face-to-face collective bargaining agreement negotiations take place under the supervision of the Court Liaison Officer. Id. at 1172-73.
- (7) The district court prohibited any collective bargaining agreement from taking effect until it was approved by the Court Liaison Officer. Id. at 1173.
- (8) The district court established “direct control of all matters within the jurisdiction of the union that require the expenditure of any funds of the Union or any affiliated entity for the transfer of any of its assets” and enjoined defendants “from transferring any funds, property, or interests in any assets of any kind of Local 30/30B or any of its affiliated entities, except in the ordinary course of business without the express written consent of the court.” Id. at 1172.
- (9) The district court ordered that the “Court Liaison Officer shall have the right, without prior notice, to have access to any records, wherever located, at the offices, locations and other property of Local 30/30B or any affiliated entity” and to copy such records. Id. at 1173.
- (10) The district court required the union to “provide written notice to the court of all meetings, proceedings, or decisions providing for nominations and/or elections for offices or positions within Local 30/30B, or any affiliated entity.” Id. at 1173.
- (11) The district court prohibited the union and any affiliated entity and the individual defendants “in respect to any member within the jurisdiction of Local 30/30B, or any affiliated entity, from intimidating, inflicting violence, fear, or threats of personal or property damage upon any person, corporation or entity, or attempting to do so.” Id. at 1174.

- (12) The district court retained jurisdiction of all matters relating to the union and any affiliated entity and ordered that “[a]ll costs incurred in the administration of the Decreeship shall be borne by Local 30/30B and, where appropriate, its affiliated entities.” Id.
2. United States v. Local 30, United Slate Tile and Composition Roofers, 871 F.2d 401, 404-09 (3d Cir. 1989).

The Third Circuit affirmed this equitable relief, noting that “the District Court converted the preliminary injunction into a ‘final decree.’” The Third Circuit concluded that the relief granted was authorized by 18 U.S.C. § 1964(a), and that the district court did not abuse its discretion in imposing a decreeship against the Roofers Union and deciding that the ordered relief was necessary to eliminate and prevent corruption in the union. Id. at 404-09.

The court of appeals stated that under Section 1964 of RICO, [t]he district court is empowered not only to restrain but also to prevent future violations of § 1962 by ordering reorganization or even dissolution of any enterprise, as long as the court makes due provision for the rights of innocent parties.” Id. at 407. The court of appeals also explained that the intrusive relief was necessary because the evidence “supports the district court’s finding that the removal of the thirteen individual defendants would not have eliminated that corrupt influence from the Roofers Union.” Id. at 407. Finally, the court of appeals noted that the evidence showed “that the newly elected officials are long time associates and allies of the thirteen individual defendants in this case, which indicates that corrupt influences continue to exist within the Union. . . . [Consequently] the district court properly found a likelihood of wrongful acts continuing into the future.” Id. at 409.

## 6. THE JOHN LONG CASE

### A. CASE NAME:

United States v. John F. Long and John S. Mahoney, Complaint No. 88 Civ. 3289, United States District Court for the Southern District of New York. Complaint filed in May, 1988.

### B. DEFENDANTS:

There were two defendants in this case, John F. Long, who was the Secretary-Treasurer of Local 804, International Brotherhood of Teamsters, etc. (Local 804, I.B.T.), and John S. Mahoney, who was Secretary-Treasurer of Local 808, I.B.T.

### C. SUMMARY OF THE COMPLAINT:

This case alleged that the RICO enterprise was a group of individuals associated-in-fact, including the two defendants, Jesse David Hyman, Vincent Joseph Rotondo, and others. Jesse David Hyman was a dentist who had entered the business of administering pension funds associated with labor unions and had set up a company, Penvest, Inc. Rotondo was Hyman's partner in Penvest and a member of the DeCavalcante LCN Family.

The complaint alleged two claims for relief: that the defendants participated, and conspired to participate, in the affairs of the alleged enterprise through a pattern of racketeering activity. The alleged pattern of racketeering activity was the same as alleged in a parallel criminal case (Indictment No. S 87 Cr. 943 (DNE)), and consisted of a series of racketeering acts including one ERISA embezzlement, in violation of 18 U.S.C. § 664, three ERISA kickbacks, in violation of 18 USC §1954, three labor bribes, in violation of 29 U.S.C. § 186(b), one extortion affecting interstate commerce, in violation of 18 U.S.C. § 1951, one commercial bribery, in violation of New York Law, and two obstructions of justice, in violation of 18 U.S.C. § 1503. The racketeering acts were committed in connection with the purchase of benefit plan services from Penvest.

**D. RELIEF SOUGHT:**

\_\_\_\_\_The complaint requested three areas of relief: (1) that the district court permanently restrain and enjoin the defendants from having any involvement whatsoever in the affairs of their respective I.B.T. local unions; (2) that the district court enter an order requiring the defendants to disgorge all of the proceeds of their criminal activity; and (3) that the district court award costs to the United States.

**E. OUTCOME OF THE CASE:**

1. As stated above, this case was based on the parallel criminal case against both defendants. See Indictment No. S 87 Cr. 943 (DNE). In United States v. Long, 917 F. 2d 691 (2d Cir. 1990), the convictions obtained in that criminal case were reversed for erroneous jury instructions and admission of improper expert testimony.

2. In 1992, the defendant John S. Mahoney agreed to be permanently barred from involvement in union activities as he was ordered by the court-appointed Independent Administrator in the Government's civil RICO case against the International Brotherhood of Teamsters Union (IBT). (see Case Summary number 7 below in Appendix B). Therefore, this matter was dismissed as to Mahoney.

3. In 1983, the court-appointed Independent Administrator in the Government's civil RICO case against the IBT (see Case Summary number 7 below in Appendix B) permanently barred defendant John Long from membership in the Teamsters Union activities. The United States District Court for the Southern District of New York upheld Long's expulsion from union affairs. See Long v. Carberry, 1994 WL 163712 (S.D.N.Y. April 28, 1994); Long v. Carberry, 151 F.R.D. 240 (S.D.N.Y. Oct. 13, 1993). In light of Long's expulsion from union activities, this case was dismissed against him.

**F. LEADING COURT DECISIONS:**

None.

## **7. INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION CASE**

### **A. CASE NAME:**

United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al., Complaint No. 88 Civ. 4486 (DNE), United States District Court for the Southern District of New York. Complaint filed June 28, 1988. (IBT Case).

### **B. DEFENDANTS:**

The complaint charged several groups of defendants:

1. The IBT International Union - - The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (IBT) and its constituent parts. The IBT had approximately 1.7 million members.

2. The Commission of La Cosa Nostra (LCN) which consisted of the Bosses and/or Acting Bosses of the five New York City La Cosa Nostra Families (Genovese, Gambino, Colombo, Bonanno and Lucchese), and various LCN members. The alleged LCN defendants included the following:

- (1) Anthony Salerno - Consigliere, Acting Boss and the Boss of the Genovese Family;
- (2) Matthew Ianniello - Capo in the Genovese Family;
- (3) Anthony Provenzano - Capo in the Genovese Family;
- (4) Nunzio Provenzano - Member of the Genovese Family;
- (5) Anthony Corallo - Boss of the Lucchese Family;
- (6) Salvatore Santoro - Underboss of the Lucchese Family;
- (7) Christopher Furnari - Consigliere of the Lucchese Family;
- (8) Frank Manzo - Capo in the Lucchese Family;
- (9) Carmine Persico - Boss of the Colombo Family;
- (10) Gennaro Langella - Underboss and Acting Boss of the Colombo Family;



- (11) Nicholas Marangelo - Underboss of the Bonanno Family;
- (12) Joseph Massino - Acting Boss and/or Capo in the Bonanno Family;
- (13) Anthony Ficarotta - Member of the Genovese Family;
- (14) Eugene Boffa, Sr. - Associate of the Bufalino Family;
- (15) Francis Sheeran - Associate of the Bufalino Family;
- (16) Milton Rockman - Associate of the Genovese Family;
- (17) John Tronolone - Associate of the Genovese Family;
- (18) Joseph John Aiuppa - Boss of the Chicago Family;
- (19) John Phillip Cerone - Underboss of the Chicago Family;
- (20) Joseph Lombardo - Capo in the Chicago Family;
- (21) Angelo LaPietra - Capo in the Chicago Family;
- (22) Frank Balistrieri - Boss of the Milwaukee Family;
- (23) Carl Angelo DeLuna - Underboss of the Kansas City Family;
- (24) Carl Civella - Capo in the Kansas City Family;
- (25) Anthony Thomas Civella - Capo in the Kansas City Family;

3. The General Executive Board of the IBT, which included the General President Jackie Presser, the General Secretary-Treasurer, and sixteen Vice Presidents. These officials were sued in both their individual and official capacities.

The complaint charged a total of forty-five individual defendants.

**C. SUMMARY OF THE COMPLAINT:**

The complaint alleged that the RICO enterprise consisted of an association-in-fact of “the Teamsters International Union and various of its Area Conferences, Joint Councils, Locals and Benefit Funds.” (The Teamsters International Enterprise). Complaint at ¶ 53. The complaint also alleged four claims for relief: that the defendants acquired and maintained an interest in the Teamsters International Enterprise through a pattern of racketeering activity, and conspired to do so, in violation of 18 U.S.C. §§ 1962 (b) and 1962 (d), respectively, and that the defendants

participated in the affairs of the Teamsters International Enterprise through a pattern of racketeering activity and conspired to do so, in violation of 18 U.S.C. §§ 1962 (c) and (d), respectively. *Id.* at ¶¶ 54-113.

The complaint also alleged that from the 1950's to the filing of the complaint, La Cosa Nostra infiltrated, dominated, exploited and controlled the IBT through a pattern of racketeering activity and used the IBT and various of its affiliated entities to conduct racketeering activity throughout the nation. The complaint alleged that the pattern of racketeering activity included LCN's control of the IBT through: (1) fraudulent intervention in the elections of Roy Williams and Jackie Presser as General Presidents of the IBT; (2) murder, violence and fear to intimidate union membership (at least 20 murders of Teamster officers or members, including numerous persons who agreed to testify against corrupt LCN figures and union officials, including James Hoffa, former President of the IBT, numerous beatings and threats of death against others); and (3) fraudulent obtaining of property from the union's membership, including money and union members' rights to free speech and democratic participation in internal union affairs, as guaranteed by 29 U.S.C. §§ 411, 501(a), 1104 and 1106. *Id.* at ¶¶ 56-111.

Paragraphs 3-52 of the complaint described the defendants, including; the various entities of the IBT; La Cosa Nostra (describing the Commission which serves as the national ruling council of the LCN, the headquarters of each of the families from New York to Los Angeles and the LCN's method of operation); the LCN defendants, their position within each respective LCN Family and a synopsis of their criminal convictions; and each union defendant and the position they held in the IBT, as well as their criminal history, if any. The complaint also included a chronological history of how the LCN gained control of the IBT.

The complaint incorporated allegations from twelve criminal indictments which resulted in the convictions of various defendants affiliated with La Cosa Nostra and the IBT for various crimes involving the IBT.

As part of the alleged pattern of racketeering, the complaint alleged that from 1975 to 1988, the General Executive Board of the IBT defrauded the IBT of money and property in the form of union jobs, wages, employee benefits and benefit funds by permitting the LCN to control the leadership of the IBT, knowing it was for the economic benefit of the LCN. These acts and failures to act included the following allegations: (1) LCN influence assisted Jackie Presser and Roy Williams in becoming President of the IBT; (2) IBT Trustees relinquished authority over investment decisions to LCN controlled officers; (3) IBT Presidents steered \$62.5 million Teamster Central States Pension Fund loans to an LCN backed corporation for the purchase of two Las Vegas Casinos; (4) IBT officers schemed to bribe a United States Senator to influence his actions regarding trucking deregulation; and (5) IBT officers promoted an LCN labor-leasing scheme.

The complaint, in addition, alleged that numerous acts of racketeering were committed by Jackie Presser. For example, from 1972-1976, Presser tried to prevent the criminal prosecution of the IBT General President in exchange for \$10,000, and in 1975, Presser offered to pay Roy Williams in exchange for his support of a proposed loan in connection with the Tropicana Casino and Hotel in Las Vegas Nevada. During 1975-1976, Presser demanded payment of money or other things of value in the amount of \$1,000, 000 in connection with the transfer of ownership of the Front Row Theater in Cleveland.

The complaint also alleged that from 1975-1984, former IBT International Vice President Salvatore Provenzano received kickbacks and defrauded various Teamster benefit funds of money and property.

The complaint also incorporated allegations from the civil RICO action, United States v. Local 560 of the IBT, Civ. No. 82-689 (District of New Jersey).<sup>4</sup> In that case, defendants Anthony Provenzano and Nunzio Provenzano, both members of the Genovese LCN Family, entered into consent judgments which permanently barred them from further contact with any

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<sup>4</sup> See Civil RICO case summary number one above in Appendix B.

labor organization and ordered defendant Salvatore Provenzano removed as President of IBT Local 560. In addition, the complaint cited evidence collected by the President's Commission on Organized Crime of La Cosa Nostra's exploitation of the IBT. Among other findings, that Report described the IBT as the union "most controlled" by organized crime, stating that the leaders of the IBT "have been firmly under the influence of organized crime since the 1950's and that 'for decades organized crime has exercised substantial influence over the international union, primarily through the office of the president.'" *Id.* at ¶ 115.

**D. RELIEF SOUGHT:**

The complaint sought the following preliminary relief: (1) enjoining the named LCN defendants from participating, directly or indirectly, in the affairs of the IBT or any other labor organization; (2) immediately requiring current IBT General Executive Board members to preserve all union records, to take no action to alter or destroy union records, and to deposit and maintain any payments to IBT entities and benefit funds under their control in appropriate accounts; (3) appointing one or more court liaison officers pendente lite to discharge the duties of the IBT President and Executive Board to prevent racketeering activity within the IBT, and to review certain actions of the IBT General Executive Board during the pendency of the action; and (4) enjoining and restraining IBT officials from interfering in any way with the duties of court liaison officers and from committing any racketeering act or associating with any LCN figure during the pendency of the action. *Id.* at pp. 104-409.

The complaint also sought the following permanent injunction: (1) prohibiting the LCN defendants, and all other persons in active concert or participation with them, from participating in the affairs of the IBT or any other labor organization; (2) prohibiting the named union defendants, their successors in office, and all persons in active concert or participation with them, from committing any act of racketeering, as defined in 18 U.S.C. § 1961 (1); (3) prohibiting the union defendants found to have violated 18 U.S.C. § 1962 from participating in the affairs of the IBT or any other labor organization about any matter which relates to the affairs of the IBT or

any other labor organization; (4) ordering a new general election for the IBT General Executive Board, to be conducted by a court-appointed Trustee; (5) ordering disgorgement of all proceeds defendants derived from their RICO violations; (6) authorizing the trustees to discharge, as the trustees deem necessary, any of the duties of the General Executive Board (other than negotiating and entering into collective bargaining agreements or participating in the affairs of any IBT political action committee) until such time as free and fair elections of new union officers were held; and (7) awarding costs to the United States and any further relief as may be necessary and proper. Id. at pp. 111-13.

**E. OUTCOME OF THE CASE:**

1. On March 13, 1989, the scheduled trial date, the IBT and the union officer defendants agreed to a settlement proposal, and on March 14, 1989, the district court entered a Consent Decree which included the following provisions:

a. Certain union defendants, and any other or future IBT General Executive Board member, officer, representative, member and employee of the IBT were permanently enjoined from: (a) committing any act of racketeering activity, as defined in 18 U.S.C. § 1961; (b) knowingly associating with any member or associate of the LCN, any other criminal group, or any person otherwise enjoined from participating in union affairs; and (c) obstructing or otherwise interfering with the work of the court-appointed officers or the Independent Review Board.

b. Various changes were made in the IBT Constitution, including requiring elections for the IBT General President and other International Officers to be by direct rank-and-file secret balloting.

c. The Consent Decree required a new election in 1991 for all IBT International Officers, and established three-court appointed officers, whose duties would terminate after the certification of the 1991 election results by the newly created Elections Officer.

d. The Consent Decree gave power to three court-appointed officers to oversee certain aspects of the affairs of the IBT: an Investigations Officer, an Elections Officer, and an Independent Administrator. The Investigations Officer was to investigate corruption and prosecute charges against alleged offenders. The Elections Officer was to supervise the 1991 election of IBT officers. The Administrator was to oversee the actions of the other two officers and to resolve disputes arising from their activities. The Administrator was authorized to make “any application to the [District] Court that the Administrator deems warranted” in order to have the court interpret the Consent Order and facilitate its implementation. The other parties to the Consent Decree were also allowed to make such applications as well.

The Consent Decree also provided, “This Court [the United States District Court for the Southern District of New York] shall have exclusive jurisdiction to decide any and all issues relating to the Administrator’s actions or authority pursuant to this order.”<sup>5</sup>

e. The Consent Decree also authorized the court-appointed Administrator to veto union expenditures, contracts and appointments that the Administrator reasonably believed would constitute an act of racketeering activity or facilitated organized crime influence in the union; and authorized the Investigations Officer to, among other matters, examine the books and records of the IBT and its affiliates, take sworn statements, and to attend meetings of the IBT’s General Executive Board. See United States v. International Bhd. of Teamsters, 803 F. Supp. 761, 767-68 (S.D.N.Y. 1992).

f. The Consent Decree also included the following procedures:

When the Investigations Officer files charges, the following procedures shall be observed:

- (a) the Investigations Officer shall serve written specific charges upon the person charged;

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<sup>5</sup> For summaries of the Consent Decree, see United States v. International Bhd. of Teamsters, 899 F.2d 143, 145 (2d Cir. 1990); United States v. International Bhd. of Teamsters, 905 F.2d 610, 613 (2d Cir. 1990).

- (b) the person charged shall have at least thirty (30) days prior to hearing to prepare his or her defense;
- (c) a fair and impartial hearing shall be conducted before the Administrator;
- (d) the person charged may be represented by an IBT member at the hearing; and
- (e) the hearing shall be conducted under the rules and procedures generally applicable to labor arbitration hearings.

The administrator shall preside at hearings in such cases and decide such cases using a 'just cause' standard. The Investigations Officer shall present evidence at such hearings. As to decisions of the IBT General Executive Board on disciplinary charges and trusteeship proceedings during the Administrator's tenure, the Administrator shall review all such decisions, with the right to affirm, modify or reverse such decisions and, with respect to trusteeship proceedings, to exercise the authority granted above in this paragraph. Any decision of the Administrator shall be final and binding, subject to the Court's review as provided herein. For a period of up to fourteen (14) days after the Administrator's decision, any person charged or entity placed in trusteeship adversely affected by the decision shall have the right to seek review by this Court of the Administrator's decision. The Administrator shall also have the right to establish and disseminate new guidelines for investigation and discipline of corruption within the IBT. All of the above actions of the Administrator and Investigations Officer shall be in compliance with applicable Federal laws and regulations.

See United States v. International Bhd. of Teamsters, Civil Action No. 88-CIV.4486. (Order entered March 14, 1989) at pp. 6-7, 9-10.<sup>6</sup>

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<sup>6</sup> On October 17, 1989, defendant Frank Balistrieri entered into a consent judgment permanently enjoining him from any dealing with any employee, representative, or agent of the IBT or any local union, joint council, benefit fund or any matter which related to the IBT or its affiliated entities.

Joseph Lambardo, midway through his trial, offered to settle the case by agreeing to pay the IBT \$250,00. In addition he was permanently enjoined from any association or participation in affairs of the IBT.

Default judgments were entered against the other LCN defendants. Those judgments basically provided that the defendants permanently enjoined from committing any act of racketeering, associating with any member of any organized crime family and from participating, in any way, in the affairs of the IBT.

2. On October 13, 1992, an Independent Review Board (IRB), consisting of three members, replaced the three court-appointed officers; the Government and the IBT each selected one member and those two members selected a third member.

The IRB had a Chief Investigator, who was the court-appointed Investigations Officer during the first stage of the IBT consent decree. To investigate allegations of misconduct, the Chief Investigator supervised a staff of independent investigators comprised of attorneys and retired law enforcement officers.

The IRB issued a written report containing its findings regarding alleged misconduct and its recommended sanctions, if any, to the IBT organization having jurisdiction over the matter. Within 90 days, the IBT organization was required to report its disciplinary action or its reasons for declining action, or it may refer the matter back to the IRB for adjudication. If the IRB finds that the action taken is inadequate, the IRB must take its objections known to the IBT entity, the IBT General President and the IBT General Executive Board (GEB). If the IBT entity has not taken or proposed corrective action within 10 days thereafter, the IRB may recommend further remedies or convene a de novo evidentiary hearing of its own with notice to the affected parties and prepare a written decision of disciplinary action which the GEB must implement. The IRB may also modify or reverse a disciplinary or trusteeship decision of the GEB.

The IRB's decisions and settlement agreements are submitted to the supervising district court for approval and entry as court orders. Under the IRB's rules and procedures, the IRB, or any individual member, may seek a court order directing the IRB to exercise its authority when one or more of the other members have "failed or refused to conduct a hearing, issue a decision, cause a needed vote, or otherwise act as required" by the IRB's rules. See IRB Rules and Procedures (Applications) reprinted at United States v. IBT (IRB Rules), 803 F. Supp. 761, 768-69, 800-805 (S.D.N.Y. 1992).



Courts have upheld a wide variety of actions of the IBT court-appointed officers and the IRB pursuant to the Consent Decree, including ordering and supervising union elections, restrictions on union actions and other activities, and disciplining and/or removing over 600 union members and officers for violations of the Consent Decree.<sup>7</sup>

The enforcement phase of the Teamsters civil RICO case, which began in 1989, is ongoing under the supervision of the United States District Court for the Southern District of New York.

**F. LEADING COURT DECISIONS:**

**F. Supp Cases**

1. United States v. International Bhd. of Teamsters, 697 F. Supp. 710 (S.D.N.Y. 1988).

The union sought re-assignment of the civil RICO IBT case to a different judge after Judge Edelstein had ruled that the civil case was related to a criminal RICO case involving IBT officials.

The district court ruled that designation of the case was consistent with the local rules and that the local rules were promulgated for internal management of the Court's caseload. The court further found that the Government had complied with the Local Rules by noting the relationship between the cases and the decision to accept the case was for the court alone to make, and that the Local Rules provided no substantive rights to the parties.

The union also filed a counter-claim charging that the conduct of the Government leading up to the filing of this action violated the Fifth Amendment due process clause; and sought expedited discovery, an evidentiary hearing, and a preliminary injunction against the prosecution of the instant action before this court and further, that prosecution in this court would create the appearance of impropriety.

The district court rejected the counter-claim, stating that the case cited by the Union related to prosecutorial misconduct and was inapposite when the Local Rules were followed and the judge accepted the case.

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<sup>7</sup> See, e.g., the following decisions that are all entitled United States v. International Bhd. of Teamsters: 19 F.3d 816 (2d Cir. 1994); 18 F.3d 183 (2d Cir. 1994); 12 F.3d 360 (2d Cir. 1990); 998 F.2d 120 (2d Cir. 1990); 981 F.2d 1363 (2d Cir. 1992); 978 F.2d 68 (2d Cir. 1992); 941 F.2d 1292 (2d Cir. 1994); 931 F.2d 177 (2d Cir. 1991); 905 F.2d 610 (2d Cir. 1990); 899 F.2d 143 (2d Cir. 1990); 842 F. Supp. 1550 (S.D.N.Y. 1994); 808 F. Supp. 279 (S.D.N.Y. 1992); 803 F. Supp. 761 (S.D.N.Y. 1992); 782 F. Supp. 243 (S.D.N.Y. 1992); 765 F. Supp. 1206 (S.D.N.Y. 1991); 764 F. Supp. 797 (S.D.N.Y. 1991); 761 F. Supp. 315 (S.D.N.Y. 1991); 728 F. Supp. 1032 (S.D.N.Y. 1990).

2. United States v. International Bhd. of Teamsters, 708 F.Supp. 1388 (S.D.N.Y. 1989).

Defendants moved to dismiss the civil RICO complaint filed by the Government. The defendants alleged a violation of their First Amendment rights in that the complaint intermingled protected activity with properly proscribed activity; pre-emption of RICO by federal labor laws; and insufficiency of the RICO allegations. The defendants also filed a motion to join indispensable parties (subordinate Teamster entities); and a motion to transfer venue based upon convenience (bulk of documents were located in Washington, D.C.). The Government filed motions for default judgment; summary judgment; to amend the complaint; and for an order striking the jury demands of the defendants.

The district court rejected the defendants' motions, holding that the complaint sought only to proscribe alleged violations of RICO, which are not protected by the First Amendment. The court also held that the exclusivity provisions of federal labor laws (29 U.S.C. § 482) applied only to the union membership and not to the Government. The district court ruled that Congress did not intend provisions of the NLRA, 29 U.S.C. § 157, to preclude application of RICO to corrupt labor unions. The defendants' motions to join indispensable parties and to change venue were rejected by the court as unnecessary. The court further held that the allegations were sufficient to support the RICO claim, and that Fed. R. Civ. P. 9(b) does not apply to RICO claims not sounding in fraud. The district court further held that the Hobbs Act, 18 U.S.C. § 1951, covers deprivation of union members' rights to union democracy protected by the LMRDA. Regarding the RICO elements, the district court held that the complaint adequately alleged a pattern of racketeering activity, the roles of the defendants, and the enterprise.

The district court also held that it was proper to name IBT's General Executive Board (GEB) as a nominal defendant "for the purpose of effectuating any possible relief," and that union had leave to renew its request to dismiss against the GEB if "it becomes clear that the GEB is not a proper defendant because it is in fact not a person under 18 U.S.C. § 1961 (3)." *Id.* at 1402.

Further, the court held that neither statute of limitations nor the doctrine of laches applied to Government civil RICO actions to enforce public policy. The district court also held that nationwide service of process satisfied due process requirements and that disgorgement was an available remedy to the Government under civil RICO.

The district court rejected the Government's motion for summary judgment holding that although collateral estoppel barred some defendants from contesting racketeering acts for which they were convicted, material issues of fact remained to be proved, particularly the enterprise, and that racketeering acts were committed in furtherance of that enterprise; and that these acts formed a pattern of racketeering. The court held that the Government was entitled to amend the complaint to add examples of continuing violations. The court also held that defendants were not entitled to a trial by jury since the RICO complaint sought equitable, not legal, relief.

3. United States v. International Bhd. of Teamsters, 723 F. Supp. 203 (S.D.N.Y. 1989), aff'd and modified, 931 F.2d 177 (2d. Cir. 1991).

The Independent Administrator (IA) submitted an application to the district court seeking clarification of Paragraph 12(d) of the Consent Decree, regarding delineation of the scope of the duties of the Elections Officer. The IBT filed a "Cross Application" asking the district court to limit the Elections Officer to monitoring activities; *i.e.*, supervising the

distribution of materials, overseeing the ballot process and certifying the election results. Furthermore, the IBT refused to pay for activities by the Elections Officers which the IBT considered ultra-vires.

The district court found that the Consent Decree gave the Elections Officer the authority to intervene in, and coordinate, the entire electoral process, up to and including promulgation of electoral rules and procedures for nomination, election, and certification of all elections. Further, the court held that the IBT would create a \$100,000 general operating account for the purpose of making funds available to Elections Officer and three support staff, consultant and public relations firm.

4. United States v. International Bhd. of Teamsters, 725 F. Supp. 162 (S.D.N.Y. 1989), aff'd, 905 F.2d 610 (2d Cir. 1990).

The district court held that the provision of the IBT's constitution that bars disciplining elective officers for activities occurring prior to their current terms, "which were not known generally" by the membership, did not preclude the Independent Administrator (IA) from disciplining Friedman and Hughes for the acts on which they were convicted. The district court held that Hughes was bound by the Consent Decree even though he was neither a signatory of the Consent Decree nor a party to the original RICO suit because: (1) IBT defendants represented Hughes' interests; and (2) the purposes of the RICO suit, to eliminate union corruption, are in the interest of the IBT membership, including Hughes.

The district court also ruled that under the Consent Decree, the actions of the court-appointed officers are not bound by the statute of limitations, and that the defendants were collaterally estopped from contesting the disciplinary charges since they were convicted of those charges. The district court also denied Friedman's and Hughes' motion for a preliminary injunction to prevent the IA from hearing the charges against them.

5. United States v. International Bhd. of Teamsters, 726 F. Supp 943 (S.D.N.Y. 1989), aff'd and rev'd in part, 899 F.2d 143 (2d Cir. 1990).

Daniel Ligurotis, a defendant in the original IBT suit, informed a membership meeting of Local 705, that he intended to file a lawsuit, in Chicago, to curb the power of the Elections Officer stating "we're not getting a fair shake in New York" and that if the case is removed from Chicago by New York, "I'm going to drop the suit".

The district court exercised its power under the All Writs Act, 28 U.S.C. § 1651, requiring all participants in Chicago lawsuit to refrain from further action except to enter a voluntary dismissal. The district court further held Ligurotis in contempt, on the ground that he violated the Consent Decree by interfering with the work of the court-appointed officers. The district court found that all necessary elements were proven by clear and convincing evidence. The district court stated that the Consent Decree was clear and unambiguous, and vested the Southern District of New York with "exclusive jurisdiction to decide any and all issues relating to the IA's actions or authority pursuant to this order." 726 F. Supp, at 946. The Court added that Ligurotis had signed the Decree, and that the contempt order was properly designed to urge compliance with Court's order.

6. United States v. International Bhd. of Teamsters, 728 F. Supp. 924 (S.D.N.Y. 1989).

Friedman and Hughes, union officials, sought a stay of rulings by the Independent Administrator that they had brought reproach upon the union by knowingly associating with LCN members and by their convictions for embezzlement, while their appeal of the criminal convictions were pending.

The district court denied the stay, holding that Friedman and Hughes had failed to show the likelihood that they would succeed on the merits; failed to show irreparable injury absent a stay; failed to show that the issuance of a stay would substantially injure other parties interested in the proceedings; and, finally, failed to show where the public interest in granting a stay lies.

7. United States v. International Bhd. of Teamsters, 728 F. Supp. 1032 (S.D.N.Y.), aff'd, 907 F.2d 277 (2d Cir. 1990).

The Government sought to have the district court enjoin all lawsuits arising under the Consent Decree filed in any forum other than the Southern District of New York since the Consent Decree vested exclusive jurisdiction in such matters in the Southern District of New York. The district court, acting pursuant to the All Writs Act, 28 U.S.C. §1651, so enjoined all subsequent litigation. More than 350 subordinate IBT entities opposed this injunction.

The district court found that the special circumstances of the litigation supported the injunction and that it could enjoin subordinate entities, not party to the underlying action, and that personal jurisdiction was not necessary because the IBT adequately represented interests of subordinate entities such as locals.

8. United States v. International Bhd. of Teamsters, In Re: Application VIII by the Independent Administrator, 735 F. Supp. 502 (S.D.N.Y. 1990).

The IBT refused to publish the names of members facing disciplinary hearings in the Teamsters' monthly magazine as part of the Independent Administrator's (IA) monthly report. The IA sought to require the IBT to publish the monthly report without editorial changes, unless pre-approved by the district court. The district court held that the IA was permitted to publish the names of members facing disciplinary hearings unless the union could prove that the material was inappropriate. The district court also ordered that all court orders published in the magazine would be published without editorial changes.

9. United States v. International Bhd. of Teamsters, In Re: Application IX by Independent Administrator, 735 F. Supp 519 (S.D.N.Y. 1990).

Members of the union objected to the Independent Administrator's interpretation of a provisions of the Consent Decree which empowered the Investigations Officer (IO) to take sworn statements in furtherance of his access to information about the IBT, arguing that they were not bound by the Consent Decree and that the IO should be required to issue notices of reasonable cause which detail the areas of inquiry.

The district court rejected the members' objection that they were not bound by the Consent Decree and held that the pertinent provision of the Consent Decree required no notice to members prior to in person interviews and sworn statements. The district court refused

to imply such notice, accepting the IO's comparison of such statements to the streamlined procedures in arbitration.

10. Cozza v. Lacey, 740 F. Supp. 285 (S.D.N.Y. 1990).

The district court denied the motion of Cozza, a member of the General Executive Board of IBT and a signatory to the Consent Decree, for a preliminary injunction prohibiting, *inter alia*, the Independent Administrator from hearing disciplinary charges against him, alleging that he knowingly associated with organized crime members. The district court stated that at this juncture any alleged harm to Cozza was speculative, and he has a right to review the IA's decisions; therefore he could not demonstrate the requisite irreparable harm.

11. Joint Council 73 v. International Bhd. of Teamsters, 741 F. Supp. 491 (S.D.N.Y. 1990).

The district court held that the disciplinary provisions of a Consent Decree between the Government and the parent union, the IBT, were binding on the entire union, including subordinate entities, which were not parties to the underlying suit.

12. United States v. International Bhd. of Teamsters, In Re: Application X by the Independent Administrator, 742 F. Supp. 94 (S.D.N.Y. 1990), aff'd as modified, 931 F.2d 177 (2d Cir. 1991).

The Independent Administrator (IA) presented the district court with a final set of election rules for review. The district court held that the rules were properly promulgated with respect to Paragraph F. 12(1) of the Consent Decree. The International Brotherhood of Teamsters (IBT) objected to the IA's authority to promulgate the rules and specifically objected to the rules which set the formula for the number of alternate delegates that each local must elect as being contradictory to the IBT constitution. Citing that without this rule some locals would be disenfranchised, the court upheld the action of the Independent Administrator.

The IBT further objected to the rule requiring each local to submit a local union plan to the Elections Officer as beyond the scope of the Consent Decree. The district court found such a rule to be within the authority of the Elections Officer to supervise the election. Further, the IBT objected to the Elections Officer's intention to conduct all phases of the election of any local not submitting a plan. The district court found that the Elections Officer's authority extended to all phases of the election in order to prevent fraud or abuse of any kind.

The district court also upheld the Elections Officer's promulgation of rules ordering that accredited candidates for office could publish their campaign literature in union magazine and accredited candidates for office were entitled to a limited release of membership lists for their campaign purposes.

13. United States v. International Bhd. of Teamsters, In Re: Application VII by the Independent Administrator, 743 F. Supp. 155 (S.D.N.Y.), aff'd, 905 F. 2d 610 (2d Cir. 1990).

Friedman and Hughes, IBT officials, sought a preliminary injunction against the decision of the Independent Administrator (IA), finding that they had brought reproach on the Union by associating with known organized crime figures and for conduct which formed the basis for a criminal conviction of embezzlement.

The district court held that the standard of review for the determinations by the Independent Administrator is abuse of discretion. Applying this standard, the court upheld the IA acted reasonably in his determination and in ruling that and that Friedman and Hughes' affirmative defense that the criminal conduct was known to the general membership did not shield them from the IA's decision. The court further denied a stay of the imposition of the bar from union activities pending the outcome of Friedman and Hughes' appeal of their criminal convictions, but allowed for the possibility of modification if the appellate court reversed their convictions.

The district court further held that the phrase "bring reproach upon the union" was not void for vagueness and did not require definition by the IBT's GEB.

The district court further held that the remedies available to a charged official is to petition the IA for a listing of particularized charges and, if no relief is afforded, then one may appeal such convictions to the district court.

The district court further found that the IA properly applied the collateral estoppel doctrine (see 725 F. Supp. at 167), finding that the instant civil suit alleged the same conduct on which he had previously been convicted in a criminal case, and therefore the IA properly refused to allow Friedman to introduce evidence to contest the crimes underlying his conviction. The court noted that the IA did not deprive Friedman of the opportunity to raise whatever defenses he could have raised in his criminal trial.

14. United States v. International Bhd. of Teamsters, In Re: Application XIII by the Independent Administrator, 745 F. Supp 189 (S.D.N.Y. 1990).

Independent Administrator (IA) sought review of his opinion that the Investigations Officer had sustained his burden of demonstrating that there was just cause to find that IBT officers Cirino Salerno and William Cutolo breached their duties under the IBT constitution by associating with organized crime figures, and should be given lifetime suspensions from the IBT.

The district court affirmed the opinion of the IA. Salerno did not contest the findings of the IA, but argued that his subsequent resignation from the union mooted the penalties and findings of the IA. The district court held that Salerno's resignation would not prevent his subsequent return to the union at a later date and therefore the penalties and findings were appropriate. Cutolo argued that the IA did not have jurisdiction over him and that the evidence was insufficient against him. The district court dismissed these arguments as vacuous.

15. United States v. International Bhd. of Teamsters, In Re: Application XII by the Independent Administrator, 745 F. Supp. 908 (S.D.N.Y. 1990), aff'd, 941 F.2d 1292 (2d Cir. 1991).

This case involved the review of Independent Administrator's (IA) decision on disciplinary charges against Dominic Senese, Joseph Talerico, and James Cozzo, suspending them for life from the IBT. Senese was banned for bringing reproach on the union by his association with known LCN members; Talerico was banned for refusing to testify before a grand jury; Cozzo was banned for being a member of the LCN.

The district court held that the IA had sustained his burden of establishing "just cause" for finding the charges proved and resulting sanction of lifetime ban. The district court

also held that the lifetime ban did not violate the First Amendment because it served a compelling interest in keeping the IBT free from the influence of organized crime.

The district court also held that the IA has jurisdiction over the parties because the consent decree is binding on non-signatory members of the IBT.

Senese and Talerico also raised a due process claim, claiming they did not have notice that association with LCN would subject them to discipline and, further, that it was a violation of due process to step up disciplinary enforcement after a period of laxity. The district court rejected this argument, holding that the IA was not a state actor and that therefore due process is not implicated, and in any event there was no due process violation because the Consent Decree did not establish new standards of conduct and; that it defies logic to think association with LCN members would not bring reproach on the union. Id. at 913.

The district court further held that reliable hearsay is admissible in the disciplinary hearing because the Consent Decree establishes the rules and procedures generally applicable to labor relation arbitration hearings and at such arbitration hearings hearsay evidence, if reliable, is admissible. Specifically, the district court upheld admission of hearsay information supplied to FBI Agents, and deposition testimony, and physical surveillance. Further, the court upheld the testimony of an FBI Agent as an expert on organized crime. Id. at 914-15.

The district court further held that because the Consent Decree set the standard of admissibility as that in labor arbitration and because pleas of nolo contendere are admissible in labor arbitration such pleas are therefore admissible in disciplinary hearings.

The court found the penalty of lifetime suspension from the IBT imposed by the IA was not arbitrary and capricious, did not violate the LMRDA, and was well within the power of the IA to impose.

16. United States v. International Bhd. of Teamsters, 750 F. Supp. 129 (S.D.N.Y. 1990).

The district court held that a union member did not establish irreparable harm and therefore was not entitled to a preliminary injunction to enjoin a union's delegate election due to the alleged fact that a special meeting ordered by the IA was beyond the scope of election rules.

17. United States v. International Bhd. of Teamsters, In Re: Application XVI of Independent Administrator, 753 F.Supp. 1181 (S.D.N.Y. 1990), aff'd, 941 F.2d 1292 (2d Cir. 1991).

Dominic Senese, ex-member and officer of IBT, argued that supplemental decisions of Independent Administrator (IA), barring post-expulsion payments into benefit plans on Senese's behalf, was arbitrary and capricious and beyond the authority of the Consent Decree.

The district court found that the IA's actions were subject to a review using the arbitrary and capricious standard; that the IA had the authority to bar future payments into the benefit plans; and it was not arbitrary and capricious for the IA to permit payments out of plans where the payments are based upon a constitution made prior to expulsion.

18. United States v. International Bhd. of Teamsters, In Re: Application XIV of the Independent Administration, 754 F. Supp. 333 (S.D.N.Y. 1990).

Mario Salvatore, Secretary Treasurer of IBT Local 191, appealed the Independent Administrator's (IA) decision regarding a disciplinary hearing finding that Salvatore brought reproach on the Local by embezzling monies from the Health and Insurance Plan and that he violated his membership oath by his embezzlement. The IA dismissed the first charge as unproved, but found as to the second charge, that the Investigations Officer had shown just cause that the charge had been proved.

Salvatore argued that the decision of the IA was arbitrary and capricious because: (1) the wrong standard was applied; (2) the evidence failed to establish the charge; (3) charge II was barred by collateral estoppel; (4) the same charge was barred because the membership knew of the allegations; (5) the penalty was unduly harsh; and (6) Salvatore was not bound by the Consent Decree.

The district court held that the evidence was sufficient to show fraudulent intent to deprive the union of funds; that circumstantial evidence is appropriate in internal union disciplinary hearings; that it is proper to draw negative inferences from union officers' failure to act upon an affirmative duty; and that suspension from union office and membership was an appropriate sanction. The district court also found that charge II was not barred by the doctrines of res judicata and collateral estoppel because the General President of the IBT conducted a trusteeship hearing involving Local 191. The court reasoned that the defenses of collateral estoppel and res judicata unavailable to Salvatore since the IA was not a party to the trusteeship proceeding nor in privity with the General President.

19. United States v. International Bhd. of Teamsters, In Re: Application XV of Independent Administrator, 761 F. Supp. 315 (S.D.N.Y. 1991).

The IBT challenged the Independent Administrator's (IA) veto of Jack B. Yager's appointment to the IBT's General Executive Board. The IA's veto was based upon his determination that such an appointment would further an act of racketeering activity and contribute, directly or indirectly, to the association of the union with LCN.

The district court found the decision of IA's to be fully supported by the evidence that Yeager aided and abetted extortion of union members' LMRDA rights, and that the standard of review is whether the IA's decision was reasonable and not arbitrary or capricious.

20. United States v. International Bhd. of Teamsters, 764 F. Supp. 787 (S.D.N.Y. 1991), rev'd, 940 F.2d 648 (2d Cir. 1991) (Table).

The voluntary IBT Consent Decree provided for changes to the electoral and disciplinary provisions of the IBT Constitution. A three-step election process was established by the Consent Decree. This action involved consideration of paragraph K.16 of the Consent Decree, two motions to intervene, and the legal status of the vote of IBT delegates at the upcoming IBT convention.

Paragraph K.16 allowed the district court to "entertain any future applications" that included interpretations of the Consent Decree. The district court held that K.16 permitted the court to consider prospective matters which could threaten the intent of the decree.



The district court denied the motions to intervene by two groups of IBT members because neither group had demonstrated that its interest in the instant matter is not adequately represented by the existing parties. The Government wanted a determination of IBT's obligation if, at the convention the delegates voted against the Consent Decree's provisions for direct rank and file election of International Officers. The district court found that the changes to IBT's Constitution were valid, and the IBT cannot undercut it, and membership could not veto IBT's settlement at least with regard to the provision for elections. The district court also held that the Consent Decree was binding on the membership without the approval at the convention. The district court also enjoined IBT from taking any action attempting to change the function of the nominating convention unless such action was expressly authorized in the Consent Decree.

21. United States v. International Bhd. of Teamsters, In Re: Application XXIII of the Independent Administrator, 764 F. Supp. 797 (S.D.N.Y. 1991), aff'd 956 F.2d 1161 (2d Cir. 1992) (Table).

Theodore Cozza, ninth Vice President of the IBT's GEB, appealed Independent Administrator's (IA) disciplinary findings that he brought reproach upon the union by knowing association with LCN members. Cozza alleged that he was denied pretrial discovery; the charge was unspecific; the charge violates his First and Fifth Amendment rights; and the membership generally knew of his association with those individuals.

The district court upheld the findings of the IA, stating that the Consent Decree did not provide a right to pre-hearing discovery; that the charge was sufficiently specific; there was no violation of First Amendment rights since the union may sanction itself in order to eliminate corruption. The district court also ruled that there is no state action, which is necessary to the constitutional argument, because "Cozza is being disciplined by the [IA] as a stand in for the IBT General President." (764 F. Supp. at 801). The court also ruled that there was no violation of due process rights since the IA could, from the length and nature of defendant's association with LCN members, properly assume that the defendant knew them to be LCN members, and he was not being punished for past conduct.

The district court further held that the IA is not limited by any statute of limitation; contrary to Cozza's application of a two-year statute of limitation based on Pennsylvania's law.

22. United States v. International Bhd. of Teamsters, In Re: Application XX by the Teamsters Administration, 765 F. Supp. 1206 (S.D.N.Y. 1991).

A printing contract was awarded to the printing firm of the IBT's General President's son-in-law. The Independent Administrator (IA) vetoed further expenditures to that printing firm. The IBT General President attempted to intervene in the IA's action.

The district court held that the IBT General President could not intervene because his desire to rebut a factual finding that damaged his personal reputation did not implicate a federal statute nor had he demonstrated any property interest in the action.

The district court further held that the union membership's right to self governance was extortable property under the Hobbs Act, and that the extortion of these rights may constitute a racketeering act under RICO. Additionally, the court held that the aiding and abetting the extortion of the members' rights under LMRDA can constitute an act of racketeering. The IA acted properly to bar further expenditures, which would constitute

racketeering activity. The district court stated that the fiduciary duty under LMRDA is heightened for union officers, particularly the President of the nation's largest labor union.

23. United States v. International Bhd. of Teamsters, In Re: Application XXI by the Independent Administrator, 775 F. Supp 90 (S.D.N.Y. 1991), aff'd in part rev'd in part, 948 F.2d 1278 (2d Cir. 1991) (Table).

Union official, George Vitale, appealed the Independent Administrator's (IA) determination that five disciplinary charges had been proved against Vitale. Vitale contended that the IA failed to provide a full, fair and impartial hearing; that his prior felony convictions do not bring reproach on the union; that there was no evidence in the record that Vitale violated § 16(c) of Local 283's bylaws; that there is no evidence to support a finding of embezzlement; and that Vitale did not violate his fiduciary duty by filing incorrect annual reports.

The district court held that the IA provided a full, fair and impartial hearing; that the prior felonies involving embezzlement do bring reproach upon the union; and that the IA's actions do not amount to double jeopardy or reveal any evidence of bias. The district court further held that the record revealed evidence of Vitale's fraudulent intent to embezzle from the union in that he failed to disclose to either the local or the International that both were paying his FICA tax and in ordering a new Lincoln Town car before leaving office.

Vitale raised the affirmative defense that what is generally known by union member about an individual before they elect that individual to office cannot be later held against that individual. The district court held that this affirmative defense is available only if the membership has "conclusive knowledge" and the individual asserting the defense must acknowledge guilt. The district court found that the IA was correct in finding that Vitale did not provide evidence supporting conclusive knowledge.

Vitale also argued that his convictions were too remote in time to be used against him in his disciplinary hearing, and relied upon Federal Rule of Evidence 609(b) which bars the introduction of convictions more than 10 years old for the purpose of attacking the credibility of a defendant unless the court determines it should be entered in the interest of justice and only if it is of probative value. Further, Vitale argued that the IA is barred, by the doctrine of laches, from bringing charges for conduct the union has been aware of and never acted on.

The district court rejected these arguments, stating that the Consent Decree removed any statute of limitation issues specifically to allow the IA to rely on past criminal acts in bringing disciplinary charges. The district court held that to allow the defendant to succeed on the doctrine of laches defense would effectively eviscerate the disciplinary provisions of the Consent Decree by shielding corrupt officials from discipline.

24. United States v. International Bhd. of Teamsters, In Re: Application XXXVII of the 2nd Administration, 777 F. Supp. 1123 (S.D.N.Y. 1991).

Union members McNeil and Morris allegedly participated in a scheme to defraud IBT Local 707 of money and property by granting unauthorized raises to themselves and other members of the Local's Executive Board, and the two had allegedly defrauded the Local of in excess of \$60,000 by giving money and automobiles to departing officials.

The Independent Administrator (IA) found that the charges against McNeil and Morris were proved and suspended them from IBT membership for 5 years on the first charge and a concurrent 5 year suspension for the second charge. The IA also prohibited: (1) anyone

from paying into the health and pension funds on behalf of Morris or McNeil; (2) the payment of legal fees for McNeil and Morris by the Locals; and (3) McNeil and Morris from receiving retirement gifts or automobiles. Morris and McNeil appealed the decision.

The district court found that the officers were bound by the Consent Decree and that the evidence fully supported the decision of the IA. The district court also rejected the claim that the disciplinary charges violated the Double Jeopardy Clause of the Constitution, stating that the Court of Appeals previously held that the actions of the IA does not constitute "state action."

25. United States v. International Bhd. of Teamsters, In Re: Application L of Independent Administrator, 777 F. Supp. 1127 (S.D.N.Y.), aff'd, 956 F.2d 1161 (2d Cir. 1991) (Table).

A Union officer, Thomas Cozza, petitioned the district court to set aside the decision of the Independent Administrator (IA) permanently banning him from IBT involvement because of his association with known members of organized crime.

In finding Cozza to have knowingly associated with members of organized crime, the IA relied upon the statements of an FBI agent which incorporated government surveillance, reports of state commissions, court records of criminal convictions, wire intercepts, press reports, surveillance and videotapes of Cozza in present of LCN members, and the testimony of Cozza's son and members of International Brotherhood of Teamsters Local 211. The district court upheld the IA's decision, rejecting Cozza's proffered newly discovered evidence.

26. United States v. International Bhd. of Teamsters, In Re: Application XXXVIII of the Independent Administrator 777 F. Supp 1130 (S.D.N.Y. 1991), aff'd, 964 F.2d 1308 (2d Cir. 1992).

The Independent Administrator (IA), relying upon evidence which included hearsay statements, found that a union member knowingly associated with Philadelphia LCN Boss Nicodemo Scarfo, and permanently barred him from the IBT and its activities.

The district court refuse to upset the IA's assessment of the union member's credibility vis a vis the credibility of the FBI Agent's signed statement, which was corroborated by criminal associates of Scarfo. The district court found that hearsay evidence, if reliable, was permissible in such a proceeding, especially where the charge against the member specifically identified the person connected to organized crime and the time frame of the association with the organized crime figure.

27. United States v. International Bhd. of Teamsters, In Re: Application XLV of the Independent Administrator, 777 F. Supp. 1133 (S.D.N.Y. 1991), aff'd, 970 F.2d 1132 (2d Cir. 1992).

International Brotherhood of Teamsters member and Secretary - Treasurer of Local 473, Carmen E. Parise, challenged the Independent Administrator's (IA) decision regarding disciplinary charges against him for bringing reproach upon the IBT and violating his membership oath by threatening a union member with economic and physical harm and by refusing to answer, under oath, questions regarding corruption in the local.

The district court found the IA's actions to be fully supported by the evidence. Parise had pled guilty to the criminal charge and the court found that he was collaterally estopped from contesting that charge in the disciplinary hearing. The district court rejected Parise's

argument that the second charge, for refusing to answer questions under oath, violated his Fifth Amendment rights, stating that the IA's decision to discipline Parise does not constitute state action.

28. United States v. International Bhd. of Teamsters, In Re: Application LX of the Independent Administrator, 782 F. Supp. 238 (S.D.N.Y. 1992).

The Independent Administrator (IA) permanently barred several former IBT officers from the IBT for knowingly associating with organized crime figures.

The district court found that the evidence was sufficient to support the IA's finding that the former officers knowingly associated with, and tolerated the presence of a member of organized crime, and further found that the IA's reliance upon hearsay statements, including those made by FBI Agents, was appropriate in a disciplinary hearing, especially when the FBI Agent was available for cross-examination.

29. United States v. International Bhd. of Teamsters, In Re: Application LXVI of the Independent Administrator, 782 F. Supp. 243 (S.D.N.Y. 1992).

The ballots for election of IBT Local 707 officers were mailed to union members and contained the names of candidates who were suspended, due to their knowing association with organized crime members. The IA ordered a rerun election because of the inclusion of the suspended members names on the original ballots. After the rerun election, the suspended incumbents refused to relinquish control of Local 707 to the newly elected officers while the appeal of the IA's action was pending.

The district court held that: (1) the incumbent officers must relinquish control regardless of pending protest; (2) the IA had the power to order the rerun election due to the Consent Decree; and (3) this power was not affected by any provision of Labor Management Reporting and Disclosure Act of 1959, 29 USC § 482(b), establishing exclusive procedures for challenging elections.

30. United States v. International Bhd. of Teamsters, In Re: Application LVIII of Independent Administrator, 782 F. Supp. 256 (S.D.N.Y. 1992).

The court held that IA's disciplinary sanction was supported by evidence; specifically corroboration by two union employees, photographs of the beaten member, and admission by Cherilla that his version of the incident did not correspond with member's injury. The court further held that ex parte depositions and hearsay evidence were sufficient to support the charge.

31. United States v. International Bhd. of Teamsters, In Re: Application of LXIV of the Independent Administrator, 787 F. Supp. 345 (S.D.N.Y. 1992), aff'd and vacated in part, 978 F.2d 68 (2d Cir. 1992).

The Independent Administrator (IA) found that charges against three officers of Local 100, involving assault and embezzlement, were proved by Investigations Officer. The district court held that the action taken by the IA was not state action for due process purposes, and under a deferential standard of review, reliable hearsay may be considered in proving the charges in a disciplinary hearing. The district court also ruled that acquittal on criminal charges did not preclude disciplinary action for the same conduct premised upon a lesser standard of proof.

32. United States v. International Bhd. of Teamsters, In Re: Application LXVII of the Independent Administrator, 791 F. Supp 421 (S.D.N.Y 1992).

John M. Trivizeno, President and Business Representative of IBT Local 398, appealed a decision of the Independent Administrator (IA) to permanently bar him from union activities for knowingly associating with LCN members. Trivizeno argued that he was denied a fair and impartial hearing in violation of due process; that the decision of IA was arbitrary and capricious; and that the penalty imposed was too severe.

The district court held that the action of IA did not involve state action and therefore no constitutional issues arose. Further, the court held that the IA's decision was based upon sufficient evidence and that the penalty, permanent banishment from union, was reasonable in light of the purpose of the Consent Decree to rid the IBT of the pervasive, and destructive influence of organized crime.

33. United States v. International Bhd. of Teamsters, In Re: Application LXXII of Independent Administrator, 792 F. Supp. 1346 (S.D.N.Y.), aff'd, 981 F.2d 1362 (2d Cir. 1992).

Robert Samsone, President of IBT Local Union 682, appealed the disciplinary decision of Independent Administrator that he brought reproach upon the union, and violated his membership oath, by not fully investigating an allegation of Vice President Parrino's ties to the LCN.

The district court found that the evidence established a duty, incumbent upon all officers of the union, to actively campaign against the influence of organized crime and that failure to employ all necessary means to verify or rebuke allegations is a gross abdication of that responsibility. The district court held that permanent debarment from union offices was not too severe a remedy.

34. United States v. International Bhd. of Teamsters, In Re: Application LXXIII of the Independent Administrator, 803 F. Supp. 740 (S.D.N.Y. 1992).

The President Patrick Crapanzano and Vice President Louis Lanza of an IBT Local appealed their permanent bar from membership in the IBT imposed by Independent Administrator (IA) for their failure to fully investigate allegations that the local president's father and brother had LCN ties.

The district court held that the finding of the IA was supported by the evidence, was not arbitrary and capricious and was therefore entitled to great deference.

35. United States v. International Bhd. of Teamsters, 803 F. Supp. 758 (S.D.N.Y. 1992), aff'd, 990 F.2d 623 (2d Cir. 1993) (Table).

Consolidated, an employer, sought to have the district court impose the decision of the IA in order to preclude a suit by employee Walker challenging his discharge. Walker claimed that Consolidated fired him in a retaliation for political activity; that he was not properly represented during his grievance; and that the board which decided against him acted in retaliation of his political views.

The district court held that the employer was erroneously attempting to view Walker's filing of a lawsuit for wrongful discharge as an attempt to "challenge the decision of the

Independent Administrator.” The district court rejected this contention, finding that Walker did not file his action seeking protection of, or relief from, the Election Rules promulgated by the IA. Walker filed his suit under section 301(a) of the LMRA, 29 U.S.C. §185(a), which is separate and distinct from the Election Rules. Therefore, the district court rejected the application of the employer.

36. United States v. International Bhd. of Teamsters, 803 F. Supp. 761 (S.D.N.Y. 1992), aff’d and rev’d in part, 998 F.2d 1101 (2d Cir. 1993).

The Government sought an order approving certain proposed rules and procedures promulgated by the Independent Review Board (IRB) in order to govern its operation, which rules were an exhibit to the district court’s opinion. The Government contended that the proposed rules were necessary for effective and efficient operation and to implement the express terms of the Consent Decree, and that the proposed rules were drawn from the terms of the Consent Decree and the IBT Constitution, as amended.

The IBT opposed the proposed rules, arguing that the Consent Decree authorized the IRB, not the Government, to promulgate rules for the IRB’s operation; that the adoption of any rule for IRB operation, regardless of its content, was an impermissible alteration of the parties’ agreement and was inconsistent with the purpose and structure of the Consent Decree.

The IBT further argued that the Government had waived its rights to promulgate proposed rules when, in the process of incorporating the Consent Decree into the IBT Constitution, it failed to raise these issues; that the adoption of rules for IRB operation violated federal labor policy favoring Government non-intervention in union affairs; that the democratic election of a new IBT Administration dedicated to eradicating corruption obviated the need for the Government’s proposed rules; and, finally, that the proposed rules imposed excessive monetary costs on the IBT.

Several of the proposed rules are based on the premise that an individual IRB member may take action without the approval of a majority of the IRB. The IBT objected to these rules, arguing that the Consent Decree required any decision of the IRB to be made by majority vote. The district court pointed out that the IBT was confusing “action” with a “decision” as in a disciplinary matter.

Other rules granted the IRB broad investigatory power including taking depositions under oath, auditing or examining books of any IBT affiliated entity, receiving notice of and having the right to attend all meetings of any IBT affiliated entity, and establishing a toll-free telephone service to receive reports of corruption.

Dismissing the IBT’s argument that the parties did not intend to grant the IRB such power, the district court noted that the IBT Constitution does not enumerate the investigative powers of the General President and General Secretary - Treasurer. The court further stated that the Consent Decree expressly and unambiguously provided that the IRB shall have the investigatory and disciplinary authority of the General President and General Secretary - Treasurer.

Section K of the proposed rules allows the IRB to require action on the part of “IBT Entities,” as well as seeking a court order, to implement its decisions. The IBT objected stating that only the GEB can be required to implement IRB decisions. The district court stated that the Consent Decree requires the GEB to implement its decisions and it would be absurd to suggest that an IBT affiliate, while bound by the decision and required to take all action

necessary to implement an IRB recommendation, is suddenly absolved of the responsibility to take any action.

The district court also rejected the IBT's objection to rules which allowed the IRB to enforce its decisions through the district court. The court ruled that, although not explicitly set forth in the Consent Decree, the Decree grants the IRB the authority to take whatever steps necessary to ensure implementation of its decisions.

The IBT further objected to a rule providing the IRB access to, and notification of any disciplinary or trusteeship decisions of the GEB, the General President or the IBT Ethical Practices Committee, arguing that the Consent Decree contemplated only review of such action taken by the GEB. The district court found this to be an overly restrictive interpretation of the language of the Consent Decree, ignoring the IBT's disciplinary review structure and threatening effective implementation of the Consent Decree.

The district court also rejected the IBT's opposition to a rule permitting the publication of IRB materials in "The New Teamster" magazine premised upon the Consent Decree's silence regarding the ability of the IRB to communicate with rank and file members. The court stated that the express goals of the Consent Decree require an informed membership.

The district court also found consistent with the Consent Decree an interpretation of the Consent Decree which permitted one member of the IRB to conduct a hearing and issue a written decision if the other two members of the IRB consent and, in the event of a deadlock, the matter will be referred to the district court for final disposition.

The district court also rejected the IBT's argument against permitting individual members of the IRB to hire personal staff at IBT expense; against indemnification of the IRB by IBT; against the ability of the IRB to seek instruction, direction or order from the Court; against the compensation of IRB members and staff by the IBT.

The district court ruled, generally, with regard to these proposed rules that the absence of rules would threaten the IRB's ability to fulfill its role under the terms of the Consent Decree and that the promulgation of such rules is consistent with the principles and policies upon which the Consent Decree is premised such as the alleviation of corrupt influences in the union and perpetual vigilance against the incursion of such corruption. Further, the district court rejected the IBT's arguments that the Government had waived its right to bring this application when it failed to raise these issues at the IBT convention as revealed by parol evidence including discussions of how to incorporate the provisions of the Consent Decree into the IBT Constitution. The district court also ruled that federal labor policy generally favored the promulgation of such rules especially since the IRB is not a government entity, but is an independent body whose existence, function, and composition are creatures of the parties' agreement.

Finally, the district court held that the current IBT Administration's stance towards reform did not obviate the propriety of the proposed rules and noted that the current administrator's performance was questionable especially since it had argued against and attempted to block the institution of virtually every remedial process intended to implement the Consent Decree.

37. United States v. International Bhd. of Teamsters, 803 F. Supp. 806 (S.D.N.Y. 1992), aff'd, 12 F.3d 360 (2d Cir. 1993).

Two members of the Independent Review Board (IRB) reached an impasse in selecting the third member of the Board. In an attempt to break the impasse, former Federal Judge Frederick Lacey, IRB member, nominated William Webster. The other member of the Board, Harold Burke, former Special Assistant to IBT President Carey, and the IBT objected to the nomination. This objection was premised upon the independent role of the IRB and that the neutral party of the IRB should be a person with knowledge of, and experience with, the work of labor unions, in addition to having a background in investigation and law enforcement. William H. Webster had served as a U.S. Attorney, a federal judge on both the District Court and the Court of Appeals, and as directors of the FBI and CIA.

The district court ruled that the IRB is both investigative and adjudicative in its authority and would serve as a perpetual agent of reform. Therefore, the district court ruled that law enforcement, investigative and judicial experience qualifies a candidate for service on IRB. The district court found William Webster uniquely qualified.

38. United States v. International Bhd. of Teamsters, In Re: Application I of the Independent Review Board, 808 F. Supp. 271 (S.D.N.Y. 1992).

The IBT Consent Decree provided for an Independent Review Board (IRB) consisting of three members, one of whom was former federal Judge Frederick Lacey. Judge Lacey was subsequently appointed Special Prosecutor and charged with investigating the conduct of certain government agencies, including the CIA and DOJ, regarding the Banca Nazionale del Lavoro (BNL) matter. Judge Lacey sought the district court's clarification as to whether this appointment would conflict with his role as a member of the IRB.

The specific rule in question was Section F(3) which provided that "... no member of the IRB ... shall ... hold any position with the government ...." The issue was whether Judge Lacey's role as Special Prosecutor was a "position with the government" as contemplated by the Section F (3).

The district court held that Judge Lacey did not hold a "position with the government" as Special Prosecutor. Rather, Judge Lacey's position as Special Prosecutor was one of independence from the Government.

39. United States v. International Bhd. of Teamsters, In Re: Application XC of the Independent Administrator, 808 F. Supp. 276 (S.D.N.Y. 1992).

Former officers of an IBT Local, Buckley and Morris, had been banned from the IBT by the Independent Administrator (IA) following disciplinary charges arising out of their knowing association with LCN members. Buckley and Morris sought reinstatement with their employers. The IA requested an order from the district court stating that the Local may remove Morris and Buckley from a seniority list in light of their banishment and Morris and Buckley may be discharged from employment if employers find them to be objectionable to co-workers.

The district court ruled that the NLRA's prohibition against discrimination against non-union employees did not apply to the diminution of former members seniority rights when the diminution is in response to misconduct, as that, it would not be discriminatory to fire non-union member employees for legitimate reasons.



40. United States v. International Bhd. of Teamsters, In Re: Application XCI of the Independent Administrator, 808 F. Supp. 279 (S.D.N.Y. 1992), aff'd, 998 F.2d 120 (2d Cir. 1993).

The Independent Administrator (IA) permanently banished Mr. Adelstein from IBT membership because of his knowing association with LCN figures. On review, the district court held that the IA's decision was not arbitrary and capricious because of its reliance upon hearsay evidence, and that the Consent Decree bound non-party IBT members.

41. United States v. International Bhd. of Teamsters, 817 F. Supp. 337 (S.D.N.Y. 1993).

The district court stated that the findings of the Independent Administrator (IA) "are entitled to great deference", and must be upheld unless they are "arbitrary or capricious." 817 F. Supp. at 341. The district court upheld the IA's findings that several IBT officers breached their fiduciary duties to union members by: (1) participating in an associated member program, which was designed to enrich the officers rather than to benefit the union; (2) involvement in payment of loans in excess of the statutory limit of \$2000 from a local union; and (3) embezzlement of union funds. However, the district court remanded the matter to reconsider its imposition of uniform sanctions, regardless of the degree of culpability.

After remand, the district court upheld the IA's reasoning and imposition of uniform sanctions. See United States v. International Bhd. of Teamsters, 824 F. Supp. 406 (S.D.N.Y. 1993).

42. United States v. International Bhd. of Teamsters, 829 F. Supp. 602 (S.D.N.Y. 1993).

On remand from the Second Circuit Court of Appeals (998 F.2d 1101), the district court approved the Rules and Procedures for Operation of the Independent Review Board as they were modified in accordance with the Second Circuit's decision.

43. United States v. International Bhd. of Teamsters, In Re: Application CXVII of the Independent Administrator, 838 F. Supp. 800 (S.D.N.Y. 1993), aff'd, 33 F.3d 50 (2d Cir. 1994) (Table).

In a prior disciplinary action, Harold Friedman, President of IBT Local 507 and President of Bakers Local 19, was charged by the Investigations Officer (IO) with embezzlement, conspiring to and engaging in racketeering activity, and filing a false LM-2, all in connection with Bakers Local 507. The Independent Administrator (IA) imposed a one-year suspension, which was affirmed by the district court. See 735 F. Supp. 506 (S.D.N.Y.), aff'd, 905 F.2d 610 (2d Cir. 1990).

The same conduct resulted in Friedman's criminal conviction, and consequently he was barred from any labor union activity for a period of three years. However, the IA determined that Friedman continued to play a significant role in the operations of Local 507, held himself out as a figure of continuing authority, and attended a contract ratification meeting to influence the union's vote after the suspension. IBT agents and officers were aware of both the suspension and the activities, yet were found by the IA to have failed to take steps to prevent the violation and had, in some cases, assisted in the violation.

The district court affirmed the action of the IA in its entirety, rejecting a First Amendment claim by the respondents, and upheld the sanctions imposed by the IA. 838 F. Supp. at 811-12. First, the district court held that the action of the IA did not constitute state action, hence, the First Amendment was not applicable. Alternatively, even if the First Amendment applied, the district court held that the action of the Independent Administrator did not violate Friedman's First Amendment rights since he "was not free to speak or associate in a manner that violated his one-year suspension and his statutory debarment."

The district court also held that the Friedman actions were not protected under 29 U.S.C. § 411 and also violated 29 U.S.C. § 504. *Id.* at 812.

Friedman was permanently barred from any IBT affiliated union positions, including membership, and prohibited from receiving any compensation therefrom. Officers and agents of the union were held to be in violation of the IBT Constitution.

44. United States v. International Bhd. of Teamsters, In re Application II of the Independent Review Board, 842 F. Supp. 1550 (S.D.N.Y. 1994).

Under the terms of the Consent Decree, when the Independent Review Board (IRB) perceives the existence of impermissible conduct, it has a duty to recommend the filing of disciplinary charges against those allegedly engaged in such conduct. An individual alleged to have engaged in wrongdoing may enter into a compromise agreement with an IBT local affiliate. When such an agreement is entered into, it is submitted to the IRB for approval.

In the instant action, the district court approved the IRB's unopposed application to submit by application all compromise agreements to the district court for review and approval and for the entry of a consent decree. The district court found that such a procedure is entirely consistent with the original Consent Decree, that it has the effect of applying sanctions for the enforcement of the decree which will serve to assure compliance with the compromise agreement.

### **F.2d Cases**

1. United States v. International Bhd. of Teamsters, Appeal of Daniel Ligurotis, 899 F. 2d 143 (2d Cir. 1990), aff'd and rev'd in part, 726 F. Supp. 943.

The Government filed a motion to hold a union officer in contempt for violating the March 14, 1989, Consent Decree, which precluded interference with court-appointed officers conducting union affairs. Daniel Ligurotis was a member of the IBT's General Executive Board and principal officer of Local 705 in Chicago. Ligurotis told IBT President McCarthy that he would not comply with the Consent Decree and that nobody could tell him how to run his local. On November 17, 1989, Ligurotis and the respective officers of five other IBT Locals filed a lawsuit in the Northern District of Illinois contending that the Consent Order infringed on the rights of local unions in a proceeding to which they were not parties and thereby violated due process and the federal labor laws. The Government argued that by suing the Elections Officer, Ligurotis was violating the provision of the Consent Order permanently enjoining him from obstructing or otherwise interfering with work of the court-appointed officers. The Government also pointed out that the Consent Order provided for exclusive jurisdiction in U.S. District Court for the Southern District of New York to decide "all issues relating to the Administrator's actions or authority." Following a hearing, the Southern District of New York Court entered an order finding Ligurotis in civil contempt for filing and litigating the Chicago suit. (726 F. Supp. 943).

The district court ordered Ligurotis to pay fees and expenses and to withdraw the Chicago action with prejudice within two days of the order or pay a fine for every day thereafter.

Ligurotis appealed and the Second Circuit held that Ligurotis, as a union officer, violated the Consent Order by being named as a plaintiff in a law suit which requested that the court-appointed officer be prevented from supervising local union elections. The Second Circuit also ruled that the District Court abused its discretion by holding Ligurotis “in contempt until the Chicago lawsuit is withdrawn with prejudice [since it] either could cause the locals, non-parties to the contemp order, to yield to its conditions, or alternatively could cause Ligurotis to act beyond his authority.” 899 F.2d at 149.

2. United States v. International Bhd. of Teamsters, 905 F.2d 610 (2d Cir. 1990), aff’g, 725 F. Supp. 162 and 743 F. Supp. 155.

This case involved an appeal of the district court’s rulings (November 2, 1989 and March 13, 1990) upholding the power of the court-appointed administrator, pursuant to the Consent Decree, to hold disciplinary proceedings against Friedman and Hughes and impose a one year suspension from elected office.

Hughes and Friedman were suspended from office for one year following criminal convictions on RICO charges in federal district court. Friedman, a named defendant in the IBT RICO case in Southern District of New York, was a signatory to the Consent Decree. Hughes was, until his suspension by the court-appointed administrator, Recording Secretary of Local 507 in Cleveland.

The Second Circuit held: (1) that it had jurisdiction to hear the appeal despite the Consent Decree provision vesting the district court with exclusive jurisdiction to decide any and all issues relating to the Independent Administrator’s actions or authority under the Consent Decree on the ground that the union’s alleged waiver of its right to appeal was not clear and unmistakable; (2) the standard of review is one of “great deference” to the Administrator’s ruling under the same standards of review applicable to review of final agency action under the Administrative Procedure Act; (3) a resolution, which silently repealed sections of the IBT Constitution, thereby barring the union charges against Friedman and Hughes, was properly within the Administrator’s responsibilities to review and interpret as not binding upon him; (4) the Administrator was not collaterally estopped by the criminal proceeding, from enforcing a suspension pursuant to a disciplinary proceeding; and (5) Hughes, as a non-party to the Consent Decree, was “bound by the terms of the disciplinary mechanism set in place by the Consent Decree . . . because the investigatory and disciplinary powers of the court-appointed officers are proper delegations of the powers of the IBT General President and the GEB within the scope of the IBT Constitution that binds all members of the IBT, and because the IBT Constitution, in Article XXVI, Section 2, contemplates amendment by the GEB, under the circumstances of this case, as a result of judicial direction.” Id. at 622.

3. United States v. International Bhd. of Teamsters, Appeal of Highway and Local Motor Freight Drivers, Dockman and Helpers, Local 707, 907 F.2d 277 (2d Cir. 1990), aff’g, 728 F. Supp. 1032.

After entry of the Consent Decree, various members and local affiliates of the IBT filed lawsuits in districts other than the Southern District of New York, which raised various issues relating to the IBT Consent Decree. The United States District Court for the Southern District of New York issued a temporary restraining order enjoining all members and affiliates of the IBT from “filing or taking any legal action that challenges, impedes, seeks review of, relief

from, or seeks to prevent or delay any act of [the court-appointed officers] in any court or forum in any jurisdiction except the rendering court. The Second Circuit held that the district court had authority under the All Writs Act to enjoin all members and affiliates of the IBT from litigating any issue relating to the IBT Consent Decree in any court other than the Southern District of New York because such collateral lawsuits in other districts created a “significant risk of subjecting the Consent Decree to inconsistent interpretations and the Court Officers to inconsistent judgment,” it was “necessary to avoid repetitive and burdensome litigation. . . . [and] consolidating all litigation relating to the Consent Decree in one forum would promote judicial economy.” 907 F.2d at 280.

4. United States v. International Bhd. of Teamsters, 931 F.2d 177 (2d Cir. 1991), aff’g, 723 F. Supp. 203 and 742 F. Supp. 94.

The Consent Decree provided for changes to the IBT’s electoral process. The Consent Decree eliminated the ex officio designation of delegates who nominated and elected IBT officers at the IBT convention. Instead, a secret ballot of the rank-and-file membership was to elect the convention delegates. At the convention, the delegates would nominate officers. The rank-and-file membership would then have a secret ballot election of IBT officers.

A number of IBT affiliates appealed because the election procedures were different from those in the IBT Constitution and they were not a party to the RICO case. The appellate court found that the order was appealable because if the affiliate had to wait until after the election, then there would be no effective remedy. The court of appeals held that even though the affiliates were not a party, their interests were adequately represented in the case by the IBT when it agreed to the provisions of the Consent Decree. The subject matter of the election provision related to the governance of the International Union which was delegated to the IBT’s General President, and it did not intrude upon the IBT’s interest in the elimination of organized crime from the union. Additionally, the court found that the provision of the Consent Decree broadened the rights of the membership.

The affiliates also challenged certain provisions of the election rules order. The court of appeals rejected the challenges, subject to one minor modification. 931 F.2d at 189-190.

5. United States v. International Bhd. of Teamsters, 941 F.2d 1292 (2d Cir. 1991), aff’g, 745 F. Supp. 908 and 753 F. Supp. 1181.

Two former IBT members appealed the decision of the district court to uphold internal union disciplinary sanctions against them for their knowing association with organized crime. The Independent Administrator (IA), permanently removed defendants Senese and Talerico from their IBT positions, and expelled them from the IBT and its affiliates. The district court upheld the sanctions and on remand, upheld the termination of Senese’s IBT employee benefits.

On appeal, the Second Circuit affirmed the sanctions, ruling that the imposition of sanctions by the IA was not state action, thus rendering various constitutional arguments raised by the defendants inapplicable. The court reasoned that the IA was performing a private function in administering the provisions of the IBT Constitution. Even if there were state action, however, the court found the defendants’ arguments to be meritless. The court stated that the disciplinary sanctions did not violate the First Amendment right to freedom of association, since the government had a compelling countervailing interest in eliminating the influence of organized crime from the unions.

The court also ruled that the sanctions did not violate appellants' Fifth Amendment rights to due process on the grounds that they were not parties to the Consent Decree. A prior decision of the court had found that the IBT membership was adequately represented when the decree was adopted. The court of appeals also rejected appellants' claim that they were denied due process because, until the Consent Decree was adopted, it was not clear that knowing association with organized crime members was prohibited. The court explained that the Consent Decree "did not create new standards of conduct for IBT members, but simply made explicit the longstanding goal of the IBT to be free of corruption." *Id.* at 1297.

The court also summarily rejected an argument that the sanctions constituted "cruel and unusual punishment" in that the Eighth Amendment applies only to punitive actions, and that the remedial sanctions imposed did not constitute punishment.

6. United States v. International Bhd. of Teamsters, 948 F.2d 98 (2d Cir. 1991).

Yellow Freight Systems, Inc., appealed the district court's order requiring access to Yellow Freight's premises by non-employees for union campaign purposes. This suit stemmed from two incidents at Yellow Freight's facilities. One incident occurred at its Chicago Ridge, Illinois facility, and the other at its Detroit, Michigan facility. At both places, non-employees were asked to leave the premises. At one location, the non-employees were able to campaign on the sidewalk across the street. The Elections Officer, appointed under the IBT Consent Decree decided that the Election Rule was violated at the Chicago Ridge facility because no meaningful access was provided; however, he upheld the exclusion at the Detroit facility because adequate alternative means for campaigning were available.

Yellow Freight alleged that the Consent Decree's terms could not be enforced against it because Yellow Freight was not a party to the Consent Decree. The court of appeals rejected this claim, stating that the district court did not purport to deem Yellow Freight bound by the Consent Decree. Rather, the district court had authority under the All Writs Act to issue an order to a non-party to effectuate the Consent Decree. 948 F.2d at 103. However, the court of appeals remanded the case to consider alternative ways of communicating with the Chicago Ridge employees of Yellow Freight away from the job site. *Id.* at 107-08.

The court of appeals also held that the dispute was not within the exclusive jurisdiction of the National Labor Relations Board. *Id.* at 105-06.

7. United States v. International Bhd. of Teamsters, 948 F.2d 1338 (2d Cir. 1991).

The Second Circuit vacated the district court's order imposing sanctions, and remanded for further proceedings. The Investigations Officer, appointed under the Consent Decree, ordered Joint Council 73, an affiliate of the IBT in New Jersey, to produce its books and records for examination. Joint Council 73 refused, stating that it was not bound by the Consent Decree as it was not a party to those proceedings. A suit was filed in New Jersey and later transferred to New York pursuant to Judge Edelstein's order mandating that all Consent Decree disputes must be adjudicated in the U.S. District Court for the Southern District of New York. Eventually, that suit was dismissed. When the Investigations Officer again tried to inspect the books, access was limited by Joint Council 73. The Government then moved to hold Joint Council 73 in contempt.

The Investigations Officer also attempted to take depositions of seven officers of Local 73, and Joint Council 73 filed another law suit. Joint Council 73 again argued that it was not bound by the Consent Decree. Both the Government and the Investigations Officer moved

for sanctions, which the district court imposed on Joint Council 73's attorneys, for their conduct in bringing the second law suit.

The court of appeals stated that these sanctions could have been imposed under either Rule 11, Fed. R. Civ. P., 28 U.S.C. § 1927, or the inherent power of the court. 948 F.2d at 1343-44. Rule 11 sanctions are based upon the signature of the attorney or client on a pleading, motion, or paper filed with the court. Under 28 U.S.C. § 1927, sanctions apply to attorneys whose actions are without merit and undertaken solely to cause delay. Under the inherent power of the court, sanctions can be imposed because of the court's need to manage its own affairs.

The time frame of the sanctioned conduct was after the first law suit was dismissed, but prior to the time when the Government moved for the contempt order. For Rule 11 purposes, only one paper was signed during this time period. If this document merited a Rule 11 sanction, it could only be imposed upon the attorney who signed the paper, and not the entire Guazzo law firm.

The Second Circuit vacated the district court's order because the district court did not articulate which standard it applied when it levied the sanctions, and remanded the matter for the district court to specify the basis for its ruling.

8. United States v. International Bhd. of Teamsters, 954 F.2d 801 (2d Cir. 1992), aff'g, 776 F. Supp. 144 (S.D.N.Y. 1991).

The Second Circuit affirmed the district court's order to enforce the decision of the Independent Administrator, pursuant to the Consent Decree, to reinstate an employee with back pay. The employee was fired for "stealing company time" by leaving his pre-shift overtime position before the overtime shift ended. The employee admitted leaving his post twenty five minutes before the end of the shift to obtain cold medicine, eat and perform some union business. The employee claimed that this was customary within the company and that he was actually fired in retaliation for union activity.

First, the court of appeals held that "since the IA acted pursuant to the IBT constitution, a private charter, and the IA was himself a paid official of the IBT, he was not a state actor." 954 F.2d at 806. Therefore, the court concluded that the IA's actions "did not implicate constitutional due process concerns." Id. at 807. The Second Circuit also held that by virtue of the All Writs Acts, 28 USC § 1651(a), the Consent Decree could be applied against third parties so long as such application was "agreeable to the usages and principles of law," and its application to a third party did not violate due process, because the procedures used satisfied due process even if due process applied.

The Second Circuit also held that the district court did not have to defer to an arbitrator's decision where a plaintiff's labor related claim stems from legal rights separate from those conferred by a collective bargaining agreement, and the district court's decision was not pre-empted by the arbitration provisions of the LMRA, 29 U.S.C. § 185.

9. United States v. International Bhd. of Teamsters, 955 F.2d 171 (2d Cir. 1992).

Sikorsky Aircraft appealed the order of the district court requiring it to provide limited access of its facility to non-employee union candidates campaigning for leadership positions in the IBT. The Elections Officer had found that there was no reasonable alternative available to the candidates to access the employees because campaigning outside the gates of the company could place the candidate in jeopardy from traffic. Sikorsky appealed the decision to

the Independent Administrator (IA) and then the district court. Both affirmed the ruling and the district court ordered Sikorsky to comply immediately.

On appeal, the Second Circuit held that an employer may not be ordered to grant access either when reasonable alternatives exist or when the IA or the district court fails to find that reasonable alternatives do not exist, and the union candidate has the burden of establishing the unavailability of reasonable alternatives to compelled access.

The Second Circuit reversed and remanded this case, having found that the burden had been improperly shifted onto Sikorsky and that the union candidate failed to make even a minimal showing that access to Sikorsky's facility was the only reasonable alternative for communicating with IBT member employees.

10. United States v. International Bhd. of Teamsters, 964 F.2d 180 (2d Cir. 1992), vacating in part, 764 F. Supp. 817.

The court of appeals held that a union pension trust fund and its employee trustee were not bound by the Consent Decree entered between the United States and the IBT where neither the trust nor trustees were parties to the litigation, had not signed the Consent Decree, and had not taken any action which would interfere with the court's ability to implement the Consent Decree. The court stated that: "normally a person is not bound by an in personam judgment entered in litigation in which he is neither designated as a party nor served . . . Limited exceptions exist for persons who are agents of, or acted in concert or participation with, parties bound by a judgment, See Fed. R. Civ. P. 65 (d), or who were adequately represented in the litigation that resulted in the judgment." 964 F.2d at 183.

The court further explained: "We have ruled that IBT affiliates are bound because their interests were adequately represented by the IBT . . . and that an officer of an IBT local was bound by the disciplinary mechanism of the Consent Decree because the investigatory and disciplinary powers of the court-appointed officers are proper delegations of the powers of the IBT General President and the General Executive Board within the scope of the IBT constitution that binds all members of the IBT." Id. at 183.

11. United States v. International Bhd. of Teamsters, 964 F.2d 1308 (2d Cir. 1992), aff'g, 777 F. Supp. 1130.

Joseph Cimino, Jr., former President and Business Agent Local 107 in Philadelphia, was charged with violating Article II, Section 2 (a) and Article XIX, Section 6(b) of the IBT Constitution because of his knowing association with Nicodemo Scarfo, the Boss of the Philadelphia LCN family, during his tenure as an officer of Local 107. The Investigations Officer (IO) relied upon the declaration of an FBI Special Agent which summarized Cimino's association with the Philadelphia LCN Family. This declaration was based upon three hearsay statements from former LCN members, Philip Leonetti, Lawrence Merlino, and Nicholas Caramandi, which revealed the extent of the relationship between Cimino and the LCN.

The Independent Administrator (IA), affirmed the decision of the IO and permanently barred Cimino from the IBT; ordered him to relinquish all union positions; prohibited him from drawing any money from IBT and ordered that no further contributions should be made on Cimino's behalf to health or pension trust funds. The district court affirmed the IA's decision, and Cimino appealed arguing that the statements used by the Special Agent in his declaration were inherently unreliable because the statements were hearsay and were made as part of the declarant's agreement to cooperate with the government. The court of appeals

rejected this argument, stating that there was no danger of a criminal conviction based on unreliable evidence and, therefore, there was no presumption of unreliability. 964 F.2d at 1312. The Court stated that the standard to be used is whether the admission of such statements calls into question the “integrity and fundamental fairness” of Cimino’s internal union disciplinary hearing. *Id.* Therefore, the court of appeals found the statements were reliable and constituted “such relevant evidence as a reasonable mind might accept as adequate to support the conclusion “that Cimino associated knowingly with Scarfo.

The court of appeals also noted that the Consent Decree provided for the same standard of review for the actions of the IA that applies under the Administrative Procedures Act, and that under the standards of review that agency findings are “to be set aside only if they are ‘unsupported by substantial evidence’, the district court’s order must be sustained.” *Id.* at 1311.

12. United States v. International Bhd. of Teamsters, 968 F.2d 1472 (2d Cir. 1991).

The Second Circuit reversed and vacated an order of the district court mandating that Commercial Carriers, Inc., permit its union truck drivers to display campaign stickers on company trucks in connection with the 1991 IBT election.

The issue arose when a truck driver for Commercial Carriers, Inc., was told that he would not be dispatched unless and until he removed campaign stickers from his truck. A protest was filed with the IBT Elections Officer (EO) who determined that Commercial Carriers, Inc., had neither a written policy nor an enforced oral policy against placing campaign stickers of any sort on the company vehicles. The EO ordered that Commercial Carriers, Inc. permit drivers to affix stickers. Commercial Carriers, Inc., appealed to the district court, which upheld the decision of the EO.

On appeal, the Second Circuit stated that it could discern no “pre-existing right” for the drivers to affix campaign stickers to Commercial Carriers, Inc., vehicles and the fact that an employee had done so for a few months before he was ordered to remove them did not establish a company policy. 968 F.2d at 1476. Therefore, the Second Circuit looked to National Labor Relations Act, 29 U.S.C. §§ 157 and 158(s)(1)(1988), and the cases construing employee’s rights to distribute union literature in non-working areas of the employer’s property. *Id.* at 1477.

The Second Circuit emphasized the importance of protecting intra-union campaigning activity from unlawful interference and noted that affixing stickers to a personal vehicle, distributing campaign literature in non-work areas, and wearing campaign pins on company uniforms are all protected activities under 29 U.S.C. §157. The court of appeals, however, concluded that these activities are very different from what the EO ordered in this case. The Second Circuit found that such an order is not confined to the premises of the employer, relates to its vehicles and not employee’s personal property or work clothes and has little, if any, discernible effect upon the election process. Further, the court found that such an order would create an appearance that Commercial Carriers, Inc., endorsed certain candidates. Looking to the All Writs Act, the Second Circuit failed to discover any significant assistance provided to the objective of a proper IBT election by requiring Commercial Carriers, Inc., to provide “mobile bill boards” for the campaign. Further, the Court of Appeals found the EO’s order to be a sharp departure from applicable “usages and principles of law.” The Second Circuit reversed the order of the district court and vacated the district courts’ order sanctioning Commercial Carriers, Inc., for pursuing a “baseless position.” *Id.* at 1477-78.



13. United States v. International Bhd. of Teamsters, 968 F.2d 1506 (2d Cir. 1992).

The Elections Officer (EO) was charged in the IBT Consent Decree with the promulgation of rules and supervision of the IBT election process. The EO issued an Advisory of Campaign Contributions and Disclosures wherein two organizations, the Teamsters for a Democratic Union (TDU) and Teamsters Rank and File Education and Legal Defense Foundation (TRF), were required to file financial reports subject to inspection by the candidates. TDU and TRF were denied a preliminary injunction by the district court and filed this appeal.

The issue on appeal was whether the “All Writs Act” authorized the EO to order the TDU and TRF to file financial disclosure statements. The Second Circuit stated that, consistent with the holding in Yellow Freight, 948 F.2d 102 (2d Cir. 1991), the action by an EO attempting to apply the All Writs Act to non-parties to the Consent Decree had to be invalidated as not agreeable to the usages and principles of law; that the requirement was necessary or appropriate in aid of the discharge of the EO responsibilities.

14. United States v. International Bhd. of Teamsters, 970 F. 2d 1132 (2d Cir. 1992), aff’g, 777 F.Supp. 1133.

The IBT Independent Investigations Officer (IO) charged IBT member Carmen Parise with bringing reproach on the union by threatening local members with economic and physical harm and violating his oath of membership by refusing to answer questions regarding corruption under oath in the IO’s investigation.

Before the scheduled hearing on those charges began, Parise and the IO signed an agreement, providing for Parise to be suspended from the IBT for three months. The Independent Administrator (IA) submitted the agreement to the district court. The district court refused to approve the agreement in light of the severity of the charges. Consequently, the IA conducted a hearing on the charges, found Parise liable and suspended him from the IBT for 24 months. The district court affirmed the IA’s findings and sanction.

On appeal, the Second Circuit held that “the district court appropriately exercised its authority in refusing to approve the Proposed Agreement,” 970 F.2d at 1137, and upheld the district court’s affirmance of the IA’s sanctions.

15. United States v. International Bhd. of Teamsters, 978 F.2d 68 (2d Cir. 1992), aff’g, in part and vacating in part, 787 F. Supp. 345.

The court of appeals affirmed the finding of Consent Decree violations of a business agent who assaulted a union officer and of two officers who embezzled money from an IBT local. The court rejected the appellants’ contentions that the IA could not base its decision on hearsay, finding that the hearsay was not unreliable even though the hearsay declarants were not cross-examined.

But the court of appeals reversed the district court’s increasing the penalty from a five-year suspension from union activity to a lifetime suspension, in the absence of any finding by the district court that the administrator’s five-year sanction was arbitrary and capricious.

16. United States v. International Bhd. of Teamsters, 981 F.2d 1362 (2d Cir. 1992), aff'g, 792 F. Supp. 1346.

The court of appeals upheld the IA's determination that Robert Sansone, a former President of an IBT Local, had breached his fiduciary duty to investigate allegations that a union official was a member of the LCN and had associated with LCN members, and imposition of a sanction permanently barring Sansone from holding an IBT office and from employment with specified IBT subordinate and affiliated entities without prior approval of the IA.

17. United States v. International Bhd. of Teamsters, 998 F.2d 120 (2d Cir. 1993).

The court of appeals upheld disciplinary sanctions (permanent bar from the IBT and loss of IBT related benefits) against Bernard Adelstein, a former member and officer of IBT Local 813, for knowing association with LCN members based on hearsay evidence consisting of the declaration of an FBI Agent, Gotti trial testimony of Salvatore Gravano, other hearsay declaration, and transcripts of court-authorized electronic surveillance. The court also held that Adelstein is bound by disciplinary provisions of the IBT Consent Decree even though he did not sign it, because the IBT had through the Consent Decree "merely exercised its discretionary authority under the [IBT] Constitution to delegate the investigation and discipline of union misconduct to the court appointed officers." 998 F.2d at 124.

18. United States v. International Bhd. of Teamsters, 998 F.2d 1101 (2d Cir. 1993), aff'g and rev'g in part, 803 F. Supp. 761.

The court of appeals upheld the authority of the district court to approve rules governing the operation of the Independent Review Board pursuant to the IBT Consent Decree, subject to several modifications.

### **F.3d Cases**

1. United States v. International Bhd. of Teamsters, 3 F.3d 634 (2d Cir. 1993).

The court of appeals held that under the express terms of the IBT Consent Decree, the court-appointed Elections Officer (EO) lacked authority to determine union official's election protest after the EO had certified the results of the election, which the official won.

2. United States v. International Bhd. of Teamsters, 12 F.3d 360 (2d Cir. 1993), aff'g, 803 F. Supp. 806.

The IBT Consent Decree provided for the appointment of an Independent Review Board (IRB) upon the expiration of the authority of the IA and IO. Under the terms of the Decree, the IBT was to select one of the three members, the Attorney General of the United States was to select one member, and those two members were to agree on the third.

The district court appointed William Webster (former Director of the FBI and CIA and former Federal Judge) after the two selected members could not agree on a third member. Ruling that service on an oversight board is not "domination" or "interference" with the administration of a labor organization within the meaning of the NLRA, the court affirmed the appointment.

3. United States v. International Broth. of Teamsters, 14 F.3d 183 (2d Cir. 1994), aff'g, 817 F. Supp. 337 and 824 F. Supp. 406.

The court of appeals held that substantial evidence supported the finding of the Independent Administrator (IA) that union officials breached their fiduciary duties to the union's constitution.

4. United States v. International Broth. of Teamsters, 19 F.3d 816 (2d Cir. 1993), aff'g, 824 F. Supp. 410.

Following a hearing, the Independent Administrator found that Nicholas DiGirlando, a member and employee of IBT Local 41, had knowingly associated with members of the LCN and ordered DiGirlando permanently barred from the IBT. The district court affirmed; DiGirlando appealed.

Under the terms of the IBT Consent Decree itself, the standard to be applied by the administrator is a "just cause" standard. The district court is then to review the decision of the Administrator under the "same standard of review applicable to review of final federal agency action under the Administrative Procedure Act." The effect of these provisions is to require the district court to treat the decisions of the Administrator with "great deference."

The court of appeals upheld the IA's finding (based in part on reliable hearsay) that union employee's and member's knowing association with organized crime figures violated provisions of the Consent Decree, and the IA's sanction permanently barring the employee from the IBT. The court of appeals also held that the IA's sanctions did not violate his rights to free speech and association guaranteed by the LMRDA or the First Amendment.

5. United States v. International Bhd. of Teamsters, 170 F. 3d 136 (2d Cir. 1999), rev'g, 951 F. Supp. 1113.

The court of appeals reviewed the sanctions imposed by the Independent Review Board (IRB) under the standards applicable to final agency review under the Administrative Procedure Act. 170 F.3d at 142-43. The court of appeals reversed the IRB's sanction of a lifetime ban from union membership for violating various financial control provisions in the IBT Local's ByLaws resulting in a loss of \$1600 to the union.

6. United States v. International Bhd. of Teamsters, 266 F.3d 45 (2d Cir. 2001).

Several IBT members were permanently barred from the IBT because they were found guilty of embezzlement of union funds and other breaches of their fiduciary duties. The barred IBT members thereafter took control of an independent union, Local 116 of the Production and Maintenance Employees' Union, and sought NLRB recognition to have Local 116 become the exclusive collective bargaining representative of a warehouse business. The IBT sought an order from the district court, pursuant to the IBT Consent Decree, enjoining those IBT barred members and Local 116's activities insofar as they might affect the current IBT members. The court of appeals held that the district court had authority under the All Writs Act to enjoin the former IBT members, who were non-parties, to enable the district court to enforce the Consent Decree by enjoining them "from acts that would frustrate the consent decree's operation on parties that are bound to the decree." 266 F.3d at 50. The court explained that the barred members had been permanently enjoined from participating in IBT affairs, and that "[p]rohibiting them from contacting IBT members to solicit their membership in Local 116 was

within the district court's discretion in protecting the operation of the consent decree's prohibition on association." Id. at 51.

However, the court of appeals ruled that the district court's injunction was overbroad "[i]nsofar as [the barred members] seek to attract for Local 116 new members who are not currently members or employees of the IBT or its local unions [because] they pose no threat to the vitality of the consent decree." Id. The court of appeals also ruled that the overbroad aspect of the injunction also interfered with the barred members' right to petition the NLRB and their First Amendment right of petition. Id.

## 8. VINCENT GIGANTE

### A. CASE NAME:

United States v. Vincent Gigante, et. al., Civ. No. 88-4396, United States District Court for the District of New Jersey. Complaint filed October 13, 1988; and amended complaint filed February 10, 1989.

### B. DEFENDANTS:

\_\_\_\_\_The complaint charged three individuals, a trucking company, and a law firm as defendants. The individuals were: Vincent “Chin” Gigante, the alleged boss of the Genovese LCN Family; Thomas S. DiBiasi, an alleged associate of the Genovese LCN Family and an attorney who provided a pre-paid legal services plan for members of IBT Local 560; and Myron Shevell, the chief executive of New England Motor Freight (NEMF). The complaint also named Shevell’s company, New England Motor Freight, and DiBiasi’s law firm, Citrino, Balsam and DiBiasi, as defendants.

### C. SUMMARY OF THE COMPLAINT:

The first claim for relief alleged that defendant Gigante and other alleged organized crime figures conspired from at least February 8, 1984, to maintain the Genovese LCN Family’s interest in and control of Local 560 of the International Brotherhood of Teamsters Union (Local 560), the alleged RICO enterprise for the first claim for relief, through a pattern of racketeering activity, in violation of 18 U.S.C. §§ 1962 (b), (c) and (d). The alleged pattern of racketeering activity included: (1) acts involving a conspiracy among Gigante, other organized crime figures, Local 560, and businessmen to extort “labor peace” payoffs from various trucking and warehouse companies; (2) efforts by defendant Shewell and organized crime figures to circumvent the remedial relief ordered by the district court in the Government’s first civil RICO case against Local 560 and others (see case summary number one above), and to retain organized crime’s control over Local 560; and (3) misappropriation of union assets.

The second claim for relief alleged that defendant Shewell, various organized crime figures, and Local 560 officials conducted and conspired to conduct the affairs of New England Motor Freight, Inc., the alleged enterprise for the second claim for relief, through a pattern of racketeering activity involving fraud and illegal labor payoffs (in violation of 29 U.S.C. §§ 186 and 501(c) and 18 U.S.C. § 1341), all in violation of 18 U.S.C. §§ 1962 (c) and (d).

The third claim for relief alleged that the defendant Thomas Di Biasi did conduct and conspired to conduct the affairs of the defendant law firm, Citrino, Balsam and Di Biasi, through a pattern of racketeering activity involving fraud (18 U.S.C. § 664 and 1341 and 29 U.S.C. § 501 (c)), and bribery (29 U.S.C. § 186 and 18 U.S.C. § 1954), all in violation of 18 U.S.C. §§1962 (c) and (d). In particular, the complaint alleged that Di Biasi devised a scheme to defraud trucking companies of money they contributed to pay for pre-paid legal services for Local 560 members who were employees of the trucking companies.

On February 10, 1989, an amended complaint was filed, which added allegations about DiBiasi's activities since 1984. The original pre-paid legal services plan had been sold to IBT Local 84 which was a predecessor union to Local 560 and in 1984, after DiBiasi had been convicted of a fraud type offense and was barred from any involvement in an ERISA fund.

**D. RELIEF SOUGHT:**

The complaint sought equitable relief to:

1. Permanently enjoin defendant Gigante from endeavoring to influence or control the affairs of Local 560 and its related benefit plans and of any other labor organization or employee benefit plan.
2. Require defendant New England Motor Freight to restore the Local 560 bargaining unit as it existed prior to 1977.
3. Enjoin defendant Myron Shewell from: (a) endeavoring to obtain the assistance of organized crime figures regarding any labor relations matters; (b) engaging in labor negotiations with representatives of any labor organization or employee benefit plan, unless specifically

authorized to do so by the district court; and (c) engaging in corrupt practices similar to those alleged in the complaint.

4. Requiring defendants Di Biasi and his law firm to disgorge, and restore to Local 560, the proceeds of their unlawful racketeering acts and enjoining Di Biasi from providing professional services to any labor organization or employee benefit plan.

**D. OUTCOME OF THE CASE:**

1. On April 5, 1989, DiBiasi and his law firm entered into a Consent Decree in which it was agreed that for 20 years DiBiasi would provide no professional services of any kind to any labor organization or employee welfare benefit plan and that he would repay the legal services plans \$50,000 in ten equal monthly installments.

2. On September 29, 1989, defendants New England Motor Freight and Shevell entered into a Consent Decree in which they agreed to restore Local 560 members who had been deprived work as a result of the sweetheart arrangement to the NEMF payroll. Shevell agreed that he would not personally engage in labor negotiations with the representatives of any labor organization; and NEMF agreed that it would take no action to undermine its collective bargaining arrangement with Local 560.

3. The case against defendant Gigante was stayed pending resolution of his mental fitness in a criminal case. Defendant Gigante died in 2005.

**F. LEADING COURT DECISIONS:**

None.

## 9. PRIVATE SANITATION INDUSTRY OF LONG ISLAND

### A. CASE NAME:

United States v. Private Sanitation Industry Association of Nassau/Suffolk Inc., et al., Civil No. CV-89-1848, United States District Court for the Eastern District of New York. Complaint filed February 14, 1989, amended complaint filed June 6, 1989.

### B. DEFENDANTS:

The complaint named 112 defendants who had participated in the solid waste industry. There were five categories of defendants: (1) the Lucchese and Gambino organized crime families of the LCN; (2) the union defendant, Private Sanitation Local 813 of the International Brotherhood of Teamsters Union (IBT); (3) Private Sanitation Industry Association of Nassau/Suffolk, Inc. (PSIA), a trade association of individuals and entities engaged in the business of solid waste collection; (4) forty-four Long Island carting companies involved in solid waste collection, transportation and disposal; and (5) sixty-four individual defendants, including alleged organized crime members and associates, certain Long Island carters, and former public officials and employees. The charged individual defendants included Antonio Corallo, and Salvatore Scanturo, alleged former boss and underboss of the Lucchese LCN Family, respectively.

### C. SUMMARY OF THE COMPLAINT:

The complaint alleged forty-six (46) separate RICO enterprises including: the PSIA Enterprise; the Local 813 Enterprise; the Carting Industry Enterprise; a group of individuals and companies associated-in-fact; and each of the corporate defendants as a separate enterprise and referred to collectively as the "Corporate Enterprise." The complaint alleged that organized crime had controlled the trash disposal industry in Nassau and Suffolk Counties since the 1950's. Alleged members and associates of organized crime families were directors, officers, employees and/or shareholders of various carting companies, and had extended their control through IBT



Local 813, which allegedly provided favorable treatment to the corrupt carting companies and harassed the legitimate businesses.

The complaint alleged that this cartel operated through an illegal customer allocation agreement, whereby carters did not seek or accept business from customers serviced by another carter who was a member of the cartel. The right to service such customers was the “property” of the carting company, to be bought and sold by the carters. The complaint also alleged that when larger public contracts were offered through bids, the defendant carters and others agreed among themselves, prior to the bidding, as to which company would obtain the contract, and the defendant carters and others then rigged the bids accordingly. Organized crime families enforced these agreements; any attempt by rebel carters to compete for existing customers or submit competitive bids was met with threats of violence and economic harm.

The complaint alleged that the carting companies made periodic payments in cash to the Lucchese and the Gambino LCN crime families in return for protection. It alleged that one hundred ten (110) defendants had violated RICO, by conducting or participating in the conduct of an enterprise’s affairs through a pattern of racketeering, or had conspired to do so, or both. The complaint alleged that the defendants had participated in a total of 486 predicate acts of racketeering, (RA) including extortion and theft from rebel carting companies (RA 1-221); theft from the townships of Islip and Oyster Bay and bribery of their employees to permit defendants to use dumps for solid waste without payment to the townships (RA 221-449); bribery of Huntington township officials to vote in favor of rate increases for residential carters (RA 450-472); bribery of state officials to grant contracts to collect garbage at state parks to defendant carters and to issue improper permits to transport and incinerate medical waste (RA 473-484); interstate transportation of stolen vehicles (RA 485); and arson (RA 486).

**D. RELIEF SOUGHT:**

1. The Government sought a permanent injunction to, among other matters, enjoin:
  - a. The Lucchese LCN Family, the Gambino LCN Family, and the individual defendants from any involvement or connection with the collection, transportation or disposal of solid waste, and from associating with any other defendant or member or associate of organized crime for commercial purposes.
  - b. All defendants from violating RICO, 18 U.S.C. §§ 1961, et seq.
  - c. The Lucchese and Gambino LCN Families and all the individual defendants from participating in the affairs of the PSIA, Local 813 and its Executive Board, or Local 813's various benefit funds.
  - d. Defendants PSIA and Local 13 from associating with any member or associate of organized crime.
  - e. Various persons from holding positions in Local 813 and PSIA.
2. The Government also sought the district court to order:
  - a. All defendants to divest themselves of any interest they held in any of the alleged enterprises, and that all proceeds from such divestiture be deposited in a fund for innocent victims of defendants' alleged racketeering activity.
  - b. Restitution to all victims of defendants' unlawful activities, and that all proceeds not awarded as restitution be deposited in the United States Treasury.
  - c. The defendants to be jointly and severally liable for monetary relief in excess of one million dollars.

**E. OUTCOME OF THE CASE:**

1. Over several years, numerous defendants entered into substantially similar consent decrees wherein they agreed to be permanently enjoined from: (1) any activities involving or connected with the collection, transportation or disposal of solid waste; (2) violating any provision of RICO, 18 U.S.C. §§ 1961 et seq.; (3) associating with any member or associate of organized crime for any commercial purpose; and (4) participating in the affairs of PSIA, its Board of Directors, Local 813, its Executive Board and Local 813's various benefit funds. See Consent Decrees and district court orders issued October 1989, November 26, 1989, December 1989, May 16, 1990, November 17, 1991, November 16 and 17, 1992, January 21, 1993, February 17, 1993, May 17 and 18, 1993, June 4, 7, 21 and 23, 1993, January 3, 1994, and February 4, 1994.

2. On July 19, 1989, the district court dismissed defendants the Lucchese and Gambino LCN Families on the ground that an organized crime family is not a “person” within the meaning of 18 U.S.C. §§ 1961(3) and 1962, and hence was not subject to suit under RICO.

3. On February 28, 1994, a Consent Judgment was entered which included an injunction and the appointment of a compliance officer and a Hearing Officer.

a. The Settling Defendants were enjoined from:

(1) knowingly associating with any member or associate of an organized crime group for any commercial purpose;

(2) engaging in conduct, or conspiring to engage in conduct, which constitutes an act of racketeering, as defined in 18 U.S.C. § 1961, or an act of corruption which includes, but is not limited to, bribery, extortion, larceny and theft;

(3) engaging in conduct, or conspiring to engage in conduct, which constitutes or promotes an unlawful customer allocation agreement or property rights system designed to inhibit a competitive market system in the solid waste industry;

(4) engaging in conduct, or conspiring to engage in conduct, which constitutes bid-rigging or which

unlawfully interferes with the bidding process with respect to any public or private contracts involving the collection, transportation or disposal of solid waste; and

(5) obstructing the work of the court-appointed Compliance Officer, Hearing Officer and/or Receiver described herein or the implementation of any other relief that may be imposed in this case.

b. The Compliance Officer was authorized to, among other matters:

(1) monitor compliance with the injunction and to investigate possible violations.

(2) adopt procedural rules.

(3) inspect the books and records of the settling defendants and to require them to provide detailed information about all aspects of their commercial activities in the waste disposal industry.

(4) use the subpoena power of the district court to compel sworn testimony and the production of records.

(5) seek relief before the Hearing Officer for any violation of the injunction and to appeal the decisions of the Hearing Officer to the district court.

(6) request assistance from the Government.

(7) employ personnel to assist the Compliance Officer in carrying out its powers.

(8) issue periodic reports to the district court.

c. The Hearing Officer was authorized to, among other matters:

(1) adjudicate alleged violations of the injunctive relief in accordance with the procedures under Administrative Procedures Act, 5 U.S.C. §§ 551 et seq. and §§ 701 et seq.

(2) implement procedural rules.

(3) use the subpoena power of the district court to compel testimony and the production of books and records.

(4) impose fines or other sanctions (not in excess of \$75,000), issue cease and desist orders and to order restitution.

(5) request assistance from the government and the district court.

- d. The Consent Decree also afforded parties the right to appeal any adverse decision of the Hearing Officer to the district court under the procedures set forth in the Administrative Procedures Act, and provided that any disgorgement shall be paid to the United States Treasurer.

**F. LEADING COURT DECISIONS:**

**F. Supp. Cases:**

1. United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 793 F. Supp. 1114 (E.D.N.Y. 1992).

The district court granted in part and denied in part the motion of one hundred four defendants to dismiss the Government's complaint, pursuant to Rules 12(b)(6) and 8(a), Federal Rules of Civil Procedure, or grant their motions for summary judgment, pursuant to Rule 56, Federal Rules of Civil Procedure.

First, the district court held that the complaint adequately pleaded the requisite enterprise element in the first, third, and fourth through forty-fourth claims for relief, which alleged that various unions, including Local 813, PSIA, and forty-one incorporated carting industry companies, were RICO enterprises. The district court also held that the enterprise alleged in the Government's second claim for relief--the carting industry enterprise--was adequately pleaded for RICO purposes and that the issue whether the enterprise was independent from the pattern of racketeering was a matter to be decided after the production of proof at trial or after a timely motion for summary judgment. Id. at 1126-1128.

The district court rejected the claim that the complaint alleged that certain persons were improperly both the RICO enterprise and the person liable for the RICO violation. The district court stated that it was proper to allege "that many of the RICO enterprises in the complaint are also alleged to be defendants" since there was not a complete identity between the enterprise and all the defendants. Id. at 1127-1128.

The district court dismissed with prejudice all racketeering acts pleaded under the New York coercion statute, or as "grand larceny . . . involving bribery," because coercion is not included as a state law offense under 18 U.S.C. § 1961(l). Id. at 1128-1135. The court ruled, however, that the 195 acts in question, alleged also as Hobbs Act violations, were alternatively maintainable as a racketeering activity under 18 U.S.C. § 1961(l)(B). Similarly, the court dismissed all predicate acts alleging "grand larceny..... involving bribery," because they were not chargeable as bribery under New York law. Id. at 1134-1135.

The district court also ruled that the "Mandate of Federal Rule of Civil Procedure 9(B) that allegations of fraud and of mistake be pleaded with particularity is inapplicable to RICO actions that do not involve claims of fraud." Id. at 1124.

Turning to the pattern of racketeering activity, the district court dismissed several claims for relief because the complaint alleged only one properly pled racketeering act under those claims. However, the district court held that the remaining claims for relief adequately alleged the requisite "continuity plus relationship" to establish a pattern of racketeering activity. Id. at 1139-44.

However, the district court concluded that, in almost every case, no defendant was put on notice as to which particular predicate acts he was alleged to have committed or to have agreed to commit. The district court found that the conspiracy allegations were “so vague and so undifferentiated as to evade analysis,” *Id.* at 1147, and did not “set out a basis for an inference that the predicate offenses which the defendants are alleged to have agreed to commit constitute a pattern of racketeering as to any one defendant.” *Id.* at 1148. Accordingly, the district court dismissed the forty-fifth and forty-sixth claims for relief against all defendants. *Id.* at 1145-48.<sup>8</sup>

Regarding the remedies sought--damages, injunctions, disgorgement and divestiture--the district court dismissed the forty-seventh claim for relief for treble damages, because the Government does not have standing to sue for damages to its business or property under 18 U.S.C. § 1964(c). The district court denied defendant’s motions to dismiss the claims for injunctive relief and for divestiture and disgorgement, subject to the court’s review of the Government’s proof that the interest sought constituted tainted proceeds of racketeering activity. *Id.* at 1148-1150.

The district court also denied as without merit Local 813's claim that federal labor law (29 U.S.C. §§ 401, *et seq.* and 29 U.S.C. §§ 151, *et seq.*) divested the court of jurisdiction and pre-empted the Government’s claims for relief against Local 813. The district court rejected as a misreading of the complaint the defendant’s view that the Government sought indirectly to control certain aspects of the activities of the Local by virtue of the RICO violations of other defendants, rather than seeking to correct RICO violations committed by the union itself. *Id.* at 1153-1154.

The district court also rejected defendants’ contention that the pattern element of the RICO statute is unconstitutionally vague, especially in cases which involve organized crime. *Id.* at 1156-1161.

The district court denied various other motions raised by the defendants, including the following arguments: (1) that the complaint was time-barred by the statute of limitations, because the statute of limitations and doctrine of laches are inapplicable to civil RICO actions brought by the Government (rejecting the defendants’ demand for a four-year statute of limitations); (2) that the complaint was violative of Fifth Amendment double jeopardy provisions because, under the doctrine of dual sovereigns, the defendants’ prior state convictions do not bar a federal prosecution for the same conduct; (3) that the action was barred by the Tenth Amendment because regulation of the solid waste industry is a state governmental function; (4) that RICO liability could not be imposed on the corporate defendants under a theory of respondeat superior, because the normal rules of agency should apply to the civil liability created by the RICO statute and respondeat superior furthers the RICO statute’s goals (relying on *Connors v. Lexington Ins. Co.*, 666 F. Supp. 434, 453 (E.D.N.Y. 1987)); (5) that the defendants should have separate trials; and (6) that portions of the complaint alleging defendants’ associations with organized crime figures should be stricken. *Id.* at 1152, 1154.

The district court also denied, without prejudice, the defendants’ claim-and issue-preclusion arguments. The defendants had argued that the Government’s case was rendered moot by civil suits brought by certain local governments. The district court ruled this matter might be suitable as a Rule 56 motion for summary judgment but that any motion for summary

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<sup>8</sup> The district court repeatedly rebuked the Government for its failure to craft a concise, clear, and legally adequate complaint. *See*, 793 F. Supp. at 1127-1128, 1130, 1137 n.30, 1143, 1144, 1146-1147 and 1148.

judgment was premature. The district court stated that the fact of the other lawsuits “call[ed] into question any justification for this action,” Id. at 1155. The court added:

More specifically, the relief already obtained by these civil actions against many of those defendants--relief that includes injunctions against future criminal activity as well as substantial payments into victim-restitution funds--would appear to make this action a dubious use of precious governmental and judicial resources.

Id.

2. United States v. Private Sanitation Indus. Ass’n of Nassau/Suffolk, Inc., 811 F. Supp. 802 (E.D.N.Y. 1992).

The district court denied the defendant Salvatore Avellino’s motion to stay civil proceedings, pending the outcome of two grand jury investigations.

In determining whether to stay civil proceedings to await the outcome of a pending parallel criminal investigation, the district court balanced the private interests of the plaintiff in proceeding expeditiously with civil litigation against prejudice to plaintiffs if delayed; private interest of and burden on defendant; convenience to courts; interest of persons not parties to civil litigation; and the public’s interest. The district court noted that preindictment requests for stay of civil proceedings are generally denied. Id. at 805, citing Arden Way Assocs. v. Boesky, 660 F. Supp. 1494, 1497 (S.D.N.Y. 1987). The district court added that the convenience of courts is best served when motions to stay proceedings are discouraged. Id. at 808.

The district court ruled that Avellino was not entitled to preindictment stay of the civil RICO action pending the outcome of grand jury investigations against him with respect to an alleged conspiracy to control Long Island waste collection industry because the Government, nonparties and the public had an interest in speedy resolution of the civil action and Avellino’s countervailing interest in avoiding the use of his Fifth Amendment privilege, as well as any burden he faced if the motion to stay was denied, was minimal. Id. at 807-808.

The district court further ruled that forcing a defendant to assert his Fifth Amendment privilege in a civil action is constitutional. Id. at 807.

3. United States v. Private Sanitation Indus. Ass’n of Nassau/Suffolk, Inc., 811 F. Supp. 808 (E.D.N.Y. 1992), aff’d, 995 F. 2d 375 (2d Cir. 1993).

The district court granted the Government’s motion for partial summary judgment, providing for broad injunctive relief against defendant Salvatore Avellino and denied Avellino’s request for a continuance to conduct discovery pursuant to Fed. R. Civ. P. 56(f).

The complaint alleged that Avellino, a capo in the Luchese LCN and hidden owner in two corporate defendant carting companies, collected extortion payments and tribute from area carters. Avellino divided these illegal proceeds between the Luchese LCN family and the Gambino LCN family, which controlled IBT Local 813, the union that represents workers employed by employers engaged in the solid waste industry on Long Island. To control the carting industry, Avellino used and threatened to use force against rebel carters, controlled bidding on certain jobs, and bribed public and union officials to ensure continued control of the carting industry.

The Government contended that there were no genuine factual issues in dispute to preclude granting its motion as a matter of law because all the requisite elements of civil RICO

liability were established by Avellino's several guilty pleas to New York State anti-trust charges and charges for coercion and bribery, all related to his illegal activities in the carting industry.

In reaching its conclusion that Avellino failed to show a genuine issue of fact as to his civil liability, the district court rejected Avellino's claim that the insufficiency of his response to the Government's alleged statement of undisputed facts was attributable to his assertion of his privilege against self-incrimination. Avellino's liability, the district court found, was not based on the adverse inference which arises when a defendant invokes the privilege. Instead, the district court found that the Government had produced sufficient independent corroboration evidence of the matters to be inferred from such adverse inference and that Avellino's guilty pleas conclusively established that he committed at least two predicate acts necessary for RICO liability.

The district court found that a state court judgment has collateral estoppel effect in a subsequent federal proceeding to the same extent it would have in a subsequent state action under state law, and that a guilty plea has the same preclusive effect as a conviction after a trial. Therefore, the district court ruled that Avellino's guilty pleas in state court conclusively established that he committed the two predicate acts based on those two convictions. Id. at 813-15.

The district court also found that the defendant's actions adequately affected interstate commerce under RICO on the ground that the carting companies affected by Avellino's threats used garbage trucks that were manufactured out-of-state.

Moreover, the district court found that the Government had proved that Avellino was employed by or associated with the enterprise and that his racketeering actions constituted a pattern, stating:

It is beyond cavil that the threats against the rival carters Kubecka and the bribes are related to the furtherance of the Luchese (SIC) Family's control of the Long Island waste industry, and that Avellino and the other named defendants embody a threat to the domination of an industry that has been plagued with corruption for the past decade.

Id. at 815.

The district court also rejected Avellino's claim that the transcripts of intercepted communications involving him and his co-conspirators, which were obtained pursuant to state court orders, did not meet the authentication requirements of Fed. R. Civ. P. 56(e). The court reasoned that Avellino could not relitigate the admissibility of tapes which he had challenged in the earlier state litigation in which he plead guilty, and whose admissibility had been upheld on appeal. Therefore, Avellino was either collaterally estopped from relitigating the issues addressed by the state courts or barred by the doctrine of res judicata from litigating any claim which he could have raised but did not before these courts. Id. at 815-16.

Moreover, the district court found the Government's evidence, which included trial testimony from LCN members Alphonso D'Arco, Peter Chiodo, and Salvatore Gravano referenced in an agent's declaration, admissible and sufficient to support its motion for summary judgment. Therefore, there was no need for the court to reach Avellino's general challenge to all tapes on the ground that the Government had failed to demonstrate proper resealing after being



used in either former proceedings. As to Avellino's claim that certain statements contained in the tapes of intercepted conversations were inadmissible hearsay, the court found that they fell within various exceptions to the hearsay rule, including personal statements of a party opponent and statements of coconspirators. Id. at 815-17.

The district court rejected Avellino's request for a continuance under Rule 56(f) due to the stay of discovery in this action, because he had invoked his Fifth Amendment privilege in earlier proceedings and intended to do so in current proceedings. Citing F.S.L.I.C. v. Molinaro, 889 F. 2d 899, 901-03 (9th Cir. 1989), the district court rejected Avellino's claim that summary judgment was improper because he was unable to submit an affidavit in opposition since he had invoked his Fifth Amendment privilege.

The district court rejected Avellino's contention that the broad injunctive relief sought by the Government impermissibly infringed on his constitutional right of association.

In that respect, the district court ordered that:

(1) defendant Avellino refrain from participating directly or indirectly in the carting industry, any company engaged in the business of carting, any trade waste association and in the affairs of Local 813;

(2) defendant Avellino be divested of his interests in the carting industry and in PSIA enterprises;

(3) defendant Avellino disgorge the illicit proceeds of his racketeering activity;

(4) defendant Avellino refrain from associating with the other defendants in this action for any commercial purpose; and

(5) defendant Avellino refrain from associating with known members and associates of organized crime for any commercial purpose.

Id. at 818.

The district court, citing United States v. Bonanno Organized Crime Family of La Cosa Nostra, 683 F. Supp. 1411, 1441 (EDNY 1988), aff'd, 879 F.2d 20 (2d Cir. 1989), ruled that 18 U.S.C. § 1964(a) granted the court authority "to enter reasonable injunctions against violators restricting their future business activities." The district court found that the injunction against associating with other defendants and with known members and associates of organized crime "(was) designed to further the significant governmental interest in eliminating the insidious impact upon a captive community of corruption and racketeering in the Long Island carting industry." Id. at 818.

4. United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 862 F. Supp. 861 (E.D.N.Y. 1994).

The district court denied defendant Joseph Ferrante's motions for partial summary judgment and dismissal of the complaint, which was based on two grounds: (1) that there were no facts upon which a reasonable jury could conclude that he committed the predicate acts

alleged by the Government; and (2) that there are no facts upon which a reasonable jury could conclude that Ferrante participated in a pattern of racketeering activity. The district court concluded that the Government had submitted evidence upon which a reasonable jury could determine that acts of extortion were committed by Ferrante's company and that it could not be said that a reasonable jury could not conclude that Ferrante committed, aided or abetted the commission, or conspired to commit the predicate acts of extortion. The district court also concluded that the Government had produced evidence that Ferrante participated in a series of related predicates extending over a substantial period of time, and hence summary judgment would be inappropriate.

5. United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 899 F. Supp. 974 (E.D.N.Y. 1994), aff'd, 47 F.3d 1158 (2d Cir. 1995) (Table).

The district court granted the Government's motion for summary judgment, granted broad injunctive relief against defendant Nicholas Ferrante, and denied Ferrante's cross-motion requesting a continuance to conduct discovery.

The complaint alleged that Ferrante, a reputed associate of the Lucchese LCN family and owner of two Long Island carting companies, was a close associate of Salvatore Avellino, an alleged Capo in the Lucchese LCN Family, and assisted Avellino on a regular basis in collecting extortion payments and tribute from area carters. In reaching its conclusion that Ferrante failed to show a genuine issue of fact as to his civil liability, the district court found under principles of collateral estoppel, that Ferrante's guilty plea in state court to coercion in the first degree conclusively established that he had committed one predicate racketeering act and that undisputed evidence submitted by the Government established the second predicate act alleged, second degree bribery under New York State Penal Law Section 200.00. Id. at 980-82. Ferrante's liability for the bribery charge, the district court found, was based on the adverse inference which arises when a defendant invokes the privilege against self-incrimination and "independent corroborative evidence of the matters to be inferred" presented by the Government. Id. at 982, citing PSIA, 811 F. Supp. at 812; United States v. Bonanno Organized Crime Family of La Cosa Nostra, 683 F. Supp.1411, 1452 (E.D.N.Y. 1988), aff'd, 879 F. 2d 20 (2d Cir. 1989).

Regarding other RICO elements, the district court found that the defendant's Hobbs Act violation and his bribes were clearly related to his role in the Long Island carting industry and constituted a pattern of racketeering activity. Moreover, the district court found that the Government had proved that Ferrante was an integral part of the carting industry and Private Sanitation Industry Association enterprises.

The district court found Ferrante liable for a RICO violation and imposed the following equitable relief. Ferrante was enjoined from:

- (i) engaging in any activities involved in connection with the collection, transportation or disposal of solid waste, (ii) violating, aiding or abetting the violation of, and/or conspiring to violate any of the provisions of Title 18, United States Code Section 1961 et seq., (iii) participating in the affairs of PSIA or other trade waste association, and from participating in the affairs of Local 813 and its Trust Funds, any other union and its trust funds, (iv) associating with any other defendant or member or associate of organized crime for any commercial purpose and (b) ordered to divest his interests in the named enterprises and to disgorge the proceeds

derived from his unlawful conduct and participation therein into a Court-administered fund.

Id. at 983-84.

Moreover, the district court rejected Ferrante's request for a continuance under Fed. R. Civ. P. Rule 56(f), and denied his request that the court defer ruling on the Government's motion for summary judgment to allow him to conduct additional discovery. The district court found Ferrante's request disingenuous because he attempted to obtain testimony of other witnesses, while he continued to assert his Fifth Amendment privilege with respect to the underlying facts. The court stated that there was no reason to grant a continuance to a litigant who has "personal and intimate knowledge of the underlying facts for the purported purpose of conducting discovery to ascertain those identical facts." Id. at 984, quoting Private Sanitation Indus. Ass'n of Nassau/Suffolk Inc., 811 F. Supp. at 817-818. The district court also rejected further deposition of a witness whose declaration was supported by independently admissible evidence and of further witnesses who Ferrante had not subpoenaed. Id. at 899 F. Supp. at 984.

The district court granted Ferrante's motion to strike the Government's references to Avellino's guilty plea allocution to racketeering charges. The Government asserted that Avellino's allocution was submitted not to prove the existence of any of the RICO elements, but rather to prove the full extent and viciousness of the carting enterprise. The district court held that Ferrante's liability for the RICO violations did not depend on this element and thus, the proof related to it was not relevant and was inadmissible under Fed. R. Evid. 402. The district court also determined that even if the Avellino allocution was admissible, its minimal probative value would be far outweighed by its prejudicial impact. Fed. R. Evid. 403. Id. at 984-85.

6. United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 159 F.R.D. 389 (E.D.N.Y. 1994).

The district court granted the Government's motion to substitute the estates of two deceased defendants as parties in place of those two defendants on the ground that a civil RICO suit survives the death of a party because it is remedial, and not penal in nature.

7. United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 914 F. Supp. 895 (E.D.N.Y. 1996).

The district court granted the Government's motion for summary judgment against defendants Sanitation and U-Need-a-Roll Off. Corp., finding that under principles of collateral estoppel, the corporate-defendants' guilty pleas to criminal charges conclusively established that they committed the racketeering acts charged against them in the civil RICO suit. Id. at 896-98.

The district court also denied defendant Ferrante's motion to withdraw its earlier order (see 899 F. Supp. 974), drawing an adverse inference from Ferrante's invocation of his Fifth Amendment privilege and his request to allow his testimony. Id. at 899-900.

The district court further ruled that United States v. Carson, 52 F.3d 1173 (2d Cir. 1995), did not preclude the order requiring Ferrante and the corporate defendants to disgorge the proceeds of their RICO violations because "unlike Carson, the defendants in this case continue to be actively involved in the identical activities upon which this RICO suit is predicated" and hence "the monies these corporations gained illegally obviously constitute capital available for the purpose of funding or promoting the illegal conduct." Id. at 901.

Finally, the district court ordered that the defendants were subject to the same equitable relief provided in the Consent Judgment entered by the district court on February 28, 1994. Id. at 901-02. See Section E(3) above.

**F. 2d. Cases:**

1. United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 995 F. 2d 375 (2d Cir. 1993), aff'g, 811 F. Supp. 808 (E.D.N.Y. 1992).

The Second Circuit affirmed the district court's decision granting the Government partial summary judgment against defendant Salvatore Avellino. First, the Second Circuit held that the Government's evidence, consisting of Avellino's state court guilty plea to the crimes underlying the two charged racketeering acts, the testimony of government informants, and the adverse inference drawn from his failure to testify in the present proceeding, was sufficient to establish that Avellino committed the two bribery racketeering acts.

Second, the Second Circuit held that the district court did not abuse its discretion in denying Avellino's request for a continuance to conduct discovery before the district court entertained the motion for summary judgment.

Third, the Second Circuit rejected Avellino's claims that the injunctive relief was not warranted, was beyond the scope of RICO's civil remedies, and violated his First Amendment associational rights.

2. United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 44 F. 3d 1082 (2d Cir. 1995).

The Second Circuit ruled that the defendant was not entitled to a stay, pending appeal, of the district court's order finding him liable for violating RICO, enjoining him from participating in the waste disposal business, and associating with his co-defendants for any commercial purpose, and directing the defendant to divest his interests in various enterprises and to disgorge proceeds derived from his unlawful conduct into a court-administered fund.

## 10. ILA LOCAL 1804-1

### A. CASE NAME:

United States v. Local 1804-1, International Longshoremen's Association, AFL-CIO, et al., 90 Civ. 0963 (LBS), United States District Court for the Southern District of New York. Complaint filed on February 14, 1990, amended complaint filed on September 27, 1991.

### B. DEFENDANTS:

The amended complaint named as defendants: (1) six International Longshoremen's Association (ILA) locals and their Executive Boards (Locals 1840-1, 1588, 1814, 1809, 824, 1909); (2) thirty-seven then present and former officers and Executive Board members and delegates of the ILA Locals; (3) 25 alleged members and associates of the Genovese and Gambino LCN Families; (4) six alleged members of the Westies Organized Crime Group; (5) two corporate-employers (Nodar Pump Repair, Inc., and Doreen Supply Company, Inc.) and (6) two associations of employees (the Metropolitan Maintenance Contractors' Association, Inc. (MMMCA) and the New York Shipping Association (NYSA)). In addition, pursuant to Fed. R. Civ. P. 23(a) and (b)(1), (b)(2), and (b)(3), the complaint made class action allegations against four classes of defendants: The Genovese Organized Crime Family Class, the Gambino Organized Crime Family Class, the Westies Organized Crime Group Class and the Employer Class. The four defendant classes were named for the purpose of obtaining effective relief.

The named alleged Genovese LCN defendants included Anthony Salerno, boss; Venero Mangano, underboss; and soldiers Tino Fiumara, John Barbato, Michael Coppola, Vincent Colucci, Douglas Rago, George Baronne, and Thomas Buzzanca; and associates Vincent Colucci, and James Caskin. The named alleged Gambino LCN defendants included boss John Gotti; capos Anthony Scotto and Anthony Cicconi; underboss of the of Cleveland LCN, Frank Lonardo; soldiers Anthony Anastasio, and Anthony Pimpinella.

**C. SUMMARY OF COMPLAINT:**

The complaint alleged that for more than thirty years the Genovese and Gambino LCN Families had cooperatively exploited the ILA, the Waterfront shipping industry, and the workers laboring on the Waterfront through a pattern of violence, corruption and other abuses. The complaint also alleged that the Genovese and Gambino LCN Families continued to exercise control over the International Union and New York-New Jersey ILA locals.

The alleged RICO association-in-fact enterprise consisted of certain members and associates of the Genovese and Gambino LCN Families , the Genovese and Gambino LCN Families themselves, acting through their members and associates, ILA Locals 1804-1, 1588, 1814, 1809, 1909, 824, certain other ILA locals, and certain of their respective Executive Boards and their related labor councils, and their Pension, Welfare, and Benefit Funds, certain present and former ILA International and local officials and employees, and certain businesses and employer associations operating on or about the Waterfront (Waterfront Enterprise).

The complaint alleged four claims for relief: that the individual named defendants conducted the affairs of the Waterfront Enterprise through a pattern of racketeering activity, and conspired to do so, in violation of 18 U.S.C. §§ 1962 (c) and (d), respectively (claims one and two), and that the individual named defendants acquired and maintained an interest in and control of the Waterfront Enterprise through a pattern of racketeering activity, and conspired to do so, in violation of 18 U.S.C. §§ 1962 (b) and (d), respectively (claims three and four). The alleged pattern of racketeering activity underlying the four claims for relief included numerous violations, including: (1) embezzlement of Local 1804-1 funds through the expenditure of sham, extra pension payments and no show jobs held by organized crime figures, excessive salaries, in violation of 29 U.S.C. § 501(c); (2) numerous unlawful payments to union officers and employees, in violation of 29 U.S.C. § 186; (3) numerous extortions of payments from employers, in violation of 18 U.S.C. § 1951; (4) extortion of union member's rights to union democracy guaranteed by the LMRDA (29 U.S.C. §§ 501(a) and 411), in violation of 18 U.S.C.

§ 1951; (5) embezzlement of union-benefit funds, in violation of 18 U.S.C. § 664; (6) receipt of things of value because of defendants' connection to employee benefit funds, in violation of 18 U.S.C. § 1954; (7) loansharking, in violation of 18 U.S.C. §§ 891-894; and (8) conducting illegal gambling businesses, in violation of 18 U.S.C. § 1955.

**D. RELIEF SOUGHT:**

The relief sought included a preliminary and permanent injunction, enjoining: (1) all individual defendants, and all other persons in active concert or participation with them in the affairs of the LCN, from participating in the affairs of the ILA, any of its locals, any of its affiliated benefit funds, or any other labor organization or employee benefit funds, and from any dealings, directly or indirectly, with any officer, auditor or any employee of ILA or its affiliated benefit funds or any other labor organization, about any matter which relates directly or indirectly to the affairs of the ILA, any of its locals or affiliated benefit funds, or any other labor organization or benefit funds; (2) the six ILA Executive Boards, their individual members, any of their successors and all persons in active concert or participation with them, from committing any act of racketeering activity as defined in 18 U.S.C. §§ 1961 et seq., and from associating directly or indirectly with any member or others associated with the LCN; (3) any defendant found to have violated 18 U.S.C. § 1962 from any participating in any way in: (a) any activities of the Waterfront; (b) the affairs of the ILA, any of its locals, or any other labor organization about any matter which relates directly or indirectly to the affairs of the ILA, any of its locals or any other labor organization; or (c) the ownership, operation or employment of or by any business which is a member of the Employer Class.

The Government also sought the following relief, an order: (1) requiring new elections for members of the Executive Boards of the six ILA Locals to be conducted by court-appointed trustees; (2) pending the new elections, appointing trustees for the six ILA Locals to discharge the duties and responsibilities of the six Locals' Executive Boards (other than negotiating and entering into collective bargaining agreements); (3) appointing one or more administrators who

shall serve until such time as the Waterfront and ILA Locals are free from corruption, to oversee operations of the Waterfront and to implement reforms to prevent racketeering acts; (4) enjoining the defendants and the ILA Locals and affiliated entities from interfering with the activities of the court-appointed trustees; (5) requiring that all defendants found to have violated 18 U.S.C. § 1962 disgorge all proceeds of their violations; and (6) requiring that defendants pay the costs of the court-appointed officers and the costs incurred by the government in this suit.

E. **OUTCOME OF THE CASE:**

1. During the course of the litigation various individual defendants entered into Consent Judgments wherein they agreed to similar relief, including an agreement to be bound by any order of the district court appointing court officers in this suit and an injunction permanently enjoining the settling defendants from: (1) committing any racketeering act as defined in 18 U.S.C. §§ 1961 et seq.; (2) knowingly associating, directly or indirectly, with any member of the LCN or any person in active concert or participation with any member of the LCN; and (3) obstructing or interfering with any injunctive relief imposed by the district court in this case. Some of these settling defendants were also enjoined from having any dealings with any ILA related entity or their officers, employees or representatives. See orders entered August, 1990, November 5, 1990, March 12, 1991, May 3, 1991, May 30, 1991, September 5, 1991, September 17, 1991, September 20, 1991, and October 30, 1991.

2. On March 25, 1991, a Consent Judgment was entered into among the Government, ILA Local 1804-1, its Executive Board, and several officers of Local 1804-1 that included the following relief:

- a. the officers of Local 1804-1, its Executive Board and current and future officers, agents, representatives, employees and members of Local 1804-1 were permanently enjoined from: (a) committing any act of racketeering as defined in 18 U.S.C. §§ 1961 et seq., (b) knowingly associating with any member or associate of the LCN or any other criminal group or any person



prohibited from participating in union affairs, and (c) obstructing, opposing or otherwise interfering with the work of the court-appointed officers.

- b. the district court would appoint a Monitor to oversee the operations of Local 1804-1, whose powers included the following:
- (1) the right to attend every meeting of Local 1804-1 and its Executive Board.
  - (2) the right to have complete and unfettered access to, and to make copies of, the books, records, files, etc. of Local 1804-1, its Executive Board and officers.
  - (3) to require and take sworn statements or sworn oral depositions of any officer, agent or employee or member of Local 1804-1 relating to the Monitor's duties.
  - (4) to obtain an accounting of the assets of Local 1804-1.
  - (5) to exercise the powers set forth in the ILA's Constitution and By-Laws that relate to investigating and disciplining officers, agents, employees and members of Local 1804-1.
  - (6) to supervise elections for officers of Local 1804-1.
  - (7) to review all expenditures and proposed contracts (except for collective bargaining agreements) of Local 1804-1, appointments to Local 1804-1 office or employment and proposed changes to the Constitution and By-Laws of Local 1804-1 and to veto such expenditures, contracts, appointments and changes that would constitute a racketeering act or would further the association of Local 1804-1 or any of its members with any element of organized crime.

(8) to hire personnel to assist the Monitor with all the expenses of the Monitor and such personnel to be paid for by Local 1804-1.

(9) to submit periodic reports to the district court, the government and Local 1804-1.

- c. The Consent Judgment also amended Local 1804-1's Constitution and By-Laws regarding compensation and benefits for its officers, and further provided that any decision of the Monitor was final and binding subject to the district court's review under procedures applicable to review of final agency review under the Administrative Procedure Act.

3. On March 26, 1991, a Consent Judgment was entered into among the Government ILA Locals 824, 1809 and 1909 and their respective Executive Boards and Officers that included the following relief.

- a. Two defendants were barred from holding any office or position in ILA Locals 824, 1809 and 1909 and any other Local or subdivision of the ILA.
- b. The next union election was to be supervised by the United States Department of Labor.
- c. The district court would appoint a Monitor to oversee certain operations of ILA Local 1909, with powers similar to those of the court-appointed Monitor for Local 1804-1, described above.
- d. The district court entered a permanent injunction against officers of ILA Locals 824, 1809 and 1909 that was virtually the same as the injunction imposed against officers of Local 1804-1 described above.

4. On December 17, 1991, a Consent Decree was entered among the Government, ILA Local 1814, its Executive Board and several individual defendants that included the following relief:

- a. The district court entered a permanent injunction against the individual settling defendants and all current and future officers, agents, representatives, employees and members of Local 1814 that was virtually the same as the injunction imposed against officers of Local 1804-1 described above.
- b. The district court was to appoint a Monitor to oversee certain operations of Local 1814, with powers similar to those of the court-appointed Monitor for Local 1804-1, described above.
- c. The Constitution and By-Laws of Local 1814 were amended to conform with all the terms of the Consent Decree, and to require secret-ballot election of shop stewards by rank and file members and to limit compensation of Local 1814 officers and employees.
- d. Several defendants were permanently barred from membership or holding any office or position in Local 1814, the ILA, any other ILA Local or affiliated entity, or any pension or other benefit plan or fund affiliated with any ILA entity, and also were permanently barred from any employment or other participation in the affairs of any entity doing business on the Waterfront.

5. On January 3, 1992, a Consent Judgment was entered between the Government and ILA Local 1588, that included the following relief:

- a. The district court would appoint an Ombudsman, with authority similar to that granted to the court-appointed Monitor for Local 1804-1 described above.
- b. The United States Department of Labor would supervise the next election for officers of Local 1588.

- c. Two person were barred from holding any office or position in Local 1588, or any entity affiliated with Local 1588 or the ILA.
- d. The district court entered a permanent injunction against the then current officers of Local 1588 and its Executive Board and future officers, agents, representatives and members of Local 1588 that was virtually the same as the injunction imposed against Local 1804-1 and its officers described above.
- e. The Constitution and By-Laws of Local 1588 were amended to add provisions relating to disciplining members, officers and employees of Local 1588 for misconduct.

6. Following a non-jury trial, the district court found the remaining defendants liable and imposed equitable relief. See United States v. Local 1804-1, International Longshoremen's Ass'n, 812 F. Supp. 1303 (S.D.N.Y. 1993), modified, 831 F. Supp. 167 (S.D.N.Y. 1993), aff'd and vacated in part, 52 F.3d 1173 (2d Cir. 1995), discussed below in Section F.

## **F. LEADING COURT DECISIONS:**

### **F. Supp. Cases**

- 1. United States v. Local 1804-1, International Longshoremen's Ass'n, 732 F. Supp. 434 (S.D.N.Y. 1990).

The district court denied defendant's motion for an order authorizing counsel to represent simultaneously a local and an officer of that local who was charged with wrongdoing in his individual capacity (officer defendants) and authorizing the locals to pay attorney fees for the officer defendants prior to a determination on the merits of the complaint. The district court explained that the interests of the unions were not, as the unions argued, necessarily aligned with those of the individual defendants and that, assuming for argument that no conflict of interest existed in their respective defenses, there was no certainty conflict would not arise in the future. Further, the district court noted that under case law and 18 U.S.C. § 501(c), union funds were not available to defend officers charged with union misconduct and that defendants must finance their defense costs and seek reimbursement if successful.

The district court denied the Government's motion seeking to bar counsel who had appeared on behalf of both a defendant local and an individual officer defendant from continuing to represent the local, but left available the Government's option to file at later time, if the facts warranted, an appropriate motion to disqualify.

2. United States v. Local 1804-1, International Longshoremen's Ass'n, 745 F. Supp. 184 (S.D.N.Y. 1990).

The district court denied, as premature in the absence of a fact-finding hearing, defendants' motions to dismiss the complaint on the grounds the Government could not prove the allegations in the complaint, and ruled that the complaint was adequate on its face. The district court also denied as premature the Government's motion to strike affirmative defenses inasmuch as a motion to strike was not intended to provide an opportunity for the determination of disputed and substantive questions of law. The district court also denied without prejudice the motion to dismiss certain defendants.

The district court also denied defendants' motion for summary judgment based on the Government's assertion of its good faith belief that it could prove by direct testimony, and otherwise, the extortion of Local 1809's members, even though some witnesses, fearing physical harm, had thus far refused to testify. The district court warned the Government that it took seriously the Local's protest that it should not be required to participate in a lengthy and complex trial if the Government could not produce testimony to prove that Local 1809 members were extorted.

The district court waived, subject to discovery, the requirement of Celatex Corp. v. Catrett, 477 U.S. 317 (1986), that the respondent (the Government) had a duty to defend against a motion for summary judgment with specificity and a demonstration of the existence of material questions fact. The district court reasoned that Celatex, which addressed a commercial dispute, was not dispositive where the safety of witnesses was advanced as a concern.

3. United States v. Local 1840-1, International Longshoremen's Ass'n, 753 F. Supp. 1158 (S.D.N.Y. 1990).

ILA Local 1809 filed a motion to compel disclosure of the names of members of Local 1809 who stated, on the condition of anonymity, that the Local was controlled by members of organized crime who would retaliate if union members exercised their union rights. In spite of earlier representations by the Government that they believed some victim/members of Local 1809 would agree to testify, the Government had failed to obtain the consent of any Local 1809 member to testify at trial or otherwise disclose his or her identity.

The district court rejected the Government's proposal to submit written interrogatories to witnesses whose identities could not be disclosed. The district court ruled that such a procedure would not adequately protect Local 1809's right to a fair trial in a case in which an FBI agent's hearsay testimony would be the only evidence as to the victim/members' state of mind. The district court also ruled that the Government could not invoke the informant's privilege with respect to victim/members identities while at the same time relying on the FBI agent's account of their statements to sustain the Government's burden of proof as to the members' state of mind. The district court set a deadline for the Government to advise the court and defendants whether there would be any testimony by victim/members at the trial. However, the district court did not compel disclosure.

On December 17, 1990, in an unpublished decision, the district court denied Local 1809's application for disclosure of the names of Local 1809 members.

4. United States v. Local 1804-1, International Longshoremen's Ass'n, Donald Carson, 812 F. Supp. 1303 (S.D.N.Y. 1993), modified, 831 F. Supp. 177 (S.D.N.Y. 1993), aff'd and vacated in part, 52 F.3d 1173 (2d Cir. 1995).

After a ten-week bench trial, the district court ruled that the Government had proved by a preponderance of the evidence that the four remaining defendants (Donald Carson, Anthony Gallagher, George Lachnicht, and Venero Mangano) were liable for RICO violations.

The evidence included live testimony, deposition testimony, and more than ten thousand trial exhibits. The district court also concluded that defendant Carson, whose action claiming entitlement to pension benefits was consolidated with this action, was not entitled to pension benefits from Local 1588.<sup>9</sup>

The district court found the following evidence sufficient to establish the existence of an association-in-fact enterprise consisting of ILA Locals and officials local union employers, Waterfront businesses and members of La Cosa Nostra (LCN):

- a. Public reports documenting conclusions and findings developed from extensive factual investigations (e.g., Public reports, such as the President's Commission on Organized Crime, successful state and federal criminal investigations and prosecutions);
- b. Eye witness and expert testimony;
- c. Electronic surveillance investigations;
- d. Evidence of wrongdoing by defendants who settled and were no longer parties in the case.

Id. at 1310-15.

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<sup>9</sup> Carson filed a lawsuit against Local 1588 in the District of New Jersey to compel the Local to resume his monthly pension payments and to ensure that in the event of his death the payments would be made to his widow. The New Jersey action was transferred to the Southern District of New York and consolidated with the present action.

The court denied Carson's motion for summary judgment in his civil action (90 Civ. 5618), Carson v. Local 1588 Int'l Longshoremen's Ass'n, 769 F. Supp. 141 (S.D.N.Y. 1991), where the court held that the Local had conceded that a pension plan had been established, as defined by ERISA. In its summary judgment opinion, the court found that "top-hat" pensions plans, such as the one at issue, were exempt from the non-forfeiture and non-alienation rules which typically apply to employee pension plans under ERISA. Carson, 769 F. Supp. at 144. The court also held that the union could obtain forfeiture of Carson's benefits if it could demonstrate that Carson had breached a fiduciary duty to the pension plan. Id. at 145 n.6. Two factual circumstances would estop Carson from claiming pension benefits: (1) if Carson failed to comply with the mandated disclosure and reporting provisions of ERISA as required of those responsible for managing top-hat pension funds; and (2) if Carson caused injury to Local 1588's pension fund based on the conduct for which he was criminally convicted in 1988. Id. at 145. As the union's plan administrator, Carson clearly owed a fiduciary duty to the pension. And the evidence demonstrated that Carson's involvement in the MOTBY scheme caused financial injury to Local 1588 (By Carson's not upholding ILA policy that the work in question be done by deep-sea longshoremen, members of Local 1588 lost employment opportunities and salaries, resulting in lost revenues and a diminished treasury for Local 1588.). Thus, under ERISA § 1109(a), which permits the court to impose equitable or remedial relief against those who breach fiduciary duty to a pension plan, Carson was estopped from receiving the pension benefits he sought.

The district court also found that the defendants' predicate acts, discussed below, were related to each other and to the Waterfront enterprise by the exploitation of the Enterprise by LCN figures, their ILA confederates, and their control of ILA Local 1588. The existence of the pattern of racketeering activity was confirmed by the public report evidence and expert and fact testimony. The requisite continuity was evident from the fact that the related predicates themselves involved a distinct threat of long-term racketeering activity. Moreover, the district court noted that under Second Circuit case law, continuity may virtually be presumed because "the fact that an act is done at the behest of organized crime makes it likely that a pattern will continue." *Id.* at 1316.

The district court found that the Government proved by a preponderance of the evidence that the defendants had committed, or aided and abetted, various racketeering acts involving: (1) the unlawful receipt of payments from employers, in violation of 29 U.S.C. § 186; (2) embezzlement of union funds, in violation of 29 U.S.C. § 501(c); and (3) extortion of union members' rights to union democracy protected by the LMRDA, in violation of 18 U.S.C. § 1951. *Id.* at 1308-09, 1318-39, 1349-50.

In particular, the district court stated that the Government presented "persuasive evidence that the union members were intimidated by [Local 1588's] association with organized crime" (*id.* at 1336), including evidence that there were no opposed elections during Carson's tenure at the union, and that the union failed to criticize or object to Carson's leadership when they would have done so, absent the intimidation. *Id.* at 1337. In addition, the Government's expert witness testified that these facts gave rise to the inference that the union members' silence was the result of fear and intimidation. This inference was further supported by circumstances occurring after the murder of an LCN member who exercised corrupt influence over Local 1588 and Carson's conviction and retirement from the union: first, union membership increased, and second, following Carson's retirement, union members regularly complained of Carson's abuses as an officer. *Id.* at 1334-37.

However, the district court also found that the Government did not prove several racketeering acts involving embezzlement, illegal employer payments under 29 U.S.C. § 186, and extortion of union members' economic rights. *Id.* at 1326-27, 1334-35, 1339-40.

The district court concluded that the defendants were liable for RICO violations, but deferred imposition of sanctions.<sup>10</sup>

5. United States v. Local 1804-1, International Longshoremen's Ass'n, 831 F. Supp. 177 (S.D.N.Y. 1993), aff'd and vacated in part, 52 F. 3d 1173 (2d Cir. 1995).

This opinion entailed the remedy phase of the litigation, following the district court's finding, after a bench trial, that four defendants were liable for violating RICO as noted above.

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<sup>10</sup> The district court granted the Government's request for a preliminary order, restraining the defendants from dissipating their assets pending execution of a final judgment in this case. See, United States v. Local 1804-1 International Longshoremen's Ass'n, 1993 WL 77319 (S.D.N.Y. March 15, 1992).

The district court also modified its decision finding defendants' liable regarding several evidentiary matters. See United States v. Local 1804-1, International Longshoremen's Ass'n, 831 F. Supp. 167 (S.D.N.Y. 1993).

First, the district court ruled that there was no need to receive further evidence regarding remedies, and rejected defendants' proffered evidence as irrelevant or immaterial. Id. at 181-84.

Second, the district court ordered each defendant to disgorge the proceeds of their RICO violations as follows: Defendants Mangano, Gallagher and Carson were each ordered to disgorge \$16,100 that each received in kickbacks. Id. at 186-88. Defendant Carson was also ordered to disgorge \$60,000 reflecting the portion of his salary that he embezzled. Id. at 188. Defendant Lachnicht was ordered to disgorge \$15,000. Id. at 189.

The district court rejected the Government's request for prejudgment interest on the amounts disgorged and declined to impose joint and several liability on the defendants. Id. at 185-88.

The district court also rejected defendant Carson's claim that his disgorgement award constitutes a second punishment for his underlying conduct which was the basis for his prior conviction. The district court explained that disgorgement was "remedial" and not punishment. Id. at 190-91.

Third, the district court enjoined the defendants who had violated RICO: (1) from committing any racketeering act as defined in 18 U.S.C. § 1961; (2) "from having any dealings, directly or indirectly, with any members or associates of organized crime for any commercial purpose concerning the affairs of the Waterfront [Enterprise] . . . or any labor organization;" (3) "from having any dealings, directly or indirectly, with any other defendant in this action for any commercial purpose concerning the affairs of the Waterfront [Enterprise] or any labor organization;" (4) "from participating in any way in the affairs of or having any dealings, directly or indirectly, with (i) any labor organizations. . . . (ii) any officer, agent, representative, employee, or member of [several locals]; (iii) any other officer, agent, representative, employee, or member of the ILA or any other labor organization concerning the affairs of such organization or the Waterfront [Enterprise];" and (5) "from visiting the site of any ILA entity or other labor organization or communicating with any person who is at the site of any ILA entity or other labor organization." Id. at 191-92.

6. United States v. Local 1804-1, International Longshoremen's Ass'n, 831 F. Supp. 192 (S.D.N.Y. 1993).

The district court approved the Consent Decree, dated July 21, 1993, between the United States and the New York Shipping Association, Inc., finding that the Consent Decree met the standards for approval of consent decrees enunciated by the Supreme Court in Local 93, International Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986).

The Consent Decree included the following relief:

- (a) The district court appointed the Waterfront Commission of New York Harbor (Waterfront Commission) to determine a list of persons to be prohibited from seeking, obtaining, or remaining in employment on the Waterfront. The list was to include any person who: (1) defaulted in this case or was found to have violated RICO; (2) was a member of any organized crime group as defined in the complaint; (3) knowingly associated with a member of any organized crime group; and (4) committed a felony under the laws of the United States or any state.



- (b) Any person who contested any charge by the Waterfront Commission was entitled to a hearing conducted in the same manner as proceedings before administrative law judges. The Government had the burden of proof by the preponderance of the evidence. Any person found liable had a right to appeal the decision to the district court who shall uphold the decision if the decision was supported by substantial evidence, within the meaning of the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.* Such person also had a right to apply for a de novo hearing. All questions of law were to be reviewed de novo.

## F.2d Cases

1. Local 1814, Int'l Longshoremen's Ass'n v. New York Shipping Ass'n, 965 F.2d 1224 (2d Cir. 1992), cert. denied, 506 U.S. 953 (1992).

ILA Local 1814 argued that the proposed RICO Consent Decree (discussed above in Section F(1)(6)) between the New York Shipping Association, Inc. (NYSA) and the Government included injunctive relief that exceeded the district court's jurisdiction. Specifically, the NYSA argued that the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, "which divests federal courts of jurisdiction to enter injunctions in all 'labor disputes', takes precedence over RICO." *Id.* at 1225. One provision of the proposed consent judgment would have barred from waterfront employment any individual who violated RICO, any individual who was a member of organized crime, and any individual who aided or abetted individuals in the first two categories. Local 1814 contended that this would create new categories for termination of employees and would unilaterally impose new terms on the collective bargaining agreement. The union began an arbitration proceeding and sought an injunction to prevent NYSA from taking action which would effectuate the consent decree. The Government sought an injunction to prevent arbitration. The district court granted the Government's injunction and denied the union's requested injunction. *Id.* at 1226-1231.

The Second Circuit first determined that the issue of arbitrability was one for the court to decide in the first instance, and that the dispute between NYSA and Local 1814 was arbitrable. *Id.* at 1233-34. The Second Circuit next determined that this was a labor dispute under the Norris-LaGuardia Act because the new categories for termination concerned the terms and conditions of employment. *Id.* at 1235-36.

The Second Circuit stated that district courts have jurisdiction to issue injunctions under two exceptions to the jurisdiction - stripping provisions of the Norris-LaGuardia Act. "First, the federal courts have jurisdiction to issue injunctions in 'labor disputes' when necessary to accommodate Norris-LaGuardia's 'strong policy favoring arbitration. . . '. Second, the federal courts have equity jurisdiction when necessary to reconcile Norris-LaGuardia with the mandates of a specific federal statute." *Id.* at 1236. (citations omitted).

The Second Circuit concluded that the injunction under RICO fell within the second exception. *Id.* at 1236-38. The Second Circuit explained that Congress specifically intended RICO's civil remedies to combat organized crime's infiltration of labor unions and that, therefore, it had a duty to apply RICO which was specifically designed to apply in the labor context. *Id.* at 1236-37. The court added that once subject matter jurisdiction and jurisdiction over the parties has been acquired, the All Writs Act, 28 U.S.C. § 1651, authorizes federal courts to protect that jurisdiction. *Id.* at 1236-37. The Second Circuit concluded, therefore, that Congress anticipated that RICO injunctions would extend to some labor disputes and that Norris-LaGuardia's general prohibition against injunctions in labor disputes did not bar the relief

requested by the Government. Specifically, “the anti-injunction provision of Norris LaGuardia must yield to the compelling governmental interest of eliminating the hold of organized crime on labor unions as contemplated by RICO.” Id. at 1238.

The Second Circuit limited its holding as follows:

Our holding today is narrow. We do not hold that “mere unlawfulness under any law is enough to remove the strictures of the Norris-LaGuardia Act.” (citations omitted). We hold only that when injunctive relief in what would otherwise be a “labor dispute” is properly sought to further RICO’s remedial purposes, the anti-injunction provisions of Norris-LaGuardia are inapplicable, and a federal court has jurisdiction to grant injunctive relief.

Id. at 1238-39.

2. United States v. Local 1804-1, International Longshoremen’s Ass’n, 44 F.3d 1091 (2d Cir. 1995).

The Second Circuit held that the district court’s finding a person in civil contempt for violating the terms of a Consent Decree was reviewable for an abuse of discretion. Id. at 1095-96. Under that standard, the Second Circuit reversed the district court’s finding of contempt that a former union official violated the Consent Decree by knowingly associating with organized crime persons or with persons barred from participation in union affairs, finding that the district court had misinterpreted the relevant provisions of the Consent Decree. In that regard, the Second Circuit stated that under the specific terms of the Consent Decree at issue:

The mere fact of knowing association with individuals of prohibited status is not enough; in the absence of a showing of explicit impropriety, there must also be grounds, based on the circumstances of the particular contacts in question, for concluding that those contacts help to perpetuate organized crime’s control over the union or impinge on the integrity and independence of the union.

Id. at 1098.

The Second Circuit, however, affirmed the district court’s finding the former union officer in contempt for violating the Consent Decree by his pursuing pension benefits by attempting to influence the decision making of an entity doing business on the Waterfront, which conduct was prohibited by the Consent Decree. Id. at 1099-1100.

3. United States v. Carson, 52 F.3d 1173 (2d Cir. 1995), aff’g and vacating in part, 831 F. Supp. 177 (S.D.N.Y. 1993).

Following a bench trial, the district court found Donald Carson liable for violating RICO while he was Secretary-Treasurer of Local 1588 of the ILA, and enjoined Carson from: (1) committing any act of racketeering as defined in 18 U.S.C. § 1961; (2) having any dealings with any defendant in this case or any member or associate of organized crime for any commercial purposes concerning the affairs of the Waterfront or any labor organization; and (3) participating in any way in the affairs of, or having any dealing, with any labor organization or any officer agent, representative, employee, or member of any labor organization, subject to several exceptions. Id. at 1184 and n. 10. See section F (1)(4) and (5) above.

The Second Circuit upheld this injunction, rejected Carson's claims that the injunction was overly broad and violated his First Amendment freedom of association, and concluded that there was a reasonable likelihood of future wrongdoing. Id. at 1183-85.

The Second Circuit also held that disgorgement of a wrongdoer's ill-gotten gains was an available remedy to the Government under civil RICO, and that such disgorgement was remedial, not punitive, and did not violate the Double Jeopardy Clause of the Constitution. Id. at 1181-83.

However, the Second Circuit held that such disgorgement was confined to preventing and restraining future violations. The Court added that:

Ordinarily, the disgorgement of gains ill-gotten long in the past will not serve the goal of "prevent[ing] and restrain[ing]" future violations unless there is a finding that the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose."

Id. at 1182.

In that regard, the Court stated:

The vast majority of the money the district court has ordered Carson to disgorge was received by him long before the civil suit was ever brought against him in 1990. All of the \$16,100 ordered disgorged in connection with the MOTBY scheme was received in 1981 and 1982. The \$60,000 ordered disgorged in connection with the salary embezzlement was received between 1982 and 1988. Much of this money was acquired by Carson too far in the past for its disgorgement to be part of an effort to "prevent and restrain" future conduct.

Id. at 1182.

However, the Second Circuit added that:

We do not determine what portion (if any) of the disgorgement order should ultimately survive. Rather, we vacate the existing order of disgorgement and remand to the district court for a determination as to which disgorgement amounts, if any, were intended solely to "prevent and restrain" future RICO violations.

Id. at 1182.<sup>11</sup>

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<sup>11</sup> On remand, the district court concluded that the government was not entitled to disgorgement of any of the funds at issue. See United States v. Local 1804-1, International Longshoremen's Ass'n and Donald Carson, 1996 WL 22377 (S.D.N.Y. Jan. 22, 1996).

## 11. IBT LOCAL 295

### A. CASE NAME:

United States v. Local 295, International Brotherhood of Teamsters, et al., Civil Action No. 90-0970, United States District Court for the Eastern District of New York. Complaint filed March 20, 1990, amended complaint filed April 25, 1990.

### B. DEFENDANTS:

The complaint named institutional and individual defendants: (1) the union defendants, Teamsters Locals 295 and 851; (2) the executive boards of each local; and (3) alleged members or associates of the Lucchese LCN Family including --capo Frank Manzo; Harry Davidoff, and his son Mark Davidoff, both former officers of Local 851; Frank Calise, a former officer of Local 295; Anthony Calogna and Anthony Calagna, both made members; Leone Manzo and Richard Schroeder; (4) members or associates of the Gambino LCN Family, including Carmelo Amato and made member Anthony Guerrieri; Local 295 officers Michael Urso-Pernice, Robert Reinhardt, Sharon Moskowitz, daughter of Harry Davidoff, and Nancy Siano.

### C. SUMMARY OF THE COMPLAINT:

The amended complaint alleged that since 1978, New York's John F. Kennedy International Airport (JFK Airport) had been the site of a wide variety of organized criminal activities by the Lucchese and Gambino LCN Families which controlled Teamster Locals 295 and 851, and whose members were employed in the air freight industry at JFK Airport. Air freight companies are particularly vulnerable to threats of strikes, work slowdowns or other labor difficulties because they must provide on-time service. The defendants allegedly used threats of labor unrest to extort payments from air freight companies doing business at JFK Airport and had received payments from air freight companies in return for non-enforcement of collective bargaining agreements. Federal criminal prosecutions in the Eastern District of New York,

which led to the incarceration of various individuals, including former high-ranking officers of Locals 295 and 851, had not ended organized crime's domination of the unions.<sup>12</sup>

The amended complaint alleged two association-in-fact RICO enterprises: (1) the "Airport Union Enterprise," consisting of IBT Locals 295 and 851, their Executive Boards, Local 851's Pension and Welfare Funds, the Lucchese and Gambino LCN Families and the individual defendants; and (2) the Lucchese Family Enterprise, consisting of the Lucchese LCN Family. Through these enterprises the defendants allegedly engaged in the following predicate acts of racketeering, in violation of 18 U.S.C. §§ 1962 (c) and (d) :

(1) Nineteen acts of racketeering, each the subject of one or more federal indictments in the Eastern District of New York, were set forth in the first sixteen labor racketeering acts (each with three to five alternative acts) , alleging violations of 29 U.S. C. § 186 (b), 18 U. S. C. § 1951, and New York Penal Law § 155. 3 0 (dealing with labor unrest, e.g. , stoppages, picketing, and other labor difficulties). Specifically, the complaint alleged that the LCN defendants and others, who were employed by the various air freight companies or served as officers of the defendant labor unions, demanded or received kickbacks from the air freight companies by threats of financial injury to the victim air freight companies and by threatening and causing work stoppages, picketing, increased labor costs, boycotts, and other labor difficulties. The complaint alleged that the union defendants and various individual defendants aided and abetted the defendants by using their positions within the unions, the victim air freight companies, or the LCN to conceal and protect these illegal acts and/or by sharing the profits of the alleged illegal conduct;

(2) One act of racketeering (Racketeering Act 17) alleged fraud in the sale of securities, in violation of 15 U.S.C. §§ 78 j(b), 78ff. The complaint alleged that defendant Calise breached his fiduciary duties as the President of Local 295 by misappropriating confidential merger

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<sup>12</sup> See, e.g., United States v. Davidoff, 845 F.2d 1151 (2d Cir. 1988).

information for his own profit when he supplied information concerning the proposal merger of certain air freight companies to the Manzo defendants;

(3) Two acts of racketeering (Racketeering Acts 18 and 19) set forth Thomas Greco's convictions for obstruction of justice, in violation of 18 U.S.C. § 1503. Greco caused a witness to give false testimony and to conceal information from the Special Grand Jury.

In addition, the complaint alleged that the defendants, through the Airport Union Enterprises and the Luchese Family Enterprise, conspired to violate 18 U.S.C. § 1962 (c), in violation of 18 U.S.C. § 1962 (d).

**D. RELIEF SOUGHT:**

1. The Government sought a preliminarily injunction to: (a) enjoin defendants from committing any racketeering act listed in 18 U.S.C. § 1961; (b) enjoin the individual defendants from participating in the affairs of Locals 295 and 851, their Executive Boards, or their affiliated employee pension and welfare funds or any other labor organization or employee benefit plan relating to the affairs of Locals 295 and 861; (c) enjoin the incumbent Executive Boards of Locals 295 and 851 from any actions on behalf of or related to the locals; (d) remove all officers and trustees of Locals 295 and 851 and their affiliated employee pension and welfare plans; (e) appoint one or more trustees pendente lite to discharge all duties and responsibilities of the Executive Boards and Pensions Welfare Funds of Locals 295 and 851, including to oversee operation of the locals and their affiliated employee and pension and welfare funds; and to order supervised free elections in the locals; and to order any other injunctive relief deemed appropriate.

2. The government sought a permanent injunction:

a. prohibiting all of the individual defendants from participating in or having any future dealings of any nature whatsoever with any officer, agent, representative or employee of Teamsters Local 295, Teamsters Local 851, Local 295 Executive Board, Local 851 Executive Board, Local 851 Pension and Welfare Funds, or of any other labor organization, about any

matter which relates directly or indirectly to the affairs of Teamsters Local 295, Teamsters Local 851 or any other labor organization, and from owning, operating or participating in any way in, or profiting from, any motor carrier or freight forwarder in the Eastern District of New York or elsewhere, provided however, that any injunctive relief against defendant Frank Manzo be limited so as to be consistent with, and not duplicate, relief ordered in a consent judgment against defendant Frank Manzo in United States v. International Brotherhood of Teamsters, 88 Civ. 4486 (S.D.N.Y. October 17, 1988);

b. making permanent any provision of the preliminary injunction which the district court deems appropriate.

Finally, the complaint requested the district court to order the individual defendants to divest themselves of any interest, direct or indirect, not limited to monies, in the Union Airport Enterprise.

**E. OUTCOME OF THE CASE:**

1. In a Memorandum and Order dated March 7, 1991, the district court denied various motions to dismiss the complaint and granted partial summary judgment on behalf of the United States. The union defendants, joined by defendants Harry and Mark Davidoff, Calagna, and Schroeder, moved to dismiss, contending that the complaint: (1) failed to give adequate notice as to how they aided and abetted the predicate acts; (2) failed to allege that the defendants provided substantial assistance in the commission of the crimes; (3) failed to state sufficient facts to justify imputing liability under agency law; (4) failed to allege sufficient facts to support the broad equitable relief requested; (5) alleged that the broad relief sought contravened federal labor law policy; (6) alleged that the executive boards were not “persons” under RICO and therefore were not proper defendants; and (7) alleged that the RICO statute is unconstitutionally vague.

The district court held that the complaint was sufficient, stating that although it did not specify precisely how union defendants aided and abetted the commission of the

racketeering acts, the complaint sufficiently alleged that they aided and abetted and generally in what manner. The district court dismissed, as premature in the absence of a factual inquiry, the issues of union liability, defendants' challenge to agency liability, their claims that the requested relief was too broad and in contravention of labor law policy, and their challenge to the characterization of the executive boards as "persons." The district court also concluded that prior convictions and consent decrees in another case involving Frank and Leone Manzo resolved different claims and issues than those alleged by the complaint and held that the doctrines of res judicata and collateral estoppel did not bar the instant action.

The district court granted the Government's motion for partial summary judgment against defendants Frank Calise and Harry Davidoff based on collateral estoppel because their prior convictions "conclusively establish[ed]" their liability for the RICO conspiracy alleged in the complaint. The district court found that undisputed Government evidence established that the conspiracy obtained \$961,400 from the victim companies. The court held Calise and Davidoff jointly and severally liable for \$961,400 in damages. In addition, the district court enjoined defendants Frank Calise and Harry Davidoff from participating in the affairs of Locals 295 and 851, their Executive Boards, or any other labor organization or employee benefit plan, or from having any dealings with any officer or employee of any labor organization relating to the affairs of Locals 295 and 851 or any other labor organization.

2. Pursuant to the terms of a June 7, 1991, Consent Decree, defendants Thomas Greco and Carmelo Amato were permanently enjoined from: (1) participating in providing services to, or the management, representation or control of the IBT, and any local, subordinate or affiliated labor organization or any affiliated benefit or pension plan, or from having any dealings with any member, employer, or agent of any local, subordinate or affiliated labor organization or any affiliated benefit or pension plan about any matter relating to the provision of services to or the management, control or conduct of the affairs of the IBT or any subordinate or affiliated labor organization or any affiliated benefit or pension plans, except that Greco and



Amato were not precluded from being a member of a labor organization or from voting in a union election; and (2) interfering with any officer appointed by the district court to oversee the affairs of Locals 298 and 851, or any affiliated pension or benefit plan or any components or agents thereof.

Defendants Amato and Greco also agreed to be jointly and severally liable for disgorgement of \$65,000 to be paid to the registry of the district court.

3. In a Memorandum and Order, dated June 28, 1991, 1991 WL 128563, the district court vacated that part of its March 7, 1991, order holding defendants Davidoff and Calise, jointly and severally liable for \$961,400 in damages. The district court found the evidence, adduced in support of the motions for summary judgment, which established that the conspiracy obtained \$961,400 from victim companies, did not establish the amount each defendant received from his participation in the conspiracy. The district court, however, adhered to its previous finding of civil liability on the part of the defendants and ruled the parties could renew their motions after discovery.

4. In United States v. Local 295 of the International Brotherhood of Teamsters, 784 F. Supp. 15 (E.D.N.Y. 1992), the Government moved for a second time for the appointment of a trustee for Local 295. The district court granted the Government's motion. The district court found that corruption in Local 295 had been extensive in terms of diversity, duration, and number of people involved and that the union membership displayed no interest in reforming the union. Evidence showed "a smug, almost contemptuous, indifference to the presence of organized crime in union affairs by a number of former union officials and an active effort by many in Local 295 to thwart reform." Id. at 19.

For example, following the January 1991 conviction of Lucchese LCN Family soldier Anthony Calagna, Sr., President of Local 295, for extortion and conspiracy to extort money, Vice President Robert Reinhardt assumed the Presidency, and the Local appointed Anthony Cuzzo, chairman of Calagna's defense fund committee, to the position of Vice-

President. The district court found that Cuozzo violated his fiduciary duties and his oath by interfering with the local's legal obligation under the Consent Order and by knowingly associating with Calagna, a member of the LCN. Id. at 19.

The district court stated (Id. at 21) that “the evidence exhibits more than simply a failure by the Executive Board to act affirmatively in the face of substantial evidence of corruption. Local 295's officers closed ranks against the government's investigation” when they (1) violated their fiduciary duties by failing to investigate and to take action on numerous allegations of criminal acts by and convictions of present and former union officers, including Calagna, and allegations of LCN involvement in the Local's affairs; and (2) embezzled the Local's funds by paying Calagna's legal fees and awarding him a substantial pay increase, by establishing a severance plan for themselves after they learned they were being investigated by the FBI, by buying a car in violation of the Local's by-laws for a retiring officer, and by making payments since 1972 to former vice president Harry Davidoff despite his conviction for extortion and conspiracy to extort Local 295 employers.

In addition, the district court found (Id. at 21) that the corruption extended to a membership manipulated by the Local's officers into sanctioning the Board's embezzlement, as demonstrated by the approval of payment of Calagna's criminal defense by a majority of those members present at a special meeting of the general membership.

The district court rejected the claim that past corruption was over and did not warrant injunctive relief, stating, “Defendants' contention that Local 295 is now free of the influence of organized crime rings hollow. Previous assertions that all corruption had been eliminated from the Local proved wrong, and the recent convictions and pleas of its officers argue for continued, close scrutiny.” Id. at 22.

Furthermore, over the objection of Local 295, the district court imposed a court - ordered trusteeship to conduct various operations of Local 295 and to conduct investigations to eliminate corruption within Local 295. The district court stated that it had authority to “appoint a

trustee to oversee the affairs of a local union under [Section 1964(a) of RICO]”. Id. at 19. The district court also quoted a Senate Report stating that “[t]he implementation of trusteeships under civil RICO is no longer a novel, one-time experiment. It is quickly being recognized as an extremely valuable part of effective law enforcement.” Id. at 19.

5. Pursuant to the above decision, in an order dated April 29, 1992, the district court appointed a Trustee for Local 295, authorizing the Trustee among other matters:

- a. “To conduct, administer and supervise the daily affairs of Local 295, including the power to handle grievances, arbitration and collect and disburse monies (including member dues) on behalf of the Local; [and negotiate, enter, and terminate contracts and leases and to hire personnel as he deems necessary]”.
- b. “To investigate corruption and abuse within Local 295, with or without probable cause, and with such investigative assistance as he deems appropriate.”
- c. “To discipline, remove and replace any officer, administrator, organizer, business agent, employee, shop steward, negotiator, or trustee of Local 295, for just cause as follows:
  - (1) The Trustee’s decisions with respect to discipline of members shall be final and binding. Any member’s appeal shall be to the United States District Court for the Eastern District of New York within fourteen days of receipt of the Trustee’s decision.
  - (2) In any appeal pursuant to paragraph 2(e)(1), the standard of review shall be whether the Trustee’s decision is supported by a preponderance of the evidence. Such evidence may consist of or include hearsay.
  - (3) Any actions of the Trustee pursuant to this subparagraph shall be reviewable, exclusively by this Court, and are not subject to arbitration or other challenge under the IBT Constitution or Local 295 By-Laws.”
- d. “To take possession of and review all current and past books, records, files, accounts and correspondence of Local 295 and the Executive Board.”
- e. To conduct and supervise union elections.
- f. “To subpoena witnesses and documents.”

- g. “To take testimony formally or informally, on the record under oath before a court reporter or otherwise as the circumstances may require in the Trustee’s sole discretion.”
- h. “To receive assistance of federal and local law enforcement” and to “refer possible violations of criminal law to federal or local law enforcement authorities.”
- i. “To apply to the [district] Court for such assistance as may be necessary and appropriate to carry out the powers conferred upon the Trustee.”
- j. To provide periodic written reports to the district court and the government.
- k. To provide the Trustee with “all powers granted to Trustees of locals pursuant to the IBT Constitution and all powers formerly held by the Executive Board of [Local 295] to the extent that such powers, including the power to conduct hearings, discipline, remove and replace officers, employees and members, are broader than those enumerated [in the district court’s order].”
- l. To petition the district court for modification of any of the terms of the district court’s order.

6. In a Memorandum and Order dated September 27, 1993, the district court denied a motion by an employer of union members to quash subpoenas issued by the court-appointed Trustee and granted cross-motion by the court-appointed Trustee to compel compliance. The district court ruled that the Trustee had authority to subpoena non-parties to the consent decree to obtain information relevant to its investigation of alleged corruption involving “hiding” employees from the local in violation of collective bargaining agreements.

7. Pursuant to a Consent Decree entered into in August, 1994, the district court appointed a Trustee for IBT Local 851 with powers similar to the court-appointed trustee for Local 295. The district court also enjoined Local 851 and all of its current and future officers, agents, representatives, employees and members from: (1) committing any racketeering act listed in 18 U.S.C. § 1961; (2) knowingly associating with any member or associate of an organized crime group or a person enjoined from participating in union affairs; and (3) obstructing the work of the court-appointed Trustee.

**F. LEADING COURT DECISIONS:**

See Section E above.

## 12. NEW YORK CARPENTERS UNION

### A. CASE NAME:

United States v. District Council of NYC and Vicinity of the United Brotherhood of Carpenters and Joiners of America, et. al., No. 90 Civ 5722 (CSH), United States District Court for the Southern District of New York. Complaint filed September 6, 1990, and supplemental complaint filed July 6, 1991.

### B. DEFENDANTS:

The original complaint charged eleven defendants: the District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners (District Council); and the following officers of the District Council: Paschal McGuinness, President; Irving Zeidman, First Vice President; Frederick W. Devine, Second Vice President; and Francis J.P. McHale, Secretary-Treasurer. The Complaint also charged the following alleged members of the Genovese LCN Family: Anthony Salerno, a/k/a “Fat Tony” (Boss), Vincent DiNapoli (Capo), Louis DiNapoli (Soldier), Peter DeFeo (Capo), Alexander Morelli, a/k/a “Black Alex”, (Soldier), and Liborio Bellomo, a/k/a “Barney”, (Capo). The supplemental complaint named all of the persons who were named in the original complaint and added John R. Abbetemarco, George J. Albert and Robert J. Cavanaugh who were elected First Vice-President, Second Vice-President and Secretary-Treasurer of the District Council, respectively, in an election held in June 1991. In addition, Frederick W. Devine was redesignated President of the District Council to reflect the results of that election. Paschal McGuinness, Irving Zeidman and Francis J.P. McHale were retained as defendants in the supplemental complaint, but were redesignated “former” officers to reflect their defeat in the June 1991 election.

### C. SUMMARY OF THE COMPLAINT:

The original complaint alleged that the RICO enterprise consisted of an association-in-fact comprised of the District Council, its constituent Local Unions, and the District Council

Benefit Funds (District Council Enterprise). The District Council consisted of and oversaw the operations of 22 constituent Local unions in the New York City area.

The complaint alleged four claims for relief: that the defendants knowingly acquired and maintained an interest in and control of the District Council Enterprise, and conspired to do so, in violation of 18 U.S.C. §§ 1962 (b) and (d) (claims one and two, respectively); and that the defendants knowingly conducted and participated in the affairs of the District Council Enterprise through a pattern of racketeering activity, and conspired to do so, in violation of 18 U.S.C. §§ 1962 (c) and (d) (claims three and four, respectively).

The complaint alleged that various defendants committed, aided and abetted the commission of, and conspired to commit three broad categories of racketeering acts in support of each of these four claims for relief. The complaint also incorporated by reference counts of independent criminal indictments that corresponded to, or supported, the complaint's charges. The first category of racketeering acts alleged that various defendants, who were District Council officers, received illegal benefits from employers who employed union members, including cash pay-offs, building materials, and other things of value, in violation of 29 U.S.C. § 186(b)(1) and 18 U.S.C § 1954. The first category also included allegations that corrupt union officers and members and associates of the Genovese LCN family formed a "club" which engaged in bid-rigging and other illegal activities in connection with construction projects.

The second category of racketeering acts involved charges that various officers of the District Council's Local Unions received illegal benefits from employers, including cash pay-offs and other things of value, to secure labor peace and under threats of violence or economic loss, in violation of 29 U.S.C. § 186(b)(1) and 18 U.S.C. § 1951, and state bribery and theft statutes.

The third category of racketeering acts involved claims that the defendants, through extortion in violation of 18 U.S.C. § 1951, obtained and attempted to obtain property in the form of the rights of labor organization members to free speech and democratic participation in union affairs as guaranteed by 29 U.S.C. § 411; to loyal and responsible representation by their union

officers as guaranteed by 29 U.S.C. § 501(a); and to loyal and responsible representation by the fiduciaries of the District Council Benefit Funds as guaranteed by 29 U.S.C. §§ 1104 and 1106. The complaint alleged that the defendants deprived the union members of such property rights through creating a climate of intimidation and fear by killing, assaulting and threatening persons who posed a threat to their control of the alleged RICO enterprise or who failed to obey the defendants' orders, as well as through threats of economic harm.

Under the third category, the complaint also identified persons with known criminal histories and criminal records who had been repeatedly appointed to union offices and jobs, and also identified union officers who associated with persons who had known organized crime ties or criminal histories or records. That section of the complaint also included specific examples where the defendant officers of the District Council consistently refused to take remedial action to rid the District Council and its locals of corruption. As examples of public demonstrations of such corruption, the complaint cited: (1) specific indictments; (2) the New York State Commission of Investigation Report entitled "Investigation of the Building and Construction Industry: Report of Conclusions and Recommendations," wherein the Commission described widespread corruption in the District Council; (3) the President's Commission on Organized Crime; and (4) Vincent Cafaro's testimony before the U.S. Senate Permanent Subcommittee on Investigations wherein Cafaro stated that the Carpenters Union is controlled by the Genovese LCN Family in New York City.

The supplemental complaint added officers elected in June 1991 as nominal defendants and changed the designation of the defeated officers to "former" officer.

**D. RELIEF SOUGHT:**

The relief sought under the complaint included the following:

1. Enjoining various defendants and other persons in active concert or participation with them, from participating in the affairs of the District Council or any of its officers or employees, or any other labor organization or employee benefit fund about any matter that related to the affairs of the District Council;



2. Enjoining the defendant District Council officers, their successors and all persons in active concert or participation with them, from committing any racketeering acts as defined in 18 U.S.C. §1961, and enjoining the defendant District Council officers from any participation with any member of La Cosa Nostra or any person in active concert or participation with them;
3. Enjoining any defendant found to have violated 18 U.S.C. § 1962 from participating in any way in the affairs of the District Council or any other labor organization or employee benefit fund about any matter which relates directly or indirectly to the affairs of the District Council or any other labor organization or employee benefit fund; or in the ownership, operation, or employment by any business which employs members of the District Council;
4. That following a trial on the merits, the district court order a new general election to elect the officers of the District Council, to be conducted by a court-appointed Trustee or Court Liaison Officer;
5. That pending those elections, the district court appoint a Trustee to discharge any of the duties and responsibilities of the District Council (other than negotiating and entering into collective bargaining agreements) when the Trustee deems it necessary to protect the rights of the members of the District Council;
6. Enjoining the defendants and the members, officers and employees of the District Council from interfering with the court-appointed Trustee or Court Liaison Officer in the execution of their duties;
7. That the district court order disgorgement of all proceeds by individual defendants who are found to have violated 18 U.S.C. § 1962 with such proceeds to be paid to the victims of these violations and any remaining proceeds to be paid to the United States;
8. That the district court issue a judgment declaring that the District Council has been controlled and exploited by La Cosa Nostra;
9. That the district court order that the costs of the suit and court-appointed officers be paid by the defendants and order such other and further relief as may be necessary and appropriate.

**E. OUTCOME OF THE CASE:**

1. Defendants Peter DeFeo and Anthony Salerno died during the pendency of the litigation.
2. On August 27, 1991, nominal defendant John Abbetemarco, entered a consent stipulation of dismissal of the matter against him and agreed to be bound by any order which the district court might issue as a result of the litigation.

3. In October 1992, nominal defendant George J. Albert entered into a consent decree in which he agreed to not commit any racketeering acts, to refrain from associating with the LCN and to be bound by the orders which the district court issues in the litigation. Also in October 1992, defendants Liborio Bellomo, Irving Zeidman and Francis J.P. McHale entered consent decrees in which they agreed to be enjoined from any participation or involvement in the affairs of the District Council. Zeidman and McHale agreed to disgorge the proceeds of their racketeering activity. Zeidman agreed to disgorge \$35,000 and McHale agreed to disgorge \$45,000.

4. On March 4, 1994, after the case had been in trial for approximately one month, the Government, the District Council, Frederick Devine, and Robert J. Cavanaugh entered into a Consent Decree which resolved the case as to all defendants, except for Vincent DiNapoli and Paschal McGuinness. The Consent Decree included the following provisions:<sup>13</sup>

a. All present and future officers, employees and members of the District Council and its constituent locals were enjoined from committing any act of racketeering defined in 18 U.S.C. § 1961; from knowingly associating with any member or associate of the LCN or any other criminal group or with any person prohibited from participating in union affairs (collectively referred to as “barred persons”); and from obstructing or otherwise interfering with the work of the court-appointed officers;

b. The district court was to appoint an Investigations and Review Officer (IRO) who has the power to review the actions, including financial actions and changes in the Constitution and By-Laws of the District Council, taken by the District Council and to veto any actions which would violate the Consent Decree.

Specifically, the Consent Decree provided that the District Council shall give prior written notice of, and the Investigations and Review Officer shall have the authority to

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<sup>13</sup> The terms of this Consent Decree are summarized in United States v. District Council of New York City, 409 F. Supp. 2d 439 (S.D.N.Y. 1996).

review: (a) all expenditures of the District Council and its constituent locals in excess of \$250.00 occurring after the date of entry of this Consent Decree; (b) all contracts or proposed contracts on behalf of the District Council and its constituent locals, except for collective bargaining agreements; and (c) all proposed changes to the Constitutions or By-Laws of the District Council and the constituent locals. The IRO shall further have the authority to veto any such expenditure, contract or proposed contract, or proposed change to the Constitutions or By-Laws which, if effectuated, would violate the injunction set forth in paragraph one above. Nothing contained herein shall in any way limit the authority of the IRO to initiate disciplinary proceedings against any person of this Consent Decree with respect to any expenditure, contract or proposed contract, or proposed change to the Constitutions or By-Laws.

The IRO had the authority to hire personnel as necessary to conduct investigations and to bring disciplinary charges against any member of the District Council or its constituent locals for violation of the Consent Decree or the misconduct provisions of the By-Laws and Working Rules of the District Council. All of the decisions of the IRO except decisions to bring disciplinary charges, are subject to review by the district court.

The IRO was also given the authority to: (a) upon application to the district court to issue subpoenas for testimony and documents from any person or entity; (b) attend every meeting of the District Council's Executive Board; (c) have complete and unfettered access to, and the right to make copies of, all books, documents, files and other records of the District Council, its constituent local unions and their employees and officers; (d) take and require sworn statements or sworn oral deposition of any officer, employee or member of the District Council or any of its constituent local unions concerning any matter within the IRO's authority under the Consent Decree.

c. To hear and rule on the disciplinary charges made by the IRO, the consent decree appointed an Independent Hearing Committee (IHC) composed of five named persons. Charges are to be heard by a panel composed of three members of the hearing committee with the

IRO and the charged party selecting one member each and the two members selecting the third member of the hearing panel. The Consent Decree also specified the procedures for the disciplinary procedures; which were the same as generally applicable to labor arbitration proceedings. Decisions of the three member panel are subject to review by the district court under the same standard of review applicable to review of final agency action under the Administrative Procedure Act.

d. The IRO also has the authority to propose changes in the operations of the District Council and its constituent locals relating to the procedures for disciplining misconduct of officers and the procedures for filling vacancies in union offices.

e. The current officer of the District Council are to remain in office until the next scheduled election in June 1995. The IRO is to supervise the June 1995 election which is to be conducted by secret ballot among the rank-and-file membership of the local unions making up the District Council. The secret ballot is to take place under rules formulated by the IRO after publication for comment by the membership of the District Council. The election rules formulated by the IRO are to be made a permanent part of the rules of the District Council.

f. The Consent Decree mandated new job referral rules for the District Council and its constituent local unions. These rules, which must be followed by the District Council and each of its constituent locals, are designed to prevent unfair discrimination and to prevent the use of the job referral rules from being used in a manner to intimidate the membership in the exercise of their lawful right to participate in union affairs. The IRO has the authority to supervise the adoption, implementation and operation of the new job referral rules and to issue any direction to any local union or its officers, employees or members as may be appropriate to remedy any violation of the new job referral rules subject to review by the Independent Hearing Committee.

g. The By-Laws of the District Council were amended to conform with all the terms of the Consent Decree.

h. The costs of the court-appointed officers and their staffs were to be paid by the District Council.

i. The district court retained jurisdiction to decide any and all issues arising under the Consent Decree.

5. On March 17, 1994, Paschal McGuinness entered a consent decree in which he agreed to relinquish his positions as President of Carpenters Local 608 and delegate to the District Council effective with the expiration of his terms in those offices in June 1994. McGuinness also agreed to relinquish his right to hold elected, appointed or salaried position in the District Council or its constituent locals during the term of the Consent Decree and to be bound by the terms of the March 4, 1994, Consent Decree, including being subject to the disciplinary authority of the IRO.

6. On March 16, 1994, the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (the International), the parent union of the District Council, formally endorsed the March 4, 1994, Consent Decree and agreed to be bound by its terms insofar as the operations of the District Council are concerned. The International agreed to contribute \$300,000.00 to the budget of the court-appointed officers.

7. On April 6, 1994, Vincent DiNapoli entered into a Consent Decree in which he agreed to refrain from influencing or attempting to influence the affairs of the District Council or any of its constituent locals.

**F. LEADING COURT DECISIONS:**

1. United States v. District Council of New York City, 778 F. Supp. 738 (S.D.N.Y. 1991).

In their motion to dismiss the complaint pursuant to Rule 12 (b)(6), Fed. R. Civ. P., the defendants alleged that: (1) the RICO statute was unconstitutionally vague; (2) they did not have adequate notice of an association-in-fact enterprise; (3) the pleading of the pattern of racketeering did not meet the H.J. Inc., 492 U.S. 229 (1989), standards; (4) a RICO claim needed to comply with Fed. R. Civ. P. 9, even if fraud was not alleged; and (5) they did not have adequate notice of the alleged aiding and abetting.

The district court held that only those predicate racketeering acts that sound in fraud must be pleaded in conformity with Rule 9(b), and that the complaint sufficiently alleged

the RICO violations. *Id.* at 746-48. The district court also held that the criminal standard applied to judging aiding and abetting liability in Government civil RICO suits for equitable relief, and that the complaint adequately alleged the aiding and abetting theory of liability, including allegations that union officers failed to carry out their fiduciary duties to investigate and discipline union corruption. *Id.* at 748-57.

The district court held that the complaint adequately alleged an association-in-fact enterprise consisting of the District Council, and its Benefit Funds and Constituent Local Unions and that the alleged pattern of racketeering activity had the requisite nexus to the alleged enterprise and satisfied the “continuity” requirements. *Id.* at 757-760.

The district court also held that the alleged RICO enterprise was not unconstitutionally vague, *id.* at 760-62, noting that “[a] reasonable person cannot be surprised that his receipt of labor payoffs, abuse of position at the District Council, Benefit Funds and Local Unions, and similar activity by his cohorts, may mean that those entities are named as [a RICO] enterprise.” *Id.* at 762.

The district court further held that the inclusion of new officers of the District Council as defendants in the supplemental complaint did not violate union members’ First Amendment rights, and that defendants’ other First Amendment challenges to the Government’s requested relief were premature on a pre-trial motion to dismiss. *Id.* at 762-63. The district court also rejected the defendants’ arguments that the Government was required to “proceed by way of criminal prosecutions instead of civil RICO,” *id.* at 763, and that certain alleged surpluses should be stricken from the complaint. *Id.* at 764-66.

2. United States v. District Council of New York City, 1991 WL 243385, (S.D.N.Y. Nov. 8, 1991).

This opinion was issued upon a motion brought by a defendant to compel two non-party witnesses to answer deposition questions propounded by the defendant. The witnesses refused, citing their Fifth Amendment privilege. The defendant argued that the instant case is the outcome of a joint state and federal investigation and that the witnesses, having appeared before a federal grand jury, are immunized due to New York State law which grants transactional immunity to witnesses who appear before a New York State grand jury. Therefore, the defendant argued that the witnesses are not entitled to invoke their Fifth Amendment privilege.

The Government argued that the witnesses were not entitled to immunity and were entitled to invoke their Fifth Amendment privilege. The Government maintained that the state immunity would not apply since the witnesses appeared before a federal grand jury, even though the investigation may have been both state and federal in nature. The district court found that the witnesses were not subject to the New York State statutory immunity and could therefore invoke their Fifth Amendment privileges.

The defendants also moved for a stay of discovery with regard to the depositions and document productions for defendants McGuinness, Zeidman, Devine, and McHale. Defendants argued that they were put to a Hobson’s choice of either defending themselves fully in the civil case by testifying and risking criminal prosecution or invoking their Fifth Amendment privilege, and refusing to testify. The district court found that, although presented with a difficult choice, the defendants were not entitled to a stay of discovery.

3. United States v. District Council of New York City, 782 F. Supp. 920 (S.D.N.Y. 1992).

This decision involved the appeal of the District Council and the other defendants of the decision of the United States Magistrate to compel the testimony of two non-party witnesses, who previously testified under grants of immunity, and their production of documents over the witnesses' assertion of their privilege against self-incrimination. The defendants argued that the witnesses no longer had a justifiable basis for assertion of their privilege against self-incrimination since the Government could never show that any prosecution of them for the conduct revealed in their testimony was not based, at least indirectly, on the immunized testimony. The district court rejected this argument, noting that the witnesses could be subject to prosecution if the Government was able to demonstrate that the prosecution was based upon evidence wholly independent of the immunized testimony.

The several defendants had also appealed the Magistrate's denial of their motion to stay discovery requests directed at them because of the Government's refusal to say whether or not they were the subjects of a criminal investigation. Noting that the general rule is that criminal and civil proceedings can go forward simultaneously absent special circumstances, cf. United States v. Kordel, 397 U.S. 1 (1970), the district court affirmed the magistrate's ruling. Since McGuinness had been acquitted of the charges against him and since there was no indictment pending against any of the others, the special circumstances required for a stay of the civil proceedings had not been established.

4. United States v. District Council of New York City, 1993 WL 159959 (S.D.N.Y. May 12, 1993).

This opinion involved the district court's ruling on the defendants' motions for summary judgement, pursuant to Rule 56, Fed. R. Civ. P.

The principal contention raised by the defendants was that whatever corruption existed in the District Council at the time of trial, that corruption was, after the three year hiatus between filing and the ruling on the motion, insufficient to warrant the relief the Government requested. Mainly, the defendants contended that the June 1991 election, which resulted in the defeat of the former officers and the installation of new officers, established that any problems had been remedied so that the injunctive relief sought with respect to the District Council was inappropriate. The district court held that construing the evidence in the light most favorable to the Government, it could not hold that the matter was appropriate for summary judgement.

The defendants also asserted that much of the evidence upon which the Government relied in opposing the motion for summary judgement would be inadmissible at trial and, therefore, summary judgement should be granted. The district court held that, although the party opposing summary judgement must establish that there is sufficient admissible evidence in opposition to the moving party, the court did not have sufficient information to rule that the evidence proffered by the Government was inadmissible. These challenges were construed as motions in limine and the Government was directed to respond to them.

Finally, the district court held that, although it perceived a number of close factual questions, the evidence presented a sufficient disagreement to require submission to the fact finder.

5. United States v. District Council of New York City, 832 F. Supp 644 (S.D.N.Y. 1993).

This opinion involved the district court's ruling on the various defendants' motions in limine which were considered as having been filed in connection with the defendants' motions for summary judgment.

First, the defendants moved to exclude the testimony of several witnesses on the ground that their testimony was not admissible under Rule 801(d)(2)(E), Fed. R. Evid., because the evidence was insufficient to prove the existence of a conspiracy, the evidence did not show the defendants' membership in the conspiracy, the conspiracy asserted as being established by the Government differed from that alleged in the complaint, and the offered statements were not made in furtherance of the conspiracy. The district court rejected these objections in limine on the ground that it would admit the statements subject to later ruling on a full evidentiary record. The district court also held that the claim that the conspiracy differs from that alleged is not a ground for exclusion of evidence of conspiratorial statements, because no conspiracy need be alleged at all to make the statements admissible. Id. at 647-49.

The defendants also objected to the introduction of out-of-court statements made by contractors that they had paid the defendants and were now asserting their privileges against self-incrimination. The district court deferred this objection until trial. Id. at 649-50.

Relying on Brink's, Inc. v. City of New York, 717 F. 2d 700 (2d Cir. 1983), the district court held that there was a permissible inference of guilt which could be drawn against the defendants from the invocation of the privilege against self incrimination by non-party witnesses who are shown by the evidence to be co-conspirators of the defendants. Id. at 650-52.

The district court also declined to preclude the testimony of three witnesses whose depositions had not been taken because the fault for the failure to take the depositions was the defendants' own. Id. at 652-54.

6. United States v. District Council of New York City, 1994 WL 75026 (S.D.N.Y. March 4, 1994).

In this opinion, the district court declined to exclude the testimony of an expert witness to describe the structure of La Cosa Nostra, its family hierarchy, rules of operation, its ruling body (the Commission), and its activities in labor racketeering. The district court, relying on United States v. Locasio, 6 F. 3d 924, 936-39 (2d Cir. 1993), held that it was not required to admit the testimony, but that the testimony would "assist the trier of fact to understand the evidence or to determine a fact in issue."

7. United States v. District Council of New York City, 1994 WL 88031 (S.D.N.Y. March 11, 1994).

In this opinion, the district court granted a defendant's motion to exclude the testimony of Alfonso D'Arco to the effect that defendant McGuinness was "controlled" by Jimmy Ida, the alleged consigliere of the Genovese LCN family, because the Government failed to disclose the substance of D'Arco's testimony in this regard when it would have been responsive to an interrogatory which had been propounded to the Government. The fact that the Government's attorneys did not know of the substance of D'Arco's testimony was irrelevant where others working with the attorneys did know of the substance of D'Arco's testimony at the time of the interrogatory.



8. United States v. District Council of New York City, 1994 WL 704811 (S.D.N.Y. Dec. 16, 1994).

The district court ordered the District Council to publish the Investigations and Review Officer's periodic reports about his activities to rid the District Council of Corruption in the Union's newspaper, *The Carpenter*.

9. United States v. District Council of New York City, 880 F. Supp. 1051 (S.D.N.Y. 1995).

The district court upheld the proposed rules by the Investigations and Review Officer (IRO) appointed pursuant to the Consent Decree entered March 4, 1994, governing the election of officers of the District Council under the supervision of the IRO.<sup>14</sup>

10. United States v. District Council of New York City, 941 F. Supp. 349 (S.D.N.Y. 1996).

This opinion is the leading case that sets the standards of review for disciplinary proceedings under the Consent Decree in this civil RICO suit. The district court held that since the Consent Decree provided that disciplinary hearings "shall be conducted under the rules and procedures generally applicable to labor arbitration proceedings," *id.* at 362, the court-appointed Investigations and Review Officer (IRO) must prove disciplinary charges by a preponderance of the evidence. *Id.* at 362-65.

Applying that standard, the district court upheld the IRO's findings that a union member violated the Consent Decree and its permanent injunction by knowingly associating with a member or associate of organized crime; breaching his duty of fair representation and other misconduct, and also violated various union rules by invoking his Fifth Amendment right to refuse to answer questions regarding his alleged misconduct. *Id.* at 364-87.

The district court also held that the IRO's decision to permanently ban the union member from holding union office was not arbitrary or capricious.

11. United States v. District Council of New York City, 972 F. Supp. 756 (S.D.N.Y. 1997).

The district court held that: (1) that the Consent Decree did not require prior court approval of the District Council's proposed restructuring plan, and (2) union members and local unions were not entitled to intervene.

12. United States v. District Council of New York City, 2005 WL 1137877 (S.D.N.Y. 2005).

The district court declined to extend the two-year term of the Independent Investigator appointed by the district court.

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<sup>14</sup> For other decisions involving the district court's review of proposed union election rules, see 1999 WL 386935 (S.D.N.Y. June 11, 1999) and 1999 WL 494121 (S.D.N.Y. July 12, 1999).

13. United States v. District Council of New York City, 2007 WL 1157143 (2d Cir. April 18, 2007), rev'g, 409 F. Supp. 2d 439 (S.D.N.Y. 2006).

The Second Circuit held that the district court erred in ruling that a collective bargaining agreement entered into by the District Council did not violate the Consent Decree entered March 4, 1994, and the case was remanded to the district court for entry of an order of contempt and imposition of an appropriate remedy.

### 13. **HEREIU LOCAL 54-EDWARD HANLEY**

#### **A. CASE NAME:**

United States v. Edward T. Hanley, et al., Civil Action No. 90-5017 (GEB), United States District Court for the District of New Jersey. Complaint filed December 19, 1990.

#### **B. DEFENDANTS:**

The complaint named three groups of defendants: (1) The first group consisted of the following “nominal” defendants: Local 54 of the Hotel Employees Restaurant Employees International Union (Local 54), its Executive Board, and its Severance Trust Funds; (2) Union official defendants: Edward T. Hanley (President of the International Union), Roy Silbert (President Local 54), Felix Bocchicchio, Jr. (Vice President, Local 54), Frank Gerace (former President, Local 54), Thelma Hilferty (Secretary-Treasurer), Anthony Staino, Jr. (Business Agent), Joseph Erace (Business Agent), Karlos Lasane (Business Agent), Eli Kirkland (Organizer), Lawrence Smith (Administrator/Associate of Bruno/Scarfo Philadelphia-based LCN Family); and (3) alleged members and associates of the Bruno/Scarfo LCN family including: Nicodemo Scarfo, a/k/a “Little Nicky” (Boss), Frank Lentino (capo), Albert Daidone (associate), Phillip Leonetti (underboss), Lawrence Merlino, a/k/a “Yogi”, Raymond Martorano a/k/a/ “long John” (made-member), Frank Materio (associate), Ralph Natale (associate), Anthony Piccolo, a/k/a “Tony Buck” (acting boss), Nicodemo Salvatore Scarfo a/k/a “Nicky” (associate).

#### **C. SUMMARY OF THE COMPLAINT:**

The complaint alleged that the RICO enterprise was an association-in-fact consisting of “Local 54, its predecessor and/or component Locals 170, 33, 491 and 741, the Severance Plan, and the International Trust Fund and its component, the Local 54, Welfare Plan.” The complaint referred to the enterprise as “the Local 54 Enterprise.”

The complaint described the structure, organization and jurisdiction of Local 54 and the Hotel Employees Restaurant International Union, AFL-CIO and the Executive Boards of the International and of Local 54. The complaint also described the structure and nature of the

components of the charged enterprise. The complaint identified the individual defendants' union position and LCN status or association.

In a 27-page section, the complaint described the structure, nature and history of the Bruno/Scarfo LCN Family that operates primarily in the Philadelphia Metropolitan area and New Jersey, and set forth a chronological description of the acts undertaken by the Bruno/Scarfo LCN Family and its union associates and others to gain and maintain control of Local 54 and related matters for the period 1970 through 1988.

The complaint alleged 13 predicate acts of racketeering as follows: (1) three acts of embezzlement of funds of Local 54 by diverting such funds to the personal benefit of the named defendants, in violation of 29 U.S.C. § 501(c) and 18 U.S.C. § 664; (2) extortion of Local 54 members' property rights, in violation of 18 U.S.C. § 1951, including loss of money by reason of excessive salaries and benefits paid to Local 54, Executive Board members and other officers, the right of union members to free speech and democratic participation in internal union affairs as guaranteed by 29 U.S.C. § 411, and the right of union members to loyal and responsible representation by their union officers as guaranteed by 29 U.S.C. § 501(a); (3) three acts of murder and attempted murder to enable LCN boss Nicodemo Scarfo and his LCN associates to gain and maintain control of Local 54; (4) five acts of extortion of money from employers by Nicodemo Scarfo and his LCN associates, in violation of 18 U.S.C. § 1951; and (5) one act of unlawful receipt of money by an officer of Local 54 from an employer, in violation of 29 U.S.C. § 186(a)(b)(1) and (d).

The complaint alleged three causes of action. First, the complaint alleged that from 1970 to December 19, 1990, the named individual defendants conspired together and with others to participate in the affairs of the alleged enterprise and to acquire and maintain an interest in the alleged enterprise through the alleged pattern of 13 racketeering acts as set forth above, in violation of 18 U.S.C. §§ 1962(b), (c) and (d). The second cause of action alleged that the defendants acquired and/or maintained an interest in and/or control of the Local 54 Enterprise

through the alleged pattern of 13 racketeering acts, in violation of 18 U.S.C. § 1962(b). The third cause of action alleged that the defendants participated in the affairs of the Local 54 Enterprise through the alleged pattern of 13 racketeering acts, in violation of 18 U.S.C. § 1962 (c).

**D. RELIEF SOUGHT:**

The relief sought under the complaint included the following:

1. An injunction restraining the LCN defendants, and all other persons in active concert or participation with them, from participating in the affairs of Local 54 and/or its affiliated funds or any other labor organization or employee benefit plan or from having any dealings with any officer, trustee, etc. of Local 54 or any of Local 54's affiliated benefit funds or any other labor organization or employee benefit fund, about any matter which relates to the management and/or control of Local 54 or its affiliated benefit funds;
2. An injunction enjoining the Executive Board of Local 54 and its members and all persons in active concert with them, from committing any act of racketeering, as defined in 18 U.S.C. § 1961(1), and from associating with the named LCN defendants and any other member of the LCN and any other person in active concert or participation with them.
3. The appointment of a Trustee to secure and safeguard the funds of Local 54, to discharge the duties of the Executive Board, Local and Severance Funds and to investigate and discipline corrupt officers; to monitor the expenditure of union funds, appointments to union office, contracts and proposed contracts;
4. That the district court supervise general elections run by Trustees appointed by the court; empower Trustees to prevent racketeering acts until elections can be held;
5. The district court appoint Administrators to serve until such time as LCN domination and corruption of Local 54 is removed, to oversee operations of the union and affiliated benefit funds;
6. That the district court enjoin defendants from interfering with the Trustees or Administrators;

7. That the district court order all defendants found to have violated 18 U.S.C. § 1962 to disgorge of all proceeds of their violations;

8. That the district court order the cost of Trustees, Administrators and all other costs be borne by the defendants; and

9. That the district court grant the United States such other relief as may be necessary and proper, including attorneys' fees.

**E. OUTCOME OF CASE:**

1. On February 20, 1991, Judgments for Default and Permanent Injunctions as requested by the Government were entered against LCN defendants Nicodemo Scarfo, his son, Nicodemo Salvatore Scarfo and Ralph Natale.

2. On March 26 and 28, 1991, Consent Judgments and permanent injunctions as requested by the Government were entered against defendants Frank Lentino, Frank Materio and Eli Kirkland.

3. a. On April 12 and 26, 1991, Consent Decree Orders were entered against defendants Leonetti, Merlino, Erace, Materio, Lentino, Franzese, McBride, Ripp, Smith, Hanley, Gerace, Silbert, Boccichio, Hilferty, Daidone, LaSane, Staino, Marterano, Piccolo, and Local 54 and its Severance Funds. These orders generally granted all of the relief requested by the Government, permanently enjoining each defendant from participating in any way, directly or indirectly, in the provision of services to and/or the management and/or control of the affairs of any labor organization and from having any dealings with the officers, trustees or administrator of any labor organization employee benefit fund. The defendants were also permanently enjoined from interfering with the functions of the court-appointed Administrators and Trustees, or any such other officer. Certain defendants, such as Frank Gerace and Edward Hanley, were additionally enjoined from being employed by labor organizations for a period of years and were enjoined from interfering with the general elections to be held within the union membership. The Consent Decrees also provided for court-supervised election of Local 54 officers.

b. The Consent Decree granted the court-appointed Monitor with all of the powers, privileges and immunities of a person appointed pursuant to Rule 66, Fed. R. Civ. P. and which are customary for court appointed officers performing similar assignments, including the following powers to:

- (1) Investigate, audit and review all aspects of Local 54 and its affiliated benefit plans (which shall include the Local 54 Severance Fund) and report periodically or when otherwise requested by the District Court on such matters to the District Court and the signatory entities;
- (2) Appoint, discharge or reassign personnel of Local 54 for good cause shown. Discharges shall be upon notice with an opportunity to be heard by the Monitor and will thereafter be subject to review by the United States District Court on the same basis of review (record review) as would be available on review of a final agency decision under the Administrative Procedure Act, 5 U.S.C. § 501 *et seq.*;
- (3) Hold exclusive authority (which he/she may delegate) to control all disbursements of Local 54 monies, all Local 54 purchases, all Local 54 assets, until the lawful election of the secretary-treasurer by union-wide election as described in paragraph 13 herein, after which time the Monitor shall hold the authority to review and approve all disbursements;
- (4) File such lawsuits as are deemed necessary to recover monies or otherwise advance the interests of Local 54;
- (5) Review and terminate, after non-binding consultation with the Executive Board, contracts with vendors or service providers to Local 54 and enter into or terminate all leases for real and personal property;
- (6) Review all collective bargaining agreements, the processing of grievances, and other trade union matters, and disapprove such action or inaction that (i) has been undertaken or withheld in violation of the Constitution or By-laws of the union, or (ii) is contrary to law, or (iii) constitutes an act of racketeering as defined by 18 U.S.C. § 1961;
- (7) Request the United States Attorney or any agency of the United States to provide legal, audit and investigative personnel to assist in the execution of the Monitor's duties, such assistance to be at the expense of the United States and not chargeable to either Local 54 or its affiliated benefit funds;
- (8) Subject to the approval of the District Court, retain legal, accounting or other support, where necessary and consistent with the Monitor's duties as set forth herein, and to utilize the funds of Local 54 to pay for such services;
- (9) Request the United States Attorney to seek relief from any court to protect or advance the interests of Local 54 and/or its benefit funds and to perform such acts as are necessary to effectuate such goals.

4. During 1992, the court appointed Monitor, pursuant to election rules which he had promulgated with the approval of the district court, disallowed the candidacy of three persons who were found to be closely allied with the Local 54 administration which had been removed. In a November 30, 1992, order the district court upheld the ruling of court appointed Monitor.

5. A court-supervised election of officers was held on January 26, 1993, and the interim President chosen in the immediate period following the entry of the consent decree was elected President of the Local.

**F. LEADING COURT DECISIONS:**

1. United Sates v. Henley, 1992 WL 684356 (D.N.J. Dec. 3, 1992), aff'd, 6 F. 3d 780 (3d Cir. 1993) (Table).

The district court upheld the court-appointed Monitor's decision to disallow the candidacies of three candidates who had been found to be too closely allied with the administration which had been removed by the Consent Decree. In reaching his conclusion, the District Judge ruled that the Monitor's decision would be upheld if it was supported by "substantial evidence" in the record, taken as a whole. In applying this standard, the district court rejected the Government's position that the ruling of the Monitor must be upheld unless the ruling was "arbitrary and capricious"; and he also rejected the disqualified candidates' claim that they were entitled to a full review in "an adversarial setting, complete with cross-examination and subpoena powers."

In disallowing the candidacies of two candidates, Renzi and his running mate, DeRose, the district court found that there was substantial evidence that Renzi and DeRose were selected by the ousted defendants, alleged LCN figures Ralph Natale and Albert Daidone. The district court held that New Jersey State police surveillances of lengthy meetings which messengers for Natale and Daidone had with Renzi and DeRose, the fact that Renzi was Natale's cousin, and the fact that Renzi lied to the monitor about the length and nature of the meetings constituted substantial evidence warranting the disallowance of their candidacies.

With respect to Edward McBride, a candidate for President of Local 54, the district court held that evidence of McBride's past associations with Natale, Daidone, officials of Local 30 of the Roofers' Union and other organized crime figures constituted substantial evidence warranting the disallowance of his candidacy, even though there was no evidence of current association with organized crime.



#### 14. LOCAL 100 OF HEREIU

**A. CASE NAME:**

United States v. Amodeo and Local 100 of Hotel Employees & Restaurant Employees International Union AFL-CIO (Local 100 and HEREIU) et al., 92 CV 7744 (RPP), United States District Court for the Southern District of New York. Complaint Filed October 23, 1992.

**B. DEFENDANTS:**

The complaint named as defendants, Local 100 of the Hotel Employees & Restaurant Employees International Union, Anthony R. “Chick” Amodeo, Sr., President and Business Manager of Local 100, and Anthony R. “Tony” Amodeo, Jr., Vice-President of Local 100. The complaint also named the Hotel Employees & Restaurant Employees International Union (HEREIU) as a nominal defendant.

**C. SUMMARY OF COMPLAINT:**

The complaint alleged that from its creation in 1983 until October 1992, Local 100, which represents workers employed in New York City’s restaurant industry, had been infiltrated by corrupt individuals and organized crime figures, who had conducted the affairs of the union through a pattern of racketeering activity, exploited their control over Local 100 for personal gain, and had systematically traded the rights of Local 100’s members for illegal payoffs. In particular, the complaint alleged that before the 1986 convictions and imprisonment of Colombo LCN Boss Carmine Persico, Sr., and John R. “Jackie” DeRoss, a Colombo capo and soldier who served as First Vice President of Local 100 since 1983, the LCN’s control over Local 100 was shared between the Colombo and the Gambino LCN Families. When Persico and DeRoss began serving their federal prison terms, Colombo Family control over Local 100 began to erode, and the Gambino LCN assumed control of Local 100. At the time the complaint was filed, the Amodeos allegedly reported directly to Thomas Gambino, an alleged capo and soldier in the Gambino LCN Family, who reported directly to Gambino then LCN Family Boss John Gotti.

Both Amodeos allegedly used their positions as officers of Local 100 to control the union on the behalf of the Gambino LCN Family.

The complaint also alleged that since 1983, the officers of Local 100 had taken bribes from employers, converted collective bargaining agreements into tools of extortion, have failed to enforce the rights of union members, and had taken bribes from union members. As result of the corruption, extortion, and intimidation, Local 100 had been defrauded, its members deprived of their rights, and its membership reduced from 25,000 to 5000 union members.

The alleged RICO enterprise consisted of an association-in-fact comprised of Local 100 and its officers, employees, and associates, which was referred to as the “Local 100 Enterprise.”

The complaint alleged four claims for relief: (1) and (2) that the defendant officers of Local 100 knowingly acquired and maintained an interest in and control over the Local 100 Enterprise through a pattern of racketeering activity and conspired to do so, in violation of 18 U.S.C. §§ 1962 (b) and 1962 (d), respectively; and (3) and (4) that the defendant officers of Local 100 did conduct and participate in the conduct of the affairs of the Local 100 Enterprise through a pattern of racketeering activity, and conspired to do so, in violation of 18 U.S.C. §§ 1962 (c) and (d), respectively.

The complaint alleged that the defendant officers of Local 100 together with LCN figures committed a pattern of racketeering activity in support of these four claims for relief. The alleged pattern included twelve racketeering acts involving extortion of restaurant employers, bribery and prohibited payments to labor officials, in violation of 29 U.S.C. § 186 (b)(1), New York Penal Law Section 180.25, and 18 U.S.C. §§ 1951 and 2.

The complaint also alleged five predicate acts of extortion of union members’ rights, in that the defendant officers, together with the Colombo and Gambino LCN Families, deprived the union membership of their rights under 29 U.S.C. §§ 501(a) and 411 to loyal representation, free speech and democratic participation in internal union affairs, all in violation of 18 U.S.C. § 1951.

The complaint also alleged that “[e]ach of the officers of Local 100 has aided and abetted each of the racketeering acts set forth . . . that occurred during his or her tenure, by, at a minimum, knowingly refusing to take any action to redress that racketeering act.”

**D. RELIEF SOUGHT:**

1. Preliminary Relief:

a. The relief sought included a preliminary injunction barring defendants Amodeo, Sr., and Amodeo, Jr., and their associates from any participation in the affairs of Local 100 or any other labor organization and from owning, operating, or being employed by any business employing Local 100 members. The complaint also sought to bar the Amodeos and their associates from committing any acts of racketeering and from associating with members of the LCN or other organized crime groups.

b. In addition, the complaint sought the appointment of a court officer, pendente lite, to oversee the daily affairs of Local 100, including review of collective bargaining agreements, contracts, changes in the constitution or bylaws of Local 100; and to supervise the discipline of corrupt officers, agents, employees, or union members. The complaint also sought to preliminarily enjoin the union’s officers and membership from interfering with the court officer in the execution of his duties and to grant the government any other preliminary relief necessary to prevent further RICO violation involving criminal control over and exploitation of Local 100.

2. Permanent Relief:

a. The government sought to permanently bar the Amodeos and all other persons in active concert or participation with them, from any participation in the affairs of Local 100 or any other labor organization or any participation in any business dealings with officers or employees of Local 100 or any other labor organization about any matter which relates to the affairs of Local 100 or any other labor organization, from committing any acts of racketeering as

defined in 18 U.S.C. § 1961; and from associating with any member of LCN or other organized crime members.

b. The complaint also sought other relief: court-ordered and supervised general elections; appointment of a Trustee to investigate corruption and ensure democratic elections; a judgment declaring that Local 100 had been controlled and exploited by the LCN; an order directing that Local 100 bear costs of the court-appointed officers and that the district court award any other relief necessary to prevent resumption of LCN control over Local 100. The complaint also sought to permanently enjoin the Amodeos and others associated with Local 100 from interfering with the trustee or court-appointed officer in the execution of his duties.

**F. OUTCOME OF THE CASE:**

Simultaneously with the filing of the complaint, a Consent Decree, dated October 23, 1992, was filed that was agreed upon by all the defendants. The Consent Decree included the following provisions:

1. The district court appointed a “Court Officer” to investigate corruption and oversee the actions of a court-appointed Trustee for Local 100 as described below in paragraph 2.

The court-appointed Trustee’s authority included the powers:

- a. To administer, supervise and conduct the daily affairs of Local 100;
- b. To appoint new officers, business agents, executive board members, trustees, delegates, shop stewards, administrative and/or clerical employees, professional and technical advisors who will perform administrative and operational functions of Local 100 and the Local 100 Executive Board;
- c. To remove, pursuant to the HEREIU Constitution, any Local 100 officer, business agent, executive board member, trustee, delegate, shop steward, administrative and/or clerical employee, any professional and/or technical advisors and/or advisory committees;
- d. To retain legal counsel and to employ accountants, consultants, experts and other necessary personnel to assist the Trustee in the discharge of his duties;
- e. To remedy any corruption identified by the Court Officer to have been committed concerning Local 100, and to protect the rights of

the members of Local 100, consistent with the provisions of Title 29 of the United States Code, the HEREIU Constitution, the By-Laws of Local 100 and the Consent Decree;

- f. To assist the Court Officer in the investigation of corruption and abuse within Local 100;
- g. To negotiate collective bargaining agreements or other contracts, or to designate persons to handle such negotiations on behalf of Local 100 with any employer or employer organization, or any representative of such employer or employer organization or such other entities or firm having contractual relations with Local 100.
- h. To administer and supervise Local 100's operations with respect to the HEREIU Funds;
- i. To review or direct the review of all current and past books, records, files, accounts and correspondence of Local 100 and the Executive Board; and to do so without prior notice to any current or former Local 100 officers, the Executive Board or any agents thereof;
- j. To administer, conserve and obtain an accounting of the assets and liabilities of Local 100;
- k. To seek recovery of any and all assets of Local 100 that may have been dissipated or otherwise misappropriated;
- l. To withhold, to the extent permitted by law, the payment of any and all funds, salaries, fees or benefits of whatever kind or description from any individual or entity who or which has misappropriated, or is about to misappropriate any assets of Local 100, until the completion of the accounting described above and the resolution of any and all claims instituted against any individual or entity by or on behalf of Local 100 and the Executive Board;
- m. To conduct shop steward elections, by secret ballot, within ten (10) months of the Trustee's appointment by this court;
- n. To direct and supervise the election of new officers, executive board members, trustees and delegates prior to the termination of his trusteeship.
- o. To conduct or cause to be conducted an educational program for the membership of Local 100 relating, but not limited to, collective bargaining and union democracy; and
- p. To apply to the court for such assistance as may be necessary and appropriate to carry out the powers conferred by HEREIU upon the Trustee.

- q. To furnish the district court and the United States Attorney for the Southern District of New York with a complete report every three months.

3. The Trustee was to remain in office for eighteen months or until the election of new officers, executive board members, trustees and delegates, whichever date is later. Upon the application on notice by HEREIU or the Government, the District Court may extend the trusteeship as the Court finds necessary.

- 4. The powers, rights and responsibilities of the Court Officer included the powers:
  - a. To investigate alleged corruption by any present or former Local 100 officers, business agents, executive board members, trustees, delegates, clerical employees, administrative employees, or professional and/or technical advisors;
  - b. To investigate alleged misconduct by an employer or potential employer, including such employer's officers, stockholders, employees, agents, professional and/or technical advisors and consultants, presently or formerly under collective bargaining agreement with Local 100;
  - c. To supervise, direct and assist the Trustee in recovering any and all assets of Local 100 of which Local 100 may have been wrongfully deprived;
  - d. To supervise, direct and assist the Trustee in recovering any and all assets of Local 100, which may have been wrongfully diverted, including membership dues and fees; and to supervise, direct and assist the funds in recovering contributions owed by any employer of the members of Local 100;
  - e. To review all current and past books, records, files, accounts and correspondence of Local 100 and the Executive Board for the time period beginning 1982 and continuing up to and including the date of this Order, upon three (3) days prior notice to the Trustee;
  - f. To review all current and past books, records, files, accounts and correspondence for the time period beginning 1986 and continuing up to and including the date of this Order and for a longer period if deemed necessary by the Court Officer, of any employer presently or formerly under collective bargaining agreement with Local 100;
  - g. To subpoena witnesses and documents;
  - h. To take testimony formally or informally, on the record under oath before a court reporter or otherwise as the circumstances may require in the Court Officer's sole discretion;

- i. To retain legal counsel and to employ accountants, consultants, experts and other necessary personnel to assist the Court Officer in the discharge of her duties;
- j. To request the assistance of federal and local law enforcement authorities, without charge to the trusteeship, in effecting the powers, rights and responsibilities enumerated herein and accomplishing the mandate of ending corruption and abuse within Local 100;
- k. To refer possible violations of criminal law to federal or local law enforcement authorities as appropriate;
- l. To apply to the district court for such assistance as may be necessary an appropriate to carry out the powers conferred upon the Court Officer; and
- m. To investigate and oversee any actions taken by the Trustee pursuant to the Consent Decree in the sole discretion of the Court Officer.

5. The Consent Decree also provided that the Court Officer and his/her designee(s) shall, in addition to the powers and duties enumerated in the Consent Decree, have all of the powers, privileges and immunities of a person appointed pursuant to Rule 66, Fed. R. Civ. P. and which are customary for court-appointed offices performing similar assignments. Such powers may be modified by the United States District Court to achieve the purposes of the action herein, including but not limited to the protection of members' rights and the assets of the Local and its affiliated benefit plans.

6. The Consent Decree also entered a permanent injunction, enjoining:
- a. Defendants Anthony R. Amodeo, Sr. and Anthony R. Amodeo, Jr. from participating in any way in the affairs of Local 100, or any other local union affiliated with HEREIU, and from having any dealings, directly or indirectly, with any officer or employee of Local 100 or any other local union affiliated with HEREIU about any matter which relates directly or indirectly to the affairs of HEREIU, and from owning, operating, or being employed by, any business which employs HEREIU members;
  - b. The current officers of Local 100 and their representatives and successors from associating with Anthony R. Amodeo, Sr., Anthony R. Amodeo, Jr., and with any member or associate of any organized crime group.

**G. LEADING COURT DECISIONS:**

1. United States v. Amodeo, 44 F.3d 141 (2d Cir. 1995).

Pursuant to the common law right of access, the district court released to the public a modified version of a sealed investigative report that had been filed with the district court. The Court Officer appointed pursuant to the Consent Decree filed in this civil RICO case had redacted and edited the investigative report. A subject of the investigative report argued that the report did not qualify as a judicial record and its public release violated the subject's privacy rights.

On appeal, the Second Circuit held that the investigative report constituted a judicial document subject to the right of public access because the report, which recounted the Court Officer's investigation to eliminate corruption within Local 100, was "relevant to the performance of the judicial function and useful in the judicial process." Id. at 145. However, the Second Circuit remanded the matter to the district court so that the district court, rather than the Court Officer, could "make its own redactions, supported by specific findings, after a careful review of all claims for and against access." Id. at 147.



## 15. TEAMSTERS LOCAL 282

### A. CASE NAME:

United States v. Local 282 of the International Brotherhood of Teamsters, Executive Board of Local 282, Robert Sasso, Michael Carbone, Michael Bourgal, John Prbeyahn, and Joseph Matarazzo, No. CV-94-2919 (Platt, C.J.), United States District Court for the Eastern District of New York. Complaint filed June 21, 1994.

### B. DEFENDANTS:

The complaint named as defendants Local 282 of the International Brotherhood of Teamsters Union (IBT); the Local's Executive Board; and the Local's former officers Robert Sasso (formerly President, Vice-President, Secretary-Treasurer and Business Agent); Michael Carbone (formerly Secretary-Treasurer and Business Agent); Michael Bourgal (formerly President, Vice-President, Secretary-Treasurer and Business Agent); John Probeyahn (formerly Vice-President, Secretary-Treasurer and Business Agent); John Matarazzo (formerly Business Agent).

### C. SUMMARY OF THE COMPLAINT:

The complaint alleged that for more than 25 years the Gambino LCN Family, including its leaders Paul Castellano, John Gotti and Salvatore Gravano, had corruptly infiltrated and controlled Local 282 of the IBT. The alleged enterprise consisted of an association-in-fact comprised of Local 282 and "co-racketeers" Paul Castellano, John Gotti, Salvatore Gravano and other persons associated with the Gambino LCN Family. The complaint also alleged that the defendants conspired to participate in the affairs of the alleged enterprise through a pattern of over 40 racketeering acts, in violation of 18 U.S.C. §§ 1962 (c) and (d).

In particular, the complaint alleged that the defendants, in conjunction with the Gambino LCN Family, demanded and accepted illegal payments from companies falling within the jurisdiction of Local 282. The complaint alleged that the defendants used fear of physical or economic harm, in exchange for allowing work without a labor agreement, lax enforcement of

collective bargaining agreements, and the absence of labor unrest. The complaint charged separate racketeering acts relating to the various companies that were victimized by this extortion/illegal payoff scheme. The complaint also alleged that defendants Sasso and Carbone were associates of the Gambino LCN Family, and through Sasso, Carbone and others, the LCN used Local 282 to extort and obtain payment from companies in the concrete industry. The extortion included demands for cash payments of \$100,000 for the “privilege” of opening a concrete plant, and the payment to the Gambino LCN family of \$3.00 per yard of concrete poured by various companies for the “right” to do business. These monies were shared with Local 282 officials such as Sasso and Carbone. All five individual defendants named in this civil RICO complaint previously pleaded guilty to criminal charges involving these allegations.

The complaint further charged that from the late 1970s to the complaint’s filing date, Sasso, Carbone, and the Local 282’s Executive Board extorted Local 282’s members’ rights to participate in internal union democracy in violation of 18 U.S.C. § 1951.

**D. RELIEF SOUGHT:**

The relief sought included the following:

1. An injunction enjoining:
  - a. Defendants Local 282, its current and future Executive Board; its officers, agents, foremen, stewards and members, now and in the future, from violating any provision of 18 U.S.C. § 1961 *et seq.*, and from having any dealings or interactions, directly or indirectly, with the individual defendants, relating to the business of Local 282, and from associating with any person who is a member or associated with the Gambino LCN Family or any other organized crime family;
  - b. The individual defendants from participating in any way in the affairs of Local 282, and from having any dealings, directly or indirectly, with any officer, agent, former steward and member of Local 282.

2. That the district court appoint a Trustee to assume control of and direct all operations of Local 282 until such time as all racketeering or organized crime influence is removed from Local 282, including, but not limited to, the powers to remove and appoint employees and officials, negotiate and handle collective bargaining agreements and handle the finances of Local 282, and to conduct elections for officers of Local 282's Executive Board.

3. That the district court order the defendants to disgorge all proceeds that they received from their alleged racketeering activities; with such proceeds to be awarded as restitution to victims and any remaining funds be awarded to the United States.

**E. OUTCOME OF THE CASE:**

On March 22, 1995, an agreed upon Consent Decree was entered that included the following relief:

1. The IBT Trustee to be appointed by the district court, Local 282, and all of its current and future officers, agents, representatives, employees, and members were enjoined from:
  - a. engaging in conduct which constitutes or furthers an act of racketeering activity, as enumerated or defined in 18 U.S.C. § 1961;
  - b. knowingly associating with any member, associate, or other individual involved with an organized criminal group, or knowingly associating with any person enjoined from participating in union affairs;
  - c. obstructing the work of the Corruption Officer to be appointed by the district court or the implementation of any other relief that may be imposed in this case.

As used herein, the term “knowingly associating” shall have the same meaning as that ascribed to it in the context of the consent decree in United States v. IBT (Application XII), 745 F. Supp. 908, 917-18 (S.D.N.Y. 1990), aff'd, 941 F.2d 1292 (2d Cir. 1991).

2. The district court would appoint a Trustee for Local 282 with the powers, rights and responsibilities of an IBT-appointed trustee of a Teamsters Local as set forth in the provisions of the IBT Constitution, as well as the powers, among other matters to:

- a. organize non-union shops;
- b. negotiate collective bargaining agreements;

- c. maintain the books, records, files and accounts of Local 282;
- d. administer, invest, sell and conserve the assets of Local 282;
- e. enter and terminate contracts or leases, and to buy and sell property on behalf of Local 282;
- f. adjust grievances and arbitrate such matters as he or she deems appropriate on behalf of Local 282 and the members it represents;
- g. hire, appoint, retain, remove and discharge members of Local 282's Executive Board, officers, business agents, stewards, trustees of benefit plans, advisory committees, employees, lawyers, accountants and consultants, in accordance with the powers of a trustee provided for in Article VI, Section 5 of the IBT Constitution and with other applicable law;
- h. submit all reports required under the Labor- Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (LMRDA), providing copies to the Corruption Officer and the United States Attorney's Office.
- i. submit a report every six months to the IBT General President, the Corruption Officer and the United States Attorney's Office regarding the affairs and transactions of Local 282;
- j. take such other action, including discipline of members, as the IBT Trustee deems necessary for the promotion and preservation of Local 282 and its members' interests;

3. The district court would appoint a Corruption Office for Local 282, whose powers included the following:

- a. to investigate corruption within Local 282;
- b. to interview any Local 282 officer, administrator, organizer, business agent, employee, shop steward, negotiator, trustee or member or the IBT

Trustee, about any matter within the jurisdiction of his/her powers and duties, and to gain entrance to, inspect and investigate, without advance notice or permission, any job site, depot, building or office at which members of Local 282 are working;

- c. to the same extent that the IBT Trustee or Local 282 is entitled under applicable laws or agreements, to obtain access to any records, or to investigate or interview any persons under the control of an employer who employs employees represented by Local 282, including but not limited to access to such records or persons relating to contributions made by employers to pension or other benefit plans in which Local 282 members participate, relating to any matter within the jurisdiction of his/her powers and duties;
- d. to take testimony informally or formally on the record before a court reporter or otherwise as the circumstances may require in his/her sole discretion about any matter within the jurisdiction of his/her powers and duties;
- e. to hire, appoint, retain and discharge accountants, consultants, investigators, and any other personnel necessary to assist in the proper discharge of his/her powers and duties.
- f. to receive notice of and observe any negotiations between employers and Local 282 of a collective bargaining agreement or amendments or modifications thereto, only if the Corruption Officer has specific reason to believe that an act of corruption as defined herein has occurred during negotiations of a collective bargaining agreement and deems his/her attendance at such negotiations is necessary to investigate such act of corruption or prevent other acts of corruption from occurring;

g. to remove officers, business agents, stewards, or employees of Local 282, or to seek the expulsion of members of Local 282 for just cause arising from any corruption under the following procedures:

(i) The Corruption Officer's decisions as to removal under this subsection shall be final and binding and shall take effect immediately. Only the IBT Trustee may appeal such removal to the District Court by letter within fourteen days of receipt of the Corruption Officer's decision.

(ii) In any appeal pursuant to subparagraph (i) above, the Corruption Officer's decision will be upheld unless it is an abuse of discretion or is not supported by substantial evidence. Such evidence may include hearsay.

(iii) Any actions of the Corruption Officer pursuant to this subparagraph shall be reviewable exclusively by the District Court and are not subject to arbitration or other challenge under the IBT Constitution or the Local 282 By-Laws in accordance with applicable law.

h. to review any proposed appointments by the IBT Trustee of certain officers, business agents, stewards, and other employees of Local 282, as follows:

(i) The Corruption Officer's decisions as to rejections of proposed appointments under this subsection shall be final and binding and shall take effect immediately. Only the IBT Trustee may appeal such rejection to the District Court by letter within fourteen days of receipt of the Corruption Officer's decision.

(ii) In any appeal pursuant to subparagraph (i) above, the Corruption Officer's decision will be upheld unless it is an abuse of discretion or is not supported by substantial evidence. Such evidence may include hearsay.

(iii) Any actions of the Corruption Officer pursuant to this subparagraph shall be reviewable exclusively by this Court and are not subject to arbitration or other challenge under the IBT Constitution or the Local 282 By-Laws, in accordance with applicable law.

- i. to receive the assistance of federal, state, and local law enforcement authorities in carrying out his duties;
- j. to refer possible violations of law to federal, state, or local law enforcement authorities;
- k. to have full, complete and unfettered access to all books, records, files, accounts, and correspondence of Local 282, its Executive Board, officers, IBT Trustee, and any benefit plans in which members of Local 282 participate (to the same extent that Local 282 or the IBT Trustee has such access);
- l. to receive notice and a written agenda or description of the proposed subject matter (if such a written agenda or description is created) of and to attend every scheduled meeting of Local 282's Executive Board, a committee of its Executive Board, or of Local 282's general membership.
- m. to request and obtain oral or written reports regarding any matter concerning Local 282 from the IBT Trustee, about any matter within the jurisdiction of the Corruption Officer's powers and duties;
- n. to review all expenditures made by, or obligations incurred by, the IBT Trustee, Local 282 or any other person or entity authorized to make such expenditure or incur such obligation on behalf of Local 282, and to the same extent as the IBT Trustee or Local 282 is empowered to do so, to void and recover any expenditure or obligation that constitutes or furthers act of Corruption;
- o. to review all collective bargaining agreements, contracts and leases, entered into by Local 282, the IBT Trustee, or any other person or entity authorized to enter into such agreement, contract or lease on behalf of Local 282, and to the same extent as the IBT Trustee or Local 282 is

empowered to do so, to disaffirm any contract prior to its ratification that constitutes or furthers an act of corruption as defined herein;

- p. to review all decisions by the IBT Trustee to hire an independent contractor, including but not limited to attorneys, accountants, brokers, to perform services or provide goods on behalf of Local 282, and to reject any such decision that constitutes or furthers an act of Corruption as defined herein;
- q. to the same extent that the IBT Trustee or Local 282 is authorized to do so, to seek recovery of any and all assets of Local 282 that may have been dissipated or otherwise misappropriated in the past;
- r. to submit periodic reports of its activity;
- s. to oversee and monitor any elections held by Local 282 for any acts consisting of or furthering act of corruption, and to certify the results of any election as being free of any acts of corruption.

**F. LEADING COURT DECISIONS:**

1. United States v. Local 282 of the International Brotherhood of Teamsters, 13 F. Supp. 2d 401 (E.D.N.Y. 1988), aff'd in part, and vacated and remanded in part, 215 F.3d 283 (2d. Cir. 2000).

Based on Robert Sasso's guilty plea to a RICO conspiracy charge, the district court granted the Government's motion for summary judgment in its civil RICO action "to the extent of finding Sasso liable in that he 'conspired with the other individual defendants and members of organized crime to conduct the affairs of defendant Local 282 of the International Brotherhood of Teamsters as an enterprise through a pattern of labor racketeering activities, including acts of extortion and illegal receipt of money from employers, from the late 1970's through 1991 in violation of 18 U.S.C. § 1962 (c)'" Id. at 402. The district court also permanently enjoined Sasso from: (1) "owning, operating, or working for any business in the construction, demolition, or excavation industries or part of the trucking industry which was engaged in construction, demolition, or excavation"; (2) "working in any capacity for any person or business doing business with the construction, demolition, or excavation industries, and from associating for any commercial purpose with any member or associate of organized crime"; and (3) "from visiting the work sites of the International Brotherhood of Teamsters and, with limited exceptions, communicating with any person at these sites." Id. at 402.

The district court also ordered Sasso to pay 15% of the costs of a monitorship (i.e., \$136,000) that the district court had imposed over Local 282 pursuant to a Consent Decree. In so ruling, the district court stated:



The broad discretion in fashioning remedies granted by section 1964(a) affords this Court the power to order Sasso to fund the monitorship which the Consent Judgment created. Ordering Sasso to fund the monitorship does not violate the restraints on district courts' powers under § 1964(a) emphasized in [*United States v. Carson*, 52 F. 3d 1173 (2d Cir. 1995)]. In *Carson*, the Second Circuit warned that district courts have the power to “prevent and restrain’ future conduct” but not the power to “punish past conduct.” *Carson*, 52 F.3d at 1182 (emphasis in original). The Second Circuit held that the *Carson* district court overstepped its jurisdiction by ordering Carson to disgorge profits he illicitly acquired eight years before the launch of the civil suit. *Id.* at 1182. Carson’s profits were garnered “too far in the past to be part of an effort to ‘prevent’ and ‘restrain future conduct’.” *Id.* (emphasis in original).

Here, in contrast, the plaintiff does not request that Sasso disgorge profits. Rather, plaintiff only moves the Court to order Sasso to contribute to the funding of the monitorship. As Judge Glasser noted, funding a monitorship furthers the prevention and the restraint of future illegal conduct. *See Private Sanitation Indus. Ass’n*, 914 F. Supp. at 901, *surpra*. Here, there is no question that additional funding for the Local 282 monitorship will help prevent the illegal conduct Sasso fostered at Local 282. Indeed, the monitorship in this case was created for the express purpose of eradicating the possibility of future labor racketeering by Local 282 officials. Additionally, funding the monitorship will further prevent future illegal conduct by Sasso. Sasso will be deterred from engaging in labor racketeering because a fully funded monitorship is difficult to evade.

Id. at 403.

2. United States v. Sasso, 215 F.3d 283 (2d Cir. 2000).

On appeal of the above-referenced opinion, the Second Circuit held that the district court’s order requiring Sasso to fund a portion of the costs of the court-imposed Monitorship of Local 282 fall within the district court’s broad equitable powers under 18 U.S.C. § 1964. The Second Circuit distinguished its earlier opinion in United States v. Carson, 52 F.3d 1173 (2d Cir. 1995), stating:

In *Carson*, we dealt with a disgorgement order, not with an order of contribution to the funding of a monitorship; and we reversed only to the extent that the sums ordered disgorged were not meant for the prevention of future RICO violations. Our remand plainly allowed an order requiring the payment of any amounts that were “intended solely to prevent and restrain future RICO violations.” 52 F.3d at 1182 (internal quotation marks omitted).

In the present case, we deal with an order for Sasso’s payment of money into a fund that plainly is to be used to prevent further violations of section 1962.

Id. at 291.

The Second Circuit also rejected Sasso's argument "that ordering contribution from him is inappropriate because he has now been enjoined from engaging in the pertinent activities, thereby preventing him from committing any future RICO offense." Id. at 291. The Second Circuit explained:

First, there was evidence from the Corruption Officer that Sasso, while imprisoned following his RICO conviction, had hundreds of communications with persons associated with organized crime, persons associated with Local 282, persons whose businesses were within the Local's jurisdiction, and persons who had previously made illegal payments to corrupt Local officials. That evidence easily demonstrates that there can be no effective monitorship without attention to Sasso's own current activities. Sasso's suggestion that such attention is unnecessary because he has been enjoined rings hollow in light of his postconviction conduct and in light of the pattern of concealment previously engaged in by the individual defendants, which included clandestine meetings, surreptitious money transfers, and lying under oath. Second, even if Sasso himself had not continued to have suspicious contacts with the persons described above, it would be well within the court's equity powers to conclude that Sasso, having engaged in conduct that corrupted the union, should bear part of the cost of eliminating that corruption.

Id. at 291.

The Second Circuit remanded the matter to the district court to make appropriate findings as to "how it arrived at 15 percent as Sasso's appropriate share of the [monitorship] expenses." Id. at 292.

3. United States v. Sasso, 230 F. Supp. 2d 275 (E.D.N.Y. 2001).

On remand from the Second Circuit, the district court weighed the role of Sasso in comparison to that of the other individuals who were responsible for corruption in Local 282, and concluded that Sasso should pay 20% of the costs for the original monitorship period (\$181,000).

## 16. MASON TENDERS DISTRICT COUNCIL OF GREATER NEW YORK

### A. CASE NAME:

United States and Robert B. Reich, Secretary of the United States Department of Labor v. Mason Tenders District Council of Greater New York, et al., Complaint No. 94 Civ 6487, United States District Court for the Southern District of New York. Complaint filed September 8, 1994.

### B. DEFENDANTS:

Mason Tenders District Council of Greater New York (District Councilor MTDC),  
Executive Board of the Mason Tenders District Council of Greater New York,  
James Lupo, President of the District Council, Union Trustee to the Trust Funds,  
Christopher Suriano, Executive Board Member,  
Salvatore Lanza, Secretary/Treasurer,  
Michael Pagano, Jr., Business Manager, Union Trustee to the Trust Funds,  
Brian J. Loiacono, Recording Secretary,  
Mason Tenders District Council Pension Fund,  
Mason Tenders District Council Welfare Fund,  
Mason Tenders District Council Annuity Fund,  
Mason Tenders District Council Asbestos Training Fund,  
Mason Tenders District Council Industry Fund,  
Mason Tenders District Council Legal Services Fund,  
Mason Tenders District Council Vacation Fund,  
James Messera (alleged Capo in the Genovese LCN Family), Ernest M. Muscarella,  
Richard Kelly, Anthony Zotollo, Joseph Fater, Baldo Mule, Ronald Miceli, Louis Casciano,  
Albert Soussi, Carmine Mandragona, Anthony Lanza a/k/a “Nino,” Thomas Fitzgerald, Medical  
Diagnostic Testing, Inc., Wilfred L. Davis, Arthur M. Blau, Onofrio Macchio a/k/a “Malfie,”  
Michael Capra a/k/a “Mikey Cap” (alleged soldier in the Luchese LCN Family), Peter Vario a/k/a  
“Jocko” (alleged soldier in the Luchese LCN Family), Michael Labarbara, Jr. a/k/a “Big Mike”  
(alleged soldier in the Luchese LCN Family), Paul J. O’Brien and Shelly M. Lipsett.

Of the Defendants, the following Defendants were named only as “nominal” defendants, whose participation was necessary for complicate and effective relief in this action: the District Council and its various Trust Funds, Salvatore Lanza, Brian Loiacomo, Paul O’Brien and Shelly Lipsett. The following Defendants were alleged associates of the Genovese LCN Family:

Richard Kelly, Baldo Mule, Ronald Miceli, Louis Casciano, Albert Soussi, Carime Mandragona, Anthony Lanza, and Onofrio Macchio.

**C. SUMMARY OF THE COMPLAINT:**

The Mason Tenders District Council, which is a component of Laborers' International Union of North America (LIUNA), consisted of twelve local unions in the New York area whose members included laborers, bricklayers, masonry and asbestos removal workers. Each union local provided a delegate to the District Council, with these delegates electing District Council officers and members of its Executive Board. The District Council engaged in collective bargaining on behalf of the members of the local unions, and administered seven multi-million dollar trust funds established for the benefit of union members.

The alleged association-in-fact enterprise consisted of the District Council and its associated Trust Funds. The complaint alleged that, acting through the individuals named as defendants, the Luchese, Gambino and Genovese LCN Families, particularly the Genovese Family, corruptly controlled the District Council and its constituent unions and associated Trust Funds, and dictated the composition of the District Council's leadership. In particular, the complaint alleged that the LCN Families exerted such control through extortion, inducing District Council and union officials to breach their fiduciary duties, engaging in kickbacks from service providers, illegal payoffs to union officials and other forms of labor racketeering. The complaint also alleged that virtually all of the individually-named defendants had previously been convicted of RICO violations arising from the same course of conducts alleged in the complaint.

The complaint alleged twelve claims for relief. Claims one and two alleged that from the 1980's to the filing of the complaint, the individual defendants Messera, Muscarella, Kelly, Lupo, Mule, Suriano, Pagano, Capra, Vario, LaBarbara, Macchio, Casciano, Soussi, Mandragona, Miceli, Fater, Davis, Blau, and Lanza, acquired and maintained an interest in the alleged

enterprise through a pattern of racketeering activity and conspired to do so, in violation of 18 U.S.C. §§ 1962(b) and (d). The alleged pattern of 110 racketeering acts (RA) were as follows:

RA #1 — purchase of certain Brooklyn real properties for \$3.4 million with monies embezzled from the union pension fund

RA #2 — money laundering to conceal the improper purchase of the Brooklyn real properties

RA #3 — fraudulent use of employee benefit funds to make a \$15.8 million loan to an LCN associate

RA #4 — purchase of a Brooklyn real property for \$24 million with monies embezzled from the union pension fund

RA #5-57 — illegal receipt of benefits by District Council members, officers, and employees

RA #58-108 — illegal offers and promises to give money and other things of value to influence the operation of employee benefit plans

RA #109 — purchase of a Florida residential property for \$1.45 million using monies embezzled from the employee benefit fund

RA #110 — receipt of kickbacks by union officials

Similarly, these same acts were incorporated into the third and fourth claims for relief, alleging that the same defendants conducted the alleged enterprise's affairs through the same pattern of racketeering activity, and conspired to do so, in violation of 18 U.S.C. §§ 1962 (c) and (d).

The complaint also stated eight claims for relief under ERISA, 29 U.S.C. §§ 1105 and 1106, for acts involving misuse of the employee funds and the receipt of improper benefits by union officers in carrying out the racketeering acts enumerated in the complaint.

**D. RELIEF SOUGHT:**

The Government requested relief, that would do the following, among other matters:

1. That the district court issue a permanent injunction that would enjoin certain defendants from:

- a. having any future dealings of any nature whatsoever with:
  - (1) any officer, agent, member, delegate, representative, trustee or employee of the District Council or the Trust Funds;
  - (2) any officer, agent, member, delegate, representative, or employee of any of the District Council's constituent Locals; or
  - (3) any officer, agent, member, delegate, representative, or employee of any other labor organization or employee of any other labor organization or employee benefit plan concerning any aspect of the operation or administration of such labor organization or employee benefit plan;
- b. owning, operating, or being employed by, or a consultant to, any business which employs members of the constituent Locals of the District Council;
- c. committing any act of racketeering as defined in 18 U.S.C. § 1961 and any violation of ERISA;
- d. participating in any way in the affairs of the District Council, its constituent Locals, the Trust Funds, or any other labor organization or employee benefit plan; and
- e. owning, operating, or being employed by, or a consultant to, any business that employs members of the constituent Locals of the District Council.

2. That the district court enjoin and restrain any defendant and any officer, agent, member, delegate, representative, trustee or employee of the District Council, its constituent Locals or the Trust Funds from knowingly associating with any member or associate of La Cosa Nostra or persons in active concert or participation with any member or associate of La Cosa Nostra.

3. That following a determination of liability under RICO, the district court order that a new secret ballot, rank and file general election be held among the members of the constituent Locals of the District Council directly to elect the officers of the District Council, with all components of such election to be conducted by one or more Trustees to be appointed by

the court, and that until such elections are held a Trustee be appointed to administer the District Council.

4. That the district court order all defendants found to have violated 18 U.S.C. § 1962 to disgorge all proceeds and benefits derived from such violations.

5. That the defendants bear the costs of the court-appointed Trustee and the costs of this suit;

6. That the district court remove certain defendants from, and bar them from holding, certain positions in the District Council and its affiliated Trust Funds.

**E. OUTCOME OF THE CASE:**

1. December 1994 Consent Decree. On December 27, 1994, the United States and the defendants Mason Tenders District Council and its Executive Board and affiliated Trust Funds entered into a Consent Decree, approved by the district court, which found that the evidence adduced by the United States in its motion for partial summary judgment established that the alleged enterprise had been conducted through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962. See United States v. Mason Tenders District Council of Greater New York, 1994 WL 742637 (S.D.N.Y. Dec. 27, 1994). This Consent Decree included the following provisions:

a. PERMANENT INJUNCTIONS. All current and future officers, agents, representatives, employees, and members of the MTDC and of its constituent locals were permanently enjoined:

- (1) from committing any act of racketeering, as defined in 18 U.S.C. § 1961;
- (2) from knowingly associating with any member or associate of any La Cosa Nostra crime family or any other criminal group, or with any person prohibited from participating in union affairs; and

- (3) from obstructing or otherwise interfering with the work of the court-appointed officers described herein or with the purposes of this Consent Decree.

As used herein, the term ‘knowingly associating’ shall have the meaning ascribed to it in the context of the adjudication, by the Second Circuit, of disputes under the consent decree in United States v. Int’l Brotherhood of Teamsters, 88 Civ. 4486 (DNE) (S.D.N.Y.), as of the date of the entry to this Consent Decree.

- b. THE MONITOR: The district court shall appoint a Monitor, who shall have the following powers:

- (1) Jurisdiction. The Monitor’s jurisdiction is to ensure compliance with the injunctions, and with union constitutions, to impose sanctions for violation of those injunctions, constitutions (any such individual violation is referred to as a ‘proscribed act’), and to exercise oversight and litigation authority.
- (2) Oversight Authority. The Monitor shall have review and oversight authority with respect to the following matters and shall, if necessary, prescribe procedures under which such matters shall be presented to the Monitor for review:
  - (a) The Monitor shall have the authority to review all expenditures and investments of the MTDC and to veto or require the lawful representatives of the MTDC or the Trustees of the MTDC trust funds to rescind any expenditure or investment that: (i) constitutes or furthers an act of racketeering as defined in 18 U.S.C. § 1961; or (ii) furthers or contributes to the association, directly or indirectly, of any member, employee, or agent of the



MTDC, or any of the members or employees of the MTDC's constituent locals, with any element of organized crime; (iii) is contrary to or violates labor law or ERISA; or (iv) is inconsistent with the purposes of the Consent Decree.

- (b) The Monitor shall have the authority to review all contracts or proposed contracts on behalf of the MTDC (except for collective bargaining agreements and any decision to strike) and to require the lawful representatives of the District Council or the Trustees of the MTDC to rescind any contract or prevent the MTDC from entering into any proposed contract that: (i) constitutes or furthers an act of racketeering as defined in 18 U.S.C. § 1961; (ii) furthers or contributes to the association, directly or indirectly, of any member, employee, or agent of the MTDC, or any of the members or employees of the MTDC's constituent locals, with any element of organized crime; (iii) is contrary to or violates labor law or ERISA ; or (iv) is inconsistent with the purposes of this Consent Decree.
- (c) The Monitor shall have the authority to review all proposed appointments to: (1) MTDC office or employment, including any proposed replacement of the LIUNA Trustee or Deputy Trustee or their designee(s) to the District Council; and (2) all proposed appointments to any office or employment with any constituent local of the MTDC, and to veto any proposed appointment that: (i) constitutes or

furthering an act of racketeering as defined in 18 U.S.C. § 1961; (ii) furthers or contributes to the association, directly or indirectly, of any member, employee, or agent of the MTDC, or any of the members or employees of the MTDC's constituent locals, with any element of organized crime; (iii) is contrary to or violates labor law or ERISA; or (iv) is inconsistent with the purposes of this Consent Decree.

(d) The Monitor shall have the authority to challenge the implementation of any proposed change to the Constitution of the MTDC that: (i) constitutes or furthers an act of racketeering as defined in 18 U.S.C. § 1961; (ii) furthers or contributes to the association, directly or indirectly, of any member, employee, or agent of the MTDC, or any of the members or employees of the MTDC's constituent locals, with any element of organized crime; (iii) is contrary to or violates labor law or ERISA; or (iv) is inconsistent with the purposes of this Consent Decree. During the pendency of such challenge, such change shall not be implemented at the MTDC.

(e) The Monitor shall have the authority to call meetings of the MTDC.

(3) Access to Information. The Monitor shall have complete and unfettered access to, and the right to make copies of, all books, records, accounts, correspondence, files, and other documents of the MTDC, its constituent local unions and their officers, except

for personal documents of such officers that do not concern the affairs of the MTDC or any investigation or charge against the officer within the Monitor's jurisdiction.

(a) The Monitor shall have the right to take and compel the sworn statement or sworn oral deposition of any officer, agent, representative, employee, or member of the MTDC or any of its constituent local unions concerning any matter within the Monitor's authority under this Consent Decree, provided that the person to be examined receives reasonable advance notice of the deposition, and may be represented by legal counsel of his or her own choice, or by a member of the MTDC, at any such deposition.

(b) The Monitor shall have the right to compel an accounting of the assets of the MTDC.

(4) Litigation Authority. The Monitor shall have the right to authorize the initiation of civil actions on behalf of the MTDC to recover damages incurred by the MTDC arising from any actions within the Court-Appointed Officers' jurisdiction as defined in this Consent Decree.

(5) Disciplinary Authority. The Monitor shall have all the rights and powers of the MTDC and any of its members or officers, including, without limitation, the powers set forth in the Uniform District Council Constitution of LIUNA and the Uniform Local Constitution of LIUNA with respect to discipline, and shall have the right to fine, suspend and expel members, officers, agents, representatives and employees as set forth below.

- (6) Elections. The Monitor is empowered to supervise all phases of the rank and file, secret ballot election of the Executive Board of the MTDC.
- (7) Review of the Monitor's Decisions. Any decision of the Monitor shall be final and binding, subject only to the court's review as provided herein:
- (a) Should the District Council's lawful representatives wish to challenge the Monitor's decision to suspend the operation of the Constitution of the MTDC, the lawful representatives, within ten calendar days of the Monitor's decision, shall have the burden of challenging before this Court any aspect of the Monitor's decision concerning any proposed suspension of the Constitution.
  - (b) In reviewing decisions of the Monitor, the court shall apply the same standard of review applicable to review of final federal agency action under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*
  - (c) The decisions of this court with respect to the decisions of the Monitor shall be final and subject to appeal only as follows: any appellant who is unsuccessful in reversing the Court's decision shall be obligated to pay all reasonable attorneys' fees and costs incurred by the Monitor and/or Investigations Officer in connection with opposing the appeal. Accordingly, each such appellant shall be required to post a bond prior to prosecuting an appeal in an amount satisfactory to the Court, the Monitor and/or the Investigations Officer, in accordance with Rule 7 of the Federal Rules of Appellate Procedure.
- (8) Reports to the Court. The Monitor may report to the court whenever the Monitor deems fit but, in any event, shall file a written report not less frequently than every six months regarding the Monitor's activities.

(9) Applications. The Monitor may make any application to the court, upon reasonable notice to the MTDC and the Government, for such assistance as may be necessary and appropriate to implement this Consent Decree.

c. THE INVESTIGATIONS OFFICER: The district court shall appoint an Investigations Officer, who shall have the following powers, rights, and responsibilities:

(1) Duties. The duty of the Investigations Officer is to investigate and to prosecute any proscribed acts that either have occurred since January 1, 1982, or occur in the future at any time prior to the expiration of the Consent Decree, and to propose appropriate sanctions for such conduct. Notwithstanding this limitations period, any proscribed act involving membership in or knowingly associating with La Cosa Nostra or any other criminal group shall be subject to investigation by the Investigations Officer regardless of when such offense occurred.

(2) Jurisdiction. The Investigations Officer's authority shall extend to: (i) officers, agents, employees, representatives or members of the MTDC for any matter constituting an offense under any applicable law or union bylaw or constitution; and (ii) officers, agents, employees, representatives or members of the MTDC or of its constituent locals with respect to enforcing the terms of the permanent injunctions set forth above.

(3) Disciplinary Authority. The Investigations Officer shall have all the rights and powers of the MTDC and any of its constituent locals and any of its members or officers, including, without

limitation, the powers set forth in the Uniform District Council Constitution of LIUNA, and the Uniform Local Constitution of LIUNA with respect to investigation, and shall have the right to propose that the Monitor impose fines upon, and/or suspend or expel members, officers, agents, representatives and employees as set forth below.

(4) Powers.

(a) Records. To carry out his duties, the Investigations Officer shall have complete and unfettered access to, and the right to make copies of, all books, records, accounts, correspondence, files, and other documents of the MTDC, its constituent local unions and their officers, agents and employees, except for personal documents of such officers, agents and employees that do not concern the affairs of the MTDC or any investigation or charge against the officer within the Investigations Officer's jurisdiction.

(b) Testimony. To carry out his duties, the Investigations Officer shall have the right to take and compel the sworn statement or sworn oral deposition of any officer, agent, employee, or member of the MTDC or its constituent local unions concerning any matter within the Investigations Officer's jurisdiction under this Consent Decree, provided that the person to be examined receives reasonable advance notice of the deposition, and may be represented by legal counsel of his or her own choice, or by a member of the MTDC, at any such deposition.

- (c) Litigation Authority. The Investigations Officer shall have the right and the responsibility to recommend to the Monitor that civil actions be initiated on behalf of the MTDC to recover damages incurred by the MTDC arising from any actions within the Court-Appointed Officers' jurisdiction as set forth above.
- (5) Hiring Authority. The court-appointed officers, upon consultation with the lawful representatives of the MTDC, shall have the authority to employ legal counsel, accountants, consultants, investigators, experts and any other personnel, subject to reasonable limits, necessary to assist in the proper discharge of the court-appointed officers' duties. The court-appointed officers also shall have the authority to designate persons of their choosing to act on their behalf in performing any of their duties as outlined in this Consent Decree.
  - (a) Compensation and Expenses. The compensation and expenses of the court-appointed officers, and of any persons hired under their authority, shall be paid by the MTDC.
- d. DISCIPLINARY HEARING PROCEDURES:
  - (1) Initiation of a Charge. Upon detecting and investigating proscribed act(s) as authorized above, the Investigations Officer shall file disciplinary charges with the Monitor against those persons who allegedly committed such act(s). The Investigations Officer shall initiate such a charge under this Consent Decree by sending a written notice of the specified charge(s) by first class mail to the last known address of the person charged. Such a charge shall state

that a decision upholding the charge may result in disciplinary action, including possible expulsion from the union.

(2) Hearing Before the Monitor.

(a) If the person charged fails to file with the Monitor an objection to the charge within 20 days after the mailing of the charge, the Investigations Officer shall present the charge to the Monitor, and the Monitor shall issue a decision adjudging the person charged in default and adopting the charge as filed by the Investigations Officer. If the person charged fails to object to the charge, the person charged waives his right to any further review of the Monitor's decision to impose disciplinary action.

(b) Any person wishing to contest the charge must file his objection with the Monitor, with a copy to the Investigations Officer, within 20 days after the mailing of the charge. The Monitor will then schedule and initiate a fair and impartial hearing on the charge(s) within 45 days of the objection. At the hearing, the Investigations Officer and the person charged may present evidence in a written and/or oral form. The Monitor shall conduct the disciplinary hearings in conformity with the rules and procedures generally applicable to labor arbitrations.

(3) Decision of the Monitor.

(a) Upon the conclusion of the hearing, or upon default by the person so charged, the Monitor shall issue a decision on the merits of the charge. That decision shall be issued no later



than 90 days after the conclusion of the hearing. The Monitor shall decide such charges according to the 'just cause' standard.

- (b) Upon the Monitor's determination that the person charged has committed any proscribed act, the Monitor shall discipline the person charged (disciplinary decision). The Monitor's disciplinary decision shall be effective immediately upon issuance. The Monitor's disciplinary decision shall be final and binding, subject only to the court's review as provided herein. All discipline imposed under this Consent Decree, whether upon consent or by decision of the Monitor, shall be so ordered by the district court.
- (c) For a period of up to ten calendar days after mailing of the Monitor's disciplinary decision concerning a disciplinary charge, any person aggrieved by the disciplinary decision (with the exception of any person who fails to contest the charge) shall have the right to seek review in district court. The decisions of the district court with respect to the disciplinary decisions of the Monitor shall be final and subject to appeal only as follows: any disciplined individual who is unsuccessful in reversing district court's decision on appeal shall be obligated to pay all reasonable attorneys' fees and costs incurred by the Monitor and/or Investigations Officer in connection with opposing the appeal.

e. MTDC EXECUTIVE BOARD ELECTIONS.

(1) In light of the history of LCN domination of the MTDC and corruption of its electoral processes, the MTDC Constitution shall be deemed suspended, and is hereby suspended, so that the election of the Executive Board of the MTDC - - which was scheduled for August 1995 - - may hereinafter be conducted by secret ballot and directly by the rank and file members of the constituent locals of the MTDC.

(2) February 1999 Supplemental Consent Decree. On February 5, 1999, the district court entered a Supplemental Consent Decree wherein the district court found that the court-appointed officers had made excellent progress toward eliminating corruption within the alleged enterprise. Accordingly, the district court terminated the terms of the Monitor and Investigations Officers under the original Consent Decree effective January 17, 1999, except that the Monitor and Investigations Officers were to continue and complete their reporting responsibilities and any disciplinary and review matters initiated before the end of their terms.

(a) The district court also appointed a Review Monitor for a term of 36 months to review certain operations of the District Council, including the following authority to:

(i) request and receive periodic reports and other information regarding, among other matters, the District Council, its constituent locals and related benefit funds;

- (ii) receive information regarding violations of the initial consent decree or the permanent injunction;
  - (iii) review proposed dissolutions, additions, or mergers of constituent local unions and to seek an order from the District Court to veto such actions under specified circumstances;
  - (iv) review certain transactions involving District Council funds;
  - (v) review certain appointments to MTDC affiliated benefit funds;
  - (vi) supervise all aspects of elections for officer positions of the District Council and its constituent locals.
- (b) The Supplemental Consent Decree also continued the previously issued permanent injunction, except that the prohibition on obstructing the work of the court-appointed officers was amended to apply to the work of the newly created position “Review Monitor.”
- (c) The Supplemental Consent Decree also provided that “[u]pon a reasonable belief that the MTDC is being operated in a manner inconsistent with the purposes of the original Consent Decree, (such purposes being applicable to all entities comprising the District Council), the Review Monitor shall have the right to apply to the Court: (i) to seek a restoration of court-ordered supervision by the Monitor and/or Investigations Officer as set forth in the

Original Consent Decree, or some other form of court-ordered supervision as the Review Monitor may deem appropriate, or (ii) for such other court orders as necessary to further the purposes of the Original Consent Decree.”

**F. LEADING COURT DECISIONS:**

1. United States v. Mason Tenders District Council, 1994 WL 742637 (S.D.N.Y. Dec 27, 1994).

This order contains the Judgment and the Consent Decree entered December 27, 1994, described above.

2. United States v. Mason Tenders District Council, 909 F. Supp. 882 (S.D.N.Y. 1995), and 909 F. Supp. 891 (S.D.N.Y. 1995).

In 909 F. Supp. 882, the district court granted the government’s motion for partial summary judgment on liability against defendants James Lupo and Joseph Fater on claims V and VII, which charged them with ERISA violations for breaches of their fiduciary duties arising from the District Council’s pension and welfare Fund’s purchases of certain properties.

In 909 F. Supp. 891, the district court held that under 29 U.S.C. § 1109 (a), which provides for personal liability for losses to employee benefit plans resulting from a breach of fiduciary duties, defendant Fater was liable for \$600,000 in damages for losses on one property, and that both defendants were jointly and severally liable for \$16,535,000 for losses on another property, plus prejudgment interest.

3. Investigators Officer v. Lupo, 1995 WL 614428 (S.D.N.Y. Oct. 13, 1995).

In this order, the district court entered a default judgment against James Lupo for accepting illegal kickbacks from service providers to District Council Trust Funds. Accordingly, the district court expelled Lupo from the District Council and its constituent locals and permanently banned him from membership in, association with, or employment by the District Council and any of its affiliated unions or trust funds.

4. United States v. Mason Tenders District Council, 1995 WL 679245 (S.D.N.Y. Nov. 15, 1995).

The Government sought permanent injunctive relief against individual defendants Casciano, LaBarbara, Mandragona, Messera, Soussi, and Vario (the Individual Defendants), seeking to limit their involvement in organized crime, union affairs, and the construction and asbestos removal industries. Each of these defendants was at one time an official of the Mason Tenders District Council, the Trust Funds, or a constituent local union. Between 1989 and 1992, each had pled guilty to various racketeering charges. At the time the Government’s proposed injunctions were submitted, all of the Individual Defendants either had been recently released from prison for those offenses or were pending imminent release. The district court rejected the Individual Defendants argument that their guilty plea agreements precluded any relief in this action, noting that “[t]he RICO statute specifically contemplates simultaneous criminals and civil liability for the identical acts of a single defendant.” *Id.* at \* 21. The district court also rejected

defendant Vario's argument that the conditions of his supervised release subjected him to conditions that made the injunctive relief unnecessary.

The Government's proposed injunction sought various restraints on the activities of the Individual Defendants, barring them from any further racketeering activity, all contacts with LCN members, all association with labor unions or the trust funds, all commercial activities involving the District Council or its unions, and involvement in the construction and asbestos removal industries. Several defendants filed various objections to the breadth and scope of these proposed restraints, asserting that the terms of the requested relief were vague and overbroad and violated their First Amendment rights. However, the district court ruled that under United States v. Carson, 52 F.3d 1173 (2d Cir. 1995), and other Government civil RICO cases, the court's authority to fashion equitable relief in order to accomplish RICO's purposes was very broad. In particular, the district court enjoined the defendants from:

- (1) committing any act of racketeering as defined in 18 U.S.C. § 1961;
- (2) knowingly associating for commercial purposes, directly or indirectly, with any member or associate of organized crime, with any defendant in this action, with any member of the MTDC or its constituent locals, or with any owner, officer, agent, or employee of any business employing members of LIUNA, the MTDC, or the MTDC's constituent local unions;
- (3) visiting any social jobs, where commercial activities are discussed, or known to be frequented by members or associates of organized crime;
- (4) participating in any way in the affairs of, or continuing as a member of, or having any dealings, directly or indirectly, with any labor organization or employee benefit fund, including, without limitations, any entity or employee benefit fund affiliated with LIUNA, the MTDC, or an MTDC constituent local, provided that nothing in this judgment shall prohibit any one of the six Individual Defendants from: (a) making application for or receiving a pension from the MTDC Pension Fund, or from communicating with the MTDC Pension Fund concerning these pension payments; (b) permitting any business not employing members of LIUNA, the MTDC, or the MTDC constituent local unions, which business employs any one of the six Individual Defendants, from deducting money from his wages and from remitting such money to a labor organization not affiliated with LIUNA, the MTDC, or any MTDC constituent local; or (c) seeking and receiving benefits provided for by a collective bargaining agreement binding on any business not employing members of LIUNA, the MTDC, or the MTDC constituent local unions, which business employs any one of the six Individual Defendants, or provided for by an ERISA-protected employee benefit plan established by that business;
- (5) knowingly associating for any commercial purpose, directly or indirectly, with any officer, agent, delegate, representative, shop steward, or employee of any labor organization or employee

benefit fund, including, without limitation, any labor organization or employee benefit fund affiliated with LIUNA, the MTDC, and the MTDC constituent locals;

- (6) owning, operating, having any interest in or control of, doing business with, or having any commercial dealings, directly or indirectly, with any entity that employs members of LIUNA or the MTDC, including, but not limited to, such entities in the construction or asbestos removal industries.

However, the district court refused to impose a blanket prohibition barring the Individual Defendants from operating any construction or asbestos removal business.

5. United States v. Mason Tenders District Council, 1996 WL 22360 (S.D.N.Y. Jan. 19, 1996).

Pursuant to the district court's grant of injunctive relief in the previous decision, the Government advised the district court of a conflict between injunctive provisions. Specifically, as noted by the Government, the court's decision to permit the defendants to operate construction or asbestos removal businesses while barring them from all contacts with the District Council or LIUNA would effectively permit the defendants to insulate their businesses from unionization. The district court, therefore, modified its earlier decision by entering an injunction permitting the defendants to operate such businesses, but prohibiting them from any commercial dealings with any entity employing members of the District Council or LIUNA.

6. Investigations Officer v. Lanza, 1996 WL 514871 (S.D.N.Y. Sept. 10, 1996).

The district court upheld charges against defendant Salvatore Lanza for engaging in conduct prohibited by the Consent Decree, including for knowingly associating with organized crime persons that occurred before the Consent Decree's injunction against such conduct. The district court explained that the general rule that injunctions ordinarily have only prospective effect did not apply to the Consent Decree because consent of the parties enables the court approving a consent decree to exceed the scope of the relief that it might have awarded absent the parties' consent.

The district court expelled Lanza from the District Council and LIUNA Local 30 and permanently banned him from membership in, association with, or employment by the District Council and any affiliated union or trust fund.

7. United States v. Mason Tenders District Council, 1997 WL 340993 (S.D.N.Y. June 20, 1997) and 1997 WL 345036 (S.D.N.Y. June 20, 1997).

The district court upheld the Monitor's decision to disqualify persons as potential candidates for President and Vice-President of Local 66 of the District Council.

8. United States v. Mason Tenders District Council, 1997 WL 698188 (S.D.N.Y. Nov. 7, 1997).

After a hearing on charges brought by the Investigations Officer, the Monitor barred defendant LaBarbara from any association with the District Council, its unions or its trust funds, and imposed a fine of \$10,000. LaBarbara appealed. The district court sustained the

Monitor's findings that LaBarbara had engaged in racketeering activities involving extortion, interfered with union business, and knowingly associated with LCN members and associates.

9. United States v. Mason Tenders District Council, 1998 WL 23214 (S.D.N.Y. Jan. 13, 1998).

Defendant Vario received a union severance package of \$35,769.50 three weeks before he was convicted of labor racketeering. The Investigations Officer subsequently charged Vario with three acts of accepting labor payoffs in violation of the Consent Decree. When Vario failed to contest the charges, the Monitor declared Vario in default, expelled Vario from the District Council and its constituent locals, permanently barred him from association with the District Council, and fined him \$53,769.50 payable to Vario's former local union. After a hearing challenging the default and the imposition of the fine, the Monitor affirmed the penalties. Vario appealed, claiming that there was no evidence that he received the severance package by collusion and that his sentence on the labor racketeering conviction, which included confinement and a fine, precluded the Monitor's action. The district court sustained the Monitor's findings that even absent any collusion, Vario's receipt of the severance package was "unconscionable" in light of Vario's conviction. The district court also held that the fine, payable to the union and not the United States, properly compensates the union for the losses Vario caused it.

10. United States v. Mason Tenders District Council, 1998 WL 23217 (Jan. 13, 1998).

The district court upheld the Monitor's suspension of a union member's shop steward certification for twenty-four months for engaging in conduct prohibited by the Consent Decree.

11. United States v. Mason Tenders District Council, 2000 WL 307250 (S.D.N.Y. March 27, 2000) and 2000 WL 328755 (S.D.N.Y. March 28, 2000).

The district court upheld the Monitor's decision finding that various union officers breached their fiduciary duties by failing to investigate organized crime's corrupt influence over the union and to take any remedial action, and permanently barring the officers from holding union office in the Mason Tenders District Council or any of its affiliated local unions or entities.

12. United States v. Mason Tenders District Council, 205 F. Supp. 2d 183 (S.D.N.Y. 2002).

The district court granted the Mason Tenders District Council's motion for a preliminary injunction to enjoin an independent local union, Local 116, from soliciting or trying to represent Teamster - represented workers, and from contacting District Council members and soliciting them to join Local 116. The district court explained that Local 116 was controlled by members of the International Brotherhood of Teamsters Union (IBT) who were expelled from the IBT and enjoined under the IBT Consent Decree, and therefore "this preliminary injunction is necessary and appropriate to enforce this Court's previous order enjoining all [District Council] members from associating with anyone who is barred from participating in union affairs." *Id.* at 190.

## **17. LABORERS' INTERNATIONAL UNION OF NORTH AMERICA (LIUNA)**

### **A. CASE NAME:**

United States v. Laborers' International Union of North America, et al., settled February 13, 1995 before the complaint was filed. The case would have been brought in the United States District Court for the Northern District of Illinois.

### **B PROPOSED DEFENDANTS:**

The draft complaint<sup>15</sup> proposed three categories of defendants:

1. The Union defendant -- the Laborers' International Union of North America (LIUNA), which is an international union that represents a variety of general laborers, including masons' helpers, general construction laborers, pipeline laborers, watchmen, asbestos removers, pavers, stone cutters and mail handlers. At the time of settlement, LIUNA had approximately 700,000 rank and file members and included eleven regional offices covering the United States, 60 district councils and approximately 820 local unions throughout the United States and Canada;

2. Twenty-eight individual defendants, including various current and former LIUNA officers and alleged members and associates of La Cosa Nostra (LCN) Families throughout the United States;

3. Nominal defendants - - various members of LIUNA's General Executive Board (GEB) and the General Counsel of LIUNA were named as "nominal" defendants in their official capacities for the purpose of properly effectuating the relief requested in this case, but were not named in their individual capacities as alleged violators of RICO 18 U.S.C. § 1962 (¶¶ 11-14).

The draft complaint also specified numerous co-conspirators, not named as defendants, including various alleged members and associates of the LCN (¶ 13).

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<sup>15</sup> Available at [www.thelaborers.net](http://www.thelaborers.net).



**C. SUMMARY OF THE DRAFT COMPLAINT:**

1. The draft complaint alleged that the RICO enterprise consisted of “LIUNA together with its regional offices, subordinate district councils and local unions, and affiliated employee welfare benefit and employee pension benefit plans.” (¶ 16). The draft complaint alleged four claims for relief: claims (1) and (2), that from at least the late 1960's up to the date of the complaint, the defendants acquired and maintained control of the alleged enterprise through a pattern of racketeering activity, and conspired to do so, in violation of 18 U.S.C. §§ 1962 (b) and (d); claims (3) and (4), that during the same time period, the defendants participated in the affairs of the alleged enterprise through a pattern of racketeering activity, and conspired to do so, in violation of 18 U.S.C. §§ 1962 (c) and (d) (¶¶ 17-27).

The draft complaint alleged that the defendants used the following means and methods to carry out their alleged RICO violations: (1) various LCN members and associates, acting with corrupt LIUNA officers and members, corruptly controlled the selection of numerous LIUNA officers, including four consecutive General Presidents of LIUNA from 1926 to 1995 (¶ 19 (a)); (2) the LCN used violence, including murder, to perpetuate its control of LIUNA and to intimidate the rank and file membership of LIUNA (¶ 19 (b)); (3) the defendants repeatedly approved the appointment of persons with known criminal histories or organized crime ties to union offices and union employment and allowed corrupt union officials to remain in office (¶ 19 (c)); (4) to perpetuate their control of LIUNA, the defendants used LIUNA election procedures, imposed trusteeships over locals to prevent opposition and manipulated hiring halls to gain employment for union members loyal to them and to deny employment to others to deter opposition (¶ 19 (d)); and (5) the defendants relied on nepotism and cronyism in the selection of union officials and hiring of employees (¶ 19 (e)).

The draft complaint also alleged that various LIUNA officials failed to satisfy their ethical and fiduciary obligations to LIUNA and its members by assisting the above described corruption and by failing to take adequate measures to investigate and discipline

corrupt union officials and to eliminate and address such corruption (§ 48).

2. The draft complaint (§§ 28-78) further alleged that the defendants committed a pattern of 110 racketeering acts to carry out their alleged RICO violations, including the following: (1) various defendants obtained and conspired obtain “property” from the membership of LIUNA through extortions, including money and the rights of union members to free speech and democratic participation in internal union affairs as guaranteed by the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 411, 481 (e), 501 (a), 1104 and 1106, all in violation of 18 U.S.C. § 1951; (2) various defendants received and conspired to receive numerous kickbacks with intent to be influenced with respect to their actions and decisions relating to various pension, health and welfare funds, in violation of 18 U.S.C. § 1954; (3) various defendants received and conspired to receive illegal payoffs from employers, in violation of 29 U.S.C. § 186 (b) and (d); (4) various defendants extorted money from construction companies and other employers in exchange for labor peace and other benefits, in violation of 18 U.S.C. § 1951; (5) various defendants committed murder and conspiracy to murder, in violation of state laws; (6) various defendants embezzled, stole and unlawfully converted union related benefit funds, in violation of 18 U.S.C. § 664; and (7) various defendants sought to obtain money through fraud, in violation of 18 U.S.C. §§ 1341 and 1346.

The draft complaint also alleged that various defendants were previously convicted of many of these racketeering acts, and hence they were collaterally estopped from denying the essential allegations underlying those racketeering acts (§§ 28-78).

**D. RELIEF SOUGHT:**

The relief sought in the draft complaint included the following:

1. That the district court issue a permanent injunction to do the following:
  - a. Enjoin various officers of LIUNA and their successors as officers, employees, and agents of LIUNA, and all persons acting in active concert with them, from committing any acts of racketeering, as defined in 18 U.S.C. § 1961 (1), or from associating,

directly or indirectly, with any member or associate of the LCN, or any other persons in active concert with members or associates of the LCN;

b. Enjoin any defendant named in the complaint who was found to have violated 18 U.S.C. § 1962, from participating in any way, either directly or indirectly, in the affairs of LIUNA or any of its affiliated bodies or subordinate district councils or local unions or other subordinate entity, or any other labor organization, and from being employed in a position which has among its duties dealing with any labor organization, and from owning, operating or being employed in any business or other organization which employs members of LIUNA or any of its subordinate organizations, or subsidiary organizations, and such organizations' affiliated employee benefit plans and any entity providing benefit plans services to such employee benefit plans or any other related entities.

2. That following a trial on the merits the district court issue a decree providing for the following:

a. Amending the LIUNA Constitution to establish procedures to provide that the General President, General Secretary-Treasurer and all other members of the Board are elected through a process of direct election by the rank and file membership of LIUNA;

b. Directing that new general elections be held to select a new General President, a new General Secretary-Treasurer and new International Vice-President, under the supervision and direction of an independent court-appointed officer, in such a manner as will ensure that the election is not vulnerable to intimidation or coercion of those LIUNA members found to be eligible to vote in the election;

c. Amending the LIUNA Constitution to provide for a method of operating the hiring hall procedures used by LIUNA Local Unions to find work for LIUNA members in such a fashion to prevent any LIUNA official at any level of LIUNA from operating the hiring hall in a discriminatory manner or in any manner which tends to intimidate the rank and file membership of LIUNA from exercising their individual rights as provided by LMRDA and other

provisions of law; and

d. Amending the LIUNA Constitution so as to establish procedures to ensure that the imposition of trusteeships on subordinate LIUNA entities and the creation of district councils within LIUNA are not used in any manner to intimidate the rank and file membership of LIUNA from exercising their individual rights as provided by LMRDA and other provisions of law.

3. That following a trial on the merits, the district court appoint independent Court Liaison Officer(s) to discharge the duties of LIUNA's President and/or its General Executive Board which relates to disciplining corrupt or dishonest officers, including the powers to conduct investigations to find corrupt and dishonest LIUNA officials and to impose those sanctions appropriate to ensure that LCN and criminal control of LIUNA is removed and to ensure that the rights of the membership of LIUNA under Title 29 are protected and preserved and to discharge any of the other duties of the Board of LIUNA (other than negotiating and entering into collective bargaining agreements, participating in the affairs of any LIUNA-related political action committee, or participating in the process related to the resolution of employee grievances) when the court-appointed officer deems it necessary to fulfill his duty to protect the rights of the membership of LIUNA and to prevent corruption and infiltration by the LCN or any other criminal group.

4. That following a trial on the merits, such independent court officers as the district court deems sufficient to achieve the objectives of this suit remain in office until the court determines that such officers are no longer necessary to achieve the objectives of this action.

5. That the district court provide in its Order that the fees and expenses of such officers as the court deems necessary are paid out of the funds of LIUNA.

6. That the district court enjoin and restrain the defendants who are named only as officials of LIUNA, pursuant to Rule 19 of the Federal Rules of Civil Procedure, and their successors as officials of LIUNA, and any of its members, agents, employees, officers, Regional

Offices, District Councils, Local Unions, and affiliated employee benefit funds or training funds from interfering in any manner whatsoever with any officer(s) appointed by the court pursuant to this law suit in the execution of those powers given to such officers by the court.

7. That the district court order that all of the individual defendants who are found to have violated 18 U.S.C. § 1962 (d) to disgorge all proceeds derived from such violations, with such proceeds to be applied for the benefit of the rank and file members of LIUNA, who are victims of those violations, with the remainder to be paid to cover the expenses of any officer appointed by the district court pursuant to this law suit or distributed as the court finds are in the interests of equity and justice.

8. That the district court issue a judgment declaring that LIUNA has been controlled and exploited by the LCN through multiple violations of 18 U.S.C. § 1962.

9. That the district court award the United States the costs of this suit together with such other and further relief as may be necessary and appropriate to prevent and restrain further violations of 18 U.S.C. § 1962, and to end the LCN's control over the exploitation of LIUNA.

**E. OUTCOME OF THE CASE:**

1. **Initial Settlement Agreement** –

In late 1994, the United States served LIUNA with its draft complaint, and settlement discussions ensued. On February 13, 1995, the Department of Justice (DOJ) entered into an agreement with LIUNA in which DOJ agreed to refrain from filing a civil RICO lawsuit against LIUNA and which allowed LIUNA an opportunity, without court supervision and court-appointed officers, to implement an Internal Reform Program to eliminate corruption within LIUNA. LIUNA's Internal Reform Program is described below. The Initial Settlement Agreement provided that if after 90 days "the Assistant Attorney General for the Criminal Division determines, in her sole discretion, that the imposition of a consent decree is necessary or desirable, after having given LIUNA an opportunity to have a meeting to be heard, the parties agree to the filing of the attached complaint and entry and implementation of the attached

consent decree.”

The attached Consent Decree provided for, among other matters: (1) a permanent injunction against LIUNA officers, representatives and members from committing any act of racketeering and other misconduct; (2) court-appointed officers to investigate, prosecute, and discipline LIUNA officers, representatives, employees and members for misconduct; (3) adoption of procedures to conduct investigations and adjudication of disciplinary charges; (4) various reforms in LIUNA’s Job Referral Rules and financial practices; and (5) union election reforms. DOJ also agreed to assist LIUNA’s reform efforts.

2. **Renewal Agreements** –

On January 14, 1998, and January 4, 1999, DOJ and LIUNA entered into renewal agreements that made slight changes to the Initial Settlement Agreement.

3. **Final Settlement Agreement** –

On January 18, 2000, DOJ and LIUNA entered into a Final Settlement Agreement whereby DOJ gave up its rights to impose an agreed upon Consent Decree and to have court-appointed officers to implement reform and to investigate and remove corrupt LIUNA officers, employees and members. Many of the provisions in the agreed upon Consent Decree became moot in light of the success and adopted reforms of LIUNA’s Internal Reform Program summarized below. The Final Settlement Agreement guaranteed that LIUNA would continue its Reform Programs for a substantial period. LIUNA agreed to the following principal matters:

a. LIUNA shall not prior to the 2006 LIUNA General Convention make any “material change” to LIUNA’s Internal Reform Program without prior approval of the United States. Therefore, in substance, LIUNA agreed to retain its Ethical Practices Code, Disciplinary Procedures, and Reform Team officers.

b. LIUNA’s General Executive Board (GEB) would continue to support the Internal Reform Program through the 2006 General Convention.

c. LIUNA agreed to retain an independent Elections Officer to run LIUNA's 2001 and 2006 International Elections and LIUNA agreed to provide the Elections Officer with a budget of \$4.4 million to supervise the 2001 International Election.

d. If the United States concluded that LIUNA had materially breached the Final Settlement Agreement, the United States may seek judicial enforcement of the Agreement before the United States District Court for the Northern District of Illinois that is presiding over the existing civil RICO Consent Decree in the Chicago District Council case. To expedite any such litigation, LIUNA agreed that the only issues to be adjudicated were whether LIUNA materially complied with its obligations under the Agreement, or whether any proposed change to its Internal Reform is a "material change" within the meaning of the Agreement.

e. Through 2006, the United States would continue to assist and monitor LIUNA's Internal Reform Program, and to that end representatives of LIUNA would continue to meet periodically with, and provide information to, representatives of the United States.

4. **LIUNA Accomplishments 1995-October 2006 -**

From February 1995 to October 2006, when the final Settlement Agreement ended, the following reforms and matters were accomplished pursuant to the Settlement Agreements:

a. **Ethical Practices Code** - LIUNA adopted an Ethical Practices Code modeled on codes proposed by the A.F.L.-C.I.O. in the late 1950's and adopted by the United Auto Workers Union. The code imposed standards of conduct for all financial practices relating to the handling of union, benefit and pension funds, the award and administration of contracts, conflicts of interest and similar issues. The code also prohibited LIUNA officers, representatives, employees and members from engaging in "barred conduct."<sup>16</sup>

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<sup>16</sup> "Barred Conduct" was defined as: (a) committing any act of racketeering as defined in 18 U.S.C. § 1961(1); (b) knowingly associating with any member or associate of the LCN; (c) knowingly permitting any member or associate of the LCN to exercise control or influence over LIUNA; or (d) obstructing or interfering with the Reform Team's enforcement of the Ethical Practices Code. The GEB Attorney, described below, was also authorized to seek disciplinary

(continued...)

b. **Reform Team** - LIUNA created four new positions to carry out its internal

reform program:

- (1) the Inspector General to investigate alleged violations of the Ethical Practices Code. LIUNA hired Douglas Gow, a retired former Associate Deputy Director of the FBI, to be the Inspector General, who in turn hired or retained approximately 40 former FBI and Department of Labor agents and other former law enforcement officials to assist him;
- (2) the GEB Attorney to investigate and prosecute violations of the Ethical Practices Code. LIUNA retained an independent attorney, Robert D. Luskin, a former Special Counsel to the Chief of the Organized Crime and Racketeering Section, and an attorney in Washington, D.C. to be the GEB Attorney. In turn, Mr. Luskin hired or retained other independent attorneys to assist him;
- (3) the Independent Hearing Officer, Peter F. Vaira, formerly United States Attorney in Philadelphia, and Organized Crime Strike Force Chief in Philadelphia and Chicago, to preside over and decide all cases brought by the GEB attorney; and
- (4) the Appellate Officer, attorney Neil Eggleston, a former AUSA in the Southern District of New York and a partner in Howry & Simon, to hear and decide appeals from the decisions of the Independent Hearing Officer.

c. **Removal of Officers, Employees and Members for Corruption-** 351

individuals (161 of whom have ties to organized crime) had left LIUNA either because of expulsion resulting from disciplinary charges or because of retirement or resignation, rather than submit to the disciplinary process. All the LIUNA officers and employees who were alleged to be corrupt individuals by the United States in its 1994 draft RICO complaint had left or were removed from LIUNA, including its former President Arthur A. Coia, who pled guilty to mail fraud charges,<sup>17</sup> and three International Vice-Presidents: John Serpico, Samuel Caivano and Peter

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<sup>16</sup>(...continued)

sanctions against any officer, agent, representative, employee, or member of LIUNA or its constituent entities for committing any federal or state felony, whether or not related to union affairs, or any federal or state misdemeanor violation involving the conduct of the affairs of a labor union or employee pension or welfare benefit plan, and may suspend such persons upon indictment pending resolution of the disciplinary charges.

<sup>17</sup> On January 31, 2000, Arthur A. Coia pleaded guilty to a one count information alleging that he executed a scheme to defraud the State of Rhode Island and the Town of Barrington,  
(continued...)



Fosco.

d. **Election Reform** - LIUNA amended its constitution to provide for direct election through secret ballot by rank and file members of all of its international officers, including its General President, and General Secretary Treasurer and all 13 International Vice-Presidents, which in 1996 resulted in the first contested election for LIUNA's presidency in LIUNA history. In 1996, LIUNA appointed an independent Elections Officer who supervised the election of LIUNA's international officers.

e. **Imposition of Trusteeships and Supervision** - In addition to the disciplinary process, LIUNA imposed 48 trusteeships and 46 "supervisions" on various locals and subordinate entities, which resulted in the removal of 434 officers and implementation of more efficient management measures. LIUNA also agreed to court-appointed officers in three cases to eliminate corruption: (1) The Mason Tenders District Council in New York City; (2) The Chicago District Council; and (3) Local 210 in Buffalo, New York.<sup>18</sup>

f. **Hiring Hall Reform** - In 1996, LIUNA implemented hiring hall reform to eliminate corruption and favoritism and to ensure that out of work union members would be dispatched for work on a fair and objective basis. These reforms were enforced by LIUNA's Inspector General's and GEB Attorney.

g. **Miscellaneous Reforms** - LIUNA also implemented other financial reforms to eliminate mismanagement and corruption.

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<sup>17</sup>(...continued)

Rhode Island of taxes owed on several automobiles. See United States v. Coia, Information No. 00-10024-GAO (D. Mass. January 27, 2000). Pursuant to a guilty plea agreement, Mr. Coia agreed to, among other matters, "remain retired from LIUNA as General President Emertius. . . and [was] barred, whether within or outside LIUNA, from any service as a consultant or advisor (as those terms are used and defined for purposes of 29 U.S.C. § 504) to LIUNA or any of its affiliated or subordinate entities, or in any capacity from any decision making authority concerning or over, or control over LIUNA or any of its affiliated or subordinate entities."

<sup>18</sup> See case summaries numbers 6, 19 and 20, in App. B at 40-42, 208-228.

5. **DOJ's Assistance** –

Throughout the period of these Settlement Agreements, DOJ closely monitored LIUNA's reform efforts through regular meetings and discussions, insisted upon various reforms and provided information and evidence to enable LIUNA's reform team to eliminate corruption.

6. **Continuation of LIUNA's Reform Efforts** –

Although the Final Settlement Agreement formally ended in October 2006, LIUNA has maintained its above-described reform program and is continuing its efforts to eliminate corruption, and DOJ continues to assist LIUNA's reform efforts.

**F. LEADING COURT DECISIONS:**

1. Serpico v. Laborers' International Union of North America, 97 F.3d 995 (7<sup>th</sup> Cir. 1996).

Two former LIUNA officials and five LIUNA locals sued LIUNA, contending that the decisions of LIUNA's General Executive Board (GEB) to establish a disciplinary code and to suspend officers in response to the Department of Justice's informing LIUNA of its intent to file a civil RICO suit against LIUNA and others violated Title I of the Labor-Management Reporting and Disclosure Act (LMRDA) 29 U.S.C. §§ 411-15 because LIUNA's GEB acted without a vote of the union's membership. The Seventh Circuit rejected this claim, concluding that the LMRDA "does not require any particular subject to be put to a referendum; it says only that when voting occurs every union member has equal rights to take part." 971 F. 3d at 998.

The Seventh Circuit also ruled that LIUNA's GEB's action was authorized by Article VIII § 2(b) of LIUNA's constitution, which empowers the GEB to amend LIUNA's constitution and to "exercise legislative power, when in its opinion, it deems it necessary to conform to or comply with the law; or when, in its judgment, the exercise of such power is deemed necessary, proper and appropriate in an emergency." *Id.* at 997. The Seventh Circuit explained that "[t]he word 'necessary' in a constitution does not mean 'essential'; it means expedient to the task at hand." *Id.* at 997. Under that understanding of the term, the Seventh Circuit concluded that "reasonable and honest interpreters could have concluded that the steps the [GEB] took were necessary to avoid a RICO complaint, which given the dire consequences of a receivership could have been deemed an emergency." *Id.* at 999.

2. Laborers' International Union of North America v. Caruso, 197 F.3d 1195 (7<sup>th</sup> Cir. 1999).

Pursuant to LIUNA's Internal Reform Program, LIUNA imposed a trusteeship over LIUNA's Chicago District Council (CDC) to eliminate organized crime's corrupt influence and control over the CDC. Following an evidentiary hearing, LIUNA's Independent Hearing Officer (IHO) concluded that "a trusteeship of the CDC was necessary to expel the influence of organized crime, restore democratic process and otherwise carry out the legitimate business of the Unions." *Id.* at 1197. LIUNA's Appellate Officer (AO) ruled that the IHO's opinion was not appealable under the Ethics and Disciplinary Procedure (EDP) established by LIUNA "because it

concerned a trusteeship only and imposed no ‘discipline’ on any of the defendants”, which would have been appealable. *Id.* at 1197.

However, the CDC refused to permit LIUNA to impose the trusteeship and denied LIUNA’s appointed trustee access to the CDC facilities. LIUNA and its trustee for the CDC sued in federal district court, seeking a restraining order barring the CDC and its former officers from interfering with the trusteeship. The district court granted the plaintiffs’ motion for summary judgment and issued the requested restraining order.

On appeal, the CDC contended that: (1) the IHO’s “evident partiality” deprived the CDC of a fair and impartial hearing; (2) LIUNA’s “patently unreasonable” interpretation of its Constitution and the EDP deprived the CDC of an intraunion appeal; and (3) LIUNA’s “bad faith” and “unclean hands” precluded summary judgment.

The Seventh Circuit refused to consider the first two contentions because the CDC did not raise them in its response to the motion for summary judgment. The Seventh Circuit rejected the CDC’s third claim as “meritless”, stating:

In *Serpico*, 97 F.3d at 999, this court upheld LIUNA’s agreement with the government stating that “we, too, think that reasonable and honest interpreters could have concluded that the steps the Board took were necessary to avoid a RICO complaint, which given the dire consequences of a receivership could have been deemed an emergency.” The CDC’s attempts to characterize its new challenges to the EDP as challenges to how the EDP is implemented do not alter the fact that the EDP was appropriately enacted and we are not aware of any compelling reason that warrants concluding that LIUNA’s efforts to establish a trusteeship over the CDC was in bad faith.

197 F.3d at 1197-98.

**18. HOTEL EMPLOYEES AND RESTAURANT  
EMPLOYEES INTERNATIONAL UNION (HEREIU)**

**A. CASE NAME:**

United States v. Hotel Employees and Restaurant Employees International Union and the General Executive Board of the Hotel Employees and Restaurant Employees International Union, Civil Action No. 95-4595 (GEB), United States District Court for the District of New Jersey. Complaint filed September 5, 1995.

**B. DEFENDANTS:**

The complaint named two defendants: (1) In order to “fully effectuate the relief sought” by the civil RICO suit, the complaint named the Hotel Employees and Restaurant Employees International Union (HEREIU) as a nominal defendant. The HEREIU was defined as including its various “constituent entities,” including HEREIU Districts, District Councils, and local unions located throughout the United States. (2) The complaint also named as a defendant the General Executive Board (GEB) of the HEREIU, which consisted of its current and former members, including the General President of the HEREIU, who served as Chairman of the General Executive Board, the General Secretary Treasurer, the General Vice President, the Director of Organization, 14 District Vice Presidents, and 10 Vice Presidents at large. At the time of the filing of the complaint, the General President was Edward T. Hanley.

**C. SUMMARY OF THE COMPLAINT:**

The complaint alleged that the RICO enterprise consisted of an association-in-fact (HEREIU enterprise), which was comprised of “the HEREIU (including its constituent entities), the Defendant General Executive Board, and the officers, employees and associates of the HEREIU.” The complaint alleged that since in or about 1970 and continuing to the filing date of the complaint, the defendant GEB, acting with known and unknown members and associates of organized crime, had conspired to conduct and participate, directly and indirectly, in the conduct of the affairs of the HEREIU enterprise through a pattern of racketeering activity, in violation of

18 U.S.C. § 1962 (d). Pursuant to the authority of United States v. Glecier, 923 F.2d 496 (7<sup>th</sup> Cir. 1991), the complaint did not allege specific racketeering acts. Rather, the complaint alleged that the pattern of racketeering activity consisted of: (1) multiple acts of extortion indictable under the Hobbs Act, 18 U.S.C. § 1951; (2) multiple acts of embezzlement and theft of union funds indictable under 29 U.S.C. § 501(c); and (3) multiple acts of wilfully receiving prohibited employer payments indictable under 29 U.S.C. § 186 (b)(1) and (d).

The complaint specifically alleged that as part of the conspiracy GEB, acting with members and associates of organized crime, had obtained and attempted to obtain property in the form of the right of the HEREIU's rank and file union members to the loyal and responsible representation by their officers, agents, and representatives as guaranteed by 29 U.S.C. § 501(a), and to free speech and democratic participation in union affairs, as guaranteed by 29 U.S.C. § 411. The complaint alleged that such property had been obtained by the defendant General Executive Board with the consent of such union members having been induced by the wrongful use of actual and threatened force, violence and fear, including fear of physical and economic harm, in violation of 18 U.S.C. § 1951.

The complaint also specifically alleged that the GEB had fostered a climate of intimidation created by members and associates of organized crime and also had violated its duty to provide loyal and responsible representation to the union members of the HEREIU by, among other things, failing to enforce the HEREIU constitution; failing to investigate charges of corruption within the HEREIU and its constituent entities; failing to redress proven instances of fraudulent practices and illegal organized crime control; and appointing to office and permitting to remain in office corrupt officials and organized crime figures. The complaint alleged that the GEB had engaged in such activity despite notice of corruption and the influence and control of organized crime within the HEREIU through published reports, public investigations, and multiple criminal and civil charges against the officers and employees of HEREIU and its constituent entities.

The complaint further alleged that as part of the conspiracy, the GEB, acting with officers and agents of the HEREIU's constituent entities and members and associates of organized crime, had embezzled, stolen, and willfully converted the property of the HEREIU (including its constituent entities) by approving and permitting improper expenditures and loans of HEREIU funds to various persons, which expenditures and loans were not in the interest and not for the benefit of the HEREIU and its union membership, resulting in the diminution of HEREIU assets, and by knowingly refusing and failing to exercise the GEB's investigatory and disciplinary authority to redress such corrupt activity within the HEREIU, in violation of 29 U.S.C. § 501(c).

Also, as part of the alleged conspiracy, the GEB, acting with the officers and employees of the HEREIU and of various constituent entities and members and associates of organized crime, was charged with having requested, demanded, received, accepted and agreed to receive and accept payments of money and other things of value from various employers, and persons acting in the interest of employers, in violation of 29 U.S.C. § 186. Finally, the complaint alleged that the GEB had aided and abetted officers and employees of the HEREIU and its constituent entities and members and associates of organized crime to request, demand, receive and accept unlawful payments of money and other things of value from the such employers by knowingly refusing and failing to investigate and redress such conduct, in violation of 29 U.S.C. § 186(b)(1) and (d) and 18 U.S.C. § 2.

**D. RELIEF SOUGHT:**

1. The Government sought to permanently enjoin all current and future officers, agents, employees, representatives, and persons holding positions of trust in the HEREIU and its constituent entities, and all current and future members of the HEREIU and its constituent entities, from:

- a. committing any crime listed in 18 U.S.C. § 1961(1);
- b. knowingly associating with any member or associate of any criminal group or with any barred person;

- c. knowingly permitting any member or associate of any criminal group or any barred person to exercise any control or influence, directly or indirectly, in any way or degree, in the conduct of the affairs of the HEREIU and its constituent entities; and
- d. obstructing or otherwise interfering, directly or indirectly, with the efforts of anyone effectuating or attempting to effectuate the relief ordered or attempting to prevent any criminal groups or barred person from exercising influence on the conduct of the affairs of the HEREIU and its constituent entities.

A “barred person” was expressly defined in the complaint as: (a) “any member or associate of any organized crime family or other criminal group, or (b) any person prohibited from participating in union affairs pursuant to or by operation of the injunction or other court order or statute.”

2. The complaint also requested that the district court appoint a Monitor, funded by the HEREIU, with investigatory, review and disciplinary powers, including the authority to review and approve candidates for elective and appointive office in the HEREIU and its constituent entities; to disapprove the hiring, appointment, reassignment or discharge of any person or business entity by the HEREIU or its constituent entities; to disapprove or terminate any contract (including, but not limited to, contracts with service providers or vendors), lease, or other obligation of the HEREIU or its constituent entities; and to impose disciplinary sanctions on union members and any officer, representative, agent, employee or person holding a position of trust in the HEREIU and its constituent entities. The disciplinary sanctions could be based on engaging in actions or inactions which violated any of the injunctive prohibitions ordered by the district court, violated any criminal law involving the operation of a labor organization or employee benefit plan, or which furthered the direct or indirect influence of any organized crime group or the threat of such influence.

**E. OUTCOME OF CASE:**

**1. September 5, 1995 Consent Decree:**

On September 5, 1995, the Government and the HEREIU filed a Consent Decree simultaneously with the complaint following negotiations by representatives of the HEREIU, the United States Attorney's Office for the District of New Jersey and the Organized Crime and Racketeering Section (OCRS). The HEREIU also consented to consolidation of the case with the prior civil RICO action in United States v. Edward T. Hanley, et al., Civil Action No. 90-5017 (GEB) (D. N.J.), then pending before United States District Court Judge Garrett E. Brown, Jr.

Without any express or implied admission of liability or fault by the defendants as to the matters alleged in the complaint, the parties acknowledged in the Consent Decree that historically the HEREIU and its constituent entities "had suffered from an externally induced corruption problem" and that the remedial objective of the Consent Decree was that the HEREIU and its constituent entities be free from the direct or indirect influence of any organized crime group or the threat of such influence then and in the future.

**a. Injunctive Prohibitions**

All current and future officers, agents, employees, representatives, and persons holding positions of trust in the HEREIU and its constituent entities as well as all current and future members of the HEREIU and its constituent entities were permanently enjoined from:

1. committing any crime listed in 18 U.S.C. § 1961(1);
2. knowingly associating with any member or associate of any criminal group or with any barred person;
3. knowingly permitting any member or associate of any criminal group or any barred person to exercise any control or influence, directly or indirectly, in any way or degree, in the conduct of the affairs of the HEREIU and its constituent entities; and
4. from obstructing or otherwise interfering, directly or indirectly, with the efforts of anyone effectuating or attempting to effectuate the terms of this Consent Decree or in attempting to prevent any criminal groups or barred person from exercising influence on the conduct of the affairs of the HEREIU and its constituent entities.



As used in the Consent Decree, the term “knowingly associating” meant that: (a) an enjoined party knows or should know that the person with whom he or she is associating is a member or associate of any criminal group or is a barred person; and (b) the association is more than fleeting.

And as used in the Consent Decree a “barred person” was defined as: “any member or associate of any organized crime family or other criminal group, or any person prohibited from participating in union affairs pursuant to or by operation of this Consent Decree or other court order or statute.”

**b. Court-Appointed Monitor**

The district court appointed a Monitor for a 4 year term, subject to extensions. The Monitor’s powers included the following:

**1. General Powers**

- a. To investigate, audit and review all aspects of the HEREIU and its constituent entities to advance the remedial objective of this action. These powers shall include the power of the Monitor to conduct investigatory interviews and sworn depositions to advance the remedial objective of this action;
- b. To request the United States Attorney or any agency of the United States to provide legal, audit and investigative personnel to assist in the execution of the Monitor’s duties;
- c. To retain legal, investigative, accounting and other support personnel at the HEREIU’s expense and delegate any of his/her powers or duties to such persons, where, in the Monitor’s discretion, such personnel and delegation are necessary to execute the Monitor’s duties as set forth herein;
- d. To attend all HEREIU Executive Board meetings and HEREIU committee meetings (with the exception of bargaining committee meetings);
- e. To refer matters to the HEREIU or the United States Attorney for appropriate action;

- f. To perform all such functions and duties not specifically enumerated herein in order to fulfill his/her duties as Monitor.

**2. Review Authority**

Whenever the Monitor reasonably believes that any of the following actions, proposed actions, or omissions to act (a) may violate the injunctive prohibitions of this Consent Decree, (b) may constitute any crime involving labor organizations or employee benefit plans, or (c) may further the direct or indirect influence of any organized crime group or the threat of such influence now or in the future, he or she has the power to:

- i. disapprove the hiring, appointment, reassignment or discharge of any person or business entity by the HEREIU or its constituent entities; and
- ii. disapprove or terminate any contract (including, but not limited to, contracts with service providers or vendors) lease, or other obligation of the HEREIU or its constituent entities.<sup>19</sup>

The HEREIU had a right to appeal any such decision to the district court.

**3. Disciplinary Powers**

- a. The Monitor had the right and power to remove, suspend, expel, fine or forfeit the benefits (with the exception of vested employee retirement benefits subject to title I of the Employee Retirement Income Security Act -- 29 U.S.C. § 1001, *et seq.*) of any officer, representative, agent, employee or person holding a position of trust in the HEREIU and its constituent entities or member of HEREIU

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<sup>19</sup> ¶ 20 of the Consent Decree required the HEREIU to inform the Monitor of “expenditures or proposed expenditures in excess of \$10,000.” In practice, the Monitor reviewed only such expenditures in excess of \$10,000.

when such person engages or has engaged in actions or inactions which (i) violate the injunctive prohibitions of this Consent Decree, (ii) violate any criminal law involving the operation of a labor organization or employee benefit plan, or (iii) further the direct or indirect influence of any organized crime group or the threat of such influence now or in the future.

- b. Disciplinary Procedure. In order to discharge disciplinary duties under this decree, the Monitor shall have the same rights and authority as the HEREIU General President, the HEREIU GEB, and any other officer, agent, employee, or representative of the HEREIU as well as the full authority derived from any and all provisions of law. When exercising his/her disciplinary rights and powers, the Monitor shall afford the subject of the potential disciplinary action written notice of the charge(s) against him/her and an opportunity to be heard. The Monitor shall conduct any hearing on any disciplinary charges, render the final decision regarding whether discipline is appropriate and impose the particular discipline. The charged party shall have 20 days to answer the charges against him/her and may be represented by counsel at any hearing conducted by the Monitor. Any hearing shall be conducted under the rules and procedures generally applicable in labor arbitration proceedings and decisions shall be made using a “just cause” standard. In conducting any hearing, the

Monitor shall have the right and power:

- i. to administer oaths. All testimony and other evidence shall be subject to penalties of perjury to the same extent as if such evidence was submitted directly to the district court;
  - ii. to examine witnesses or conduct depositions;
  - iii. to receive evidence. The Monitor may receive evidence withheld from the charged party and the public which contains or constitutes sensitive information provided by a law enforcement agency, and can choose what weight, if any, to give such evidence, but in no case shall the identity of a confidential source of law enforcement information be required to be disclosed; and
  - iv. to issue subpoenas requiring the attendance and presentation of testimony of any person and/or the production of documentary or other evidence. In the case of contumacy or failure to obey a subpoena issued under this Paragraph, the Monitor may: (i) impose discipline upon the person in accordance with this Consent Decree; and/or (ii) seek an order from the Court requiring the person to testify or to produce documentary or other evidence.
- c. Appeal of Disciplinary Action. Any discipline imposed by the Monitor shall be final and binding, subject to review by the district court. A person disciplined by the Monitor may obtain review of the Monitor's decision regarding such discipline by filing a written appeal of such decision with the Court within thirty (30) days of such decision by the Monitor. The Monitor's decision, all papers or other material relied upon by the Monitor and the papers filed or issued pursuant to this appeal procedure shall constitute the exclusive record for review. The Monitor's decisions pursuant to this Paragraph shall be reviewed by the district court, if necessary, under the substantial evidence standard

set forth in 5 U.S.C. § 706(2)(E). Materials considered by the Monitor but withheld from the appellant and the public which contain sensitive information provided by a law enforcement agency shall be submitted to the district court for ex parte, in camera consideration and shall remain sealed. The person disciplined by the Monitor may appeal the Monitor's decision regarding the discipline imposed against him/her and any decision by the Monitor regarding discipline imposed against a person which is not appealed in accordance with this Paragraph may not be appealed or otherwise challenged. HEREIU or the United States may seek the district court's review of the Monitor's decision not to impose discipline.

4. **The Public Review Board**

The Consent Decree further provided that the HEREIU would create a three-member Public Review Board (PRB) within the HEREIU to enforce an Ethical Practices Code (EPC) attached to the Consent Decree. The PRB and EPC were to be presented to the HEREIU Convention in 1996 for incorporation within the HEREIU Constitution. If these steps were taken by the HEREIU, the Consent Decree further provided that the Monitor would become a member of the PRB and his independent disciplinary authority would expire within 6 months of the date when the PRB became effective, or not later than March 5, 1997. All new matters arising after the Monitor's appointment to the PRB would be jointly investigated and pursued by the Monitor and the two other

members of the PRB whose were required to be persons of “national prominence” and whose chairman must be a person “with extensive federal prosecutorial experience.” The parties agreed that the initial two members would be former Illinois Governor James Thompson and Roman Catholic Archbishop James Keleher.

**5. Election Procedures**

The Monitor was authorized to review proposed candidates for union elective offices. Accordingly, in the event the Monitor discovered information which may indicate that a candidate’s election (a) violates or would violate the injunctive prohibitions of the Consent Decree, including permitting a barred person to serve; or (b) is or would be any crime involving labor organizations or employee benefit plans; or (c) furthers or would further the direct or indirect influence of any organized crime group or the threat of such influence now or in the future, the Monitor was authorized to disallow the particular nomination or election of the individual.

A person disallowed by the Monitor pursuant to the above paragraph was allowed to appeal the Monitor’s action by filing a written appeal of such action with the Monitor within twenty (20) days of such action by the Monitor. The Monitor shall issue to the appellant a written decision regarding the appeal within twenty (20) days after he/she receives such appeal. The Monitor’s decision, all papers or other material relied upon by the Monitor and the papers filed or issued pursuant to this appeal procedure constitute the exclusive record for review. The Monitor’s decisions pursuant to this Paragraph was to be reviewed by the

district court, if necessary, under the substantial evidence standard set forth in 5 U.S.C. § 706 (2)(E). Materials considered by the Monitor but withheld from the appellant and the public which contain sensitive information provided by a law enforcement agency were to be submitted under seal to the district court for ex parte, in camera consideration. A person disallowed by the Monitor was authorized to appeal the Monitor's decision regarding his/her candidacy and any decision by the Monitor regarding a person's candidacy which was not appealed in accordance with this paragraph could not be appealed or otherwise challenged. HEREIU or the United States was authorized to seek the court's review of the Monitor's decision not to disallow a person to seek or obtain elected office.

**6. Reports**

The Monitor was required to provide the district court, the Government and the HEREIU with written progress reports every six months.

**2. Actions Following the September 5, 1995 Consent Decree:**

On September 9, 1996, the HEREIU PRB became effective pursuant to action of the HEREIU Convention held during July 1996.

On December 31, 1996, the Monitor filed his second report with the district court advising that in addition to sanctioning various union officials, he had removed convicted felon and former Congressman Dan Rostenkowski from HEREIU employment as a union negotiator.

On February 25, 1997, in an unpublished order, the district court approved the Monitor's request, supported by the United States and not opposed by the HEREIU, that the Monitor's independent disciplinary authority be extended from March 5, 1997, for 12 months

and that the Monitor be appointed as a member of the HEREIU PRB following March 5, 1998. The district court found that the United States had demonstrated probable cause to believe that corruption and organized crime continued to exist with the HEREIU and its constituent entities.

On April 15, 1997, the district court filed an order denying motions to quash the Monitor's subpoenas with respect to records held by Frank Ervolino and other officers of HEREIU Local 4 in Buffalo, New York. The district court ruled that the Monitor had authority under the Consent Decree to issue subpoenas in any federal judicial district without prior application to the district court and that the district court had the authority to resolve all challenges to such subpoenas, regardless of where the subpoenas were served, under the All Writs Act, 28 U.S.C. § 1651. When Ervolino continued to pursue his motion to quash in the Western District of New York, the Government sought an order to show cause why the motion should not be dismissed.

On April 24, 1997, the district court directed Ervolino and others Local 4 officials to dismiss their motions to quash or litigate them in the District of New Jersey in hearings which the movants ignored.

On May 27, 1997, the district court filed an unpublished memorandum opinion denying the motions to quash and ruling that the HEREIU Consent Decree did not violate the separation of powers doctrine within the United States Constitution. Ervolino and the other Local 4 officials had argued that as a judicial officer the Monitor had improperly undertaken to conduct factual investigations and make prosecutorial decisions of behalf of the Executive Branch of the United States. The district court held that the Monitor was not engaged in governmental action and was in fact the creature of the Consent Decree's agreement between the parties. The district court specifically ruled that the Monitor was appointed and paid by the HEREIU and that although the Monitor's disciplinary actions may be appealed to the court, "neither the Monitor nor the [Monitor-selected] Investigations Officer are empowered to act on behalf of the government or on behalf of the court." Memorandum Opinion at 4 in United States



v. HEREIU, et al., Civ. No. 95-4596(GEB) (D.N.J.) (filed May 27, 1997). The district court also concluded that the HEREIU GEB members had the authority to bind all officers and employees of the HEREIU and its constituent entities by agreeing to the Consent Decree which effectively gave the Monitor unfettered access to such officials and the constituent entities' records. Id. at 5.

Reasserting the court's authority under the All Writs Act, the district court also concluded that because Ervolino and the other Local 4 officials had declined to participate in its hearings on the motions to quash, it would deny the motions. Finally, the district court held that subpoenas issued pursuant to 18 U.S.C. § 1965(c) were proper because the civil RICO action was still pending, despite the Consent Decree's settlement of any contested litigation between the parties, and that the subpoenas had been properly made returnable in the Western District of New York for the convenience of the movants even though the subpoenas could have been made returnable in the District of New Jersey as required by section 1965(c). Id. at 5-6, n.3.

On March 5, 1998, Kurt Muellenberg, the court-appointed Monitor, became a member of the PRB. However, Muellenberg retained his independent disciplinary powers, including subpoena authority, for all investigations pending prior to that date.

On May 18, 1998, in response to allegations of having abused union funds, General President Edward Hanley publicly announced that he had agreed with the Monitor to retire in July 1998 from all positions within the HEREIU and as a trustee of the HEREIU Pension and Welfare Plans in July 1999. Hanley's agreement with the Monitor also called for limited restitution to the union and an agreement not to seek recoupment of legal expenses from the HEREIU.

On August 25, 1998, the Monitor filed his fourth and final report as Monitor with independent disciplinary powers. The Monitor reported that he had reviewed more than 1064 candidates for union elections, approved 64 elections, and postponed or invalidated 3 elections; and had charged 34 HEREIU officials with disciplinary infractions of which 10, including 2 former General Executive Board members, involved knowing association with organized crime

figures. All 34 individuals were removed from, or agreed to vacate, their union positions on a temporary or permanent basis. One of these officials, Frank Ervolino, had also been a President of the Laundry Workers International Union. Former General President Edward Hanley had agreed to resign without formal disciplinary charges. The Monitor also included in his report 47 recommendations made to the HEREIU with respect to financial and operational reforms of the union. For example, such recommended reforms included the preparation of a written, annual budget; limiting union-paid perquisites for union consultants and retired union officials; hiring full-time auditors; and maintaining a data base of persons removed from other unions for organized crime association or corruption.

On July 21, 1999, the Subcommittee on Employer-Employee Relations of the Committee on Education and the Workforce, United States House of Representatives, held hearings under the chairmanship of Representative John Boehner concerning the HEREIU and the civil RICO action. Newly appointed HEREIU General President John Wilhelm testified that 44 of the 47 recommendations had been implemented and that implementation of the other three was in progress.

On December 5, 2000, following a joint application to the district court for dismissal of the civil RICO action, the district court entered a Final Order of Dismissal in which the parties agreed that the objectives of the Consent Decree had been substantially achieved, but that the HEREIU and its constituent entities should continue to be free from the influence of organized crime and other corrupting elements. For that purpose, the Final Order provided that the defendants would permanently maintain the PRB and the Ethical Practices Code in substantially the same forms as they then existed and that the United States would have the right to nominate and veto any candidate to fill the former Monitor's position on the PRB until December 5, 2006. Moreover, during that six-year period, the PRB was required to give due deference to recommendations of the former Monitor or his successor in regard to the selection of investigators and prosecutors before the PRB of alleged corruption or influence of criminal

groups within the HEREIU.

The Final Order also required that all current and future members and officials of the HEREIU continued to be enjoined by any permanent injunction or order of the court, including the injunctive prohibitions formerly contained in the Consent Decree and incorporated into the Final Order. Moreover, the Final Order confirmed the district court's continuing jurisdiction over the HEREIU and its constituent entities and expressly provided that violation of the district court's orders could result in the court's imposition of "remedies beyond fines and incarceration for contempt when such remedies are warranted." The Final Order also expressly provided that the district court may order such relief as "necessary and proper" in the event that the United States demonstrates by clear and convincing evidence that the PRB had ceased to function or function effectively, or that systemic corruption or organized crime influence existed in the HEREIU or its constituent entities. This last provision was intended by the parties to include a revival of the court-approved Monitorship, if necessary, without commencement of a new civil RICO action and was accompanied by an express provision that the record of all prior proceedings in the case or other matters involving the HEREIU would be admissible in the event that an application was made to the court pursuant to the Final Order.

On November 6, 2002, the district court granted the PRB's petition for preliminary injunction and an order to show cause why a lawsuit filed by former officials of HEREIU Local 5 in Anthony A. Rutledge, Jr., et al. v. John Wilhelm, et al., 02-CV-5926 (D. HI.), should not be dismissed in the District of Hawaii and plaintiffs enjoined from challenging the authority of the PRB in courts outside the District of New Jersey. Plaintiffs sought to compel the PRB to prosecute and adjudicate alleged unethical practices by officials of Local 5 who had defeated plaintiffs' slate of candidates. Following the order to show cause, plaintiffs transferred their lawsuit to the District of New Jersey before Judge Brown.

On May 20, 2003, in an unpublished opinion, the district court dismissed the plaintiffs' claim for relief on the grounds that the Consent Decree had vested the PRB with

“exclusive jurisdiction and discretion in deciding whether the HEREIU Code of Ethical Practices and Bylaws have been violated by Union representatives and executives.” The court further found that because the PRB’s decisions to investigate were not judicially reviewable, the court could not compel the PRB to act. Plaintiffs appealed the district court’s decision, but the parties agreed to dismiss the appeal without judicial action. Order of Dismissal of Appeal in Rutledge v. Wilhelm, No. 03-2825 (3d Cir.) (filed 2/2/2004).

On August 23, 2004, the district court approved an Amended Final Order of Dismissal which recognized that the HEREIU had formally merged in July 2004 with the former UNITE Union and that the HEREIU PRB had ceased to function when the Convention of the merged UNITE HERE union had approved a reorganized PRB and revised Ethical Practices Code for the merged union. The Amended Final Order effectively recognized that all provisions of the Final Order of Dismissal would continue in force in regard to the international union of the UNITE HERE, the former HEREIU local unions, and any local UNITE union which had merged with a former HEREIU local union until December 5, 2006. After that date all components of the UNITE HERE, including former UNITE local unions which had never been parties to the civil RICO action, would become subject to the disciplinary sanctions of the reorganized PRB. The PRB was also expanded to include an additional member chosen by the union.

Between March 6, 1998, and December 6, 2006, the PRB commenced disciplinary actions against 25 individuals which resulted in a lifetime bar of 16 individuals from either membership in or other association with the union or both; the suspension of 7 individuals from service as an officer, employee or consultant for lesser periods; and 1 dismissal of charges. One disciplinary action remained pending in 2007.

**F. LEADING COURT DECISIONS:**

1. Agathos v. Muellenberg, 932 F. Supp. 636 (D. N.J. 1996).

In this decision, the district court dismissed an action to enjoin the court-appointed Monitor’s disciplinary charges against the plaintiff as pre-mature because the court lacked subject matter jurisdiction to review disciplinary charges prior to their adjudication by the Monitor under the express terms of the September 5, 1995, Consent Decree. Following a detailed

review of the Consent Decree's procedure by which the Monitor was authorized to commence and dispose of disciplinary actions against union officials and members, the district court noted that the doctrine of exhaustion of administrative remedies is not limited to litigation involving agencies created by Congress, but limit a court's jurisdiction where the requirement of administrative exhaustion is explicitly set forth in a court-approved settlement. 932 F.Supp. at 638 and n. 1 (citing in part an unpublished decision in United States v. International Bhd. of Teamsters et al., Civ. No. 88-4486 (DNE), 1993 WL 33605 (S.D.N.Y. 1993)) (other citations omitted). The district court did not reach plaintiff's argument that the HEREIU Consent Decree did not endow the Monitor with authority to sanction HEREIU officials for past conduct prior to the filing of the Consent Decree on September 5, 1995.

2. United States v. Hotel Employees and Restaurant Employees, Int'l Union, 974 F. Supp. 411 (D. N.J.1997).

The court-appointed Monitor found that John Agathos, Sr., President of HEREIU Local 69 and a trustee of its benefit funds, violated the September 5, 1995, Consent Decree by misconduct that occurred both before and after the Consent Decree was entered, including knowingly associating with members of the Genovese LCN Family and committing extortion and embezzlement of HEREIU Local 69 funds. The Monitor permanently barred Agathos "from membership, office, employment, and any other position of trust, in the HERIEU and any of its constituent entities, including, but not limited to, Local 66 and Local 69 Funds." 974 F. Supp. at 414.

The district court upheld the Monitor's disciplinary action, and rejected each of Agathos' challenges. The court concluded that: (1) Kurt Muellenberg had been in fact appointed by the court as Monitor on September 5, 1995, contrary to Agathos' meritless assertion that Muellenberg was not appointed until January 1997 when the court signed a nunc pro tunc order permitting Muellenberg to receive copies of court documents as a party to the litigation; (2) although the Consent Decree had expressly exempted the HEREIU international Pension and Welfare Benefit Funds from the Monitor's jurisdiction, the Consent Decree's definition of HEREIU "constituent entities" was sufficiently inclusive to give the Monitor authority over local union employee benefit plans; (3) the Monitor possessed the authority to discipline union officials and members for wrongful conduct committed prior to the date of the Consent Decree because its disciplinary provisions provided that the Monitor may remove or otherwise discipline an offender who "engages or has engaged in actions or inactions" that violate the injunctive provisions of the Consent Decree or any criminal law involving the operation of a labor organization or employee benefit plan; and (4) Agathos' claim that the Monitor had improperly denied him the right to argue jurisdictional defenses before being subpoenaed to testify and participate in the disciplinary hearing about the substantive charges was rendered moot by the court's decision that Agathos' jurisdictional defenses lacked merit.

## 19. CHICAGO DISTRICT COUNCIL OF LIUNA

### A. CASE NAME:

United States of America, and Laboreres' International Union of North America by and Through Robert Luskin, in his official capacity as General Executive Board Attorney v. Construction & General Laborers' District Council of Chicago and Vicinity, Civil No. 99-C-5229, United States District Court for the Northern District of Illinois. Complaint filed August 11, 1999.

### B. DEFENDANTS:

The sole defendant was the Construction & General Laborers' District Council of Chicago and Vicinity (Chicago Laborer's District Council or CLDC), which is a subordinate labor organization of the Laborers' International Union of North America (LIUNA) and then consisted of and oversaw the operation of 21 constituent LIUNA local unions in the Chicago metropolitan area. The complaint also alleged that numerous members and associates of the Chicago La Cosa Nostra Family (LCN or the Outfit) were coconspirators not named as defendants.

### C. SUMMARY OF THE COMPLAINT:

The complaint alleged that the RICO enterprise consisted of an association-in-fact comprised of the Chicago Laborer's District Council and its constituent local unions and affiliated employee benefit funds. The complaint also alleged that for decades the Chicago LCN Family had corruptly controlled and influenced the alleged enterprise, including through controlling the selection of the General Presidents of LIUNA and officers of the CLDC, and corrupt suppression of dissent within the CLDC and its constituent local unions.

The complaint alleged two claims for relief: that from the mid-1970's to the date the complaint was filed, the defendant conspired with the named coconspirators and others to: (1) acquire and maintain control of the alleged Enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. §§ 1962(b) and (d), and (2) participate in the affairs of the alleged

Enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. §§ 1962(c) and (d).

Pursuant to the authority of United States v. Glecier, 923 F.2d 496 (7<sup>th</sup> Cir. 1991), the complaint did not allege specific racketeering acts; rather, the complaint alleged that the pattern of racketeering activity consisted of multiple acts of extortion indictable under the Hobbs Act, 18 U.S.C. § 1951, and also alleged the manner and means as well as numerous overt acts in furtherance of the two alleged conspiracies. In particular, the complaint alleged that through the wrongful use of actual and threatened, force, violence and fear of physical and economic injury, the CLDC and its coconspirators obtained and conspired to obtain property from the delegates of the CLDC and the membership of its twenty-one constituent local unions consisting of: (1) the right of union members to run for and hold office and to support the candidates of their choices, as guaranteed by 29 U.S.C. § 481(e); (2) the right of union members to free speech and democratic participation in internal union affairs, as guaranteed by 29 U.S.C. § 411; (3) the right of union members to loyal and faithful representation by their union officers and other representatives, as guaranteed by 29 U.S.C. § 501 (a); and (4) the right of union members to loyal and responsible representation by the fiduciaries of employee welfare and pension benefit plans, as guaranteed by 29 U.S.C. §§ 1104 and 1106.

The complaint also noted that in 1998, LIUNA imposed a Trusteeship over the CLDC to eliminate the LCN's corrupt influence over the CLDC. However, the reforms initiated through the Trusteeship and LIUNA's other remedial actions were not sufficient by themselves to eliminate the extensive corruption that permeated the CLDC.<sup>20</sup> Therefore, LIUNA, through its General Executive Board Attorney, joined in this action to enable the United States to obtain equitable relief to eliminate the LCN's corrupt influence and control over the CLDC.

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<sup>20</sup> In 1995, LIUNA entered into oversight agreement with the United States. As part of this agreement, LIUNA adopted an Ethical Practices Code (EPC), designed to eliminate corruption from LIUNA and its affiliated entities, and an Ethics and Disciplinary Procedure, which created an independent structure consisting of a General Executive Board (GEB) Attorney and LIUNA's Inspector General to investigate and prosecute potential violations of the EPC and an Independent Hearing Officer and an Appellate Officer to adjudicate these charges. See LIUNA Case Summary number 17 above in Appendix B.

**D. RELIEF SOUGHT:**

The United States requested that the district court grant preliminary and injunctive relief that would:

1. Enjoin and restrain all current and future officers, representatives, members and employees of the CLDC and its affiliated entities and all persons acting in concert with them from committing any acts of racketeering, as defined in 18 U.S.C. § 1961(1), and from knowingly associating, directly or indirectly, with any members or associates of the Chicago Outfit or any other LCN family;
2. Appoint court liaison officers, pendente lite to run and administer the affairs of the CLDC, to conduct investigations of LCN and other corrupt activity, to institute removal actions of any individuals associated in any way with the CLDC or its affiliated entities, to appoint trustees to any of the funds affiliated with the CLDC, to restore democratic processes within the CLDC, and to review practices or procedures of the CLDC and to petition the district court for an order altering any such practice or procedure when the court liaison officers deem it necessary to protect the rights of the members of locals affiliated with the CLDC consistent with the provisions of Title 29 of the United States Code and the LIUNA Constitutions, and to take other reasonable and appropriate action to prevent the perpetuation of LCN or other criminal influence in the affairs of the CLDC or any of its affiliated entities and funds;
3. Enjoin and restrain anyone affiliated with the Chicago Laborers' District Council and any entity associated with the CLDC in any way from any interference with the court liaison officers in the execution of their duties as court liaison officers;
4. Provide that the expenses of the court liaison officers be paid out of the funds of the Chicago Laborers' District Council and its affiliated locals;



5. Award the United States the costs of this suit together with such other and further relief as may be necessary and appropriate to prevent and restrain further violations of 18 U.S.C. § 1962 and to end organized crime's control over the CLDC.

**E. OUTCOME OF THE CASE:**

1. On August 31, 1999, the district court entered an agreed upon Consent Decree between the United States and the defendant CLDC that included the following equitable relief:

a. Permanent Injunctions: All current and future officers, agents, representatives, employees and members of CLDC and its affiliated entities were permanently enjoined:

- (1) from committing any act which is defined as an act of racketeering as defined in 18 U.S.C. § 1961(1);
- (2) from knowingly associating with any member or associate of the LCN or with any person barred from union affairs;
- (3) from knowingly permitting any member or associate of the LCN or barred person to exercise any control or influence, directly or indirectly, in the conduct of the affairs of the CLDC and its affiliated entities except in the circumstances set forth in this Consent Decree; and
- (4) from obstructing or otherwise interfering, directly or indirectly, in any way or degree, with the work of anyone who is appointed under this Decree, or working under their direction and control, or from interfering with the efforts of any officer, attorney, or employee of the CLDC and its affiliated entities in effectuating the terms of this Decree.

b. LIUNA Internal Reform Officials: Pursuant to the LIUNA Ethics and Disciplinary Procedure which was implemented as part of LIUNA's internal reform program, the GEB Attorney and the LIUNA Inspector General have been given the power by the General Executive Board of LIUNA to initiate and conduct investigations to remove organized crime and

all other criminal elements as a source of influence in the affairs of LIUNA. The Monitor appointed pursuant to this Decree may designate the GEB Attorney or the Inspector General to act on his behalf to investigate and prosecute charges under this Decree whenever it is reasonable or efficient to do so. Whenever the GEB Attorney or Inspector General acts pursuant to a delegation of authority by the Monitor, he shall have all the authority granted by this Decree to the Monitor. When a case is formally referred by the Monitor for investigation or prosecution, the GEB Attorney shall file a written report on the status of the investigation/prosecution with the Monitor and shall also provide a copy to the United States. Notwithstanding any delegation to investigate or prosecute, no charge may be brought under this Decree without the consent and approval of the Monitor. The Monitor must also approve of the disposition or settlement of any charge brought pursuant to his authority.

c. The Monitor: The District Court appointed a Monitor to investigate and oversee the investigation and prosecution of charges arising under this Decree in order to remove organized crime and all other criminal elements as a source of influence in the affairs of the CLDC and its affiliated entities.

- (1) Powers: The Monitor shall have the right and power to conduct and oversee the discharge of those duties which relate to investigating and disciplining officers, agents, representatives, employees, and members of the CLDC and its affiliated entities for the purposes of complying with this Consent Decree and fulfilling its mandate. The Monitor shall also rule on the eligibility to run for and hold office in the CLDC.
- (2) Reporting Requirements: On a quarterly basis, the Monitor shall file a written status report with the District Court regarding the actions he has taken toward achieving the objectives and purposes of this Consent Decree.

- (3) Delegation of Authority: The Monitor may delegate any of his authority under this Decree to persons selected by him, in his discretion, for their skill and experience in the investigation and prosecution of organized crime corruption. In accordance with paragraph 2, above, the Monitor may: delegate his authority to the GEB Attorney, the Inspector General or their staff, where it is reasonable and efficient. No disciplinary charges may be brought or settled, or any subpoena issued, without the approval of the Monitor. This approval authority may not be delegated.
- (4) Disciplinary Powers: The Monitor, either directly or through his delegees, shall have independent authority to investigate the operations of the CLDC or any of its affiliated entities and to initiate disciplinary charges against any officer, agent, representative, employee or member of the CLDC or any of its affiliated entities. In connection with these activities, the authority of the Monitor under this Consent Decree includes the same authority to initiate and conduct investigations and to initiate prosecutions as the GEB Attorney and Inspector General have under the LIUNA Ethical Practices Code, the LIUNA Ethics and Disciplinary Procedure, the Amended Job Referral Rules, and any other provision of the LIUNA Constitutions. Charges may also be brought for a violation of the injunctions adopted under this Consent Decree. Charges may be brought by the Monitor for any conduct, regardless of whether it occurred before or after the entry of this Consent Decree. The Monitor also has authority to apply to the Adjudications Officer for an order barring the CLDC and its affiliated entities from employing, contracting with, or purchasing goods or services from any individual or entity that has engaged in conduct that would subject it to discipline if it were a member or employee of the

CLDC or its affiliated entities. Such conduct shall expressly include, but is not limited to, the refusal to cooperate in an investigation undertaken under the authority of the Monitor.

- (5) Investigative Powers: The authority of the Monitor includes the same rights and powers to initiate investigations, conduct investigations and prefer charges as the GEB Attorney and the Inspector General as set forth above, including:
- (a) The Monitor shall have the discretion to refer allegations of misconduct by any officer, agent, representative, employee, or member of LIUNA or its affiliated entities to the GEB Attorney and to the United States.
  - (b) The Monitor shall have the discretion to assume jurisdiction over any matter referred by the GEB Attorney or Inspector General that relates to any officer, employee, or member of the CLDC or its affiliated entities.
  - (c) The Monitor shall have the authority pursuant to 18 U.S.C. § 1965(b), to issue subpoenas from this Court under this case name and number to any person or entity for the purpose of compelling testimony and requiring the production of books, papers, records or other tangible objects at hearings conducted by the Adjudications Officer, appointed pursuant to this Decree.
- (6) Review and Qualification of Candidates: The Monitor, after consulting with the Trustee/Supervisor, the GEB Attorney, the LIUNA Inspector General, and the United States shall have the authority to disqualify any prospective candidate for union office based upon a determination that the candidate's service in office would: (i) constitute or further an act of racketeering, as defined in 18 U.S.C. § 1961; (ii) further or contribute to the association, directly or indirectly, of any member, employee, or agent of the CLDC with any element of organized crime; (iii) be contrary to or constitute a violation of labor law or ERISA; or (iv) be inconsistent with the purposes of this Consent Decree. The Monitor may also disqualify a candidate if he or she fails to meet the qualifications set forth in Article

VI, Section 1 of the LIUNA Uniform District Council Constitution. Any decision of the Monitor to disqualify a candidate shall be subject to review by the District Court pursuant to the standards set forth below.

- (7) Access to Information: The Monitor or his delegee shall have the unfettered right to attend all executive board or general membership meetings of the CLDC, and to examine and copy all books and records of the CLDC and its affiliated entities; conduct interviews; receive and share information from law enforcement entities or any other component of the United States Government to the extent permitted by law; take sworn testimony; and compel attendance at depositions and hearings. In addition, the Monitor shall have all rights and tools available to him under the Federal Rules of Civil Procedure.
- (8) Staff: The Monitor shall have the authority to employ such personnel as are reasonably necessary to assist in the proper discharge of the duties imposed by this Consent Decree.
- (9) Term: The term of the Monitor shall be for two years from the time of his appointment subject to the right of any party to petition the Court for a finding that the presence of the Monitor is necessary for a longer period to achieve the purposes of this decree.

d. The Adjudications Officer: The District Court appointed an Adjudications Officer to conduct hearings relating to charges brought pursuant to this Consent Decree, and granted him the following powers, rights and responsibilities:

- (1) Hearing Procedures: At any hearing conducted by the Adjudications Officer, the following procedures shall apply:
  - (a) Hearings before the Adjudications Officer shall be initiated by the filing of a written specific charge by the Monitor which shall be served upon the charged party;

- (b) The charged party shall have at least 30 days prior to the hearing to prepare a defense. The Adjudications Officer shall endeavor to conduct the hearing within 60 days after the filing of charges;
- (c) The party charged may be represented by counsel at the hearing;
- (d) A fair and impartial hearing shall be conducted before the Adjudications Officer in accordance with the LIUNA Ethics and Disciplinary Procedure;
- (e) The hearing shall be conducted under the rules and procedures generally applicable in labor arbitration proceedings and decisions shall be made using a “just cause” standard. Legal standards and interpretations of LIUNA’s Constitutions and Ethics and Disciplinary Procedure shall be consistent with LIUNA’s internal governing law as construed by LIUNA’s Appellate Officer and LIUNA’s Independent Hearing Officer;
- (f) The Adjudications Officer shall have the authority pursuant to 18 U.S.C. § 1965(b), to issue subpoenas from this Court under this case name and number to any person or entity for the purpose of compelling testimony and requiring the production of books, papers, records or other tangible objects at hearings conducted by the Adjudications Officer;
- (g) The Adjudications Officer may require any component of LIUNA, or its affiliated entities, including the CLDC, or any officer, agent, representative, member or employee of LIUNA or any of its affiliated entities to produce any book, paper, document, record, or other tangible object for use in any hearing conducted by the Adjudications Officer;
- (h) All testimony and other evidence shall be received by the Adjudications Officer under oath and shall be subject to the penalties of perjury to the same extent as if such evidence was submitted directly to the Court. The Monitor bears the burden of proving his charges by a preponderance of the evidence. The Adjudications Officer may review, consider and rely upon evidence presented in camera;
- (i) If any person who is the subject of an application for imposition of discipline, refuses to testify or to provide evidence before the Adjudications Officer on the basis of his privilege against self-incrimination, discipline may be imposed by the Adjudications Officer on such person for that reason alone, consistent with the Code of Ethics of the American Federation of Labor-Congress of Industrial Organizations, as adopted by LIUNA in 1958. Also, failure to testify or provide evidence in the absence of a valid claim of privilege may be the basis for discipline. Any person so refusing to testify or provide evidence before the Adjudications Officer may also be subject to punishment for contempt of court upon application to the Court by the Adjudications Officer;

- (j) At any hearing before the Adjudications Officer, the Adjudications Officer may receive and consider, attaching such weight as he deems appropriate, the sworn testimony of any law enforcement officer regarding information given to a law enforcement agency by a reliable confidential source of information. In no instance shall such officer be required to reveal the identity of the confidential source of information;
  - (k) Any discipline imposed by the Adjudications Officer, or other decision of the Adjudications Officer, shall be final and binding on the parties to the hearing subject to review by the Court pursuant to the standards set forth below;
  - (l) Copies of all decisions, opinions and rulings shall be made available to the Court, the GEB Attorney, the Trustee/Supervisor, and attorneys for the United States.
- (2) Appeals of Adjudication Officer's Decisions: Any decision of the Adjudications Officer shall be final and binding, subject to review by the District Court. For a period of up to fourteen (14) calendar days after the mailing of the Adjudications Officer's decision, any party to this decree, or any person, party, or entity aggrieved by the decision shall have the right to seek review in the District Court, which shall have the right to hear all claims arising from decisions by the Adjudications Officer.
- (3) Court Enforcement: The Monitor, the GEB Attorney, the United States, the Adjudications Officer, or the Trustee/Supervisor may apply to the District Court for any orders necessary or appropriate to implement this Consent Decree.
- (4) Staff: The Adjudications Officer shall have the authority to employ such personnel as are reasonably necessary to assist in the proper discharge of the duties imposed by this Consent Decree.
- (5) Term of Office: The term of the Adjudications Officer shall be for two years from the date of appointment subject to the right of any party to petition the Court for a finding that the presence of an Adjudications Officer is necessary for a longer period to achieve the purposes of this

decree. However, the Adjudications Officer shall retain his authority to resolve to completion all charges filed by the Monitor on or before the date on which the Adjudication Officer's term would otherwise end.

e. The Trustee/Supervisor: The District Court appointed a Trustee/Supervisor to administer the daily operations of the CLDC. His powers included, but were not limited to, all powers granted to a Trustee/Supervisor under the respective provisions of Article IX, section 7 of the LIUNA International Union Constitution. The Trustee also had the duty to establish election rules and procedures, and to call for and run elections for the CLDC pursuant to the approval of the District Court. The Trustee was to schedule an election of officers as early as six months, but in no event later than 12 months, after the entry of the Consent Decree. The Trustee was to promulgate rules and procedures for the election. The Trustee was authorized to resolve disputes relating to the election with the exception of issues relating to candidate eligibility, which shall be resolved by the Monitor prior to the scheduling of an election date. The Trustee was also to certify the results of the election for the officers of the CLDC to the Court. After the election, the Trustee had his title changed to Supervisor and had the duty to supervise the actions of the elected officers of the CLDC to assure that the goals of this Consent Decree are fulfilled. The Trustee/Supervisor also had the right to hire appropriate staff to discharge his duties under this decree and to seek court orders necessary or appropriate to enforce this Consent Decree.

The term of the Trustee/Supervisor was for two years from the date of his appointment by the District Court subject to the right of any party to petition the Court for a finding that the presence of a Trustee/Supervisor is necessary for a longer period to achieve the purposes of this decree.

f. The United States: The United States had the right to intervene in any matter or to appeal any decision arising out of this Consent Decree. The United States, in its discretion, was authorized to assist the GEB Attorney, the Inspector General and the court-authorized officers in the performance of their duties. The United States was authorized to appeal decisions of the



Adjudications Officer to the Court. The United States may, if requested, also agree to represent any party or entity before the District Court concerning any matter arising out of the subject of this decree.

2. The court-appointed Monitor supervised the nomination and election of Chicago District Council Officers, initiated various financial reforms and disciplined several union members for misconduct. The Monitor also reached a settlement agreement with Joseph Lombardo Jr., son of the reputed Boss of the Chicago LCN Family, whereby Lombardo Jr. agreed, among other matters, to be permanently barred from membership in, employment with, or contracting with LIUNA, any of its affiliated locals, and any of its affiliated funds.

**F. LEADING COURT DECISIONS:**

None.

## 20. LIUNA LOCAL 210 (BUFFALO)

### A. CASE NAME:

United States of America, and Laborers International Union of North America by and through Robert D. Luskin, in his official capacity as General Executive Board Attorney v. Laborers Local 210 of the Laborers International Union of North America, AFL-CIO. Civil Case No. 99 CV-0915A, United States District Court for the Western District of New York. Complaint filed November 18, 1999.

### B. DEFENDANTS:

The sole defendant is Laborers' International Union of North America (LIUNA) Local 210 located in Buffalo, New York.

### C. SUMMARY OF THE COMPLAINT:

The 114-page complaint alleges two distinct claims for relief: (1) a conspiracy from the early 1970's to the date of filing of the complaint among Local 210, its officers, agents, and employees, and various uncharged, specified La Cosa Nostra (LCN) members and associates, to acquire and maintain an interest in and control of Local 210 through a pattern of racketeering activity, in violation of 18 U.S.C. §§ 1962(b) and(d); (2) a conspiracy among Local 210 and the same persons to conduct the affairs of the alleged enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. §§ 1962(c) and(d).

The alleged enterprise for the first claim for relief was an association-in-fact consisting of LIUNA Local 210 and its affiliated employee benefit funds (§ 162, p. 86). The charged enterprise for the second claim for relief was an association in fact consisting of LIUNA Local 210, its officers, agents, and employees, and uncharged LCN members and associates of the LCN (§ 175, p. 92-93). The complaint further alleged that the Buffalo LCN Family exercised corrupt control and influence over Local 210 since the early 1970's.

The alleged pattern of racketeering activity consisted of multiple Taft Hartley violations (29 U.S.C. §§ 186 (b)(1) and (d)) for receipt of kickbacks by union representatives and multiple

Hobbs Act violations (18 U.S.C. § 1951) for extorting union members' property rights to democratic participation in union affairs as guaranteed by 29 U.S.C. §§ 411 and 481 (e) and 501(a). The complaint incorporated by reference various indictments and judgments of convictions for various named, but uncharged, co-conspirators.

The complaint also set forth that LIUNA had adopted internal reform procedures designed to eliminate corruption from LIUNA and its constituent local unions and affiliated entities. Pursuant to LIUNA's internal reform program, Local 210 had been placed into trusteeship by LIUNA, and over 20 members, employees, officers or agents of Local 210 were removed from Local 210 for corruption (see ¶¶ 16 through 44, pp. 19-37). However, the complaint also alleged that the trusteeship had been insufficient to completely rid Local 210 of the influence of organized crime.

This case is only the second time a union has joined with the United States as co-plaintiffs in a RICO lawsuit to rid a union of LCN related corruption. Under the complaint, only the United States sought injunctive and other equitable relief.

**D. RELIEF SOUGHT:**

The complaint sought the following relief: (a) a permanent injunction against Local 210 officers, officials and employees, and trustees appointed to Local 210 affiliated funds, and all persons acting in concert with them from committing any act of racketeering as defined in 18 U.S.C. § 1961(1), and from associating with any member or associate of the LCN; (b) appointment of a Court Liaison Officer to run and administer the affairs of Local 210 and conduct investigations and take other measures to eliminate corruption and to restore union democracy; (c) an order enjoining any one affiliated with Local 210 and any entity associated with Local 210 from interference with the court liaison officer's execution of his duties; (d) an order that Local 210 pay the expenses of the Court Liaison Officer; and (e) an order awarding costs to United States, and any further relief as may be necessary and appropriate to prevent future violations of RICO and to end organized crime's control over Local 210.

**E. OUTCOME OF THE CASE:**

1. On the date that the complaint was filed, the parties also filed an agreed upon Consent Decree which would grant the sought relief. The proposed Consent Decree granted the Court Liaison Officer with the authority to: (1) review major expenditures of Local 210; (2) review all contracts of Local 210; (3) review and approve in advance all appointments to office in Local 210; (4) convene membership meetings when necessary; (5) review proposed litigative actions; (6) have access to all union records and information; (7) refer to the General Executive Board (GEB) any disciplinary matters; and (8) review all candidates seeking elective office within Local 210.

2. On December 10, 1999, the parties filed a modified Consent Decree that eliminated LIUNA as a co-plaintiff after the District Court expressed concerns as to whether LIUNA was a proper plaintiff to the action.

3. In an order entered January 24, 2000, the district court approved of and entered the proposed modified Consent Decree and denied motions to intervene by several members of Local 210. The Consent Decree included the following provisions.

- a. All current and future officers, agents and representatives, employees and members of Local 210 were permanently enjoined from:
  - (1) Committing any act which is defined as an act of racketeering as defined in 18 U.S.C. § 1961(1);
  - (2) Knowingly associating with any member or associate of the LCN or with any "barred person" (i.e., any member or associate of an LCN Family or any person prohibited from participating in union affairs);
  - (3) Knowingly permitting any member or associate of the LCN or barred person to exercise any control or influence, directly or indirectly in the conduct of the affairs of Local 210 and its affiliated entities; and
  - (4) Obstructing or otherwise interfering, directly or indirectly, in any way or degree, with the work of anyone who is appointed under this decree, or working under their direction and control, or from interfering with the efforts of any officer, attorney, or employee of Local 210 and in effectuating the terms of this decree.

b. The district court would appoint a Liaison Officer for a term of sixty (60) months with the authority, among other matters, to:

- (1) review all expenditures and investments of Local 210 that equal or exceed five thousand dollars (\$5,000.00) in cash or value to any one person or entity in a twelve (12) month period and shall have the power to veto or require the lawful representatives of Local 210 to rescind any such expenditure or investment that: (i) constitutes or furthers an act of racketeering as defined in 18 U.S.C. § 1961; (ii) furthers or contributes to the association, directly or indirectly, of any member, employee, or agent of Local 210 with any element of organized crime; (iii) is contrary to or violates federal law; or (iv) is inconsistent with the LIUNA International Union Constitution, Ethical Practices Code, Ethics and Disciplinary Procedure, or the Uniform Local Union Constitution;
- (2) review all contracts, or proposed contracts, on behalf of Local 210, except for collective bargaining agreements and any decisions to strike, and to require the lawful representatives of Local 210 to rescind any contract or prevent Local 210 from entering into any proposed contract that: (i) constitutes or furthers an act of racketeering as defined in 18 U.S.C. § 1961; (ii) furthers or contributes to the association, directly or indirectly, of any member or employee or agent of Local 210 with any element of organized crime; (iii) is contrary to or violates federal law or (iv) is inconsistent with the LIUNA International Union Constitution, Ethical Practices Code, Ethics and Disciplinary Procedure, or the Uniform Local Union Constitution;
- (3) review, and approve in advance, all proposed appointments to Local 210 office or employment including: the replacement of the Trustee of Local 210 and the selection of any Local 210 agents or employees, including but not limited to candidates for the positions of Business Agent, Field Representative, or Organizer; the selection of shop stewards; and the selection of any trustee representing Local 210 on any employee benefit plan affiliated with Local 210. Further, the Liaison Officer shall have the authority to veto any such proposed appointment that: (i) constitutes or furthers an act of racketeering as defined in 18 U.S.C. § 1961; (ii) furthers or contributes to the association, directly or indirectly, of any member, employee, or agent of Local 210 with any element of organized crime; or (iii) is contrary to or violates federal law;
- (4) review proposed decisions of the lawful representatives of Local 210 regarding the conduct of litigation, including decisions to commence civil actions, to forego such litigation, or to resolve pending or prospective suits through settlement. The Liaison Officer shall have the power to veto any such litigation decision that: (i) constitutes or furthers an act of racketeering as defined in 18 U.S.C. § 1961; (ii) furthers or contributes to the association,

directly or indirectly, of any member, employee, or agent of Local 210 with any element of organized crime; (iii) is contrary to or violates federal law; or (iv) is inconsistent with the LIUNA International Union Constitution, Ethical Practices Code, Ethics Disciplinary Procedure, or the Uniform Local Union Constitution;

- (5) apply to the district court to take any and all other actions that are necessary to perform his responsibilities under, and that effectuate the “Purposes” of, this Consent Decree;
- (6) attend every regularly scheduled meeting by Local 210's representatives personally or through or along with his appointed representatives;
- (7) have complete and unfettered access to read and inspect, and the right to make copies of, all financial records, books, records, accounts, correspondence, files and any other documents of Local 210 or its lawful representatives without regard to the amount of any financial transactions;
- (8) direct that the trustees representing Local 210 on such funds use all their lawful powers to provide the Liaison Officer with prompt, complete, and unfettered access to read and inspect, and the opportunity to make copies of, all financial records, books, records, accounts correspondence, files, and any other documents of any or all benefit funds affiliated with Local 210, or of any trustees or agents of such benefit funds, and to request permission of the entire Board of Trustees to attend any meeting of the Board;
- (9) compel an accounting of the assets of Local 210;
- (10) have the authority pursuant to 18 U.S.C. § 1965, to issue subpoenas from the District Court for the purpose of compelling testimony and requiring the production of books, papers, records or other tangible objects to effectuate the “Purposes” of this consent Decree;
- (11) refer all prospective disciplinary proceedings to the LIUNA Inspector General or the LIUNA GEB Attorney for action consistent with the LIUNA Ethics and Disciplinary Procedure. The Liaison Officer shall have the authority to receive and grant requests from the Inspector General and the GEE Attorney for assistance in investigating or prosecuting disciplinary actions;
- (12) determine when it would be feasible to conduct fair, untained and uncoercive elections for Local 210 officers and to supervise and certify or to retain another person to supervise, and certify such union elections. Any candidate for Local 210 office was required to obtain the Liaison Officer's prior approval to run for office;
- (13) file with the District Court periodic reports of his activities at least every six months, and was authorized to seeks assistance in

carrying out his duties from the District Court and the United States;

c. The Consent Decree also provided that:

- (1) any decision in any matter of the Liaison Officer shall be final and binding, subject only to the District Court's review, under the same standard of review applicable to review of final federal agency action under the Administrative Procedural Act, 5 U.S.C. § 706(2);
- (2) the costs of the Court Liaison Officer, including the expenses of anyone hired by the Liaison Officer, were to be paid by Local 210;

4. During his term of office, the Liaison Officer supervised and certified fair and untainted elections for Local 210 officers, initiated training for union members and officers, implemented accounting and other financial reforms and assisted LIUNA's Inspector General and GEB Attorney to discipline union members and officials for misconduct.

5. In an order filed January 27, 2006, the district court found that the remedial objectives of the 2000 Consent Decree had been substantially achieved, and, therefore, the District Court terminated the term of the Court-Appointed Liaison Officer and dissolved the position.

6. The district court also entered a permanent injunction, providing that:

- (a) All current and future officers, agents, employees, representatives, and persons holding positions of trust in Laborers' Local 210, as well as all current and future members of Laborers' Local 210, were permanently enjoined:
  - (1) from committing any crime listed in 18 U.S.C. § 1961 (1);
  - (2) from knowingly associating with any member or associate of organized crime or with any barred person;
  - (3) from knowingly permitting any member or associate of organized crime or any barred person to exercise any control or influence, directly or indirectly, in any way or degree, in the conduct of the affairs of Laborers' Local 210 or its affiliated entities.

As used in the Order, the term "knowingly associating" shall be governed by the definition contained in the 2000 Consent Decree and means that: (a) an enjoined party knew or should have known that the person with whom he or she was associating is a barred person; and (b) the association was more than fleeting or casual;

and (c) the association related directly or indirectly to the affairs of the union.<sup>21</sup>

As used in this Order, a “barred person” is: (a) any member or associate of any La Cosa Nostra crime family or other criminal group, or (b) any person prohibited from participating in union affairs.

(4) from participating, directly or indirectly, in any way of degree, in the conduct of the affairs of Laborers’ Local 210 or its affiliated entities if the participant has been prohibited from participation in the affairs of another union.

b. The district court’s Order also provided, in part, that:

(1) Any person who violates the injunctive provisions of this Order, shall, in addition to any other sanctions or penalties, be subject to removal, suspension and/or expulsion from office or the union by the Court. In addition, the Court may forfeit the benefits of such violator (with the exception of vested employee retirement benefits subject to Title I of the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq.) which such violator holds by reason of his position, membership or employment in Laborers Local 210.

(2) Upon a showing to the Court by the United States of America by a good and sufficient demonstration that there is systemic corruption in Laborers’ Local 210, or organized crime influence in Laborers’ Local 210, or upon any officer or person holding a position of trust in Laborers’ Local 210, the Court may order such relief as in necessary and proper, including but not limited to reappointing the Court Appointed Liaison Officer, with such powers and authority

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<sup>21</sup> The Order also provides that nothing in this paragraph shall preclude:

(a) an enjoined party from meeting or communicating with a barred person who is an employer to discuss the negotiation, execution, or management of a collective bargaining agreement, or a labor dispute, when the enjoined party represents, seeks to represent, or would admit to membership the employees of that employer;

(b) an enjoined party from meeting or communicating with a barred person who is a representative of a labor organization to discuss legitimate union matters;

(c) an enjoined party from meeting or communicating with an officer, employee, or member of LIUNA and its affiliated entities; and

(d) an enjoined party from meeting or communicating with a relation by blood or marriage for solely social purposes, provided that in all such instances, reasonable prior notice of such meeting or communication is furnished to the Business Manager of Laborers’ Local 210 or, if prior notice is not practicable, such notice is provided within seven days following the meeting or communication. As used in this Paragraph, the term “relative” shall mean lineal descendant, step child, ancestor, sibling, or spouse or child of a lineal descendant, step child, ancestor, or sibling.



as the Court determines is necessary, granting the United States of America the authority to issue subpoenas and take depositions and other relief regarding the continuation, scope or modification of this Order.

- (3) The District Court shall retain exclusive jurisdiction over the parties of this Order and the original consent decree in order to enforce and implement the terms and provisions of this order and the original consent decree. This Order is binding on all current and future officers, members, employees and persons holding positions of trust in Laborers' Local 210 and its affiliated entities.

**F. LEADING COURT DECISIONS:**

None

## 21. HEREIU LOCAL 69

### A. CASE NAME:

United States v. Local 69 of the Hotel Employees and Restaurant Employees International Union, Civil Action No. 02-1733 (GEB), United States District Court for the District of New Jersey. Complaint filed April 17, 2002.

### B. DEFENDANTS:

The complaint named Local 69 of the Hotel Employees and Restaurant Employees International Union (HEREIU) as the only defendant (Local 69).

### C. SUMMARY OF THE COMPLAINT:

The complaint (p. 3) alleged that the enterprise was an association-in-fact comprised of “Local 69 and its affiliated entities; the officers, employees and associates of Local 69 and its affiliated entities; and three persons who are known to the United States.” The complaint (p. 3) stated that:

The term “affiliated entities” as utilized in this Complaint shall include, but not be limited to, any employee pension or welfare benefit plan in which members of Local 69 participate and in which representatives of Local 69 serve in a fiduciary capacity (such as the Local 4-69 Health and Welfare Fund and the Local 4-69 Pension Fund); any business organization in which Local 69 has a financial interest; any labor-management cooperation committee and any other local labor organization within the HEREIU in which members of Local 69 participate.

The complaint alleged one cause of action - that from approximately 1983 to the date the complaint was filed, the defendant, acting through its officers and Executive Board, conspired with members and associates of organized crime and others to participate in the affairs of the alleged enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962 (d).

Pursuant to the authority of United States v. Glecier, 923 F.2d 496 (7<sup>th</sup> Cir. 1991), the complaint did not allege specific racketeering acts; rather, the complaint alleged that the pattern of racketeering activity consisted of multiple acts indictable under 29 U.S.C. §§ 186 (b) and 501 (c) and 18 U.S.C. §§ 664 and 1951.

The complaint also alleged that the defendant Local 69 and its co-conspirators used the following manner and means to carry out the alleged conspiracy:

(1) the defendant Local 69, acting through its officers and Executive Board, together with members and associates of organized crime, aided and abetted officers and persons employed by Local 69 to embezzle, steal, and unlawfully and willfully abstract and convert to their own use and to the use of others, moneys, funds, property, and other assets of the Local 69 by, among other matters, approving and permitting unauthorized expenditures and loans of Local 69 funds to various persons, which expenditures and loans were not in the interest and not for the benefit of Local 69 and its membership, resulting in the diminution of Local 69 assets, in violation 29 U.S.C. § 501 (c);

(2) the defendant, acting through its Executive Board, unlawfully and willfully did request, demand, receive, accept and agree to receive and accept on behalf of officers and employees of Local 69 the payment, loan and delivery of money and other things of value from employers, and persons acting in the interest of employers, which employed Local 69 members and persons who were represented and would have been admitted to membership in Local 69, in violation of 29 U.S. C. §§ 186 (b)(1) and (d);

(3) the defendant, acting through its officers and Executive Board, together with members and associates of the Genovese Crime Family, conspired to extort money from employers;

(4) the defendant, acting through its officers and Executive Board, together with members and associates of organized crime, conspired to extort property in the form of the right of Local 69's members to free speech and democratic participation in their union's affairs, as guaranteed by 29 U.S.C. §§ 411 and 481;

(5) the defendant, acting through its officers and Executive Board, together with members and associates of organized crime, did unlawfully and willfully embezzle, steal and convert, unlawfully and willfully cause to be embezzled, stolen and converted, to the use of

others, the moneys, funds, securities, credits, property and other assets of employee welfare benefit plans subject to title I of the Employee Retirement Income Security Act, and of funds connected with such plans, in violation of 18 U.S.C. § 664; and

(6) the defendant, acting through its officers and Executive Board, fostered a climate of intimidation and also violated its duty to provide loyal and responsible representation to the members of the Local 69 by, among other things, failing to enforce the HEREIU constitution, the Local 69 by-laws and other authorities; failing to investigate charges of corruption within Local 69 and its affiliated entities; failing to redress proven instances of corrupt practices and illegal organized crime control; and appointing to office and permitting to remain in office corrupt officials and organized crime associates. The defendant did so despite notice of corruption and the influence of organized crime within Local 69 through, inter alia, published reports, decisions in the context of United States v. HEREIU, Civil Action No. 95- 4595 (GEB) and multiple criminal charges against the officers and employees of Local 69 and its affiliated entities.

**D. RELIEF SOUGHT:**

1. The Government sought to permanently enjoin all current and future officers, agents, employees, representatives, and members of and persons holding positions of trust in Local 69 and its affiliated entities (other than representatives of employees), and any and all persons in active concert or participation with any or all of them from:

- a. committing any crime listed in 18 U.S.C. § 1961(1);
- b. knowingly associating with any member or associate of any criminal group or with any barred person;
- c. knowingly permitting any member or associate of any criminal group or any barred person to exercise any control or influence, directly or indirectly, in any way or degree, in the conduct of the affairs of Local 69 and its affiliated entities; and
- d. obstructing or otherwise interfering, directly or indirectly, with the efforts of anyone effectuating or attempting to effectuate the relief ordered or attempting to prevent any criminal groups or barred person from exercising influence on the conduct of the affairs of Local 69 and its affiliated entities.

A “barred person” was expressly defined in the complaint as: (a) “any member or associate of any organized crime family or other criminal group, or (b) any person prohibited from participating in union affairs pursuant to or by operation of the injunction or other court order or statute, or a disciplinary disposition or agreement by the HEREIU’s Public Review Board.”

2. The complaint also requested that the district court appoint a Monitor, funded by Local 69, with investigatory, review and disciplinary powers, including the authority to investigate, audit, and review all aspects of Local 69 and its affiliated entities; to oversee and monitor all affairs of Local 69, including its elections; to review, oversee and otherwise take action upon all collective bargaining agreements; to review and approve candidates for elective and appointive office in Local 69; to disapprove the hiring, appointment, reassignment or discharge of any Local 69 officers and others holding positions of trust in Local 69; to disapprove or terminate any contract (including, but not limited to, contracts with service providers or vendors), lease, or other obligation of Local 69; and to impose disciplinary sanctions on union members and any officer, representative, agent, employee or person holding a position of trust in Local 69 and its affiliated entities for violating the proposed injunction or other misconduct.

**F. OUTCOME OF THE CASE:**

**1. The April 17, 2002 Consent Decree:**

On April 17, 2002, the same day that complaint was filed, the district court entered a Consent Decree agreed to by the Government and the defendant Local 69. This Consent Decree included the following provisions:

**a. Injunctive Prohibitions:**

All current and future officers, agents, employees, representatives, members of and persons holding positions of trust in Local 69 or its affiliated entities (other than representatives of employers) and any and all persons in active concert or participation with any or all of them, were permanently restrained and enjoined from directly or indirectly:

- (1) committing any crime listed in 18 U.S.C. § 1961(1);
- (2) knowingly associating with any member or associate of any criminal group or with any barred person;
- (3) knowingly permitting any member or associate of any criminal group or any barred person to exercise any control or influence, directly or indirectly, in any way or degree, in the conduct of the affairs of Local 69 and its affiliated entities; and
- (4) obstructing or otherwise interfering, directly or indirectly, with the efforts of anyone effectuating or attempting to effectuate the terms of this Consent Decree or in attempting to prevent any criminal groups or barred person from exercising influence on the conduct of the affairs of the Local 69 and its affiliated entities.

As used in this Consent Decree, the term “knowingly associating” shall mean that: (a) an enjoined party knows or should know that the person with whom he or she is associating is a member or associate of any criminal group or is a barred person; and (b) the association is more than fleeting.

As used in this Consent Decree a “barred person” is: (a) any member or associate of any organized crime family or other criminal group, or (b) any person prohibited from participating in the affairs of any union pursuant to or by operation of this Consent Decree, other court order or statute, and/or a disciplinary disposition or agreement by the HEREIU’s Public Review Board.

**b. Court-Appointed Monitor:**

The district court appointed a Monitor with the powers, rights and authority of all officers and other persons holding positions of trust in Local 69 including the powers, rights and authority of the Local 69 President, the Executive Board of Local 69 and the union’s other committees, the union trustees on Local 69’s pension and health and welfare funds and any other officer, agent, employee or representative of Local 69. Accordingly, the Monitor was authorized to:

- (1) oversee, approve or disapprove of all disbursements and distributions of Local 69 funds and other assets, purchases and financial obligations of Local 69;

- (2) approve or disapprove of the hiring, appointment, discharge or reassignment of Local 69 officers and others holding positions of trust in Local 69, employees, agents, representatives, commissioners and committee members of Local 69;
- (3) carry on and supervise the legitimate activities of Local 69;
- (4) hold (or designate the persons who hold) the positions currently held by Local 69 representatives in Local 69's affiliated entities; and
- (5) review, oversee and otherwise take action upon all collective bargaining agreements, the processing of grievances, grievance awards, or other matters involving employers with whom Local 69 deals or seeks to deal;
- (6) investigate, audit and review all aspects of Local 69 and its affiliated entities. These powers shall include the power of the Monitor to conduct investigatory interviews and sworn depositions;
- (7) issue subpoenas and serve such subpoenas in this or any other judicial district pursuant to 18 U.S.C. § 1965 (c) without the need for prior application to the district court. Such subpoenas shall be issued only for good cause if the individuals reside in another district at a place more than one hundred miles from the district court;
- (8) initiate charges or disallow nominations or elections of persons in accordance with this Consent Decree;
- (9) refer matters to the Public Review Board of the HEREIU for disciplinary action or, in the alternative, exercise the disciplinary authority and powers described in this Consent Decree over any person described in Paragraph (1) above;
- (10) refer any matter to the United States Attorney for appropriate action or request the United States Attorney or any agency of the United States to provide legal, audit and investigative personnel to assist in the execution of the Monitor's duties;
- (11) retain legal, investigative, accounting and other support personnel at Local 69's expense;
- (12) attend any and all meetings of Local 69 and its affiliated entities, including, but not limited to, meetings of the Local 69 Executive Board, the membership, committees, negotiation meetings or grievance proceedings regarding Local 69 members involving employers with whom Local 69 deals or seeks to deal and meetings of employee benefit plans in which Local 69 members participate;

- (13) enter into, disapprove or terminate any contract (including, but not limited to, contracts with service providers or vendors), lease, or other obligation of Local 69 or any of Local 69's affiliated entities for which representatives of Local 69 otherwise have authority to enter into, disapprove or terminate;
- (14) oversee and monitor all affairs of Local 69, including, but not limited to, any Local 69 elections;
- (15) act to preclude actions or inactions that violate the law or otherwise are inimical to the remedial objectives of this Consent Decree;
- (16) perform all such functions and duties not specifically enumerated herein in order to fulfill his/her duties as Monitor; and
- (17) delegate any of his/her powers or duties to any other person (s).

**c. Disciplinary Procedures:**

When exercising his disciplinary rights and powers, the Monitor shall afford the subject of the potential disciplinary action written notice of the charge(s) against him/her and an opportunity to be heard. The Monitor shall conduct any hearing on any disciplinary charges, render the final decision regarding whether discipline is appropriate and impose the particular discipline. The charged party shall have 20 days to answer the charges against him/her and may be represented by counsel at any hearing conducted by the Monitor. Any hearing shall be conducted under the rules and procedures generally applicable in labor arbitration proceedings and decisions shall be made using a preponderance of the evidence standard. In conducting any hearing, the Monitor shall have the right and power:

- (1) to administer oaths. All testimony and other evidence shall be subject to penalties of perjury to the same extent as if such evidence was submitted directly to the district court;
- (2) to examine witnesses or conduct depositions;
- (3) to receive evidence. The Monitor may receive and consider ex parte evidence withheld from the charged party and the public which contains or constitutes sensitive information provided by a law enforcement agency, and can choose what weight, if any, to give such evidence, but in no case shall the identity of a confidential source of law enforcement information be required to be disclosed; and



- (4) to issue subpoenas requiring the attendance and presentation of testimony of any person and/or the production of documentary or other evidence. Witnesses shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States and such payments shall be made by Local 69. In the case of contumacy or failure to obey a subpoena issued under this Paragraph, the Monitor may: (i) impose discipline upon the person in accordance with this Consent Decree; and/or (ii) seek an order from the district court requiring the person to testify or to produce documentary or other evidence.
- (5) Appeal of Disciplinary Action. Any discipline imposed by the Monitor shall be final and binding, subject to review by the district court. A person disciplined by the Monitor may obtain review of the Monitor's decision regarding such discipline by filing a written appeal of such decision with the Court within twenty (20) days of such decision by the Monitor. The Monitor's decision, all papers or other material relied upon by the Monitor and the papers filed or issued pursuant to this appeal procedure shall constitute the exclusive record for review. The Monitor's decisions pursuant to this Paragraph shall be reviewed by the district court, if necessary, under the substantial evidence standard set forth in 5 U.S.C. § 706(2) (E). Materials considered by the Monitor but withheld from the appellant and the public which contain sensitive information provided by a law enforcement agency shall be submitted to the district court for ex parte, in camera consideration and shall remain sealed. Only the person disciplined by the Monitor may appeal the Monitor's decision regarding the discipline imposed against him/her and any decision by the Monitor regarding discipline imposed against a person which is not appealed in accordance with this Paragraph may not be appealed or otherwise challenged. The United States may seek the district court's review of the Monitor's decision not to impose discipline.

**d. Election Procedures:**

The Monitor was given broad powers to administer, conduct and supervise the nomination and election of Local 69 officers, including the following:

- (1) to apply to the district court to set aside election results that were tainted by any unfairness or impropriety;
- (2) to disallow any nomination or election of any person, subject to review by the district court, when the Monitor determines that there is probable cause to believe that a person's election may violate: the injunctive provisions of the Consent Decree, any other order of the district court, HEREIU's Ethical Practices Code, Constitution or Local 69 by-laws, any criminal law involving the operation of a labor organization or employee benefit plan, or may be inimical to the remedial objectives of this lawsuit;

e. **Miscellaneous Provisions:**

- (1) The Monitor was given unfettered access to, and the right to make copies of, all records or documents of officials, agents, employees, and members of Local 69 and its affiliated entities.
- (2) The Monitor was required to report to the district court at least every 6 months or when requested by the court regarding the progress of Local 69 and its affiliated entities in achieving the remedial objectives of this Consent Decree.
- (3) The term of the Monitor would expire four years from the date the Consent Decree was entered.
- (4) The Consent Decree also provided that the Monitor, the United States or the HEREIU may make application to the district court to modify or enforce this Consent Decree and the court may grant such relief as may be equitable and just, having due regard for the purposes of the underlying litigation, the remedial purposes of this Consent Decree and the circumstances at the time of the application.
- (5) The district court retained jurisdiction over the parties and signatories to the Consent Decree and the subject matter of the litigation in order to implement the terms of the Consent Decree.
- (6) Pursuant to the All Writs Act, 28 U.S.C. § 1651, all parties and non-parties to the Consent Decree were permanently restrained and enjoined from litigating any and all issues relating to the Consent Decree or arising from the interpretation or application of the Consent Decree in any court or forum in any jurisdiction except the United States District Court for the District of New Jersey. Such issues relating to the Consent Decree include, but are not limited to, challenges to actions of the Monitor and/or his delegates and challenges to issuance of or compliance with subpoenas.

2. **Achievements of the Monitor:**

During the four-year term as the court-appointed Monitor of Local 69, the Monitor (Kurt Muellenberg, formerly Chief of the Organized Crime and Racketeering Section) also functioned as the government-appointed member of the HEREIU Public Review Board (PRB), the disciplinary body established by Local 69's parent union pursuant to its own civil RICO consent decree. (See App. B at 190-208). This enabled the international parent union to bear the costs of the Monitorship of Local 69 which had been largely bankrupted by corruption. In these capacities, the Monitor oversaw the ongoing PRB disciplinary investigation of Local 69

officials who had continued to permit Local 69 and its benefit plans to be corruptly influenced by John N. Agathos, the former president of Local 69 who had been expelled by court-appointed officers from both the HEREIU and the Teamsters union for knowing association with organized criminal groups and other offenses. In June 2002, Agathos' successor agreed to a lifetime debarment from office, employment or membership in any HEREIU-affiliated union or benefit plan in order to resolve disciplinary charges that he had knowingly associated with organized crime elements and embezzled union monies. Based on this investigation, the successor was subsequently convicted in 2004 of embezzling \$100,000 from Local 69 and \$30,000 from Local 69's health benefit plan and sentenced to imprisonment and restitution in United States v. David Feedback, Criminal No. 04-559 (WJM) (D. N.J.). The PRB also permanently barred another Local 69 and benefit plan official from the HEREIU for knowing association with Agathos.

In accordance with the terms of the consent decree, the Monitor deputized the parent union's trustee who had been appointed to supervise the day-to-day affairs of Local 69 shortly before the civil RICO action was filed. An earlier internal union trusteeship from 1996 to 1997 had failed to end corruption at Local 69. The 2002 deputation had the effect of suspending the LMRDA's limitation on the presumptive term of the union trusteeship to 18 months. Because of the poor financial status of Local 69 and its historic domination by the Agathos group, which had failed to hold any officer elections between 1983 and 1997 and had continued to dominate bargaining units like those at Giants Stadium and the Meadowlands Sports Complex where the best jobs and gratuities were awarded to Agathos family and friends, the Monitor recommended in 2006 that Local 69 be dissolved and its membership merged into other local unions. Local 69's 3200 members were thereafter merged into three different UNITE HERE local unions, including former HEREIU Local 100 which had also been the subject of a prior civil RICO trusteeship. The participants of the Local 69 health plan were transferred to international union health plans and the pension liabilities to former Local 69 members were transferred from the Local 69 pension plan to the UNITE National Retirement Fund.

Local 69 officials had also attempted to award \$558,000 in prohibited severance payments from Local 69 and its health plan to Agathos and Agathos' son, a former Local 69 officer and plan administrator who had also been expelled from the HEREIU in earlier disciplinary proceedings by the HEREIU Monitor. When the Monitor discovered that the Local 69 health plan had awarded a service provider contract without competitive bidding to an entity owned by Agathos' personal physician, the Monitor provided the information to the United States Department of Labor, which sued the service provider and the plan trustees in 2004, seeking disgorgement and recovery of more than \$2 million worth of excessive compensation paid to the service provider, in Chao v. Feedback, et al., Civil Action No. 04-cv-4804 (DMC-MF) (D.N.J). The civil RICO action continued after the Monitor's term expired in April 2006 because of litigation issues surrounding the Department of Labor's action with respect to the former Local 69 health plan.

**G. LEADING COURT DECISIONS:**

None

**22. UNITED STATES v. LIBORIO BELLOMO, ET AL. (ILA)**

**A. CASE NAME:**

United States of America v. Liborio Bellomo, et al., Civil Case No. CV-03-1683, United States District Court for the Eastern District of New York. Complaint filed April 7, 2003.

**B. DEFENDANTS:**

Liborio Bellomo, Thomas Cafaro, Pasquale Falcetti, Andrew Gigante, Ernest Muscarella, Michael Ragusa, Charles Tuzzo.

**C. SUMMARY OF THE COMPLAINT:**

The 12-page complaint alleged one cause of action--a “Glecier” (United States v. Glecier, 923 F. 2d 496 (7<sup>th</sup> Cir. 1991)), conspiracy to violate RICO through a pattern of racketeering activity consisting of multiple acts indictable under the following statutes: 18 U.S.C. § 1951 (extortion); 18 U.S.C. §§ 1341 and 1346 (mail fraud); 18 U.S.C. § 1956 (money laundering); 18 U.S.C. § 1512 (Witness Tampering); 18 U.S.C. § 1952 (interstate travel in aid of racketeering); 18 U.S.C. § 1955 (gambling); 15 U.S.C. §§ 78 (b) and 78 ff (fraud in the sale of securities); and New York Penal Law §§ 180.15 and 20.00 (bribery), all in violation of 18 U.S.C. § 1962(d).

The charged enterprise was a group of individuals and entities associated-in-fact, consisting of the International Longshoremen’s Association, AFL-CIO (ILA), “including its Locals operating in the New York Metropolitan area, northern New Jersey, and Miami, Florida, and their officers, employees, agents and other representatives, and the ILA’s affiliated employee benefit plans, along with the members and associates of the Genovese Family, and others known and unknown.” Complaint at 7.

The defendants are alleged members and associates of the Genovese LCN Family as follows: Muscarella was a capo and acting boss; Bellomo was the acting boss from 1988 to 1996; Tuzzo was a capo; Falcetti and Ragusa were soldiers; and Cafaro and Gigante were associates. The complaint alleged that Vincent Gigante was the boss of the Genovese Family and was an uncharged co-conspirator.

The complaint also alleged that since 1987 to the filing of the complaint, the defendants and others sought to control the “Waterfront” in the Ports of New York, New Jersey and Miami, Florida and businesses and unions operating in those ports. Id. at 10. A RICO indictment against the defendants was attached as an exhibit to the complaint. See United States v. Bellomo, et al., No. CR-02-140 (E.D.N.Y.). That indictment alleged that the defendants engaged in racketeering activity, including conspiracies to extort money from owners and representatives of businesses operating in the Ports of New York, New Jersey and Miami, Florida and from ILA union members. Complaint at 8-9.

**D. RELIEF SOUGHT:**

The complaint sought the following relief:

1. A permanent injunction enjoining defendants from: (a) violating or aiding and abetting the violation of, or conspiring to violate, any of the provisions of U.S.C. §§ 1961, et seq; (b) engaging in any commercial activity involving, or connected with, the Waterfront and the Florida Ports, the businesses and unions operating on the Waterfront and at the Florida Ports, and from engaging in any activity whatsoever involving, or connected with, the International Longshoremen’s Association; (c) having any legal or beneficial interest, direct or indirect, in any business or any entity related to, or connected with, the Waterfront and/or the Florida Ports, including but not limited to, any ownership, partnership, landlord/tenant, employment, managerial, and/or financial interest; membership in, or holding any position or office in, any labor union as defined in 29 U.S.C. §§ 402 (i) and(j); and (d) having any involvement in the administration or management of any pension, health, welfare or benefit plan or fund established or maintained by an employee organization;

2. An order directing that each defendant divest himself of any legal or beneficial interest which he holds, direct or indirect, in any business or entity involved in or connected with the Waterfront or the Florida Ports, including but not limited to, any ownership, partnership, landlord/tenant, employment, managerial, and/or financial interest.

3. Such other and further relief as the district court may deem necessary and appropriate. Complaint at 11-12.

**E. OUTCOME OF THE CASE:**

1. On the date the complaint was filed, April 7, 2003, the defendants pleaded guilty to RICO and other charges in the above referenced indictment and agreed to enter into a Consent Decree settling the civil RICO suit.

2. On May 27, 2003, the district court entered the Consent Decree, granting the requested relief and several additional matters; except, the Court did not enjoin the defendants from committing a RICO violation. Specifically, all the defendants were permanently enjoined from:

- a. engaging in any activity whatsoever involving, or connected with, ILA, any of its Locals or other constituent labor organization;
- b. engaging in any commercial activity whatsoever involving, or connected with, the Port of Miami and Port Everglades in Florida, and all businesses and unions involved in commerce in these ports;
- c. engaging in any commercial activity whatsoever involving, or connected with, the Port of New York and New Jersey and all businesses and unions involved in commerce in the ports;
- d. membership in, or holding any position or office in, any labor union as that term is defined in 29 U.S.C. §§ 402 (i) and (j);
- e. engaging in any activity whatsoever involving, or connected with, any of the following unions and their constituent labor organizations: The International Carpenters Union; The International Brotherhood of Teamsters; Local 32BJ of the Building Services Workers Union, Service Employees International Union; The Laborers' International Union of North America; or the Mason Tenders' District Council of Greater New York;
- f. having any involvement in the administration or management of any pension, health, welfare or benefit plan or fund established or maintained by an employee organization subject to and in accordance with Title 1 of ERISA;

- g. having legal or beneficial interest, direct and indirect, including but not limited to, any ownership, partnership, landlord/tenant, employment, managerial, and/or financial interest, in any business or entity related to, or connected with the Port of New York and New Jersey, or the Port of Miami and Port Everglades in Florida, and were ordered to divest themselves of any such interests;
- h. Obstructing the implementation of any other relief that may be imposed by the District Court.

**G. LEADING COURT DECISIONS:**

None.



### 23. INTERNATIONAL LONGSHOREMEN'S ASS'N (ILA)

**A. CASE NAME:**

United States v. International Longshoremen's Association, AFL-CIO, et al., Civil No. 05-CV-3212 (ILG), United States District Court for the Eastern District of New York. Complaint filed July 6, 2005.

**B. DEFENDANTS:**

The Complaint named six categories of defendants:

1. The International Longshoremen's Association, AFL-CIO (ILA), which is a national labor union that represents longshoremen and other laborers working at ports throughout the United States. The ILA was named as a "nominal defendant," *i.e.*, a defendant whose participation is necessary to effect the full relief sought in this action;

2. ILA officer defendants: (a) John Bowers, President; Robert E. Gleason, Secretary-Treasurer; Albert Cernadas, Executive Vice-President and also President of ILA Local 1235; Harold J. Daggett, Assistant General Organizer and also President of ILA Local 1804-1; Arthur Coffey, Vice President; Benny Holland, Jr., General-Vice President; and Gerald Owens, General Organizer. Holland and Owens were named as nominal defendants in their official capacities as fiduciaries whose participation is necessary to effect the full relief sought. The other five officers were named as defendants in their individual capacities; and (b) twenty-four (24) Vice-Presidents of the ILA were also named as nominal defendants in their official capacities as fiduciaries;

3. MILA defendants: (a) Defendant Management – International Longshoremen's Association Managed Health Care Trust Fund (MILA) was named as a nominal defendant and (b) the MILA Board, comprised of union and employer representatives, was named as a nominal defendant;

4. Alleged La Cosa Nostra (LCN) defendants: Peter Gotti, Anthony Ciccone and Jerome Brancato, allegedly the Boss, Captain and Soldier of the Gambino LCN Family,

respectively; and James Cashin, a former ILA official and allegedly an associate of the Genovese LCN Family;

5. METRO – defendant Metro Marine Contractors’ Association (METRO), an association of employers who employ ILA members on the Waterfront, was named as a nominal defendant;

6. METRO – ILA Fund defendants: The complaint also named as nominal defendants several benefit funds that were established pursuant to collective bargaining agreements for the benefit of Union Members ILA Locals 1804-1 and 1814.

The complaint also alleged that numerous persons who were members or associates of the Genovese or Gambino LCN Families were co-conspirators, but were not named as defendants.

**C. SUMMARY OF THE COMPLAINT:**

The complaint alleged that the RICO enterprise consisted of a group of individuals and entities associated-in- fact referred to as the Waterfront Enterprise and was comprised of “the ILA and certain of its subordinate components, namely, the Atlantic Coast District, the South Atlantic & Gulf Coast District, Locals 1, 824, 1235, 1588, 1804-1, 1814, 1922, 1922-1, and 2062; certain current and former ILA officials; certain welfare benefit and pension benefit funds managed for the benefit of ILA members, namely, MILA, and METRO-ILA Funds, the ILA Local 1922 Health and Welfare Fund, the ILA-Employers Southeast Florida Ports Welfare Fund; certain businesses operating on or about the Waterfront, namely METRO; certain members and associates of the Genovese and Gambino crime families; and certain businesses operating in the Port of Miami.”

For purposes of the complaint, the term “Waterfront” was defined as the Port of New York and New Jersey and all businesses and unions involved in commerce in the Port, whether located on Port property or not.

The complaint alleged that since the late 1950's, the Gambino and Genovese LCN Families had shared corrupt control over labor unions and businesses at commercial shipping terminals on the Waterfront and the Port of Miami through actual and threatened force, violence and fear. In particular, the complaint noted that several published government reports, including a 1986 Report of the President's Commission on Organized Crime and a 1984 Report of the U.S. Senate Permanent Subcommittee on Investigations, had concluded that organized crime had exercised corrupt control over the Waterfront for many years.

The complaint also detailed numerous prosecutions of LCN figures and ILA officials involving their Waterfront activities. For example, the complaint noted that from 1977 to 1981, 129 persons connected to the Waterfront were indicted, and 110 were convicted, including 52 union officials, several of whom were LCN members and associates. The complaint also attached indictments then pending against several ILA officials as well as other indictments that recently had resulted in convictions of several ILA officials and LCN figures.

Moreover, the complaint noted that the Government had brought prior civil RICO lawsuits against components of the ILA that resulted in Consent Decrees. The complaint alleged that notwithstanding these prior prosecutions and civil RICO suit against ILA officials and LCN figures, the LCN still exercised corrupt control over the Waterfront Enterprise, and therefore, further equitable relief was needed to eliminate corruption from the Waterfront Enterprise.

The complaint alleged two claims for relief. The first claim for relief alleged that from 1995 to the date the complaint was filed, defendants John Bowers, Robert F. Gleason, Albert Cernadas, Harold J. Daggett, Arthur Coffey, Peter Gotti, Anthony Ciccone, Jermoe Brancato and James Cashen, conducted the affairs of the Waterfront Enterprise through a pattern of racketeering activity, consisting of multiple acts of extortion (18 U.S.C. § 1951), mail and wire fraud (18 U.S.C. §§ 1341, 1343, and 1346) and money laundering (18 U.S.C. § 1956). The complaint alleged this conspiracy under the authority of United States v. Glecier, 923 F.2d 496 (7<sup>th</sup> Cir. 1991), and hence did not allege the specific acts of racketeering. However, the

complaint alleged that various defendants were convicted of RICO substantive and conspiracy charges and other offenses and were collaterally estopped from denying the essential allegations of those offenses. Copies of those indictments and verdicts of conviction were attached to the complaint. The complaint also alleged the modus operandi of the various racketeering activities that were the objectives of the conspiracy, including the principal actors, the time period of significant events and evidentiary details as to how the racketeering activity was carried out.

For example, the complaint alleged facts showing that: (1) between 1999 and 2000, the Gambino and Genovese LCN Families conspired to rig the elections of high ranking positions in the ILA; (2) between October 1, 1996 through September 30, 2001, various defendants and members and associates of the Genovese and Gambino LCN Families conspired to rig MILA health care benefit contracts for longshoremen on the Atlantic and Gulf Coasts; and (3) between 1995 and 1998, various defendants and members and associates of the Genovese LCN Family conspired to receive kickbacks in exchange for awarding a contract to be an investment advisor to the METRO-Funds and other contracts, and during the period 1994 to 2001, various defendants extorted money from businesses operating on the Waterfront through various schemes.

The second claim for relief alleged that from 1995 to the date the complaint was filed, the same defendants named under the first claim for relief conspired to acquire or maintain an interest in, or control of, the Waterfront Enterprise through the same pattern of racketeering activity alleged under the first claim for relief.

**D. RELIEF SOUGHT:**

1. That the district court issue an order, enjoining and restraining any Defendant found to have violated 18 U.S.C. § 1962 from:
  - a. committing any act of racketeering activity, as defined in 18 U.S.C. § 1961(1);
  - b. participating in any way in the affairs of the ILA or any of its subordinate labor organizations; from having any dealings, directly or indirectly, with the ILA or any of its subordinate labor organizations; and from having any

dealings, directly or indirectly, with any officer, agent, employee or representative of the ILA or any of its subordinate labor organizations relating to the affairs of the IILA or any of its subordinate labor organizations;

- c. participating in any way in the affairs of any ILA-affiliated pension or welfare plan; from having any dealings, directly or indirectly, with any ILA-affiliated pension or welfare plan; and from having any dealings, directly or indirectly, with any trustee, officer, agent, fiduciary, representative, administrator or employee of any ILA-affiliated pension or welfare plan relating to the affairs of the plan;
- d. occupying a position of trust within the meaning of 29 U.S.C. § 501 in any labor organization, as that term is defined in 29 U.S.C. § 402 (i) and (j);
- e. having any involvement in the administration or management of any pension or welfare plan subject to Title I of ERISA, 29 U.S.C. § 1001, et seq.;
- f. knowingly associating, directly or indirectly, with any member of any criminal group, including any LCN family, or any persons associated with or otherwise in active concert or participation with any criminal group, including any LCN family; and from knowingly permitting any member or associate of the LCN, or other criminal group or person barred from participating in any labor organization or pension or welfare plan as defined herein, to exercise any control or influence, directly or indirectly, in any way of degree, in the conduct of the affairs of the ILA and its subordinate labor organizations;
- g. participating in any way in the affairs of, investing in or acquiring an interest in, or otherwise having any dealings with, directly or indirectly, the Waterfront Enterprise or any entity that is part of the Waterfront Enterprise; and
- h. obstructing, or otherwise interfering with, the duties of any officer appointed by the court in this action, including any Court Appointed Officer(s) or person appointed by a Court-Appointed Officer.

2. That the district court issue an order removing and enjoining Defendants John Bowers, Robert E. Gleason, Albert Cernadas, Harold J. Daggett and Arthur Coffey from holding:

- a. membership, or any office or position, in the ILA or any of its subordinate labor organizations; and
- b. any office or position with any ILA-affiliated pension or welfare plan.

3. That the district court issue an order enjoining the nominal Defendants, including, but not limited to the ILA, MILA, the MILA Board, the METRO-ILA Funds, the Boards of Trustees of the METROILA Funds, and METRO, and their officers, agents, servants, employees,

and attorneys, and those persons in active concert or participation with them from:

- a. committing any act of racketeering activity, as defined in 18 U.S.C. § 1961(1);
- b. knowingly associating, directly or indirectly, with any member of any criminal group, including any LCN family, or any persons associated with or otherwise in active concert or participation with any criminal group, including any LCN family; and from knowingly permitting any member or associate of the LCN, or other criminal group or person barred from participating in any labor organization or pension or welfare plan as defined herein, to exercise any control or influence, directly or indirectly, in any way or degree, in the conduct of the affairs of the ILA and its subordinate labor organizations; and
- c. obstructing, or otherwise interfering with, the duties of any officer appointed by the Court in this action, including any Court-Appointed Officer(s) or person appointed by a Court-Appointed Officer(s).

4. That the district court order that new elections for the ILA Executive Council be conducted and that such elections be run by a Court-Appointed Officer(s) in accordance with rules to be established by the Court-Appointed Officer(s), and also order that the election costs be borne by the ILA and conducted at such time and in such a manner as to ensure that the election processes are not vulnerable to intimidation or other improper influences, but rather reflect the decision of the union members who are found to be eligible to vote.

5. That until such time as free and fair elections can be held pursuant to the preceding paragraph, the Court-Appointed Officer(s) for the ILA be empowered to prevent racketeering activity and to discharge any of the duties and responsibilities of the ILA Executive Council (other than negotiating and entering into collective bargaining agreements) when the Court-Appointed Officer(s) deems it necessary to protect the rights of the members of the ILA and its subordinate labor organizations.

6. That a Court-Appointed Officer(s) shall be appointed to oversee the operations of the ILA, MILA, the MILA Board, the METRO-ILA Funds, and the Boards of Trustees of the METRO-ILA Funds until such time as these entities are free from corruption, domination, control, and LCN infiltration, and such Court-Appointed Officer(s) shall institute and implement such procedures and to have such powers as are necessary to prevent acts of racketeering activity,

including authority to:

- a. review and reject the proposed actions of the Executive Council of the ILA insofar as they relate to expenditures of union funds, appointments to union office, contracts or proposed contracts other than collective bargaining agreements, or changes in the ILA Constitution, and to petition the district court for an order restraining any such proposed action or to obtain any other appropriate relief which is reasonably necessary to protect the rights of ILA members;
- b. review and reject the proposed actions of the MILA Board insofar as they relate to expenditures of MILA funds, hiring of employees, contracts and proposed contracts, or changes in the MILA Agreement and Declaration of Trust or other organizing or governing documents, and to petition the district court for an order restraining any such proposed action or obtain any other appropriate relief which is reasonably necessary to protect the rights of MILA beneficiaries;
- c. review and reject the proposed actions of the Boards of Trustees of the METROILA Funds insofar as they relate to expenditures of funds, hiring of employees, contracts and proposed contracts, or changes in the Funds' Agreements and Declarations of Trust or other organizing or governing documents, and to petition the district court for an order restraining any such proposed action or obtain any other appropriate relief which is reasonably necessary to protect the rights of the beneficiaries of the METRO-ILA Funds; and
- d. apply to the district court for such orders and other relief as may be necessary and appropriate in order to carry out the mandate of the court.

7. That the district court enjoin and restrain the Defendants from interfering or obstructing in any way with the execution of the duties of the aforesaid Court-Appointed Officer(s).

8. That the district court order all of the individual Defendants who are found to have violated 18 U.S.C. § 1962 to disgorge the proceeds of those violations and that such proceeds to be distributed to the victims of those violations and used to fund costs incurred by the Court-Appointed Officer(s).

9. That the district court issue a judgment declaring that the Waterfront Enterprise, the ILA, MILA, MILA Board, the METRO-ILA Funds, the Boards of Trustees of the METRO-ILA Funds and METRO have been controlled and exploited by LCN members and associates through violation of 18 U.S.C. § 1962.

10. That the costs of all officers appointed by the Court pursuant to preliminary or permanent injunctive relief be borne by the respective Defendant(s), including the nominal defendants, who are hereby jointly and severally liable for such costs.

11. That the district 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 18 U.S.C. § 1962 and to end LCN control over, and exploitation of, the Waterfront Enterprise.

**E. OUTCOME OF THE CASE:**

1. On September 22, 2005, a Consent Decree between the United States and defendant Albert Cernadas was entered, which included the following provisions:

a. Cernadas agreed to resign from any position of trust he holds with the ILA, from membership in the ILA, and from the board of trustees or from any other office or position he holds with any ILA-affiliated employee pension benefit plan or employee welfare benefit plan;

b. Pursuant to 18 U.S.C. § 1964 (a), Cernadas was permanently enjoined from:

(1) engaging in conduct which constitutes or furthers an act of racketeering activity, as enumerated or defined in 18 U.S.C. § 1961 (1);

(2) knowingly associating, directly or indirectly, with any member or associate of any criminal group, including any LCN family, or any persons associated with or otherwise in active concert or participation with any criminal group, including any LCN family; and from knowingly permitting any LCN member or associate, or member or associate of any other criminal group, or person barred from participating in any labor organization or employee pension benefit plan or employee welfare benefit plan as defined herein, to exercise any control or influence, directly or indirectly, in any way or degree, in the conduct of the affairs of the ILA, except that nothing in the Consent Judgment and Decree shall preclude Cernadas from meeting or communicating with a relative by blood or marriage solely for social purposes;



(3) participating in any way in the affairs of, investing in or acquiring an interest in, or otherwise having any dealings with, directly or indirectly, the Waterfront Enterprise or any entity that is part of the Waterfront Enterprise;

(4) (a) participating in any way in the affairs of the ILA, including, but not limited to (i) holding any position of trust in the ILA, (ii) having membership in the ILA, (iii) being employed by the ILA, or acting as an ILA agent, representative, consultant or service provider, and (iv) attending any event sponsored by or for the ILA; (b) having any dealings, directly or indirectly, with the ILA, including, but not limited to, employment by, or acting as an agent, representative, consultant or service provider for, any person or entity that does business with the ILA; and (c) having any dealings, directly or indirectly, with any officer, employee, agent, or representative of the ILA relating to the affairs of the ILA;

(5) (a) participating in any way in the affairs of any labor organization, including, but not limited to: (i) holding any position of trust in any labor organization, (ii) having membership in any labor organization, and (iii) being employed by any labor organization, or acting as an agent, representative, consultant or service provider for any labor organization; (b) having any dealings, directly or indirectly, with any labor organization, including, but not limited to, employment by, or acting as an agent, representative, consultant or service provider for, any person or entity that does business with a labor organization; and (c) having any dealings, directly or indirectly, with any officer, employee, agent, or representative of any labor organization relating to the affairs of the labor organization;

(6) (a) participating in any way in the administration or management of the ILA-affiliated employee pension benefit or employee welfare benefit plan or any other such plan affiliate with a labor organization including, but not limited to, being employed by any ILA-affiliated employee pension benefit or employee welfare benefit plan, or acting as an agent, representative, consultant or service provider for any ILA-affiliated employee pension benefit or employee welfare benefit plan; (b) having any dealings, directly or indirectly, with any ILA-

affiliated employee pension benefit or employee welfare benefit plan including, but not limited to, being employed by or acting as an agent or representative, consultant or service provider for any person or entity that does business with any ILA-affiliated employee pension benefit or employee welfare benefit plan; and (c) from having any dealings, directly or indirectly, with any trustee, officer, administrator, employee, fiduciary, agent, representative, consultant or service provider of any ILA-affiliated employee pension benefit plan or employee welfare benefit plan relating to the affairs of the plan;

(7) obstructing or otherwise interfering, directly or indirectly, with the efforts of anyone effectuating, or attempting to effectuate, the terms of this Consent Judgment and Decree, including any officer appointed by the district court;

(8) obstructing the implementation of any other relief that may be imposed by the district court.

c. Cernadas was ordered to divest himself of any and all legal or beneficial interests, direct and indirect, including but not limited to, any ownership, partnership, landlord/tenant, employment, managerial, and/or financial interest, that he has or may have in any business or entity related to, or connected with, the Waterfront Enterprise.

2. On April 24, 2006, a Consent Decree between the United States and defendant Peter Gotti was entered, which included the following provisions:

a. Pursuant to 18 U.S.C. § 1964(a), Gotti was permanently enjoined from:

(1) engaging in conduct which constitutes or furthers an act of racketeering activity, as enumerated or defined in 18 U.S.C. § 1961(1);

(2) knowingly associating, directly or indirectly, with any member or associate of any criminal group, including any LCN family, or any persons associated with or otherwise in active concert or participation with any criminal group, including any LCN family; and from knowingly permitting any LCN member or associate, or member or associate of any other criminal group, or person barred from participating in any labor organization or employee

pension benefit plan or employee welfare benefit plan as defined herein, to exercise any control or influence, directly or indirectly, in any way or degree, in the conduct of the affairs of the ILA. Nothing in this Consent Judgment and Decree shall preclude Gotti from meeting or communicating with a relative by blood or marriage solely for social purposes;

(3) participating in any way in the affairs of, investing in or acquiring an interest in, or otherwise having any dealings with, directly or indirectly, the Waterfront Enterprise or any entity that is part of the Waterfront Enterprise;

(4) (a) participating in any way in the affairs of the ILA, including, but not limited to (i) holding any position of trust in the ILA, (ii) having membership in the ILA, (iii) being employed by the ILA, or acting as an ILA agent, representative, consultant or service provider, and (iv) attending any event sponsored by or for the ILA; (b) having any dealings, directly or indirectly, with the ILA, including, but not limited to, employment by, or acting as an agent, representative, consultant or service provider for, any person or entity that does business with the ILA; and (c) having any dealings, directly or indirectly, with any officer, employee, agent, or representative of the ILA relating to the affairs of the ILA;

(5) (a) participating in any way in the affairs of any labor organization, including, but not limited to (i) holding any position of trust in any labor organization, (ii) having membership in any labor organization, and (iii) being employed by any labor organization, or acting as an agent, representative, consultant or service provider for any labor organization; (b) having any dealings, directly or indirectly, with any labor organization, including, but not limited to, employment by, or acting as an agent, representative, consultant or service provider for, any person or entity that does business with a labor organization; and (c) having any dealings, directly or indirectly, with any officer, employee, agent, or representative of any labor organization relating to the affairs of the labor organization;

(6) (a) participating in any way in the administration or management of any ILA-affiliated employee pension benefit or employee welfare benefit plan including, but

not limited to, being employed by any ILA-affiliated employee pension benefit or employee welfare benefit plan, or acting as an agent, representative, consultant or service provider for any ILA-affiliated employee pension benefit or employee welfare benefit plan; (b) having any dealings, directly or indirectly, with any ILA-affiliated employee pension benefit or employee welfare benefit plan including, but not limited to, being employed by or acting as an agent or representative, consultant or service provider for any person or entity that does business with any ILA-affiliated employee pension benefit or employee welfare benefit plan; and (c) from having any dealings, directly or indirectly, with any trustee, officer, Administrator, employee, fiduciary, agent, representative, consultant or service provider of any ILA--affiliated employee pension benefit plan or employee welfare benefit plan relating to the affairs of the plan;

(7) (a) participating in any way in the administration or management of any employee pension benefit or employee welfare benefit plan including, but not limited to, being employed by any employee pension benefit or employee welfare benefit plan, or acting as an agent, representative, consultant or service provider for any employee pension benefit or employee welfare benefit plan; (b) having any dealings, directly or indirectly, with any employee pension benefit or employee welfare benefit plan including, but not limited to, being employed by or acting as an agent or representative, consultant or service provider for any person or entity that does business with any employee pension benefit or employee welfare benefit plan; and (c) from having any dealings, directly or indirectly, with any trustee, officer, administrator, employee, fiduciary, agent, representative, consultant or service provider of any employee pension benefit plan or employee welfare benefit plan relating to the affairs of the plan;

(8) obstructing or otherwise interfering, directly or indirectly, with the efforts of anyone effectuating, or attempting to effectuate, the terms of this Consent Judgment and Decree, including any officer appointed by the district court;

(9) obstructing the implementation of any other relief that may be imposed by the district court.

Gotti was ordered to divest himself of any and all legal or beneficial interests, direct and indirect, including but not limited to, any ownership, partnership, landlord/tenant, employment, managerial, and/or financial interest, that he has or may have in any business or entity related to, or connected with, the Waterfront Enterprise.

3. As of this writing, the case is pending against the other defendants.