UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 11-cr-57-A

vs.

BERGAL L. MITCHELL, III,

Defendant.

OMNIBUS MOTION

COMES NOW the defendant, BERGAL L. MITCHELL, III, by and through his attorneys, LIPSITZ GREEN SCIME CAMBRIA LLP, PAUL J. CAMBRIA, JR., ESQ., BARRY NELSON COVERT, ESQ., TIMOTHY P. MURPHY, ESQ., and ELIZABETH A. HOLMES, ESQ., of counsel, and upon the annexed affidavit of Paul J. Cambria, Jr., Esq., hereby moves this Court for the following relief:

I. Motion to Dismiss Because of Lack of Subject Matter Jurisdiction.

II. Motion to Dismiss Because of Facial Insufficiency.

III. Motion to Dismiss Because of Legal Insufficiency and Motion for Disclosure of the Grand Jury Minutes.

IV. Motion to Dismiss Because the Indictment is Multiplicitous, and Motion for Disclosure of the Grand Jury Minutes.

V. Motion to Dismiss Because the Indictment is Duplicitous, and Motion for Disclosure of the Grand Jury Minutes.

VI. Motion for Suppression of Statements.

VII. Motion for Suppression of All Evidence Seized Pursuant to the Execution of the Search Warrant for 920 Center Street, Lewiston, New York 14092.

VIII. Motion for a Bill of Particulars Pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure.

IX. Motion for Discovery Pursuant to Rule 16 and Notice of Intention Pursuant to Rule 12(b)(4).

X. Motion for the Pre-trial Disclosure of all Brady Material.

XI. Motion for Revelation of Identity of Informants.

XII. Motion for the Pre-trial Disclosure of Evidence Proffered Under Rule 404(b) and the Exclusion of any such Evidence Found to be Inadmissible.

XIII. Motion for Search of Personnel Files of Government Agent Witnesses.

XIV. Motion to Preserve Evidence.

XV. Motion for Government Disclosure of Rule 807 "Residual Exception" Statements.

XVI. Motion for Leave to Make Further Motions.

DATED: September 12, 2011

Respectfully submitted,

LIPSITZ GREEN SCIME CAMBRIA LLP

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UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA,

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AFFIDAVIT OF PAUL J. CAMBRIA, JR., ESQ.
IN SUPPORT OF OMNIBUS MOTION

PAUL J. CAMBRIA, JR., ESQ., being duly sworn, deposes and says:

1. I am an attorney at law duly licensed to practice in the State of New York; I am a senior partner with Lipsitz Green Scime Cambria LLP; and Barry Nelson Covert, Esq., Timothy P. Murphy, Esq., and I represent the defendant, Bergal L. Mitchell, III, herein. The Indictment herein is found at Docket No. 1. This affidavit is offered in support of Mr. Mitchell's omnibus motion. He is charged in a 13 count indictment of various offenses, including wire fraud and embezzlement, relating to alleged illegal business activity allegedly conducted through his relationship with the Seneca Nation of Indians ("SNI").

2. Upon information and belief, a brief synopsis of the basic allegations, as averred in the Indictment, follows: From November 2000 through November 2004, Mr. Mitchell was a member of the SNI Tribal Council. In December 2004, Mr. Mitchell became vice chairman of the Board of Directors for the Seneca Gaming Corporation ("SGC"), which is alleged to be an instrumentality of the SNI. The SGC Charter, as well as the Charter for the Seneca

Niagara Falls Gaming Corporation ("SNFGC"), a subsidiary of the SGC, indicates that Mr. Mitchell had the authority to make land deals on behalf of the SNI.

3. In 2004, Timothy Toohey, a formerly licensed attorney, approached Mr. Mitchell with the proposition of having the SNI purchase land in the Town of Lewiston for the purpose of building a golf course as an amenity to the Seneca Niagara Casino. That same year, Toohey was said to have approached attorney Michael Dowd, a principal of the Old Creek Development corporation ("OCD"), with the same idea. Also in 2004, it was said to have been agreed by Toohey, Dowd and Mr. Mitchell that the property would be sold at $1.2 million dollars. The government alleges that the three parties all wanted to make money off the deal.

4. In the Summer and Fall of 2004, Mr. Mitchell is alleged to have presented the land deal to an Economic Development Subcommittee of the SNI, indicating the price would be $2.1 million. On February 19, 2005, the Tribal Council passed a resolution, prepared by Toohey and purportedly delivered by Mr. Mitchell, approving of the transaction and with a purchase price of $2.1 million. Mr. Mitchell was not a member of the Tribal Council on that date. *See* February 19, 2005 Resolution, Grand Jury Exhibit 10; **Exhibit A** herein.

5. The Purchase and Sale Agreement reflecting purchase price of 2.1 million was finalized in June of 2005. The SNI transferred the required funds in February of 2006 to the title company. The money was then transferred to Dowd's accounts, purportedly followed by transfers of money to Mr. Mitchell and his wife, among others. Mr. Mitchell is alleged to have not affirmatively disclosed his interests in the transaction to the SNI or the SGC.

6. The government's theory appears to be that the SNI would not have approved of the land deal had they known of Mr. Mitchell profiting from the transaction. In other words,

Mr. Mitchell is said to have had a fiduciary duty as an SNI employee to affirmatively disclose the information, a breach of which purportedly violated federal criminal law. [1] However, Mr. Mitchell asserts herein, inter alia, that the instant prosecution runs afoul of the Supreme Court's decision in Skilling v. United States, __ U.S. __ , 130 S.Ct. 2896 (2010), which invalidated the "honest services" fraud provision of 18 U.S.C. §1346 (a statute analogous to the charged statutes at bar), as unconstitutionally vague. His argument is set out below.

7. Mr. Mitchell also seeks several forms of relief which are set forth below:

I.

MOTION TO DISMISS COUNTS 1 (d), 4 AND 5 THROUGH 12 BECAUSE THE COURT IS WITHOUT SUBJECT MATTER JURISDICTION

8. Counts 1(d), 4 and 5 through 12, charging violations of 18 U.S.C. §1343, should be dismissed as this Court has no subject matter jurisdiction to preside over the prosecution of these counts.

9. Indian tribes have power to enforce their criminal laws against tribe members. United States v. Wheeler, 433 U.S. 313, 322 (1978). While physically within the territory of the United States and subject to federal control, they nonetheless remain "a separate people, with the power of regulating their internal and social relations." Wheeler, 435 U.S. at 322, *citing* United States v. Kagma, 118 U.S. 375, 381-382 (1886). Indeed, the right of self government includes the right to prescribe laws applicable to tribe members

[1] The Indictment alleges that the Charters of the SGC and the SNFGC prohibit "any person with an economic interest in any of the Company's activities" from serving as a Board member. *See*, Indictment, ¶ 4. The Indictment also alleges that the Charters provide that "[b]oard members shall constitute 'public officials' for purposes of the Nation['s] Ethics Laws." *Id.* Both of the above referenced Charters also, according to the Indictment, require that real property transactions be subject to Tribal Council approval. *Id.* at ¶ 5.

and to enforce those laws by criminal sanctions. Wheeler, 435 U.S. at 322, *citing* United States v. Antelope, 430 U.S. 641, 643, n. 2 (1977) (citations omitted).

10. But Indian tribes no longer possess "the full attributes of sovereignty." Wheeler, 435 U.S. at 323, *citing* United States v. Kagma, *supra*. The tribes' incorporation within United States territory, and their acceptance of its protection, has divested them of certain aspects of sovereignty. Treaty and statutory law has further removed more sovereign rights of the tribes. Wheeler, 435 U.S. at 323. In sum, the tribes' sovereignty:

> exists only at the sufferance of Congress is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty[2] or statute, or by implication as a necessary result of their dependent status.

Wheeler, 435 U.S. at 323, *citing* Oliphant v. Suquamish, 435 U.S. 191, 203 (1978).

11. 18 U.S.C. §1152 (the Indian or General Crimes Act), provides that the general penal laws of the United States, except as "otherwise expressly provided by law," apply to "Indian country." This principle, however, does not apply to "offenses by one Indian against the person or property of another Indian." *Id.* It further does not apply where one has already been punished "by the local law of the tribe" or the offense is reserved by treaty to be exclusive Indian jurisdiction.

12. 18 U.S.C. §1153 (a) (the Major Crimes Act) indicates that any of the sixteen offenses specifically enumerated therein, which are committed within Indian country may be prosecuted as any other federal crime would be. §1153 (a) references as one of the

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[2] The 1794 Treaty of Canandaigua was signed by the Six Nations of the Iroquois Confederacy, including the Seneca tribe. Articles 1 and 6 of the Treaty declared peace and friendship between the nations. Articles 2, 3, 4 and 5 established the tribes' land rights and boundaries in New York State. Article 7 provides for a complaint mechanism.

sixteen offenses, 18 U.S.C. §661, dealing with larceny. Various counts of the instant indictment alleged violations of 18 U.S.C. §666, §1163, and §1168, which prohibit theft and embezzlement involving Indian jurisdiction. Counts 1(d) *(a conspiracy count)*, 4 and 5 through 12 of the Indictment also charge Mr. Mitchell with violating §1343, that is, "[f]raud by wire, radio, or television." No specific reference is made in §1343 to Indian jurisdiction or any evidence of Congressional intent to reach Indian lands. Further, none of the enumerated offenses in §1153 (a), and by reference, in §661, address the §1343 prohibited conduct, which is "to devis[e] and intend[] to devise, a scheme and artifice to defraud." As a result, this Court is thus without subject matter jurisdiction to preside over a prosecution of the §1343 counts.

13. As further set out in **Point II** below, in fact, none of the counts in the Indictment factually allege an *affirmative* theft, thus leaving this Court without subject matter jurisdiction to preside over any of the counts in the Indictment.

14. Mr. Mitchell expects the government to reply that wire fraud under §1343 is "peculiarly Federal" in nature (*see* United States v. Markiewicz, 978 F.2d 786, t798 [2d Cir. 1992]) and addresses an "independent federal interest" to be protected. *See again* Wheeler, 435 U.S. at 331, n. 32; Markiewicz, 978 F.2d at 800. However, while the government may have a legitimate interest in prosecuting offenses regarding interstate instrumentalities, this Court must also consider the important historical and legal interests of the SNI as a sovereign entity in prosecuting 'Indian on Indian' offenses with its own law, as well as the Fifth Amendment due process rights of Mr. Mitchell as a Native American and enrolled member of the SNI. Indeed, §1343 has no discernible connection to the Indian nations. Under the facts at bar, any prohibited wire-fraud related 'Indian on

Indian' conduct, including that proscribed by §1343, not being delineated by statute, is governed strictly by Indian law.

15. Finally, escaping the prevalence of communications and interstate instrumentalities in modern society (i.e., banking, e-mail, and facsimiles) is impossible. Indeed, the federal government's reach into all things wired becomes oppressive when viewed in light of the high-tech society within which we all must live and do business. If the government can reach ***any location*** that is wired, then the tribes have, in effect, lost all geographic sovereignty and the presumptive protections of §1352.

WHEREFORE, Mr. Mitchell moves for the dismissal of those portions of the Indictment which charge violations of §1343 on the grounds that this Court is without subject matter jurisdiction.

II.

MOTION TO DISMISS COUNTS 1 THROUGH 12 BECAUSE THE INDICTMENT IS FACIALLY INSUFFICIENT

16. The charges under Counts 1 through 12 should also be dismissed as facially deficient. *See* F.R.Crim.P. 12 (b)(3).

17. A valid indictment is a "plain, concise and definite written statement of the essential facts constituting the offense charged." Fed.R.Crim.P. 7(c)(1). While a perfect indictment is not required, the instrument must set out the charged elements so as to insure the defendant is not, in contravention of the Fifth Amendment, "convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." Russell v. United States, 369 U.S. 749, 770 (1962); United States v. Bustos de la Pava, 268 F.3d 157, 162 (2d Cir. 2001). An indictment must be specific enough, permitting one to prepare a defense in compliance with the Sixth Amendment in being "informed of the nature and

cause of the accusation" (*see* United States v. Walsh, 194 F.3d 37, 44 [2d Cir. 1999] Cochran v. United States, 157 U.S. 286, 290 [1895]; United States v. Giovanelli, 464 F.3d 346, 352 [2d Cir. 2006]),[3] as well as to prevent a subsequent prosecution violative of the prohibition against Double Jeopardy. United States v. Alfonso, 143 F.3d 772, 776 (2d Cir. 1998) (citation omitted).

18. At bar, the government alleges that Mr. Mitchell, Toohey and other conspirators performed the following theft-like activities against the SNI: **Count 1(a):** Conspiracy to commit §1163: "embezzling, stealing, knowingly converting to the use of another, willfully misapplying, and willfully permitting to be misapplied…" **Counts 1(b)** (conspiracy)**, 2 and 5 through 12:** [4] §666(a)(1)(B): "corruptly soliciting and demanding, and accepting and agreeing to accept…" **Counts 1(c)** (conspiracy) **and 3:** §1168(b): "embezzle, abstract, purloin, willfully misapply, and take and carry away with intent to steal…" **Counts 1(d)** (conspiracy)**, 4 and 5 through 12:** §1343: "devising, and intending to devise, a scheme and artifice to defraud the SNI, the SGC, and the SNFGC and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises…"

A. No Affirmative Theft Alleged

19. In support of the 13 count indictment (the last count alleging false statements to the FBI), the government presents factual allegations in paragraphs 1 through 36 of the Indictment, incorporated by reference in each of the counts.[5] But the allegations of the first

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[3] Further, while greater leeway may be accorded for the facial sufficiency of a conspiracy charge, the object of the conspiracy must still be fully delineated. *See generally*, United States v. Rosenblatt, 554 F.2d 36, 39 (2d Cir. 1977).

[4] Counts 5 through 12 are also charged under the money laundering statute of 18 U.S.C. §1957 (a).

[5] Some of the allegations are included in summary form in 12 purported overt acts (pages

36 paragraphs and the 12 overt conspiracy acts, even if true *(which Mr. Mitchell disputes and does not concede)*, do not present a prima facie case for the required affirmative theft-related conduct that §1163, §666(a)(1)(B) and §1168(b) all require.[6] Here are the paraphrased allegations:

* Mr. Mitchell was a member of the SNI Tribal Council from November 2000 through November 2004, a board member of the SGC beginning in August 2002 and vice chairman of that Board beginning in December 2004 (¶4). The SGC and SNFGC Charters both prohibit Board members from serving if there is an economic conflict of interest (¶4). Board members of the SGC had the authority to make land deals, subject to SNI's approval (¶5).

* In 2004, Toohey approached Mr. Mitchell, inquiring about the land transaction referenced above (¶8). On July 8, 2004, Mitchell (after he had left the Tribal Council) contacted Dowd about the Toohey idea, indicating that things should be kept just between them (¶9). In early July 2004, Toohey told Mitchell that he was seeking 1.2 million for the land, with his company then selling it to the SNI for an increased price (¶10). In July or August 2004, Mitchell told Toohey that he expected to be paid from Toohey's cut (¶11).

* On August 25, 2004, during a discussion about commissions, Toohey implicitly told Dowd that another person (allegedly Mr. Mitchell) had influence to sell the SNI on the idea of the transaction (¶12). On August 26, 2004, Toohey told Dowd that the other person involved (allegedly Mr. Mitchell) was an SNI member, and did not want a direct contract with the SNI. Toohey told Dowd that the interests of those he was dealing with was not just to obtain property, but rather was "driven by more capitalistic tendencies" (¶13).

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16 through 18) supporting a conspiracy charge under count 1.

[6] Nor is the intent level for a §1343 theft-related scheme satisfied by the allegations therein.

* In the Summer and Fall of 2004, Mr. Mitchell made presentations to the Economic Subcommittee of the SNI Tribal Council in support of the land deal; indicating it would cost $2.1 million dollars (¶14). On January 25, 2005, Mr. Mitchell opened an account in Barry S. Halftown's name (¶15). In February 2005, he made a presentation during a pre-Council session in advance of a regular session, again supporting the land deal (¶16).

* On February 19, 2005, Toohey provided Mitchell with a draft of the Council resolution approving of the land deal (¶17). On February 19, 2005, the SNI Tribal Council considered and passed a resolution for the $2.1 million dollar land deal (¶¶18 and 19).

* Toohey, Dowd and Mitchell "thereafter" negotiated how the land contract would be implemented (¶20). A dispute arose between Dowd and Mitchell over development rights for the property (¶21). On May 2, 2005, Dowd sent a letter to SNI President Barry Snyder regarding the problem (¶22). On May 5, 2005, Dowd met with Mr. Mitchell to discuss the development rights issue. Therein, Mr. Mitchell was said to have suggested that the OCD sell the property directly to the SNI, with the SNI now paying $1.4 million for the land, $200,000 going to Dowd to forego development rights, and $700,000 going to Toohey as a consultation fee. Dowd would send Snyder a letter indicating that the problem was solved (¶23). On May 6, 2005, Dowd told Toohey that he and Mr. Mitchell had resolved their problems. He also informed Toohey of the terms (¶24).

* On May 6, 2005, Dowd sent Mitchell a revised purchase agreement, and a letter addressed to Snyder regarding the issues above. Mitchell approved of the letter and agreed to forward the contract. After Toohey approved of the Snyder letter, it was sent out (on May 9, 2005) (¶¶ 25, 26 and 27). On June 14, 2005, Snyder executed the land deal (¶28).

* On June 16, 2005, an IOLA account and a business account were opened in the name of Mr. Mitchell's wife (Rachel) (¶29). Between June 2005 and February 2006, Dowd, Toohey and Mr. Mitchell had discussions as to how the funds from the land deal would be distributed. The amounts included Toohey receiving $500,000 as a consultation fee, to be reduced by $50,000 as owed to Mr. Mitchell. $90,000 was to go to Mr. Mitchell's wife for future representation of Dowd in the construction of the golf course (¶30).

* On February 10, 2006, the SNFGC disbursed approximately $2.1 million dollars to the title company. On February 15, 2006, the OCD transferred title in the land to the SNFGC. On February 16, 2006, the title company transferred the funds to an IOLA account belonging to Dowd (¶¶ 31, 32 and 33). On February 17, 2006, $248,000 was transferred from the Dowd account to attorney Rachel Mitchell's IOLA account. From there, $90,000 was transferred to the Rachel Mitchell business account (¶34). Between February 17, 2006 and August 7, 2006, the Mitchells spent the $338,000 on personal items (¶35). At no time did Mr. Mitchell disclose to the SNI, SGC or the SNFGC his interest in the land deal (¶36).

20. Smoke and mirrors aside, the Indictment does not actually allege affirmative theft from the SNI. Though Mr. Mitchell concedes nothing, the allegations suggest, at worst, that an economic conflict of interest existed in Mr. Mitchell participating in the land deal.

21. The Indictment alleges (at ¶¶ 4 and 5) that the SGGC and SNFGC Charters prohibit "any person with an economic interest in any of the Company's activities" from serving as Board members. SNI "Code of Ethics," effective October 11, 1997 (attached as **Exhibit B**), includes in its definition under "public official" one that is either appointed or elected to an SNI office, committee, board or commission. Code of Ethics, §1.2 (o). Under the law, a public official having an unavoidable conflict of interest must disclose the conflict in

writing. *Id.* at §§ 2.2(a)(i); 4.1(a); 4.1(b)(i); 4.1(b)(ii); 5.1. Though not in the Indictment, the Code of Ethics also states that a violation therein shall not be construed as a finding of criminal conduct. *Id.* at §5.2. So even if a violation of the Code of Ethics had occurred, by the explicit intent of its drafters, no prima facie finding of a crime may be presumed.[7]

22. The failure to allege affirmative theft renders the Indictment facially defective.

23. The government's theory, in effect, of a breach of fiduciary duty / crime also runs afoul with recent Supreme Court precedent. In Skilling v. United States, __ U.S. __ , 130 S.Ct. 2896 (2010), the court invalidated the "honest services" fraud provision from 18 U.S.C. 1346, as unconstitutionally vague. Rather, only the statutory "bribery and kickback" schemes would survive. Skilling, 130 S.Ct. at 2931-2933.[8] Crucially, the court in Skilling rejected the scenario of "undisclosed self-dealing by a public official or private employee - - i.e., the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." *Id.* at 2932 (citations omitted). This appears to be the theory that the government is pursuing at bar, in effect, violating the vagueness prohibition from Skilling in implementing §1163, §666(a)(1)(B), §1168(b) and §1343.

B. Agency Issue

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[7] Moreover, under §VIII (2) of the SNFGC By-Laws, a "substantial financial" conflict of interest by an officer or director does not, by itself, even void a SNFGC contract.

[8] In *Skilling*, the Supreme Court cited to §666(a)(2) as a precursor to the §1346 "bribes and kickbacks" provision. *Id.* at 2933-2934. Therein, Congress makes it a crime when one "**corruptly** gives, offers, or agrees to give anything of value to any person, **with intent to influence or reward** an agent of an organization or of a State, local or Indian tribal government..." Contrast this language with the converse "insider" corruption language of §666(a)(1)(b), one of the provisions at issue herein: where one "**corruptly** solicits or demands for the benefit of any person, or accepts or agrees to accepts, anything of value from any person, **intending to be influenced or rewarded**..."

24. Moreover, by the terms of both the SGC and SNFGC Charters, these corporations were intended to be "autonomous" and "separate and distinct" from the SNI. *See*, SNFGC Charter, §3, pg. 3; SNFGC Charter, §3, pg. 3. Without a definitive intent to be one entity, at least for prosecution purposes, the government's charges fail to even present a direct responsibility on Mr. Mitchell's behalf to be a custodian of the SNI's funds. [9]

WHEREFORE, Mr. Mitchell moves for the dismissal of the Indictment on the grounds that the Indictment is facially insufficient, in that in an 'Indian on Indian' situation, this alleged ethical breach does not rise to the level of criminal conduct.

III.

MOTION TO DISMISS BECAUSE LEGALLY INSUFFICIENT EVIDENCE WAS PRESENTED TO THE GRAND JURY, AND ALTERNATIVELY, MOTION FOR DISCLOSURE OF THE GRAND JURY MINUTES

25. Mr. Mitchell hereby requests that this Court review the grand jury minutes, and dismiss Counts 1 through 12, in light of the factual allegations that follow.

A. With respect to Materiality of Non-Disclosure in Counts 1 through 12 of the Indictment specifically:

26. For the government to establish Mr. Mitchell's purportedly fraudulent conduct applicable to counts 1 through 12, the allegedly intentional concealment or non-disclosure at bar must have *at least* been "material" to the facts at issue. To be material, the information withheld either must be of some independent value or must bear on the value of the transaction. *See* United States v. Mittelstaedt, 31 F.3d 1208, 1217 (2d Cir. 1994) (addressing mail fraud statute under 18 U.S.C. §1341), *citing* Carpenter v. United States,

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[9] *See also* civil testimony of Robert Dennis Chamberlain, SNFGC and SGC v. Toohey, et al., Niagara Co. Index No. 140634, 4/28/11 EBT, at p. 104-106 (wherein this SNFGC and SGC "entity witness" analogized the relationship between the SNI and the gaming corporations to a typical corporation doing business within a state) (**Exhibit C**).

484 U.S. 19, 27 (1987). The first 12 counts break down as follows: **Count 1**: 18 U.S.C. §371; conspiracy to commit: 18 U.S.C. §1163;[10] 18 U.S.C. §666(a)(1)(B);[11] 18 U.S.C. §1168(b);[12] and 18 U.S.C. §1343; [13]

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[10] Embezzlement and Theft from Indian Tribal Organizations under §1163 requires that: (1) defendant knowingly received, concealed or retained monies; (2) defendant had the intent to convert monies to his own use or to the use of another; (3) monies were embezzled, stolen, converted or misapplied from an Indian tribal organization; and (4) defendant had the knowledge that the stolen funds belonged to a tribal organization. Some affirmative steps toward fraud and deception would be expected. *See*, United States v. Markiewicz, 978 F.2d 786, 803 (2d Cir. 1992); United States v. Big Crow, 327 F.3d 685, 687-689 (8th Cir. 2003) (evidence of §1163 conviction insufficient where defendant "knowingly and substantially" underpaid rent on Housing Authority property); *contrast*, United States v. Flying By, 511 F.3d 773, 775-776 (8th Cir. 2007) (evidence for §1163 conviction sufficient where, among other things, defendant took *affirmative step* of making "deceptive check notations" regarding misappropriated funds).

[11] Theft or Bribery Concerning Programs Receiving Federal Funds under §666(a)(1)(B) requires that: (1) defendant be an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof; (2) defendant corruptly solicit, demand, accept, or agree to accept, anything of value from any person; (3) defendant intended to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency; and (4) the transaction involve any thing of value of $5,000 or more. *See* Sabri v. United States, 541 U.S. 600, 604-607 (2004) (discussing intent behind §666, in protecting federal funds).

[12] Theft by Officers or Employees of Indian Gaming Establishments on Indian Lands under §1168(b) requires that: (1) defendant be an officer, employee, or individual licensee of an gaming establishment; (2) the gaming establishment was operated by or for or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission ("NIGC"); and (3) defendant embezzled, abstracted, purloined, willfully misapplied, took, or carried away with intent to steal, any moneys or other property of the gaming establishment of a value in excess of $1000.

[13] Wire Fraud under §1343 requires that: (1) defendant be an officer, employee, or individual licensee of a gaming establishment; (2) the gaming establishment be operated by or for or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the NIGC; and (3) defendant embezzled, abstracted, purloined, willfully misapplied, took, or carried away with intent to steal, any moneys, funds, assets or other property of the gaming establishment of a value in excess of $1000. *See* Fountain v. United States, 357 F.3d 250, 255 (2d Cir. 2004) (citation omitted).

Count 2: 18 U.S.C. §666(a)(1)(B) and 18 U.S.C. §2; **Count 3**: 18 U.S.C. §1168(b) and 18 U.S.C. §2; **Count 4**: 18 U.S.C. §1343 and 18 U.S.C. §2; and **Counts 5 through 12**: 18 U.S.C. §666(a)(1)(B), 18 U.S.C. §1343, 18 U.S.C. §1957(a)[14] and 18 U.S.C. §2.

27. Upon information and belief, the SNI and / or SGC (via their counsel or otherwise) knew that the actual purchase price of the land was $1.2 million dollars, and not $2.1 million, prior to the February 19, 2005 SNI resolution approving of the land deal. This Court, in reviewing the grand jury minutes for sufficiency, is directed to the following documents, addressing this point:

* Memorandum from G. Michael Brown (CEO of the SGC) to Cyrus Schlinder (Chairman of the SGC), dated September 7, 2004 (**Exhibit D** herein), indicating that Schlinder knew there would be fees required for the land deal and that Dowd, Toohey and Mr. Mitchell were all involved in the transaction; [15]

* Email from Toohey to Dowd, dated March 28, 2005, with attached Revised Contract (**Exhibit E** herein), indicating the $1.2 million purchase price (pg. 2, par. 2.1); [16]

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[14] Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity under 18 U.S.C. §1957(a) requires that: (1) defendant engage in a monetary transaction (as defined in §1956[a]) in criminally derived property, (2), the property must have a value in excess of $10,000 and (3) the property must be derived from specified unlawful activity, as defined in §1956. §666 is delineated in §1956(c)(7)(A), and §1343 is found in §1961(1), which is referenced in §1956(c)(7)(D).

[15] This Memorandum, sent to Schindler, indicates that Dowd was approached regarding the land deal by Toohey, a "disbarred Attorney." Dowd apparently informed Brown, the author of the Memorandum, that Dowd would "require a substantial finder's fee for his assistance." Brown also indicated therein that the enclosed draft letter of intent was not Mr. Mitchell's "work product nor did he agree to it."

[16] This March 2005 e-mail references an attached "...revised contract leaving it in the format that Akin Gump sent it to Mitchell in." Akin Gump Strauss Hauer & Feld LLP is the law firm representing the SNI.

* Email from Toohey to Dowd, dated July 15, 2004, noting that the enclosed document would be delivered to the SNFGC the next day, with attached draft Letter of Intent (**Exhibit F** herein), indicating on unnumbered page 2, paragraph 1, that the purchase price of the "real estate comprising the proposed golf course" was the sum of "$1,200,000," with an additional "$800,000" for the purchase of "development rights and other amenities;"

* Correspondence from Dowd to Gregory Seitz, Esq. (counsel with Aiken Gump, et al), dated January 25, 2006, with attachments, indicating how much Stephanie Boos, [17] Joseph Deck [18] and the Town of Lewiston would be paid by OCD regarding particular parcels of land as part of the deal (**Exhibit G** herein).

28. Assuming again the government's theory to be a purported breach of fiduciary duty, the present offenses under Counts 1 through 12 (should the charges survive a challenge under Skilling v. United States, *supra*) run afoul with the concept of non-disclosure crimes establishing materiality of the information secreted.

B. With respect to the Conspiracy Charge in Count 1 of the Indictment specifically:

29. Count 1 charges a conspiracy to commit violations of 18 U.S.C. §1163 (**Count 1[a]**); 18 U.S.C. §666(a)(1)(B) (**Count 1[b]**); 18 U.S.C. §1168(b) (**Count 1[c]**); and 18 U.S.C. §1343 (**Count 1[d]**).

30. Conspiracy under §371 requires: (1) an agreement among two or more persons, the object of which is an offense against the United States; (2) the defendant's knowing

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[17] Mrs. Boos is the wife of Charles Boos, who was a principal in OCD and seller of the golf course property. Charles is said to have received $680,000 from the sale.

[18] Mr. Deck was a principal in OCD and seller of the golf course property. He is said to have received $450,000 from the sale.

and willful joinder in that conspiracy; and (3) commission of an overt act in furtherance of the conspiracy by at least one of the alleged co-conspirators. United States v. Svoboda, 347 F.3d 471, 476 (2d Cir. 2003). While the commission of the substantive offense need not be proven (*see*, United States v. Pinckney, 85 F.3d 4, 8 [2d Cir. 1996]), the government must prove that "'the intended future conduct they ... agreed upon include[s] all the elements of the substantive crime.'" Pinckney, 85 F.3d at 8 (citation omitted). As set out in the bill of particulars motion below, 12 alleged overt acts are proffered under the Count 1 conspiracy charge. In its legal sufficiency review, this Court should consider the vagueness of the overt acts and the government's burden of showing the purported co-conspirators' agreement to commit all of the requisite elements. Pickney, *supra*.

C. With respect to the Issue of Agency in Counts 1(a), 1(b), 1(c), 2, 3 and 5 through 12 of the Indictment specifically:

31. Counts 1(a), 1(b), 1(c), 2, 3 and 5 through 12 require that defendant had been acting as SNI's agent at the time of the transaction.[19] Aside from the agency issues set out above regarding facial sufficiency issues, upon information and belief, (1) pending civil litigation in NYS Supreme Court (SNFGC and SGC v. Toohey, et al., Niagara Co. Index No. 140634), has revealed that the SNFGC and SGC may not have considered Mr. Mitchell to have been their agent during the pertinent time period regarding the purported criminal

[19] The pertinent language of the charges being: **Count 1(a):** Conspiracy to commit §1163: "embezzling... $338,000 belonging to the SNI, SGC, and the SNFGC..." (emphasis added); **Counts 1(b)** (conspiracy), **2 and 5 through 12:** §666(a)(1)(B): "while [Mr. Mitchell] was an agent of organizations and agencies of an Indian tribal government, that is the SGC and the SNFGC of the SNI...corruptly soliciting and demanding, and accepting and agreeing to accept..." (emphasis added); and **Counts 1(c)** (conspiracy) **and 3:** §1168(b): "[Mr. Mitchell], using his position as an officer and employee of the SGC and the SNFC, the same being gaming establishments operated by the SNI... did embezzle, abstract, purloin, willfully misapply, and take and carry away with intent to steal..." (emphasis added)

transaction,[20] (2) all relevant decisions by the Tribal Council were made at times when Mr. Mitchell was not a member of the Council (**Exhibit A**), and (3) the SNI never assigned Mr. Mitchell any authority to act on the SNI's behalf for this transaction (*see again* citation in footnote 18). In other words, the "corruption" requirement under §666(a)(1)(B), as well as the other charges requiring that defendant be an SNI agent, cannot be proven. *See* United States v. Rooney, 37 F.3d 847, 850 (2d Cir. 1994) (observing that the "typical §666 prosecution" involves a government worker accepting a kickback or bribe). As noted in Rooney, in the usual §666 case, "government's interests are sacrificed by the corrupt activities of the responsible parties." [21]

32. Section 666 was enacted to address the problem that state and local government officials, as well as private organizations that distribute federal monies, fell outside of the federal bribery statute *(i.e.*, 18 U.S.C. §201). Rooney, 37 F.3d at 851. The key concept here is "corruption." *Id.* at 852. Indeed, the purpose of the law was to "safeguard finite federal resources from corruption and to police those with control of federal funds." *Id.* at 851. If a party is not an authorized agent in the transaction, the "corruption" element is lacking.[22] The §1163 and §1168(b) charges both allege "embezzlement," meaning an internal theft, and

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[20] *See again* civil testimony of Robert Dennis Chamberlain, SNFGC and SGC v. Toohey, et al., Niagara Co. Index No. 140634, 4/28/11 EBT, at p. 53, 55, 110-112 (wherein this SNFGC and SGC "entity witness" testified to having no knowledge of Mr. Mitchell being specifically designated by either of the gaming corporations to act on their behalf regarding the land transaction at issue) (**Exhibit C**).

[21] *See e.g.*, United States v. Santopietro, 996 F.2d 17, 18 (2d Cir. 1993) (where mayor used his position to influence decisions by city agencies in return for bank loans and payoffs).

[22] Section 666 was not intended to reach normal business dealings. The statute was amended in 1986, adding a new subsection (c), indicating that the law did not apply to "bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." Rooney, 37 F.3d at 854.

thus an agency with the SNI; analogous to the "corruption" requirement of §666(a)(1)(b). The §1168(b) counts also allege that defendant was an "officer and employee" of the SGC and SNFGC during the pertinent time periods. In sum, Mr. Mitchell respectfully requests that this Court pay careful attention to these concepts in reviewing the legal sufficiency of the grand jury minutes herein regarding the §1163, §666(a)(1)(b) and §1168(b) counts.

WHEREFORE, Mr. Mitchell moves for the dismissal of the Indictment on the grounds of legal insufficiency of evidence presented to the grand jury.

IV.

MOTION TO DISMISS BECAUSE THE INDICTMENT IS MULTIPLICITOUS AND MOTION FOR DISCLOSURE OF THE GRAND JURY MINUTES

33. Counts 1 through 4 must be dismissed as multiplicitous, as they allege, in essence, the same conduct (purported criminal non-disclosure), charged in different forms:

* **Ct 1**:	§371 [conspiracy to commit §1163; §666(a)(1)(B); §1168(b); and §1343]:	"Between sometime in 2004 and in or about August of 2006, the exact dates being unknown"
* **Ct 2**:	§666(a)(1)(B) / §2	"On or about February 16th and 17th of 2006"
* **Ct 3**:	§1168(b) / §2	"Between in or about early 2004 and continuing until on or about August 2006"
* **Ct 4**:	§1343 / §2	"Between in or about early 2004 and continuing until on or about August 2006"

34. Multiplicitous counts exaggerate purported criminal activity by charging "an offense multiple times, in separate counts, when in law and fact, only one crime has been committed." United States v. Chacko, 169 F.3d 140, 145 (2d Cir. 1999). This violates the Double Jeopardy Clause of the Fifth Amendment. Brown v. Ohio, 432 U.S. 161, 165 (1977). The question is whether Congress intended to create under different statutes "units

of prosecution" (Bell v. United States, 349 U.S. 81, 82-83 [1955]), designed to permit multiple punishments. United States v. Estrada, 320 F.3d 173, 180 (2d Cir. 2003). When Congressional intent is unclear, the Rule of Lenity counsels against "turning a single transaction into multiple offenses." Bell, 349 U.S. at 84.

WHEREFORE, Mr. Mitchell moves for the dismissal of the Indictment on the grounds that counts 1 through 4 are multiplicitous.

V.

MOTION TO DISMISS BECAUSE THE INDICTMENT IS DUPLICITOUS AND MOTION FOR DISCLOSURE OF THE GRAND JURY MINUTES

35. Counts 1 and 5 through 12 must be dismissed as duplicitous. An indictment is duplicitous "if it joins two or more distinct crimes in a single count." United States v. Arcari, 968 F.2d 1512, 1518 (2d Cir. 1992). Duplicitous charging is "impermissible" if it prejudices the defendant. United States v. Sturdivant, 244 F.3d 71, 75 n. 3 (2d Cir. 2001). In United States v. Margiotta, 646 F.2d 729, 732-733 (2d Cir. 1981), the court set out its duplicity policy concerns: (1) avoiding uncertainty of a general guilty verdict by concealing a guilty finding as to one crime and not guilty as to another; (2) avoiding risk that jurors may not have been unanimous as to any of the crimes charged; (3) assuring defendant adequate notice of charged crimes; (4) providing basis for appropriate sentencing; and (5) providing protection against double jeopardy in subsequent prosecution.

36. As noted above, Count 1 joins four separate offenses: a conspiracy to commit violations of: 18 U.S.C. §1163 (**Count 1[a]**); 18 U.S.C. §666(a)(1)(B) (**Count 1[b]**); 18 U.S.C. §1168(b) (**Count 1[c]**); and 18 U.S.C. §1343 (**Count 1[d]**) in violation of 18 U.S.C. §371. As also noted above, Counts 5 through 12 all join two separate substantive offenses: engaging in monetary transactions in property derived from violations of 18 U.S.C.

§666(a)(1)(B) (also from **Count 2**) and 18 U.S.C. §1343 (also from **Count 4**), in violation of 18 U.S.C. §1957(a) and 18 U.S.C. §2.

37. The prejudice herein arises in the grand jury proceedings. Fed.R.Crim.P. 6(a)(1) states, in pertinent part, that: "A grand jury must have 16 to 23 members ... ." Rule 6(f) states, in pertinent part, that: "A grand jury may indict only if at least 12 jurors concur." For a grand jury to find probable cause that any given offense was committed, at least 12 jurors must have voted for *each* separate offense. However, where a count alleges multiple offenses, it is unknown whether this occurred. Disclosure of the minutes is thus needed. Further, should there eventually be a conviction, the counts would not be a proper basis for sentencing, as the jurors may not have been unanimous as to any one of the charges. As counts 1 and 5 through 12 are duplicitous and prejudicial, a dismissal is required.

WHEREFORE, Mr. Mitchell moves for the dismissal of the Indictment on the grounds that it is duplicitous, and for disclosure of the grand jury minutes.

VI.

MOTION TO SUPPRESS STATEMENTS

38. The defense has been notified of defendant's purported statements to law enforcement; occurring in the morning of September 10, 2008. *See* **Exhibit H** herein. As set forth below, Mr. Mitchell was subjected to custodial interrogation without the benefit of proper Miranda warnings. He now moves for suppression.

39. Under the circumstances that Mr. Mitchell allegedly made the statements, any reasonable person would have believed he was in custody and being interrogated. In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court determined that the Fifth and Fourteenth Amendments prohibition against compelled self-incrimination required that

custodial interrogation be preceded by advice to the defendant that he has the right to remain silent and to the presence of counsel. *Id.* at 479. Custody involves the "[depravation] of ... freedom of action in any significant way." *Id.* at 444. This determination requires a court to examine the objective circumstances therein (Stansbury v. California, 511 U.S. 318, 321 [1994]), utilizing the perspective of a reasonable person in the suspect's position. Berkemer v. McCarty, 468 U.S. 420, 442 (1984).

40. On September 10, 2008, FBI agents interviewed Mr. Mitchell at FBI headquarters in Jamestown. *See* **Exhibit H** (FBI 302 report, dated September 10, 2008).[23] In its report, the FBI does not claim that Miranda warnings were provided, or that counsel was present. Indeed, it is confirmed by Mr. Mitchell in his affidavit that, in fact, no Miranda warnings or legal counsel were provided. *See*, **Exhibit I** (Affidavit in Support of Motions, sworn to by Bergal L. Mitchell, III ("Mitchell Affidavit"), ¶3). The FBI report further sets out that just hours after the interrogation ended, they contacted Mr. Mitchell, and he indicated that before any further contact, he had to consult with counsel. *See* **Exhibit H** (at pg. 4). In other words, it was now too late to un-ring the bell. Counsel was needed before, and if Mr. Mitchell had known this, he would have so requested before the damage was done.

41. Though the FBI report avers that Mr. Mitchell was not in custody, in that he entered and exited headquarters on his own, defendant's affidavit describes what was, in essence, a custodial interrogation, that is Mr. Mitchell: (1) was tricked into coming to FBI headquarters by being told that they wanted to talk about him being a credit fraud victim, (2) was never Mirandized, (3) was yelled at and threatened by the agents, in that the FBI would search his

[23] With the exception of two taped phone conversations purportedly made by Mr. Mitchell on August 20, 2008, at 4:06 p.m., and on August 21, 2008, at 5:17 p.m., defendant is unaware of any other statements that he is alleged to have made to law enforcement.

financial records and "make his life hell," (4) when the FBI began to prepare a written statement for him to sign, he chose to seek counsel, and (5) when phoned by the FBI after the interrogation, he invoked his right to counsel. *See* **Exhibit I** (Mitchell Affidavit, ¶3).

42. A reasonable person in Mr. Mitchell's situation would have believed that he was not free to leave, and that there was no alternative but to answer any questions the agents had. However, Mr. Mitchell was never advised of his Miranda rights prior to being subjected to custodial interrogation. Accordingly, he did not make a knowing, intelligent and voluntary waiver of his Fifth Amendment rights. His statements were involuntary. *See generally,* Yarborough v. Alvarado, 541 U.S. 652, 661 (2004); Withrow v. Williams, 507 U.S. 680, 693-694 (1993) (considering totality of circumstances in determining voluntariness, including failure to advise of rights and to have counsel present during custodial interrogation). The violation of Mr. Mitchell's rights in this regard renders his statements inadmissible. Accordingly, suppression is in order.

WHEREFORE, Mr. Mitchell respectfully requests that the Court enter an order precluding and/or suppressing any such statements allegedly made on or about September 10, 2008, or, in the alternative, that an evidentiary hearing be conducted to determine the voluntariness of such statements and whether he was advised of his Miranda rights.

VII.

MOTION FOR SUPPRESSION OF ALL EVIDENCE SEIZED PURSUANT TO THE EXECUTION OF THE SEARCH WARRANT FOR 920 CENTER STREET IN LEWISTON

43. On September 5, 2008, the Honorable H. Kenneth Schroeder, Jr., United States Magistrate Judge, signed a search warrant for the law office of Michael Dowd at 920 Center Street in Lewiston. This warrant was executed on September 10, 2008, in response to the

application of FBI Special Agent Robert J. Gross. Numerous business documents were seized. The warrant exhibits and attachments, as well as the warrant application and supporting documents are attached as **Exhibit J** herein.

44. The exhibits and attachments to the warrant make clear the government's acknowledgement that attorney-client privileged information and documents were expected to be found in the seized items at 920 Center Street. For example, page 1 of warrant Exhibit C (par. 1) indicates that witness Charles Boos has "waived any attorney/client privilege" regarding seized documents. *See again* **Exhibit J** herein. Moreover, Exhibit C of the warrant goes on to describe the responsibilities of the government's "Taint Team" in order to "minimize the intrusion into any attorney/client privileged materials." *Id.* at page 1 (par. 4 [a]); *see also*, warrant application, pars. 45-57. One of the concerns of the "Taint Team" was to avoid the opening of "other client" files. *See Id.* at page 2 (par. [h]). The "other client" category excludes names from the entity and name list delineated in "Attachment B." Mr. Mitchell's name is on the Attachment B list. *See again* **Exhibit J** herein. He is thus not protected. Exhibit C of the warrant goes on to address "Electronic Evidence" on pages 3 through 5. Therein, the same entity and name list from Attachment B is repeated as part of paragraph 10 on page 4. Again, defendant's name is on this list, and is thus, not protected.

A. Defendant has "Standing" to Challenge the Search of 920 Center Street.

45. A defendant has standing to challenge the admission of evidence only if his own constitutional rights have been violated. *See* United States v. Salvucci, 448 U.S. 83, 86-87 (1980); Rakas v. Illinois, 439 U.S. 128, 134 (1978). Courts determine standing by deciding whether a defendant had a reasonable expectation of privacy in the areas searched or the items seized. *See* Rawlings v. Kentucky, 448 U.S. 98, 104-05 (1980). At the time of the

warrant's execution, 920 Center Street was the law office of attorney Michael Dowd. *See again* **Exhibit J** herein (Attachment C, numerous references therein). Upon information and belief, documents seized through the search warrant may include items protected by the attorney-client privilege.[24] Mr. Mitchell thus enjoyed a legitimate expectation of privacy in the premises and the documents therein.

46. Aside from the important Fourth Amendment issues at bar, what's at stake for Mr. Mitchell are his Fifth and Sixth Amendment rights to Due Process, a Fair Trial and Counsel (i.e., his ability to freely consult with an attorney without having his communications utilized against him in a subsequent criminal proceeding). Mr. Mitchell enjoyed a legitimate expectation of privacy in the documents seized in the search warrant, as he had sought legal advice from Dowd on occasions prior to the warrant's execution (*see* **Exhibit I**, Mitchell Affidavit, ¶4), cannot be sure that his communications with Dowd were not memorialized in some document or data seized via the warrant, and thus has standing to challenge the search of 920 Center Street and the seizure therein. Further, as defendant also

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[24] In order to establish an attorney-client privilege, it must be shown that:

> "'(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.'"

Colton v. United States, 306 F.2d 633, 637 (2d Cir. 1962) (citation omitted); *see also* F.R.E. 104(a), 501 and 502.

cannot be sure from the "Inventory of Items Seized from 920 Center Street" list (*see* **Exhibit J**, ¶¶ 4-6, Mitchell Affidavit) what documents and data were specifically seized,[25] a hearing must be held wherein this Court may make an *in camera* determination.

47. Moreover, the crime-fraud exception to the above privilege is inapplicable in this matter. Said exception removes the privilege from those communications that are "relate[d] to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct." United States v. Jacobs, 117 F.3d 82, 87 (2d Cir. 1997) (citation omitted). The court held in United States v. Zolin, 491 U.S. 554, 572 (1989), that trial courts may perform an *in camera* review of privileged documents to determine the applicability of the crime-fraud exception.[26] However, "[the moving] party must present evidence sufficient to support a reasonable belief that *in camera* review may yield

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[25] Among the documents presented in the "Inventory of Items Seized from 920 Center Street" (**Exhibit K**) are: "HP Pavilion a6417c CPU, s/n: MXX8200MYC (returned on 9/11/08, after e-copying)" (item **#1**); "HP Pavilion a6417c CPU, s/n: MXX7410IP (returned on 9/11/08, after e-copying)" (item **#2**); "Old Creek Development Binder" (item **#3**); "Seneca Gaming Golf Course Documents" (item **#4**); "Seneca Gaming Corporate Binder" (item **#5**); "Old Creek Golf Course Binder" (item **#6**); "Old Creek Development Binder" (item **#12**); "Old Creek Development papers" (item **#13**); "Folder containing "O" Creek Development documents" (item **#15**); "Old Creek Development paperwork" (item **#18**); "Banker's Box, with contents, labeled "Golf Course"" (items **#19-22**); "Hard drive containing dd-images of eMachine" (item **#23**); "Hard drive containing dd-images of Dell Dimension 8100" (item **#24**); "Hard drive containing dd-images of Dell Dimension 4300" (item **#25**); "Hard drive containing dd-images of Dell Dimension 4700" (item **#26**); and "Hard drive containing dd-images of Packard Bell" (item **#27**).

[26] "[T]he crime-fraud exception applies 'only when there is probable cause to believe that the communications with counsel were intended in some way to facilitate or to conceal the criminal activity.'" United States v. Jacobs, 117 F.3d at 88 (citation omitted). In such a scenario, the court must be satisfied that "the client communication or attorney work product in question was *itself* in furtherance of the crime or fraud." In re Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995). Of course, "[c]ommunications are properly excluded from the scope of the privilege even if the attorney is unaware that his advice is sought in furtherance of such an improper purpose." In re Grand Jury Subpoena Duces Tecum, 731 F.2d at 1038. Thus, the client's intentions are controlling.

evidence that establishes the exception's applicability." Zolin, 491 U.S. at 574. The movant may use "any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged" to meet the *in camera* review threshold. *Id.* at 575.

B. The Requirement of Probable Cause.

48. The Fourth Amendment requires that search warrants issue "upon probable cause, supported by Oath or affirmation." U.S. Const., Amend. IV. Said warrant may be issued by a neutral and detached magistrate only if probable cause exists to believe that a crime has been committed and that evidence of that crime will be found in the place searched. United States v. Travisano, 724 F.2d 341, 346 (2d Cir. 1983). Pursuant to F.R.Crim.P. 41, "after receiving an affidavit or other information, a magistrate judge or a judge of a state court of record must issue the warrant if there is probable cause to search for and seize a person or property." In determining the sufficiency of probable cause, a common sense approach is required, as such determinations "are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Illinois v. Gates, 462 U.S. 213, 231 (1983) (citation omitted).[27]

C. The Affidavit in Support of the Search Warrant was Insufficient on its Face to Establish Probable Cause.

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[27] An affidavit in support of a search warrant must contain facts "sufficiently close in time to the issuance of the warrant and the subsequent search conducted so that probable cause can be said to exist as of the time of the search and not simply as of some time in the past." United States v. Wagner, 989 F.2d 69, 75 (2d Cir. 1993). In United States v. Leon, 468 U.S. 897 (1984), the court established the good faith exception where a warrant is otherwise invalid for when the: (1) issuing magistrate had been knowingly misled; (2) issuing magistrate wholly abandoned his or her judicial role; (3) application is so lacking in indicia of probable cause as to render reliance upon it unreasonable; and (4) warrant is so facially deficient that reliance upon it is unreasonable. *Id.* at 923.

49. In paragraph 6 of Special Agent Gross's affidavit, it is asserted that probable cause existed for violations of 18 U.S.C. §§ 666, 1341, 1343 and 1957. Based upon the agent's investigation, "there [was] no known legitimate reason" for **(1)** Barry Halftown to receive $248,000, **(2)** for attorney Rachel L. Mitchell (Mr. Mitchell's wife) to receive $90,000 into her IOLA account, and **(3)** for attorney Mark Gabrielle to receive $202,000 from the proceeds regarding the land transaction in question. *See* **Exhibit J** (pars. 5, 20, 22, 24, 26-27, 59). In paragraph 22 of Gross's affidavit, it is asserted that based upon various *unnamed* "sources," Mr. Mitchell is a relative of Mr. Halftown and was a "backdoor wheeler dealer" for SNI President Barry Snyder, and handled Snyder's "dirty work." Paragraph 21 alleges that Mr. Mitchell and Halftown had business dealings together in the past.

50. In paragraph 23 of the agent's affidavit, it is alleged that Mr. Halftown paid $125,000 via a check written from the same account where Dowd had transferred money for a house purchased from Allison and Benjamin Gonzalez. Another unnamed source had purportedly informed the FBI that the source believed that Mr. Mitchell bought a house for his parents from Mr. and Mrs. Gonzalez. Halftown and Mr. Mitchell's parents are listed as the home's current residents. The connection here to Mr. Mitchell is tenuous at best. Assuming for arguments sake the unnamed sources' reliability *(which defendant does not concede)*, if Halftown is in fact a relative of Mr. Mitchell (i.e., a brother or uncle), then there is nothing suspicious in him purchasing a home for his parents (or his sibling and in-law). If this were not so, every relative of Halftown (and Mr. Mitchell) would fall under suspicion.

51. In paragraphs 29, 30, 31 and 58 of the agent's affidavit, taped phone conversations on August 30, 2007, and March 31, 2008, between Dowd and a Charles Boos regarding the sharing of proceeds from the land deal are discussed. Mr. Mitchell is *not* referenced by

name in the agent's affidavit as even being mentioned during the conversations. And even if Mr. Mitchell had been implicitly "referenced," [28] all that this could *potentially* provide is speculation, not probable cause of a crime. In paragraphs 24 and 25, the agent alleges that following a $90,000 transfer of funds from Dowd to Mrs. Mitchell's IOLA account, that amount was transferred to Mrs. Mitchell's business checking account. From that account, there were purported "moneys drawn" for the Mitchells' personal expenses. Receiving funds from a spouse's account to pay for personal expenses is hardly suspicious. [29]

52. On its face, the agent's allegations, particularly in "THE INVESTIGATION AND FACTUAL BASIS SECTION," proffer at best an implied guilt by association, and, even if accepted as true, fail to provide reasonable cause that Mr. Mitchell or anyone else violated federal law. As the affidavit is so lacking in indicia of probable cause, reliance upon it was unreasonable and all evidence seized pursuant to the warrant must be suppressed.

WHEREFORE, all items seized pursuant to the execution of the search warrant for 920 Center Street in Lewiston, should be suppressed for failure to establish probable cause. Alternatively, a hearing should be held to resolve any outstanding factual issues; including whether documents seized fall under the attorney / client privilege.

VIII.

MOTION FOR A BILL OF PARTICULARS

53. Mr. Mitchell hereby moves for an order pursuant to F.R.Crim.P. 7(f) requiring the government to particularize the Indictment as requested below:

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[28] There are several disrespectful references in paragraphs 29 and 30 to an "Indian" spoken about during these phone conversations, which may be referring to Mr. Mitchell.

[29] Further, none of the conduct set out in paragraphs 26, 27 and 28, involving the transfer of funds to attorney Mark Gabrielle, are described as being connected to Mr. Mitchell.

A. With respect to Count 1 of the Indictment:

(a) Specify each and every document that the government will rely upon to prove the commission of this offense; **(b)** Specify each and every financial and monetary transaction alleged, including exact dollar amounts; **(c)** Specify the manner it will be shown that Mr. Mitchell knowingly, willfully and unlawfully combined, conspired and agreed (*see,* Indict., par. 2, pg. 14) to commit the offenses; **(d)** Specify the "others, known and unknown" (*see,* Indict., par. 2, pg. 14) that are alleged to have conspired with Mr. Mitchell to commit the alleged offenses; **(e)** Specify the exact location of the charged offense and specify what is meant by the phrase "in the Western District of New York, and elsewhere" (*see,* Indict., par. 2, pg. 14); **(f)** Specify the exact dates of the commission of the alleged offense, as opposed to "sometime in 2004 and in or about August of 2006" (*see,* Indict., par. 2, pg. 14); **(g)** Specify the exact location and date "during July or August of 2004" that the purported meeting occurred (*see,* Indict., par. 2, pg. 16); **(h)** Specify the exact content of what was said to purportedly constitute an "overt act," as well as the exact dates "during the Summer and Fall of 2004" that Mr. Mitchell purportedly made presentations to the Economic Development Subcommittee (*see,* Indict., par. 3, pg. 17); **(i)** Specify the exact content of what was said to purportedly constitute an "overt act," as well as the exact date "in or about February of 2005" that Mr. Mitchell purportedly made a presentation to the SNI Tribal Council "during a pre-Council session." (*see,* Indict., par. 5, pg. 17); **(j)** Specify the exact method, location and date of where Mr. Toohey "on or before February 19, 2005, prepared and provided" Mr. Mitchell a draft resolution (*see,* Indict., par. 6, pg. 17); **(k)** Specify the exact location and date of the purported meeting between Dowd and Mr. Mitchell, alleged to have occurred "sometime between on or about May 3 and May 6, 2005" (*see,* Indict., par. 7,

pg. 17); **(l)** Specify the exact circumstances regarding Mr. Mitchell having requested that Mr. Dowd send a letter to SNI President Barry Snyder (*see,* Indict., par. 8, pg. 17-18); **(m)** Specify the exact location, content and date of the purported "conversations" between Mr. Mitchell, Dowd and Toohey, beyond the description of "[b]etween June of 2005 and February of 2006" as set out in paragraph 30 of the Indictment; and further describe who exactly was present (i.e., all three or two of the three parties) for the purported "conversations" (*see,* Indict., par. 10, pg. 18); **(n)** Specify the exact date of the purported transfer of $90,000 by Rachel Mitchell to her "business account" beyond the description of "thereafter" following the date of February 17, 2006, as described in paragraph 34 of the Indictment (*see,* Indict., par. 11, pg. 18); **(o)** Specify the exact dates, transaction amounts and circumstances of how Mr. Mitchell and his wife "spent $338,000 that they received from the proceeds of the... land [deal] by OCD to SNI" (*see,* Indict., par. 12, pg. 18); **(p)** List each and every overt act, individual or joint, of Mr. Mitchell and each co-conspirator done in furtherance of the alleged conspiracy, as opposed to the "overt acts, among others" alleged in the Indictment (*see*, Indict., second paragraph, pg. 16) whether pled in the Indictment or not; and **(q)** Identify any person acting for the state that was present during the commission of the overt acts, charged or uncharged, alleged in this Count, setting forth names, addresses, and telephone numbers.

B. With Respect to Count 2 of the Indictment:

(a) Specify each and every document that the government will rely upon to prove the commission of this offense; **(b)** Specify the exact location "in the Western District of New York" (*see,* Indict., par. 2, pg. 19) where it is alleged that the offense was committed; **(c)** Specify the basis for alleging that Mr. Mitchell was "an agent of organizations and

agencies of an Indian tribal government" (*see,* Indict., par. 2, pg. 19); **(d)** Specify the amounts and nature of the "Federal benefits in excess of $10,000 in grants, subsidies, and other forms of Federal assistance" that the "Indian tribal government" received "in the one year period immediately preceding February 17, 2006" (*see,* Indict., par. 2, pg. 19); **(e)** Specify exactly how Mr. Mitchell "did corruptly solicit and demand, and did accept and agree to accept, a thing of value of $5,000 or more" (*see,* Indict., par. 2, pg. 19); **(f)** Specify exactly how Mr. Mitchell intended "to be influenced and rewarded in connection" with the "transaction" in question; and whether the allegation involves solely one or multiple transactions; and whether by "transaction" the state means a singular factual event occurring on a particular date or an event occurring over several dates (and if so, which dates in particular) (*see,* Indict., par. 2, pg. 19); **(g)** Specify exactly which conduct Mr. Mitchell performed as a principal actor and which he performed as an accomplice under 18 U.S.C. §2 (*see,* Indict., pg. 19); **(h)** Specify the exact manner it will be shown that Mr. Mitchell acted knowingly and willfully in the alleged commission of the offense; and **(i)** Identify any person acting for the government that was present during the commission of the alleged acts, setting forth names, addresses and phone numbers.

C. With Respect to Count 3 of the Indictment:

(a) Specify each and every document that the government will rely upon to prove the commission of each offense; **(b)** Specify the exact location "in the Western District of New York and elsewhere" (*see,* Indict., par. 2, pg. 20) where it is alleged that the offense was committed; **(c)** Specify the exact dates beyond the description given of "[b]etween in or about early 2004 and continuing until on or about August of 2006, the exact dates being unknown" that Mr. Mitchell was alleged to have committed the offense (*see,* Indict., par. 2,

pg. 20); **(d)** Specify exactly which conduct Mr. Mitchell performed as a principal actor and which he performed as an accomplice under 18 U.S.C. §2 (*see,* Indict., pg. 20); **(e)** Specify the exact manner it will be shown that Mr. Mitchell acted knowingly and willfully in the alleged commission of the offense; and **(f)** Identify any person acting for the government that was present during the commission of the alleged acts, setting forth names, addresses, and telephone numbers.

D. With Respect to Count 4 of the Indictment:

(a) Specify each and every document that the government will rely upon to prove the commission of each offense; **(b)** Specify the exact location "in the Western District of New York, and elsewhere" (*see,* Indict., par. 2, pg. 21) where it is alleged that the offense was committed; **(c)** Specify the exact dates beyond the description given of "[b]etween in or about early 2004 and continuing until on or about August of 2006, the exact dates being unknown" that Mr. Mitchell was alleged to have committed the offense (*see,* Indict., par. 2, pg. 21); **(d)** Specify the exact manner that Mr. Mitchell purportedly executed "a wire transfer of $248,000" from Mr. Dowd's IOLA Keybank account to the "Halftown nominee account at Community Bank" (*see,* Indict., par. 4, pg. 22); **(e)** Specify the exact financial institution in Kansas City, Missouri, and its mailing address and records custodian, where the $248,000 was "cleared and processed" and "transmitted" from (*see,* Indict., par. 4, pg. 22); **(f)** Specify the exact manner it will be shown that Mr. Mitchell acted knowingly and willfully in the alleged commission of the offense; **(g)** Specify exactly which conduct Mr. Mitchell performed as a principal actor and which he performed as an accomplice under 18 U.S.C. §2 (*see,* Indict., pg. 22); and **(h)** Identify any person acting for the government that was present during the commission of the acts

alleged in this Count, setting forth names, addresses and telephone numbers.

E. With Respect to Counts 5 through 12 of the Indictment:

(a) Specify each and every document that the government will rely upon to prove the commission of each offense; **(b)** Specify the exact location "in the Western District of New York" where it is alleged that each offense was committed (*see,* Indict., pg. 22); **(c)** Specify and distinguish the exact conduct within counts 5 through 12 that violated 18 U.S.C. §666(a)(1)(B), as opposed to 18 U.S.C. §1343, and vise versa (*see,* Indict., pg. 22-23); **(d)** Identify and delineate any and all routing numbers and/or any identifying numbers and/or identifying information for each of the transactions listed for Counts 5 through 12 (*see,* Indict., pg. 23-24); **(e)** Specify the exact manner it will be shown that Mr. Mitchell acted knowingly and willfully in the alleged commission of the offenses; **(f)** Specify exactly which conduct Mr. Mitchell performed as a principal actor and which he performed as an accomplice under 18 U.S.C. §2 (*see,* Indict., pg. 24); and **(g)** Identify any person acting for the government that was present during the commission of the acts alleged in these Counts, setting forth their names, addresses, and phone numbers.

F. With Respect to Count 13 of the Indictment:

(a) Specify each and every document and/or recording that the government will rely upon to prove the commission of this offense; **(b)** Specify the exact location "in the Western District of New York" where it is alleged the offense was committed (*see,* Indict., pg. 24); **(c)** Specify whether the exact words that Mr. Mitchell purportedly uttered beyond "in sum and substance" (*see,* Indict., pg. 25, pars. [a], [b] and [c]); **(d)** Identify any person acting for the government that was present during the commission of the acts, charged or uncharged, alleged in this Count, setting forth names, addresses, and telephone numbers;

(e) Specify the exact manner it will be shown that Mr. Mitchell acted knowingly and willfully in the alleged commission of the offense; **(f)** Specify the names, addresses, phone numbers and titles of each and every FBI agent that Mr. Mitchell was said to have made "statements and representations" to (*see,* Indict., pg. 24-25); and **(g)** Specify the exact manner it will be shown that Mr. Mitchell knowingly and unlawfully disposed of, transferred or otherwise took action for the purpose of preventing or impairing the government's lawful authority to take the subject property into its custody and control.

54. F.R.Crim.P. 7(f) permits a court to direct the filing of a bill of particulars, which has three functions: (1) to inform defendant of the nature of the charge with sufficient precision to enable him to prepare for trial; (2) to minimize the danger of surprise at trial; and (3) to enable him to plead his acquittal or conviction in bar of another prosecution for the same offense when the indictment is too vague and indefinite. United States v. Bortnovsky, 820 F.2d 572, 574 (2d Cir. 1987); *see also* United States v. Rosa, 891 F.2d 1063, 1066 (3d Cir. 1989) (noting the elimination of the Rule 7[f] cause requirement in 1966, which encouraged "a more liberal attitude by the courts towards bills of particulars"). On a bill of particulars motion, the court may consider the complexity of the charges, the clarity of the indictment and the degree of discovery available without the bill. United States v. Bailey, 689 F. Supp. 1463, 1473 (N.D. Ill. 1987). Voluntary discovery of "voluminous" documents by the Government does not obviate the need for a bill of particulars. *See* United States v. Davidoff, 845 F. 2d, 1151, 1155 (2d Cir. 1988).

55. Mr. Mitchell requests that the specified particulars be supplied, as his ability to prepare a defense will be otherwise significantly impaired.

WHEREFORE, it is respectfully requested that the defense motion for a bill of particulars be granted.

IX.

MOTION FOR DISCOVERY PURSUANT TO RULE 16;
NOTICE OF INTENTION PURSUANT TO RULE 12(b)(4)

56. Pursuant to Rule 16, Mr. Mitchell requests that the government provide discovery, to the extent that they have not already done so. Though the government has provided the defense access to various items in its possession, this motion is brought to preserve the defendant's discovery rights. Rule 12(b)(4) establishes a procedure for notification of the government's intent to use certain evidence at trial. The purpose of this is to afford an opportunity for submission of pre-trial motions seeking the suppression of such evidence [Rule 12(b)(4)(B)]. To the extent the government has complied with Rule 12(b)(4), it should so note on its disclosure notice. Therefore, request is hereby made for an immediate notice setting forth the evidence which defendant may be entitled to under Rule 16 that the government intends to utilize at trial. This evidence includes, but is not limited to:

Statements of Mr. Mitchell

57. Mr. Mitchell is aware of only one set of oral statements that he is said to have provided to the FBI; i.e., on September 10, 2008. *See* **Exhibit H.** However, the government must disclose the substance of any relevant statements made by the defendant in response to interrogation by a government agent if intended to be used at trial, and any transcripts, reports and summaries. Mr. Mitchell also hereby requests notification of any other recorded statements made by him, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known. Recorded statements, whether written, typed or electronically created,

include, but are not limited to, all recordings and testimony relative to any Count of the Indictment, including Count 13 regarding the purported statements to the FBI.

Defendant's Prior Record

58. Mr. Mitchell hereby requests a copy of his prior criminal record, if any, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the government.

Documents and Tangible Objects

59. Mr. Mitchell requests: any documents and tangible items within the government's possession, custody and/or control which (a) the prosecutor intends to use as evidence; (b) was obtained from the defendant or which belong to the defendant; (c) is material to the preparation of the defense; (d) any and all tape recordings of conversations which pertain to any fact alleged in the indictment. Regarding discovery materials previously provided, specify the date and title of each item.

Intercepted Communications

60. Mr. Mitchell requests notification regarding any and all Title III surveillance, or any electronic surveillance conducted pursuant to federal, state or local warrant, including any intercepted communications (audio and/or video intercepts and Internet or email communications) or evidentiary leads derived therefrom, and a statement as to whether they were acquired in the presence or absence of court authorization. If acquired by warrantless means, disclosure is requested as to the following:

> (a) specifications of the name and address of the participant in each such communication who ostensibly consented to interception of same; (b) reproduction of any technical or physical surveillance logs respective of each communication so intercepted; (c) reproduction of any transcripts purporting to memorialize the content of each communication so intercepted; and (d) any

instructions by the supervising agency to each participant who purportedly consented to the interception.

61. As to each intercepted communication, counsel seeks an opportunity to examine and inspect the electronic equipment used to intercept and record each communication constituting the subject of electronic surveillance. If acquired by eavesdrop order(s), disclosure and duplication is requested as to the following:

> (a) each eavesdrop order and each amendment and extension order; (b) the application and all other supporting documents which preceded each such eavesdrop, amendment and/or extension order; (c) all progress reports which relate to any eavesdrop, amendment and/or extension order; (d) any technical and/or physical surveillance logs; (e) all minimization instructions to the executing agency(s); and (f) all sealing order(s) which relate to any of the aforementioned orders.

Search and Seizure

62. To the extent not yet provided, Mr. Mitchell seeks notification whether evidence to be offered consists of, or was derived from, the "fruits" of any search and/or seizure authorized by a judicial and/or administrative search warrant. Request is further made for:

> a copy of each such search warrant; a copy of each written search warrant application together with any supporting affidavit(s); a copy of each voice recording, stenographic transcript and/or longhand record with respect to any oral search warrant application; a copy of any search warrant inventory return; the exact time and date when the United States Government entered into the investigation of the defendant or any co-defendant relative to the instant matter; and whether the government, including any police officials or United States prosecutors, had any involvement in the instant case.

63. In the event that evidence was acquired as referred to above, request is made for any item memorializing, consisting of or derived from the "fruit" of any search and seizure.

Identification

64. Mr. Mitchell requests notification of whether any evidence to be offered relates to or is derived from an identification of his person, voice, handwriting, picture and/or a composite sketch purporting to embody his facial features. If so, a statement is requested

setting forth the date, time and place where the identification occurred; and the substance of the proceeding, including the names of all present. If such evidence relates to non-corporeal identification proceedings, request is made for access to any pictures, sketches, voice exemplars or handwriting specimens utilized during said proceeding.

Reports of Examinations and Tests

65. Mr. Mitchell requests disclosure of all results of any physical, mental or scientific examinations, tests or experiments within the prosecution's possession, custody and/or control which are either intended to be used as evidence or are material to the defense.

Jencks Material

66. Mr. Mitchell respectfully requests disclosure of Jencks material (18 U.S.C. §3500) at least 30 days in advance of trial so as to permit its meaningful use by the defense.

WHEREFORE, it is respectfully requested that the defense motion for discovery and inspection pursuant to Rule 16, and notice of intention be granted.

X.

MOTION FOR THE PRE-TRIAL DISCLOSURE OF ALL BRADY MATERIAL

67. Pursuant to the prosecution's obligations under Brady v. Maryland, 373 U.S. 83 (1963), United States v. Agurs, 427 U.S. 97 (1976), United States v. Bagley, 473 U.S. 667 (1985) and Kyles v. Whitley, 514 U.S. 419 (1995), Mr. Mitchell moves for the immediate disclosure of all exculpatory and impeaching material in the prosecution's possession, custody or control or is otherwise known to the prosecution, including, but not limited to:

(a) Any information and/or material which tends to exonerate Mr. Mitchell or which tends to show that he did not knowingly commit the indicted offenses; (b) Any and all evidence which tends to impeach the credibility of any prospective government witness (including co-defendants), including, but not limited to:

(1) Any records or information revealing prior criminal convictions or juvenile adjudications, including but not limited to, relevant "rap sheets" of each witness the prosecutor intends to call at trial;

(2) Any records and information revealing prior or subsequent misconduct, unethical conduct, criminal acts or bad acts of any witness, including co-defendants, the prosecutor intends to call at trial;

(3) Any allegations of prior or subsequent misconduct, unethical conduct, criminal acts or bad acts of any witness, including co-defendants, the prosecutor intends to call at trial of which the prosecutor knows or through the exercise of reasonable diligence should know;

(4) Any and all consideration or promises of consideration given during the investigation and preparation of this case by law enforcement, including prosecutors or agents, police or informers, to or on behalf of any witness, including co-defendants, or on behalf of a relative of any such witness or co-defendant, the government intends to call at trial, or any such consideration or promises expected by any such witness, or relative of any witness, at any time. Such "consideration" refers to anything which arguably could be of value or use to a witness, or relative of a witness, and anything which could reveal an interest, motive or bias in favor of the prosecution or against defendant or which could induce one to testify or to color one's testimony;

(5) Any and all statements -- formal and informal, oral or written -- by the prosecution, its agents and representatives to any person (including counsel for such persons) whom the prosecution intends to call as a witness at trial pertaining in any way to the possible or likely course or outcome of any government action -- state or federal, civil or criminal -- or licensing, matters against the witness, including co-defendants, or anyone related by blood or marriage to the witness;

(6) Any threats, express or implied, direct or indirect, or other coercion directed against any witness, or against a relative of such witness, whom the prosecutor intends to call at trial; criminal prosecutions, investigations, or potential prosecutions pending or which could be brought against such witness, or relative of such witness; any probationary, parole, deferred prosecution or custodial status of any such witness, or relative of such witness; and any civil, tax court, court of claims, administrative, or other pending or potential legal disputes or transactions involving any such witness, or relative of such witness or co-defendant, and the state or federal government, any agency thereof or any regulatory body or over which the state or federal government, agency, body or association has real, apparent or perceived influence;

(7) A list of any requests, demands or complaints made by any witness, including co-defendants, which could be developed on cross-examination to demonstrate a hope or expectation by the witness or co-defendant for favorable action in his or a relative's behalf;

(8) With respect to each witness or co-defendant the government intends to call at trial, or any member of the immediate family of any such witness, copies of all indictments, complaints or informations brought by the federal, or any state or local government, all administrative, disciplinary, regulatory, licensing, tax, customs, or immigration proceedings brought by the federal, or any state or local government, or by any regulatory body or association, and, state what counts or actions have been the subject of guilty pleas, convictions, consent decrees, dismissals, or understandings to dismiss at a future date; the date or dates on which pleas of guilty took place. If the government does not have said documents, state the information known;

(9) With respect to each witness or co-defendant the government intends to call at trial, or any member of the immediate family of any such witness, a written summary of all charges or proceedings which could be brought by the federal, or any state or local government, but which have not or will not or which the witness believes have or will not be brought because the witness is or has cooperated with the government, including copies of all memoranda regarding government witnesses, including letters to the attorney for a witness;

(10) Any material not otherwise listed which evidences a motivation of any witness or co-defendant either to cooperate with the government or any bias against defendant; the identification of each occasion where a witness has testified before any court, grand jury, administrative, regulatory, disciplinary body or other association, or otherwise officially narrated, in the investigation, the indictment or the facts of this case, and any testimony, statements or documents from him or her;

(11) All judicial proceedings in any criminal cases, and all regulatory, association or disciplinary proceedings of which the government knows or through the exercise of reasonable diligence should have reason to know in which testimony by any person has been given, regarding the misconduct, criminal acts or bad acts of any witness the government intends to call at the trial of this action;

(12) Any statements or documents, including but not limited to, judicial, regulatory, administrative, disciplinary, association or grand jury testimony, or federal, state or local tax returns, made by any potential witness or co-defendant at trial, which the prosecution knows or by reasonable diligence should have reason to know, is false;

(13) Any records from civil lawsuits, arbitration or other proceedings between defendant and any witness or company with which defendant or any government witness may be affiliated, including records regarding the investigation, conduct and disposition of such litigation;

(14) Any written or oral statements, whether or not reduced to writing, made by any potential prosecution witness and/or co-defendant which in any way contradicts or is inconsistent with or different from other oral or written statements he has made;

(15) Any requests prepared by the prosecution for permission to grant formal or informal immunity or leniency for any witness and/or co-defendant, whether or not such request was granted;

(16) The same records and information requested in items "(1)" through "(15)" with respect to each non-witness declaring whose statements will be offered at trial pursuant to Fed. R. Evid. 806;

(17) Copies of any and all records of law enforcement agencies reflecting intradepartmental disciplinary action taken against any law enforcement official or agent who will testify at trial;

(18) Copies of any and all records of any law enforcement or other governmental agency reflecting any commendations, awards or recognition or any kind, or requests for any commendations, awards or recognition of any kind made to or by any government agent or law enforcement officer for conduct in connection with this case.

(c) The name and address and statements made by any person, including co-defendants, with information concerning the events at bar and whose version of the same events is contrary to, or non-supportive of, the accusations in the indictment; the name and address and any written or oral statement made by persons and/or co-defendants the government believes has information helpful to the defense.

68. Due process requires that, upon request, the government disclose evidence favorable to the defendant or discrediting to its own case. United States v. Agurs, *supra.* This requirement extends to candor by witnesses as well as matters relating directly to guilt or innocence. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972). As a defendant's ability to acquire evidence is disproportionate to that of the government, the prosecution is obliged to share exculpatory evidence. *See* United States v. Bagley, *supra.*

A. Time of Disclosure.

69. "Disclosure by the government must be made at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure." United States v. Pollack, 534 F.2d 964, 973 (D.C. Cir. 1976) (citations omitted). The need for pre-trial disclosure of Brady material can not be understated. *See,* United States v. Bejasa, 904 F.2d 137, 140-141 (2d Cir. 1990). This Court can ensure that justice is administered properly by requiring immediate disclosure of the information sought.

B. Impeachment Evidence.

70. Mr. Mitchell has itemized below some likely sources of impeachment. United States v. Agurs, *supra.* Disclosure here is necessary in order to prepare for trial. At issue are the general principles of crediting and discrediting witnesses. *See,* 1 McCormick on Evidence §33, at 111-12 (4th ed. 1992); *see also,* United States v. Osorio, 929 F.2d 753, 761 (1st Cir. 1991) (describing the government's obligation to produce impeachment information as "a constitutionally derived duty"); Kyles, 514 U.S. at 419; *accord,* United States v. Payne, 63 F.3d 1200, 1208 (2d Cir. 1995). Defendant requests witnesses' "rap sheets" and the substance of any inducements, promises, compensation or consideration, which the government has held out to witnesses or which a witness anticipates to receive in exchange for testimony or assistance. An anticipatory benefit directly gives rise to the inference of bias. *See*, United States v. Mayer, 556 F.2d 245, 248 (5th Cir. 1977). The duty to disclose is an affirmative one. A prosecutor's ignorance as to promises made by another prosecutor does not excuse a failure to disclose. Giglio v. United States, *supra.* Disclosure includes all compensation or benefits paid to or expected by each witness. United States v. Leja, 568 F.2d 493, 499 (6th Cir. 1977). This includes both "the stick and the carrot." United States v.

Sutton, 542 F.2d 1239, 1243 (4th Cir. 1976). Prior testimony and statements, including 302 reports, which are exculpatory or helpful for impeachment should be produced. United States v. Miller, 529 F.2d 1125, 1128 (9th Cir. 1976); Brady v. Maryland, *supra* at 87.

71. Mr. Mitchell's request for the substance of all occasions known in which an informer, accomplice or co-conspirator has previously testified, should be granted. Where a government employee testifies, the defendant is entitled to access the personnel file to determine whether impeachment material exists. United States v. Morell, 524 F.2d 550, 552-555 (2d Cir. 1975). The right to cross-examine remains the means by which "the scope and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316 (1974). In short, the prosecution should be ordered to disclose the requested information or show good cause for their failure to do so. United States v. Agurs, *supra.*

WHEREFORE, it is respectfully requested that the defense motion for pre-trial disclosure of all Brady material be granted.

XI.

MOTION FOR REVELATION OF IDENTITY OF INFORMANTS

72. Mr. Mitchell hereby moves this Court, pursuant to F.R.Crim.P. 16 and the Fifth Amendment, for an order requiring the government to disclose the following information:

> The identity of any and all informants possessing information which may be material to defendants' alleged guilt or innocence; the identity of any and all informants who were present at any of the events which are described in the instant indictment; and any material government reports containing information received from any informant referenced above.

73. This motion is made on the grounds that informants may be percipient witnesses to the allegations contained in the Indictment, and may also possess exculpatory information. At a minimum, defendant seeks that all reports above be submitted *in camera* for review and

subsequent disclosure. In the event that the Court does not compel disclosure, defendant requests all government reports be made part of the record.

A. The Government is Obliged to Disclose the Identity and Whereabouts of Informants and to Make Them Available to the Defense.

74. In Roviaro v. United States, 353 U.S. 53 (1957), the court held that when an informant's testimony is "relevant and helpful" to the defense or "essential to the fair determination of a cause," the identity must be revealed. *Id.* at 60-61. Though there is no fixed rule here, four considerations are relevant: (1) the crime charged; (2) the possible defenses; (3) the possible significance of the informant's testimony; and (4) other relevant factors. The "relevant and helpful" language has been deemed "to require disclosure when it is material to the defense." DiBlasio v. Keane, 932 F.2d 1038, 1041-1042 (2d Cir. 1991).

75. It is not Mr. Mitchell's burden to prove what an informant might say if disclosed since the informant's unavailability makes that burden impossible. No matter how incidental an informant's role may initially appear, he may still possess relevant information. The defense is thus entitled to know informants' whereabouts and addresses so as to investigate before trial. *See,* United States v. Hernandez, 608 F.2d 741, 745 (9th Cir. 1979). Finally, the government's obligation is not satisfied by merely disclosing identity and location; as it must also make those witnesses available. Failure to do so requires dismissal.

B. The Defendant is Entitled to Pre-Trial Access to Witnesses

76. While the accused in a non-capital case has no constitutional right to the production of witness names and addresses (*see,* United States v. Cole, 449 F.2d 194, 198 [8th Cir. 1971]), this idea has been questioned. *See,* United States v. Baum, 482 F.2d 1325 (2d Cir. 1973). Indeed, requiring pretrial disclosure of witnesses is a proper exercise of judicial authority. *See,* United States v. Richter, 488 F.2d 170, 173-174 (9th Cir.

1973); Alford v. United States, 282 U.S. 687, 688 (1931) ("Prejudice ensues from a denial of the opportunity to... put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them"); United States v. Celis, 608 F.3d 818, 830 (D.C. Cir. 2010)(citing Alford, noting that informant discovery is decided case by case).

WHEREFORE, this Court should order the government to disclose the identity of their informants and their whereabouts, and to make them available to the defense.

XII.

MOTION FOR THE PRE-TRIAL DISCLOSURE OF EVIDENCE PROFFERED UNDER RULE 404(b) AND THE EXCLUSION OF ANY SUCH EVIDENCE FOUND TO BE INADMISSIBLE

77. To the extent not already provided, Mr. Mitchell moves pursuant to F.R.E. 404(b) for the pre-trial disclosure of any such evidence the government seeks to proffer at trial and for the exclusion of evidence found inadmissible pursuant to F.R.E. 403 and 404(b). F.R.E. 404(b) requires "reasonable notice in advance of trial" of the prosecution's intention to proffer evidence under the Rule. Herein, Mr. Mitchell seeks pre-trial disclosure of each such item of evidence to be offered against him. [30]

WHEREFORE, it is requested that the motion for pre-trial disclosure of evidence under Rule 404(b) and the exclusion of any evidence found to be inadmissible be granted.

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[30] Even when relevant, 404(b) proof must be excluded under 403 where its probative value is outweighed by the danger of "unfair prejudice". In Huddleston v. United States, 485 U.S. 681, 687 (1988), the court noted that 404(b) protects against extrinsic act evidence "when that evidence is offered solely to prove character," requiring a proper purpose for the evidence, which must be relevant and satisfy the 403 balancing test. *Id.* at 691; *see* United States v. Gilan, 967 F.2d 776, 780 (2d Cir. 1992). To be relevant, the item to be proven must be similar to the case at bar. Huddleston, 485 U.S. at 689-691.

XIII.

MOTION FOR SEARCH OF PERSONNEL FILES OF GOVERNMENT AGENT WITNESSES

78. Mr. Mitchell moves, pursuant to F.R.Crim.P. 12, and the Fifth and Sixth Amendments, for an order requiring the government, pursuant to Kyles, 514 U.S. at 441-446; and Payne, 63 F.3d at 1210, to search their witness personnel files, including FBI and IRS employees, to determine if Brady or Giglio material exists. *See,* United States v. Kiszewski, 877 F.2d 210, 216 (2d Cir. 1989). Such material includes acts of misconduct, dishonesty, proof of bias, false statements, mental or emotional disorder or instability, prejudice, interest, corruption, or evidence of an infirmity or lack of capacity.[31] If said material is found, it should be disclosed or submitted to the Court for an *in camera* review.

WHEREFORE, it is respectfully requested that the defense motion for search of witness personnel files be granted.

XIV.

MOTION TO PRESERVE EVIDENCE

79. Mr. Mitchell moves this Court for an order directing the government to preserve and not destroy, alter or "misplace" any evidence, papers, reports, notes, objects or other information relating to this investigation, including, but not limited to, the information and items requested through the instant motions. In support, the accused shows, as follows:

(a) This motion does not demand disclosure, discovery, inspection or production. It merely seeks to preserve evidence, directly admissible or otherwise, and other information which may be necessary or helpful to a proper resolution consistent with the defense.

(b) Included in this motion is any and all information relating to the following:

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[31] In Payne, 63 F.3d at 1208, the court noted the prosecution's duty to learn of favorable evidence known by their agents, the police. *Citing*, Kyles, 514 U.S. at 437.

Evidence, reports, memoranda, notes, video tapes, audiotapes or other information arguably subject to disclosure, discovery, inspection or subpoena pursuant to F.R.Crim.P. 6(e), 7(F), 16(a) and 17; evidence, reports, memoranda, notes, video tapes, audio tapes, or other information arguably subject to production or disclosure at trial pursuant to 18 U.S.C. §3500; evidence, reports, memoranda, notes, audiotapes, videotapes, or other information arguably favorable or useful to the accused regarding their guilt or innocence or concerning impeachment of prosecution witnesses; and/or Evidence, surveillance reports and interview notes, notes, videos and audiotapes with respect to any witness interviewed as a part of the investigation leading to this indictment, regardless of the intent to call him at trial.

(c) Any of the above in the direct or indirect or constructive possession, care, custody or control of the prosecution may be required for scrutiny by the Court or defense counsel during the pre-trial and trial stages of this case.

80. The purpose of this motion is to preserve evidence; necessitated by the administrative practice of alleged good-faith destruction of records, *see, e.g.*, United States v. Bufalino, 576 F.2d 446, 449-450 (2d Cir. 1978), and by the caution which experience teaches. The prosecution has no legitimate interest in the destruction, alteration or suppression of the above items. In light of the complexity of this case, the slight burden on the agencies involved in retaining records until the accused has an opportunity to inspect is manifestly outweighed by defendant's right to a fair trial and due process. Indeed, the government has an obligation to preserve all potentially discoverable evidence gathered in the course of its investigation. United States v. Bryant, 439 F.2d 642, 651 (D.C. Cir. 1971).

WHEREFORE, it is requested that the motion to preserve evidence be granted.

XV.

MOTION FOR GOVERNMENT DISCLOSURE OF RULE 807 "RESIDUAL EXCEPTION" STATEMENTS

81. Mr. Mitchell moves for the disclosure of residual statements pursuant to F.R.E. 807. Congress has consolidated Rules 803(24) and 804(b)(5) into Rule 807, entitled as the "Residual Exception." Rule 807 requires the statement's proponent to provide sufficient

notice before trial of the content of the statement and contact information of the declarant, so as to "provide the adverse party with a fair opportunity to prepare to meet" the statement.

WHEREFORE, it is respectfully requested that the government be ordered to immediately comply with Rule 807 by notifying the defense accordingly.

XVI.

MOTION FOR LEAVE TO MAKE FURTHER MOTIONS

84. Mr. Mitchell respectfully reserves the right to make further motions which may be required in light of newly discovered evidence, court rulings, or the relief sought herein. Said motions may include, but are not limited to, a factual and legal challenge, pursuant to the U.S. Constitution and statutory law, of each allegation set out in the three separate "Forfeiture Allegations" proffered by the government herein (*see*, Indict., pg. 26-30). Your deponent has endeavored to encompass all appropriate pre-trial prayers for relief herein. Still, it is possible that as a result of the ongoing litigation, matters will be revealed which will necessitate further applications. This Court is therefore asked to grant leave for further motions if necessary, and as this Court deems just and appropriate.

CONCLUSION

82. Deponent respectfully requests that the Court issue orders granting all of the relief sought in the attached notice of motion.

PAUL J. CAMBRIA, JR.

Sworn to before me this
12th day of September, 2011

KRISTINA DREWERY
COMMISSIONER OF DEEDS
In And For the City Of Buffalo, N.Y
My Commission Expires Dec. 31, 20__

Kristina Drewery, Commissioner of Deeds
In and for the City of Buffalo, New York
My Commission Expires December 31, 2012