UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Plaintiff,

vs.

Case No. 11-CR-57-A

BERGAL L. MITCHELL, III,

Defendant.

DEFENDANT'S SUPPLEMENTAL BRIEF REGARDING THE APPLICABILITY OF 18 U.S.C. §1153 AND UNTIED STATES V. MARKIEWICZ, 978 F.2d 786 (2d Cir. 1992) ON BEHALF OF DEFENDANT BERGAL L. MITCHELL, III

Pursuant to this Court's order on September 12, 2013, Defendant Bergal L. Mitchell, III, respectfully submits this supplemental Brief regarding the applicability of 18 U.S.C. §1153 and United States v. Markiewicz, 978 F.2d 786 (2d Cir. 1992) to his Objections to Magistrate Judge Jeremiah J. McCarthy's July 30, 2012, Report, Recommendation and Order (the "Report") (Dkt. 74).

The Objections Mr. Mitchell filed in this regard (*see* Dkt. 87) were to Judge McCarthy's application of the Ninth Circuit standard for interpreting 18 U.S.C. §1153**,** otherwise known as the "Major Crimes Act" or "Indian Crimes Act," as well as Judge McCarthy's application of the §1153 phrase, "within the Indian country," as addressed in Markiewicz.

This Brief will address the Defendant's basic theory behind utilizing §1153 and Markiewicz in this case, the historical purpose behind §1153, the rationale of Markiewicz and

the role that decision plays in this Circuit in addressing criminal allegations against an Indian defendant in Indian country.

I.

INTRODUCTION

The Defendant contends that counts 1(d) and 4 of the indictment, charging wire fraud (18 U.S.C. §1343) should be dismissed for lack of jurisdiction pursuant to 18 U.S.C. §1153, as interpreted by United States v. Markiewicz, supra.

In his Report, Judge McCarthy concludes, based on Ninth Circuit precedent, that §1153 is only applicable to federal enclave laws, and has no relevance to laws of general applicability (Dkt. 74, p. 5-6), *citing* United States v. Begay, 42 F.3d 486, 500 (9th Cir. 1994) (finding that a Native American may be charged under a federal criminal statute of general applicability even absent a peculiarly federal interest, if the charge is unaffected by federal enclave law and Native Americans have not been excluded from the statute's application). The Ninth Circuit's view is also accepted by the First, Sixth, Seventh and Eighth Circuits as well.[1] Richard W. Garnett, Once

[1] *See* United States v. Boots, 80 F.3d 580, 593-594 (1st Cir. 1996) (questioning whether Markiewicz is in fact the rule), overruled in part by Pasquantino v. United States, 544 U.S. 349, 354-355, 379-382 (2005); United States v. Newell, 658 F.3d 1, 11-12 (1st Cir. 2011) (following Boots); United States v. Yannott, 42 F.3d 999, 1004 (6th Cir. 1994) (following Eight Circuit approach); United States v. Brisk, 171 F.3d 514, 521, fn 5 (7th Cir. 1999) (rejecting the "peculiar federal interest" test previously adopted in that Circuit); People v. Blue, 722 F.2d 383, 384-386 (8th Cir. 1983) (drug charges; rejecting principles behind future Makiewicz decision); United States v. Wadena, 152 F.3d 831, 841 (8th Cir. 1998) (following Blue; though acknowledging that "when addressing claims like the one made here, our court and other courts of appeal have issued opinions that seem confusing and somewhat inconsistent"); *see also* id. at 841, fn 14 (recognizing the split between the Eighth and Ninth Circuits in one camp, and the Second and Fourth Circuits in the other); Head v. Hunter, 141 F.2d 449, 451 (10th Cir. 1944) (considering former version of §1153; rejecting principles behind future Makiewicz decision); United States v. Gachot, 512 F.3d 1252, 1254 (10th Cir. 2008) (interpreting §1152 to mean that general federal crimes apply in Indian country); *see also* Langley v. Ryder, 778 F.2d 1092, 1093 (5th Cir. 1985) (though not conducting a thorough analysis of §1153, the court finding that as a general rule, that the federal government has jurisdiction over Indian County).

More into the Maze: United States v. Lopez, Tribal Self-Determination, and Federal Conspiracy Jurisdiction in Indian Country, 72 N. Dak. L. Rev. 433, 458-471 (1996).

As explained below, the Second, Fourth and D.C. Circuits take a different approach. [2]

II.

HISTORICAL PURPOSE OF §1153

18 U.S.C. §1153 indicates, in pertinent part, that:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely,
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> murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [18 USC §§ 2241 et seq], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title [18 USC § 1365]), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title [18 USC § 661]
>
> within the Indian country, [3]
>
> shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States…

[2] The Third Circuit does not appear to have taken a position on the matter. *But see* United States v. Waters, 2013 U.S. Dist. LEXIS 107771, at *17, fn 1 (ED Pa. 2013) (observing that "[r]ape is subject to federal jurisdiction when it is perpetrated by an Indian in Indian Country," citing §1153 [case law citation omitted]). The Eleventh Circuit does not appear to have taken a position on these issues either.

[3] 18 U.S.C. §1151 defines "Indian County," in pertinent part, to mean "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." It is not disputed that the Seneca Nation of Indians territory constitutes "Indian country."

As recognized in Keeble v. United States, 412 U.S. 205, 209-210 (1973), the Major Crimes Act was enacted by Congress in 1885 in direct response to Ex Parte Crow Dog, 109 U.S. 556 (1883), which held that a federal court lacked jurisdiction to try an Indian for the murder of another Indian *(a Sioux chief with purportedly pro-U.S. Government tendencies)* [4] in Indian country. Though recognizing the power of Congress to confer such jurisdiction on the federal courts, the Crow Dog court reasoned that, in the absence of explicit congressional direction, the Indian tribe retained exclusive jurisdiction to punish the offense. Id. at 568-572. [5] In Crow Dog, the court was interpreting what is now known as the General Crimes Act (18 U.S.C. §1152), of which an earlier version was enacted as part of the Trade and Intercourse Act in 1817.[6]

In 1916, the Supreme Court in United States v. Quiver, 241 U.S. 602, addressing an adultery case between Indians in Indian country, stated that "the relations of the Indians, among

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[4] *See* James Winston King, The Legend of Crow Dog: An Examination of Jurisdiction over Intra-Tribal Crimes Not Covered by the Major Crimes Act, 52 Vand. L. Rev. 1479, 1486 (Oct. 1999).

[5] Apparently, the families of the murderer and the victim met after the crime to resolve the matter. Following tribal law, Crow Dog's family agreed to pay the victim's family "$600 in cash, eight horses, and one blanket." As far as the tribe was concerned, "the matter was settled." Word spread of the 'settlement,' however, and Crow Dog was arrested, tried and ultimately convicted in federal court. *See again* King, 52 Vand. L. Rev. at 1486-1487.

[6] 18 U.S.C. §1152, also known as the "Federal Enclaves Act" and the "Indian County Crimes Act," indicates, in pertinent part, that:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Note here that Congress in its subsequent enactment, §1153, did not require that the crime victim be an Indian.

themselves -- the conduct of one toward another -- is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise." Id. at 605-606. Moreover, "the enumeration in the [Major Crimes Act] of certain offenses as applicable to Indians in the reservations, carries with it some implication of a purpose to exclude others." Id. at 606. The federal government thus had no business under the circumstances imposing its authority in Indian country.

III.

THE MARKIEWICZ DECISION

In 1992, a unanimous panel of the Second Circuit in United States v. Markiewicz, supra, specifically dealt with the issue of "statutes of general applicability" (id. at 798), with the court deciding ***not*** to approve of automatic applicability of federal criminal jurisdiction for Indian country cases. Therein, the court dealt with the Oneida tribe which operated a bingo hall; the center of activity in its territory. The hall was run by a small business committee that was accused of mismanagement, resulting in the Markiewicz defendants, amongst others, forcing the bingo hall's closure, illegally distributing tribal funds and ultimately burning the hall to the ground. Markiewicz, 978 F.2d at 793-795. While finding under the particular circumstances that the District Court had jurisdiction over the charges at issue, the Second Circuit set out a rule placing the burden on the government to establish for charges not enumerated under §1153 that the provision was a peculiarly federal crime, the prosecution of which protected an independent federal interest.

The Markiewicz court acknowledged that other Circuits disagree with its analysis, but then explained its rationale:

> In approaching the jurisdictional problems in this case, the district court disregarded Quiver and determined that all federal statutes of

general applicability, which apply to "acts which are criminal regardless of their location in the United States", Markiewicz, 1989 WL 139221 at *5, apply of their own force to the Indian territories.

In essence, the district court concluded that, notwithstanding Quiver, any criminal law passed by congress applies of its own force to the Indian territories. The eighth circuit has taken this approach (citations omitted). The ninth circuit, too, has determined that federal criminal laws apply of their own force to Indian territories (citations omitted). Additionally, one other district court in this circuit has concluded that the federal criminal statutes "apply of their own accord" to the Indian territories. [7]

Despite these holdings, **there is an alternative approach that is more deferential to the Supreme Court's determination in Quiver** that congress's inclusion of certain crimes in the major crimes act "carries with it some implication of a purpose to exclude other[]" crimes. Quiver, 241 U.S. at 606. The fourth circuit in United States v. Welch, 822 F.2d 460 (4th Cir. 1987), followed this alternative rationale when it reversed the conviction of an Indian who had been prosecuted under the assimilative crimes act, 18 U.S.C. § 13, for raping another Indian on Indian territory. The court in Welch said that the government could not invoke the assimilative crimes act in order to apply North Carolina criminal law, noting that "when there is a crime by an Indian against another Indian within Indian country only those offenses enumerated in the Major Crimes Act may be tried in the federal courts." *Id.* at 464 (citation omitted). [8]

* * *

Further, the seventh circuit has determined that a federal district court had jurisdiction over an Indian defendant who assaulted an Indian BIA officer on Indian territory, because the assault on a federal officer was a "peculiarly Federal" offense. United States v.

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[7] Citing United States v. Burns, 725 F. Supp. 116, 121 (N.D.N.Y. 1989), *aff'd sub nom on other grounds,* United States v. Cook, 922 F.2d 1026 (2d Cir. 1991).

[8] The Fourth Circuit's position from Welch is widely considered to be the most pro-tribal jurisdiction rule in the federal system. *See* Donald D. Raymond, Jr., Balancing "Peculiarly Federal Interests" and Indian Sovereignty in Crimes by and Against Indians in Indian County," 78 Wash. U. L. Q. 347, 356-357 (2000); *see also* King, 52 Vand. L. Rev. at 1496-1497. While the Welch court did not specifically address the scope of generally applicable federal criminal laws, the Fourth Circuit therein strongly reaffirmed the Quiver principle that the Major Crimes Act's limitation on federal jurisdiction was a "meaningful one." Garnett, 72 N. Dak. L. Rev. at 468. This is still the law of the Fourth Circuit. Further, the D.C. Circuit has wholly adopted the Welch holding regarding §1153. *See* Muscogee Creek Nation v. Hodel, 851 F.2d 1439, 1446 (D.C. Cir. 1988).

> Smith, 562 F.2d 453, 458 (7th Cir. 1977), *cert. denied,* 434 U.S. 1072, 55 L. Ed. 2d 775, 98 S. Ct. 1256 (1978). [9]
>
> **The Supreme Court implicitly adopted this reasoning in United States v. Wheeler, 435 U.S. 313, 55 L. Ed. 2d 303, 98 S. Ct. 1079 (1978).** In Wheeler, a footnote stated that federal jurisdiction extends "to crimes over which there is federal jurisdiction regardless of whether an Indian is involved, such as assaulting a federal officer". *Id.* at 330 n.30. In a subsequent footnote, the Court explained that there is federal jurisdiction over such crimes because "federal criminal jurisdiction over Indians extends * * * to offenses as to which there is an independent federal interest to be protected". *Id.* at 331 n.32. **Thus, the second approach to federal jurisdiction over Indian-against-Indian offenses on Indian territory seemingly recognizes Quiver's conclusion that federal jurisdiction does not exist over Indian-against-Indian crimes that congress fails to enumerate, except where such offenses constitute "peculiarly Federal" crimes, and the prosecution of such offenses would protect an independent federal interest.**

Id. at 798-800 (emphasis added). Markiewicz is still the law of our Circuit. [10]

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[9] Though the Markiewicz court counts the Seventh Circuit amongst its allies as that Circuit had adopted a similar "peculiar federal interest" test (Smith, 562 F.2d at 458; Markiewicz, 978 F.2d at 800), Brisk, 171 F.3d at 519-522 (7th Cir. 1999), decided subsequent to Smith, actually makes the Seventh Circuit now in line with the Eighth and Ninth Circuits. *See* Brisk, 171 F.3d at 521, fn 5. Brisk also seems to have fallen under the radar of some commentators who wrongly maintain that the Seventh Circuit still follows the "peculiar federal interest" standard from Smith. *E.g.,* Raymond, Jr., 78 Wash. U. L. Q. at 357-359.

[10] Markiewicz has been cited in addressing district courts' jurisdiction in federal prosecutions on several occasions in this Circuit. *See* **United States v. White, 237 F.3d 170, 174, fn 4 (2d Cir. 2001)**, citing Markiewicz, 978 F.2d at 800. In White, then Judge Sotomayor, opined that the Markiewicz rule was inapplicable in that matter, as, unlike our case, the only possible victim in that case was the United States. But even if Markiewicz had been applied therein, so opined the court, the statutes in question, 31 U.S.C. §5313(a) and 26 U.S.C. §60501, requiring the reporting of currency transactions over $10,000, "protect independent federal interests." Id. at 174, fn 4. But because the elements of §1153 were not present, the court cited Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 177 (2d Cir. 1996) for the notion that "federal laws of general applicability are presumed to apply to American Indians, regardless of whether they reside on or off a reservation." Id. at 172. The White court did not, however, question the vitality of Markiewicz. In a loosely cited excerpt in **United States v. Redeye, 1999 U.S. Dist. LEXIS 12210, at *5-6, Dock. 98-CR-144A(H) (WDNY 1999) (Heckman, MJ)**, the Magistrate Judge indicated that "numerous courts have held that federal criminal laws of general applicability -- *i.e.*, laws prohibiting conduct regardless of where in the United States the conduct occurred -- apply even where a native American is both the defendant and the victim and the acts complained of occurred on a reservation. *See, e.g.*, United States v. Markiewicz, 1989 U.S. Dist. LEXIS 13722, 1989 WL 139221, at *4 (N.D.N.Y. November 17, 1989) (stealing from tribal organization, 18 U.S.C. §§371 & 1163; citing cases), ***aff'd***, 978 F.2d 786 (2d Cir. 1992) (bold emphasis added)…" Aside from the fact that a number of the Markiewicz counts

As noted above, the Second Circuit, based its decision in part on the Supreme Court decision in Quiver, which, according to Markiewicz, was implicitly adopted in United States v. Wheeler (435 U.S. 313, 335 [1978]), wherein the Supreme Court observed that "federal criminal jurisdiction over Indians extends… to offenses as to which there is an independent federal interest to be protected." 978 F.2d at 800, citing Wheeler, 435 U.S. at 331, fn 32. The Markiewicz court also relied on the 1976 legislative history of the considered amendments to §1153, wherein House members observed:

> …Section 1153 provides for Federal jurisdiction over the 13 enumerated offenses. Jurisdiction over other offenses rests with the tribe… The above pattern is subject to two overriding exceptions. First, some Federal laws have ceded to certain States complete or concurrent criminal jurisdiction over certain Indian country. The second overriding exception is for crimes that are peculiarly Federal. Thus, there is federal jurisdiction when the offense is one such as assaulting a federal officer or defrauding the United States.

Markiewicz, 978 F.2d at 799-800, citing H.R. Rep. No. 94-1038, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1125, 1127 (internal citations omitted).[11]

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were ***not*** in fact affirmed (id. at 817), no analysis of how the Second Circuit in Markiewicz reached its result was included therein; thus, the Redeye court did not challenge the boundaries of the Markiewicz rule. *See also* **United States v. Miller, 26 F.Supp.2d 415, 427-428 (NDNY 1998)** ("Generally, absent some federal jurisdictional hook, there is no federal criminal jurisdiction over Indians in Indian country. See 18 U.S.C. §§ 1152 and 1153; *(citing Markiewicz, 978 F.2d at 797)*. The three basic hooks for federal criminal jurisdiction are: (1) the Federal Enclave Act ("FEA"), 18 U.S.C. §1152; (2) the Major Crimes Act ("MCA"), 18 U.S.C. §1153; and (3) "peculiarly Federal crimes . . . the prosecution of [which] . . . would protect an independent federal interest." Markiewicz, 978 F.2d at 799-800; see also Wheeler, 435 U.S. at 331, nn. 30 & 32.") (footnotes omitted). In Miller, however, some of the defendants were not Indians, the acts did not take place in Indian county and federal interests existed in preventing fraud against the United States. Id. at 428.

[11] Congressional discussion of another proposed amendment in 1986 resulted in a similar conclusion: "Under current law, the Federal government can prosecute an Indian for committing, in Indian country, a serious offense against another Indian, only if the offense is listed in the Major Crimes Act. If the offense is not listed, only the tribe has jurisdiction to punish the offense . . . ." *See again* King, 52 Vand. L. Rev. at 1493, fn 98, citing H.R. Rep. No. 99-528, at 5 (1986), reprinted in 1986 U.S.C.C.A.N. 1298, 1301. A proposed amendment to the Major Crimes Act in 1968 also resulted in "statements of the amendment's sponsor… indicating a belief that, without specifically enumerated jurisdiction, punishment is left to the

As one commentator put it, while the Ninth Circuit's approach in Begay (cited by Judge McCarthy, Dkt. 74, p. 5) effectively requires the defendant to prove a treaty violation (a very narrow window of opportunity), the Second Circuit's view in Markiewicz places the burden on the government to show that "the extension of a generally applicable criminal law into Indian country vindicates a peculiarly federal interest…" *See* Garnett, 72 N. Dak. L. Rev. at 472; *see also* Felix S. Cohen, Cohen's Handbook of Federal Indian Law (Matthew Bender & Co. 2012), §9.02(3)(a) (observing that the Markiewicz court, not followed by any other circuit, rejected the "blanket application of laws of general applicability, preferring a narrower analysis that would justify jurisdiction "where such offenses constitute 'peculiarly federal crimes'"). Moreover,

> [w]hy does it matter where the burden lies? Because tribal sovereignty is a matter of structural and institutional, not only individual, concern. Our Constitution set up a political structure of diffused and limited power; it is not merely a litany of individual rights. The Begay approach requires an individual defendant, who may be indigent and unfamiliar with law and procedure (let alone issues of constitutional structure) to vindicate not only his own concrete, immediate interest in limiting federal jurisdiction, but also the more amorphous treaty and political interests of the relevant Tribe. This allocation of responsibility not only overburdens the defendant, it also exposes the integrity of tribal sovereignty to erosion through attrition, to death by a thousand plea bargains. The allocation of jurisdiction between the United States and the Tribes has an independent, constitutional, and crucial significance, beyond the needs of a particular defendant in a particular case. A defendant's consent to, or his failure or inability to fight, federal jurisdiction does not remove the injury to the integrity of tribal sovereignty worked by the expansion of federal jurisdiction. The Markiewicz approach, appropriately, charges the federal government with justifying expansions of its jurisdiction and therefore better protects both defendants and tribes. The health of tribal jurisdiction and sovereignty is not contingent on the vigilance of accused individuals who, quite understandably, may have their own interests, and not those of the Tribes, in the front of their minds. **The United States should**

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tribal courts." *See again* King, 52 Vand. L. Rev. at 1490-1491, fn 84 and 85, citing S. Rep. No. 90-721 (1968), reprinted in 1968 U.S.C.C.A.N. 1837, 1854-1867.

> **therefore have to show not only that a prosecution does not violate tribal treaty rights, but also to advance, as the Markiewicz court held, a strong and "peculiarly Federal" interest before intruding into intra-tribal disputes, before prosecuting intra-Indian crimes in Indian Country which are not enumerated in the Major Crimes Act. Given Congress's plenary power in Indian affairs, this approach would not hamstring federal power**, but only require Congress to be up front and candid when it exercises its power, as it often has, to the detriment of Indian self-determination.

Garnett, 72 N. Dak. L. Rev. at 473-474 (footnotes omitted, and bold and underlined emphasis added). The Supreme Court in United States v. Kagama, 118 U.S. 375, 384-385 (1886), established that Congress has plenary power over Indian tribes, but the Court has since recognized that Indian authorities retain their sovereignty unless the federal government says otherwise. Wheeler, 435 U.S. at 323. As noted in the Garnett commentary above, Congress has already asserted its plenary power - - and set out the parameters of its jurisdiction - - in enacting (and reviewing on multiple occasions) the Major Crimes Act. The Markiewicz approach therefore makes sense,[12] and, as observed above, is binding precedent in this Circuit.

IV.

AS APPLIED TO COUNTS 1(d) and 4 (WIRE FRAUD)

It is uncontested that the defendant is an enrolled member of the Seneca Nations of Indians. Further, the wire fraud statute is a general applicability crime that is not among the enumerated offenses listed in §1153. It therefore must be determined under Markiewicz whether the statute constitutes a "peculiarly" federal crime, the prosecution of which protects an

[12] "Although the Eighth and Ninth Circuits have developed the most precedent dealing with this issue, an examination of their case law origins reveals no greater claim to validity than those of the pro-tribal circuits." King, 52 Vand. L. Rev. at 1506; *see also* id. at 1520, 1522-1523 (opining further that the Markiewicz "peculiarly federal" interest approach is preferred in balancing tribal sovereignty and important federal interests). *See also* King, 52 Vand. L. Rev. at 1480, fn 9, *citing* Frank Pommersheim, The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction, 31 Ariz. L. Rev. 329, 333 (1989) ("Tribal courts have exclusive criminal jurisdiction over Indian defendants for all crimes not covered by . . . the Major Crimes Act . . . .").

"independent" federal interest (id. at 800). It must also be answered whether the purported offense occurred "within" Indian county.

A. Peculiarly Federal Crimes and Independent Federal Interests

The wire fraud statute, codified at 18 U.S.C. §1343, is designed to "prohibit the use of any interstate or foreign communication systems by anyone who 'intend[s] to devise any scheme or artifice to defraud.'" United States v. Trapilo, 130 F.3d 547, 551 (2d Cir. 1997). The statute provides, in pertinent part, that:

> [w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire ... communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. §1343. This statute does not present an independent federal interest to protect. For instance, §1343 "neither expressly, nor impliedly, precludes the prosecution of a scheme to defraud a *foreign government* of tax revenue." Trapilo, 130 F.3d at 551 (emphasis added). Any sovereign would want the protections that §1343 affords. And while the Eighth Circuit has criticized the Markiewicz "peculiarly federal" test as redundant,[13] there is also no peculiarly federal aspect to §1343, such as would be found in an enclave law protecting a federal building or property.

Additionally, "the statute reaches *any* scheme to defraud involving money or property, whether the scheme seeks to undermine a sovereign's right to impose taxes, or involves foreign victims and governments." Trapilo, 130 F.3d at 552 (emphasis in original); *see also* United

[13] Wadena, 152 F.3d at 840-841 (finding the rule also to be difficult to apply, as every federal statute has a federal interest).

States v. Procelli, 865 F.2d 1352, 1358 (2d Cir. 1989) (involving scheme to defraud *New York State* of sales taxes); United States v. DeFiore, 720 F.2d 757, 761 (2d Cir. 1983)[14] (finding wire fraud statute applicable to a scheme to defraud *New York State* of cigarette tax revenue). So ***any*** sovereign entity, be it federal, state, foreign, Indian or otherwise, can be the victim of a §1343 charge, and would plainly have an interest in preventing fraud perpetrated within its borders through the use of wire communications. *See again* Trapilo, 130 F.3d at 552 (finding that "the identity and location of the [wirefraud] victim… are irrelevant").

B. Within Indian Country

The Markiewicz court addressed several charges under the "within the Indian country" element of §1153. With regards to the Witness Tampering charge (18 U.S.C. §1513), the court concluded that "*the offense*… occurred outside a Syracuse, New York restaurant, and not "within the Indian country."" Markiewicz, 978 F.2d at 802 (emphasis added). As to the Contempt charge (18 U.S.C. §402), as "*that* conduct did not occur on Indian territory, this jurisdictional challenge fails for the same reason as their witness tampering challenge fails." Id. (emphasis added). With regards to the Anti-Riot Act (18 U.S.C. §2101), the court observed that the defendant called individuals in Canada to bring them into the Indian territory in question to carry out the riotous acts. Markiewicz, 978 F.2d at 802. The court concluded then that "*this part* of the crime by definition occurred, at least in part, off the Indian territory. Consequently, the anti-riot act offenses did not occur solely "within the Indian country", 18 U.S.C. §1153, and the district court properly exercised jurisdiction over the defendants." Id.

In Judge McCarthy's Report, he concluded that:

> "jurisdictional issues arise only where crime occurs on Indian territory". Markiewicz, 978 F.2d at 801. Thus, where the "offenses

[14] The U.S. Supreme Court rejected the DeFiore court's position regarding the powers of the magistrate Judge; an issue not relevant at bar. *See* Gomez v. United States, 490 U.S. 858, 862 (1989).

> did not occur *solely* 'within the Indian country' . . . the district court [may] properly exercise[ ] jurisdiction over the defendants". Id. at 802. As the government points out, "there were events in the 1343 and the conspiracy to commit 1343 that occurred on the reservation, we concede that to the Court. But, on the other hand, *there are many, many events in those particular offenses*, the conspiracy and substantive offense, which occurred far off the reservation." Transcript of oral argument [64], p. 77.

(Dkt. 74, p. 6 [emphasis added]). There are at least two problems here. First, despite the Second Circuit in Markiewicz analyzing the Witness Tampering and the Contempt charges without the "solely" language, Judge McCarthy chose that language as the standard to be applied. But the Second Circuit was not creating a new rule by concluding that the Anti-Riot offense was not committed "solely" within Indian country. This is evidenced by the fact that this "solely" language is not found within the statute or within the court's analysis for two out of the three statutes it considered in this regard. Moreover, the "solely" language does not appear to have been adopted in post-Markiewicz case law in this Circuit. [15]

Further, the Markiewicz court, as with §1153 itself, focused in on the Anti-Riot Act "offenses" (id. at 802), implying that the core events of the crime occurred outside of Indian country. "This part of the crime by definition" (id. at 802), i.e., the Markiewicz defendant bringing cohorts into Indian country through his phone calls (id.) would be essential for meeting the definition of "riot" under 18 U.S.C. §2102 (a). That provision requires, in pertinent part, that there be "a public disturbance involving **(1)** an act or acts of violence by one or more persons *part of an assemblage of three or more persons*, which act or acts shall constitute a clear and

[15] In Miller, for instance, the Northern District of New York, though conducting a close analysis of the applicable facts, did not keep to the "solely" language of Markiewicz. *See again* Miller, 26 F.Supp.2d at 428 (NDNY 1998) (where alleged wire fraud conduct involved: [1] transporting products from the Reservation into Canada and then to the black market, [2] making interstate and international phone calls, and [3] conducting financial transactions at bank located off of Reservation; citing Markiewicz, supra, at 801; and finding that crimes did not occur within Indian country).

present danger… or **(2)** a threat or threats of the commission of an act or acts of violence by one or more persons *part of an assemblage of three or more persons* having, individually or collectively, the ability of immediate execution of such threat or threats…" (emphasis added). Without bringing in other people to create "an assemblage of three or more persons," the Anti-Riot offense could not be committed.

Judge McCarthy's acceptance of the government's argument of there being "many, many events in those particular offenses, the conspiracy and substantive offense, which occurred far off the reservation" (*see again* oral argument [Dkt. 64, p. 77; Dkt. 74, p. 6]) permits an expansion of the statute to include events only tenuously related to the offense in question that are not essential to the crime. Rather, it is the events of defendant making "presentations" to the SNI authorities within Indian country (Dkt. 1, ¶¶ 14 and 16 [indictment]), resulting in the SNI Tribal Council on February 19, 2005, considering and passing a resolution that approved of the land deal (Dkt. 1, ¶¶ 18 and 19) and the SNI President executing the purchase agreement (Dkt. 1, ¶28), all occurring within Indian country, that should be deemed as constituting the pertinent events related to the "offense" for §1153 purposes. While there were events regarding the defendant purportedly taking part in a conspiracy to violate the wire fraud statute occurring outside of the Seneca's territory, the direct affirmative conduct towards the purported victims in this matter (the SNI and its corporations) occurred during the tribal council proceedings and related events on the Seneca Nation territory.

Moreover, the essence of the conduct described above was defendant purportedly *not* disclosing his financial interests in the transaction (Dkt. 1, ¶36), despite being a direct agent of the SNI and its corporations (Dkt. 1, ¶¶ 4 and 5). In other words, defendant's purportedly fraudulent ***inaction in Indian country*** is the core of the allegations at issue. As argued above,

the Markiewicz court does not leave us with a "solely within… Indian country" standard, intended to encompass all acts that could somehow be ultimately connected to the execution of the indicted crime. Again, the Second Circuit itself did not apply the "solely" standard in most of its analysis, nor has any other court since. Particularly in a white collar matter like ours, the danger becomes having the goal line being further and further moved back to where *every act* that defendant undertook within the time frame under indictment finds some connection to the crimes in question.

As the core and focus of the defendant's purported offense occurred within Indian country, §1153 applies and the wire fraud charges under counts 1(d) and 4 must be dismissed pursuant to Markiewicz.

V.

CONCLUSION

For the reasons above, Mr. Mitchell respectfully objects to the July 30, 2012 Report, Recommendation and Order (Dkt. 74), and asks that this Court dismiss counts 1(d) and 4 of the indictment.

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Buffalo, New York

Respectfully submitted,

s/Paul J. Cambria, Jr.
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