NOS. 18-2282, 18-2539

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

CHARLES M. HALLINAN and
WHEELER K. NEFF,
Appellants

APPEAL FROM JUDGMENTS OF CONVICTION AND SENTENCE
IN CRIMINAL NO. 16-00130 IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CONSOLIDATED BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

JURISDICTIONAL STATEMENT

I. Subject Matter Jurisdiction

The district court had subject matter jurisdiction over this criminal case under 18 U.S.C. § 3231.

II. Appellate Jurisdiction

This Court has jurisdiction over this matter under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF ISSUES

1. Did the district court permissibly exercise its discretion when it ruled that the crime-fraud exception to the work product doctrine applied to an email from appellant Neff to appellant Hallinan?

2. Did the district court commit plain error by not entering verdicts of acquittal for appellant Neff on Counts 1 and 2 of the indictment based on insufficiency of evidence?

3. Did the district court correctly charge the jury on the elements necessary to convict the appellants of RICO conspiracy?

4. Did the district court permissibly exercise its discretion when it barred Neff from presenting the jury with hearsay opinions of other lawyers or copies of court decisions?

5. Did the district court commit plain error by not dismissing Counts 3 through 17 on the grounds that an unadjudicated cause of action is not "property" under the mail and wire fraud statutes?

6. Was the trial court's factual finding at sentencing that the intended loss attributable to the appellants' fraud scheme exceeded $9,500,000 clearly erroneous?

7. Was the trial court's factual finding at sentencing that appellant Hallinan attempted to obstruct the investigation and prosecution of this case clearly erroneous?

8. Were the court's forfeiture rulings against Hallinan supported by law and the record?

STATEMENT OF THE CASE

Appellants Charles M. Hallinan and Wheeler K. Neff were convicted of RICO and fraud offenses related to the issuance of usurious payday loans. Counts 1 and 2 of the indictment presented RICO charges based on schemes in which the defendants and others, claiming "tribal sovereign immunity" through sham association with Native American tribes, made myriad loans in violation of state usury laws. Counts 3 through 17 addressed a fraudulent scheme in which, when over 1,000 plaintiffs undertook a class action lawsuit in Indiana concerning the payday loans, Hallinan escaped liability by deceiving the plaintiffs as to his ownership of the culpable entity.[1]

I. Statement of Facts

A. Overview of Payday Lending.

Payday loans are short-term loans of small amounts, which borrowers promise to repay out of their next paycheck or regular income payment. App. 1039. The loans usually have a fixed-dollar fee of approximately $30 for every $100 borrowed, instead of a traditional interest rate. App. 1042-43. Thus, a borrower who obtains a $300 payday loan might have to pay

[1] The appellants' briefs are almost devoid of the facts proven at trial, and therefore a lengthy statement is presented here.

$90 in order to get the loan. *Id.* Such a fee often translates to a high annual percentage rate of interest ("APR"), given the short-term nature of these loans. App. 1029-30, 1041-43. For example, a $300 payday loan with a $90 fee that must be paid back within two weeks has an APR slightly exceeding 780%. App. 1043-44.

The borrowers often are unable to repay the payday loans when they first come due. App. 1044. When this happens, the borrower can pay a new fee and roll over the loan until the next pay period. *Id.* This process can continue multiple times until the loan is ultimately repaid. *Id.* The loans do not amortize, so these new fee payments do not reduce the principal owed. App. 1045-46. For example, a person who borrows $300 for two weeks in exchange for a $90 fee and rolls over the loan three times will wind up paying $360 in fees and still owe the original $300 in principal. *Id.*

More than a dozen states, including Pennsylvania, prohibit payday lending through criminal usury laws and other statutes that cap the annual interest rates on consumer loans at 36% or less (the "Prohibited Payday Lending States"). App. 1046, 1281-82. Other states permit some payday lending but have regulatory schemes that involve licensing requirements and usually impose some limits on the size of the loans, the number of permitted renewals, and the interest rates (the "Regulated Payday Lending

States"). App. 1046-47. About six states permitted unlicensed payday lending to their residents during the indictment period. App. 1047.

In Pennsylvania, the maximum annual interest rate permitted between 1996 and 2013 on most personal loans of less than $50,000 was 6%. App. 1267-71. An exception existed for lenders licensed with the Pennsylvania Department of Banking, which could charge up to about 24% per year on loans of up to $25,000. App. 1273. None of Hallinan's payday loan companies obtained such licenses. App. 1283-85.

B. The Hallinan RICO Conspiracy.

1. Overview.

From about 1996 until August 2013, Hallinan owned, operated, controlled, and financed numerous entities that issued, serviced, funded, and collected debt from payday loans (the "Hallinan Payday Loan Companies.").[2] Most of those entities operated out of offices Hallinan rented in Bala Cynwyd, Pennsylvania. App. 2185-86, 2194. The Hallinan

[2] Most citations here are to the testimony of Michael Kevitch, App. 2177-2482, who managed Hallinan's payday lending companies from 2004 until 2013, and Adrian Rubin, App. 3230-3901, who was Hallinan's partner from 1998 until 2002 and friend until 2013. Kevitch and Rubin's testimony was corroborated by other witnesses, exhibits, recorded conversations between Hallinan and Rubin, App. 6337-6406, and Hallinan's prior testimony, App. 4534-38, 7685. Some exhibits are not included in the appendices because they are voluminous and/or duplicative of other evidence. We will provide them upon request.

Payday Loan Companies included approximately two dozen entities, with names like "TC Services Corp., d/b/a 'Telecash' and 'Tele-Ca$h'"; "CRA Services, d/b/a 'Cashnet'"; and Apex 1 Processing, Inc., d/b/a "Paycheck Today," "Cash Advance Network," and "Instant Cash USA. App. 2185, 2194-98, 2207-14, 2237-52, 3255-78; Supp. App. 463-71, 677-749, 837.

2. The "Rent-A-Bank" years.

Hallinan was introduced to the payday loan business in late 1996 by Rick Mickman. App. 6371; Supp. App. 681. Mickman and Hallinan formed RAC Corp. Supp. App. 687. RAC Corp. issued and collected debt from payday loans made to borrowers across the country. Over the next few years, Hallinan formed several other payday loan companies.

Hallinan knew that he could not lawfully issue payday loans to customers in all 50 states because of laws and regulations in many states where borrowers lived. App. 3254. Hallinan, however, also understood that federal law permitted federally insured banks to "export" the interest rates of the states in which the banks were incorporated when lending to borrowers across the country. App. 1049-51, 3253-54. What this meant is that a federal bank incorporated in a state like Delaware, which had no interest rate caps, could lawfully make payday loans to borrowers who lived in states where there were anti-usury laws or rate caps. *Id*.

Hallinan and his partners, including Scott Tucker and Adrian Rubin, tried to take advantage of this law by paying County Bank of Rehoboth, Delaware ("County Bank") to be a front for their payday lending companies. App. 3252-55, 3276-78. An attorney for the bank drafted contracts that gave the appearance that County Bank would be issuing payday loans, which the Hallinan Payday Loan Companies would be "servicing": i.e., handling customer relations and overseeing the mechanics of distributing the funds and collecting repayments. App. 3266-69.

In actuality, the Hallinan Payday Loan Companies provided most of the funds for the payday loans, controlled the loan approval process, oversaw debt collection, and received nearly all loan revenues. App. 3261-62, 3278. County Bank did little more than permit its name to be listed on the loan documents. *Id*. The practice of paying a bank to act as a front in order to evade state anti-usury laws was known throughout the payday lending industry as "rent-a-bank." App. 1049-51.

In 2003, the New York Attorney General sued County Bank and two of Hallinan's companies, TC Services and CRA Services, alleging violations of New York's anti-usury laws. App. 3286-87. The lawsuit alleged that County Bank was not the actual lender on loans issued to New York residents and that Hallinan and Rubin were. App. 3286. Although the

lawsuit took years to resolve, its filing precipitated the end of County Bank's participation in payday lending.[3] By December 31, 2003, County Bank had stopped doing business with any of the Hallinan Payday Loan Companies. App. 6346-47.

3. The "Rent-A-Tribe" years.

In early 2004, Hallinan continued to make payday loans to borrowers across the country, and he did so without any legal authority. App. 3312. Hallinan then devised a new scheme to hide his usurious loans from government interference: he and Tucker paid Indian tribes to pretend that they owned the payday lending companies. *Id.* That way, whenever a state tried to enforce its laws against a payday lender, the tribe would claim that it had "sovereign immunity" and did not have to comply. App. 3313.

In reality, the Indian tribes had little connection to the day-to-day operations of the payday lending companies. *Id.* The tribes did not provide money for the payday loans, service the loans, collect loan debt, or incur

[3] County Bank and Hallinan ultimately paid $5.5 million to settle the case. Hallinan and Rubin were both deposed, and Rubin testified that they conspired to commit perjury. App. 3286-92 ("The consensus was that we also would say that County Bank was making the loans and it was their money making the loans, when in fact that was a lie[;] it was my money or our money.").

losses if the borrowers defaulted. App. 2219-20; SVA 66-67, 75-76.[4] Those functions were conducted solely by non-tribal payday lenders, such as Hallinan and his companies. *Id.* The tribes' sole function was to claim ownership of the companies and assert "sovereign immunity" in an attempt to evade state laws and regulations. App. 3313. This model was known inside the payday lending industry as "rent-a-tribe." App. 1052-54.[5]

Kevitch, who oversaw Hallinan's payday operations from 2004 until 2013, testified that Hallinan had three different tribal relationships during that period. App. 2198, 2208-13, 2278-79. From 2004 until 2008, the relationship was with the Modoc tribe of Miami, Oklahoma. *Id.* From late 2008 until 2011, it was with Randall P. Ginger, who purported to a "hereditary chief" of the Mowachaht/Muchalaht First Nation near Vancouver, Canada. App. 2209, 2238-39, 2278-79, 5542-43, 6405, 6797-88. From 2011 until 2013, the relationship was with the Guidiville Band of

[4] The appellants supplemented the original appendix on December 28, 2018. The government is filing a separate supplemental appendix. To avoid confusion between the two "supplements," citations to the appellants' filing are to "SVA," and citations to the government's filing are to "Supp. App."

[5] Hallinan boasted to Rubin that rent-a-tribe was "my idea," although Tucker "implemented it." App. 6346-47.

Pomo Indians of the Guidiville Rancheria ("Guidiville"), a tribe based near Ukiah, California. App. 2208, 2210, 2281, 7000-54.

In 2008, Hallinan had a falling out with Tucker, which led to a severing of Hallinan's relationship with the Modoc tribe. App. 2210.[6] Hallinan needed a new tribe and new company. On July 15, 2008, Hallinan incorporated Apex 1 Processing in Florida. App. 6540-41. Hallinan then hired attorney Wheeler Neff to connect him with Ginger.[7] In late 2008, Neff drafted contracts to make it look like Hallinan was selling Apex 1 to "Aboriginal GR Financial," a sole proprietorship purportedly owned by Ginger.

These contracts included: (1) a stock purchase agreement that purported to memorialize Hallinan's sale of Apex 1 to Aboriginal GR Financial for $10,000; (2) an employment agreement by which Hallinan would become a "vice president" of Apex 1; (3) a servicing agreement; and (4) a $5 million commercial loan note. App. 3979-80, 5265-67, 6491-6502. A few months later, Neff drafted a stock purchase option agreement, which

[6] Tucker and Modoc froze the bank accounts for Hallinan's companies. App. 2210-11. Hallinan sued Tucker for, among other things, RICO violations. App. 1395-97. Tucker paid a $30 million settlement. App. 3317.

[7] Neff had previously drafted contracts between Ginger and another payday lending client named David Wiggins. App. 5258.

effectively negated the stock purchase agreement by giving Hallinan an option to buy back Apex 1's loan portfolio at any time. App. 7068-70.

Ginger never paid Hallinan any money for Apex 1, its loan portfolio, or any other assets. App. 6737-39. To the contrary, in November 2008, Hallinan sent $10,000 to Ginger. Hallinan then made additional $10,000 payments to Ginger in each of the next four months, along with an extra $10,000 payment in February 2009. Ginger returned that extra $10,000 (minus bank fees) to Hallinan in March 2009 to make it appear like he had purchased Apex 1.

Ginger also had no involvement in Apex 1's operations; Kevitch ran the company out of Hallinan's offices in Pennsylvania. App. 2198, 2208-09, 2278-79. Beginning in late 2008 or early 2009, Apex 1 issued and collected payday loan debt from borrowers across the country under its own name and the name of other entities Hallinan controlled. App. 2278-79. Later in 2009, Neff created three new companies in Ginger's name, which took over the portfolios. Supp. App. 756-64.

While the names on the loan documents changed, the operations remained the same. Kevitch oversaw about 50 employees, all in Pennsylvania. App. 2279. All the computer equipment was located in Pennsylvania. *Id.* Kevitch never met or communicated with Ginger or

anyone else from his purported Indian tribe. App. 2280-81. Kevitch reported only to Hallinan and Gary Gordon. App. 2283.[8]

Then, in late 2010, Hallinan and Neff decided to transfer Hallinan's operations from Ginger to a United States tribe, after reading a Pennsylvania Supreme Court ruling that out-of-state lenders which issued payday loans to Pennsylvania residents must comply with Pennsylvania laws. App. 3324-25, 6575-76.[9] The defendants settled on the Guidiville tribe in California.

Michael Derry, a Guidiville employee and agent, testified that a lawyer told Guidiville's leaders that payday lending was a low-risk way to raise money. SVA87-88. The attorney said that he knew a person with the most experience of anyone in the industry, "the grandfather or the godfather of online lending." SVA88. That person was Hallinan. SVA39.

[8] Gordon was often described as Hallinan's right-hand man until he was critically injured in a motorcycle accident in July 2011. App. 1803. In August 2011, Brent Kopenhaver took over Gordon's financial oversight of Hallinan's businesses. App. 2239-40.

[9] *Cash America Net of Nevada, LLC v. Penna. Dep't of Banking*, 607 Pa. 432 (2010).

Guidiville was interested. In December 2010, the tribe passed an ordinance to establish a payday lending program. SVA91-94.[10] In January 2011, Guidiville chairwoman Marlene Sanchez and Hallinan signed a letter of intent to create a payday lending partnership. SVA94-95. There was a problem, however: Guidiville's ordinance sought to comply with usury laws by capping annual interest rates on all loans at 36%. SVA103-06.

On February 18, 2011, Neff wrote an email to Guidiville stating that the cap "would render the loan program unfeasible from the outset." SVA104-05; Supp. App. 775. Three days later, Neff wrote that the rate cap was "a deal killer which would require us to immediately move on to another tribe." App. 2979; Supp. App. 778. The tribe agreed to amend its ordinance to eliminate the rate cap. App. 2979-80.

Neff then drafted several contracts that purported to make Guidiville the owner and operator of the Hallinan Payday Lending Companies. App. 7000-54. Hallinan and Derry signed the contracts on May 11, 2011, but as Derry testified, the documents created an appearance that differed from reality. App. 2988-3005; SVA66-68.

[10] The ordinance created Tribal Lending Enterprises (TLE), which was divided into multiple divisions to accommodate different lenders.

The central "contract" was a "Loan Portfolio Purchase Agreement," pursuant to which an entity created by Guidiville would buy Hallinan's payday loan portfolio from GR Financial (presumably Aboriginal GR Financial). App. 7000-05. The document was never signed by Ginger or anyone else on his behalf. App. 2984-87. Additionally, while the document referenced an "attached" loan portfolio, no portfolio was attached or otherwise provided to Guidiville. App. 2988-89, 7005-06. The "contract" did not reference a purchase price, App. 7000-05, and no money changed hands, App. 2989-90. The "contract" also was effectively negated by a contemporaneously executed option agreement, which gave an option to repurchase all of the payday loans at any time. App. 2991-95, 7043-50.

The only physical item that Hallinan ever sent to Guidiville was a computer server. App. 2998. Neff had told Derry that installing the server on tribal lands was a "core component" of having a tribal lending program. App. 3012-13. Neff explained that borrowers would "travel over the Internet to the tribe's servers to complete their loan application," which would make it possible to claim that the loans occurred on tribal land. App. 3013-14.

After the server arrived, Guidiville placed it in a shed. SVA68-70. Derry could not access the data on the server because it did not come with a keyboard or a screen. App. 3014-15. Derry emailed Neff (and others)

seeking "an easy non-intrusive way to access and print and view activity and information for auditing and regulatory purposes." App. 3020; Supp. App. 827. Neff replied that it would not be feasible to give anyone access to the data on the servers because it was "highly proprietary." App. 3022-23; Supp. App. 826.

Derry wrote back, stating that the tribe "as owners of the loan Companies," must have a way to audit the program to ensure its integrity, and added that, "we must work to find ways for the Tribe to perform its obligations as an owner and as the Regulator..." App. 3024; Supp. App. 828. Neff sought to assure Derry that something would be worked out. Supp. App. 829.

Hallinan, however, had been copied on the email exchange, and he emailed Neff stating, "If these guys are really serious about their responsibilities, then we're dealing with the wrong Tribe. I think you should have a heart to heart conversation with them & set them straight. They will NOT have access to any of our information." App. 3028-29; Supp. App. 835. Hallinan later added: "These guys are getting carried away with their 'ownership' & we have to put an end to it right now if we can't get this straightened out." Supp. App. 832.

Guidiville never gained access to the server, but it would not have mattered, because the server never interfaced with Hallinan's computers in Pennsylvania and never contained information about payday loans or borrowers. App. 3905-16. Hallinan had sent the server to Guidiville solely to create an appearance of a connection between him and the tribe.

In late June 2011, Hallinan, using new names associated with Guidiville, started issuing and collecting debt from payday loans to borrowers across the country. App. 2244-47. This continued until August 2013. *Id.* Nearly all of the loans had interest rates far exceeding usury limits of many of the states where the borrowers lived.[11]

Throughout the Guidiville era, Hallinan (through one of his companies) paid Guidiville approximately $22,000 every month. SVA72. Hallinan's companies also provided all the funds for the payday loans; serviced all of those loans; collected all of the loan debt; and received most of the profits. SVA66.

[11] The government presented the jury with about 850 agreements between the companies and Pennsylvania residents, and nearly all of them had interest rates exceeding 780%. App. 1286-89; Supp. App. 662-78 (referencing Exhs. 1001-1850). Some loans had quadruple-digit annual interest rates. App. 1289-91.

4. The appellants' awareness of state laws.

On numerous occasions, Hallinan and his co-conspirators were notified that they were violating state laws. For example, Hallinan's companies were separately sued in Florida, California, New Mexico, New York, and Indiana for violating those states' usury laws and regulations. App. 1383-1404, 2262-63.[12] The companies also received numerous complaints from borrowers and state officials that they were making illegal loans. App. 2263, 2270-72.[13] Kevitch turned over such complaints to Neff. App. 2272.

Kevitch testified that if the complaint had come from "just a customer that was emailing us or calling in, we would inform them that we were an Indian tribe and we had sovereign immunity." App. 2273. Other times, Kevitch might be directed to shut off one portfolio's payday lending in a state while continuing to make payday loans through other portfolios in the same state. App. 2273-75. In August 2012, Hallinan and Kevitch discussed by email the fact that they were still lending to borrowers who lived in states where payday lending was prohibited. App. 2341-46, 2540-44, 6934.

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[12] *See also* Exhs. 21-24 (documents relating to the California lawsuit), 28 (Florida) 31-50 (Indiana), 51-54 (New Mexico), 60 (New York).

[13] *See also* App. 1166-1266 (testimony of Dawn Schmitt); App. 6762-86, 6904-34.

The jury also heard a recording of Hallinan saying, "unfortunately, in this environment today in order to build a big book you've got to run afoul of the regulators...Because if you don't lend in California, and Colorado, and New York, and Florida...how are you going to build a big book." App. 6344, 6356.

In another recorded conversation with Rubin, Hallinan discussed a complaint the Federal Trade Commission had filed against Tucker, predicting, "I believe they are gonna prove that it's a sham, and I think Mr. Tucker is gonna lose, and I think it's gonna set a precedent...And I think they're gonna prove that they're farces, and let's face it, they are." App. 6368-69.

Neff, like Hallinan, was paying close attention to the FTC complaint and other lawsuits against payday lenders affiliated with Indian tribes. In response to them, Neff suggested rewriting the Guidiville contracts to make it appear like the tribe was receiving 51% of payday lending revenues, even though the tribe was really getting 1 or 2 percent of the revenues or monthly fees of $20,000. App. 3088-97; Supp. App. 752-55, 836-37. Neff wrote that the changed language would make the "optics" of the contracts "much better." App. 3091-92; Supp. App. 752-55.

Derry asked, "[s]ince we are only dealing with optics here anyway, why don't we put things in the most favorable light as possible and have the Tribe 'earn' 98% or 90% or something more than 51%?" App. 3093; Supp. App. 754. Neff answered that a higher percentage number "would seem bogus on its face and invite a further inquiry into the details..." App. 3094; Supp. App. 753. "I think 95% would be very suspicious to people." App. 3095; Supp. App. 753.

5. Summary.

In total, Hallinan made payday loans from about 1997 until August 2013. No later than 2008, Hallinan had help from Neff. The Hallinan Payday Lending Companies used a third-party processing company called Intercept EFT ("Intercept") to transfer funds to and from their borrowers' bank accounts.[14] Intercept's CEO, Bryan Smith, testified that between 2007 and 2013, the Hallinan Payday Loan Companies directed Intercept to fund more than $422 million in payday loans to approximately 1.4 million customers across the country and to collect approximately $688 million of payday loan debt. App. 2594-2602, 2912-14; Supp. App. 769-71. Intercept

[14] Intercept pleaded guilty in a separate indictment to one count of operating an illegal money transmittal business, in violation of 18 U.S.C. § 1960. Crim. No. 17-491.

was able to transfer approximately $490,904,533 from payday loan borrowers to the Hallinan companies in that time period. *Id*.

The Hallinan companies also collected an additional $2,336,857 in payday loan proceeds through a credit card processor called PowerPay. Supp. App. 413-19, 918-1062. Thus, the total amount collected by the Hallinan Payday Loan Enterprise from 2007 to 2013 was at least $493,241,390. Supp. App. 455.

C. The Rubin RICO Conspiracy.

While all of this transpired, the government proved, Charles Hallinan assisted a separate RICO conspiracy run by Adrian Rubin, involving other payday loan entities.

In 1998, Hallinan met Rubin and introduced him to payday lending. App. 3249-50. Rubin had just completed a federal prison sentence for tax evasion, and he heard a radio advertisement for payday loans, which referenced County Bank. App. 3249-50. Rubin contacted the bank's president, who referred him to Hallinan. App. 3250-51. Rubin met with Hallinan and Rick Mickman, who explained the business to him. App. 3252-53.

Hallinan, Mickman, and Rubin formed "CRA Services," with the "CRA" standing for Charlie, Rick, and Adrian. App. 3255. In 1998, CRA

signed contracts with County Bank and Intercept and began making payday loans with annual interest rates of between 700 and 1,500 percent. App. 3257-60. The loan documents identified County Bank as the lender, but Rubin provided all the money, and his staff made all loan approval decisions. App. 3260-61. "County Bank's role was very minimal, if any at all." App. 3261.

In 1998 or 1999, Rubin bought out Mickman's interest in CRA Services, leaving just Rubin and Hallinan as partners. App. 3262-63. In 2000, County Bank learned that Rubin had a felony conviction. App. 3265-67. Bank representatives said they would stop doing business with CRA Services unless Rubin sold his interest in the company. App. 3267. However, Rubin, Hallinan, and County Bank agreed to a solution whereby Rubin would appear to sell his interest in CRA Services to his father-in-law, Jules Shore. App. 3268. The "sale" was a sham. Rubin never received any money from Shore and never transferred any control over CRA Services to Shore. App. 3270. Shore was just a "straw" owner. App. 3272.

Around 2002, Rubin bought out Hallinan's interest in CRA Services. App. 3273-74. Rubin continued to make payday loans through CRA Services until 2003 when County Bank ended their relationship. App. 3274.

Also in 2002, Hallinan introduced Rubin to Neff. App. 3293. Rubin told Neff he wanted to remain in the payday lending business, and Neff advised Rubin to go to a "usury-friendly state" that had no interest rate caps. App. 3294. Neff told Rubin, "you can charge whatever interest you want as long as you get a license in that state." App. 3295. Neff identified Utah, Delaware, and New Mexico as "usury-friendly." App. 3295-96.

Rubin followed Neff's advice and obtained a Utah license for Global Payday Loans ("Global"), which he registered in Shore's name. App. 3296-98. Rubin then used Global to issue and collect debt from payday loans to borrowers across the country, including where the loans were illegal. App. 3298-99. Global often received complaints from officials in those states. App. 3300. In 2004, Rubin hired Neff to settle a complaint from Kansas. App. 3301-04.

Utah officials fielded so many complaints that Rubin decided to close Global in late 2006. App. 3311. Rubin then founded First National Services ("FNS") and transferred his payday loan portfolio to FNS. App. 3314. Rubin did not apply for any state licenses for FNS. *Id*. Rubin did, however, identify a new "straw," Vincent Ventriglia, a family friend. *Id*.

From approximately 2007 through 2011, Rubin used FNS to issue and collect debt from payday loans. App. 3314-15. Rubin also repeatedly

communicated with Hallinan and Neff and told them that he was making payday loans without a license. App. 3315-18. Hallinan and Neff told Rubin about Hallinan's partnerships with Indian tribes. *Id.* Rubin said that he wanted to enter into a similar arrangement. App. 3318-19.

In 2011, Hallinan agreed to connect Rubin with Guidiville. App. 3329-30. By this time, Rubin had introduced his sons, Blake and Chase Rubin, to payday lending. App. 3329. Rubin spoke with Derry, and Neff began drafting documents to memorialize relationships between Guidiville and the Rubins. App. 3331. Before the contracts were finalized, Hallinan and Rubin discussed the need for Rubin to hide behind a "straw," such as Ventriglia, because of his felony conviction. App. 3332.

Neff then drafted multiple contracts that falsely identified Ventriglia as the owner of FNS. App. 3332-46, 6577-6669. These "contracts" were similar to the documents that Hallinan and Derry had signed and purported to create a new tribal-owned entity called "Tribal Business Ventures" ("TBV"). *Id.*

In one contract, FNS purported to sell its entire payday loan portfolio to TBV. App. 3357-61, 6622-33. In another, TBV gave FNS an option to repurchase the loans at any time. App. 3361-63, 6640-41. Derry testified that the contracts "sort of canceled each other out." App. 3072. Rubin

testified that each "negate[d]" the other. App. 3363. Guidiville never received a loan portfolio from FNS and never paid any money to FNS. App. 3068-69.

Rubin, as "Ventriglia," and Derry both signed one contract in which FNS purported to sell "operating assets" to TBV for $10,000, App. 3073-75, 3364-68, 6650-58, and another contract that gave FNS the option to repurchase the same assets for the same price at any time, App. 3075-77, 3368-69, 6634-39. No money or assets ever changed hands, App. 3369, but as Rubin testified, the option agreement "negate[d] the sale." *Id.*

Rubin and Derry signed the sham "contracts" on November 10, 2011. App. 6577-6669. Rubin also sent "a $200 computer" to Guidiville "to create the illusion" that someone on tribal land was approving the loans. App. 3388-89. Rubin placed no hardware or software on the computer that would have enabled it to interface with his computers. App. 3389-90, 3905-16. He explained that he did not want the tribe to know anything about his customers, and that he alone would decide what loans were approved. "So there was no intention[] of mine of ever sending anything to the Guidiville tribe," he testified. App. 3390.

From approximately January 3, 2012, through March 31, 2012, Rubin and his sons used TBV to issue and collect debt from payday loans to

borrowers across the country. App. 3390-96. Rubin and his sons collected unlawful debt from these loans until about August 2012. App. 3397. Throughout this period, Rubin provided all of the money and all of the employees who helped collect on the loans. App. 3397; SVA75. Guidiville did nothing other than permit its name to appear on the loan documents. App. 3397. In return, Rubin paid Guidiville approximately $20,000 each month. App. 3083, 3380. Rubin and his sons also paid Hallinan $100,000, which Rubin described as "an entrance fee...to get into the Guidiville tribe." App. 3384-87.

D. Fraud on Indiana Class Action Plaintiffs.

Hallinan used the fiction of tribal ownership and control of one of his principal entities, Apex 1, in order to avoid massive liability in a class action lawsuit filed in Indiana regarding the usurious payday lending practices.

The evidence showed that Hallinan alone controlled Apex 1, notwithstanding his supposed sale of the entity to Ginger in late 2008 for $10,000. On July 15, 2008, Hallinan had founded Apex 1 in Florida and listed his Boca Raton condominium as the company's business address. App. 6540, 6747. For the next five years, Hallinan repeatedly represented that he was the owner and principal of Apex 1. For example, on at least 12 separate occasions, Hallinan swore to the IRS that he was the 100% owner

of Apex 1. App. 6746. Hallinan made these claims on both his personal tax returns and Apex 1's corporate tax returns. App. 1343-48, 1918-19, 1926-28, 1938-51, 1984, 1995-98, 2001-09, 6746. Hallinan also repeatedly represented to government agencies that Apex 1's address was either Hallinan's residence in Florida or his offices in Pennsylvania. App. 6748-57.

On December 2, 2008, Hallinan signed separate applications for Intercept to process payday loan payments for Apex 1 under the portfolios of Apex 1 subsidiaries. App. 6892-6903. On these documents, Hallinan represented that he was the 100% owner and president of Apex 1, and that Apex 1's corporate address was Hallinan's Florida residence. *Id.* Hallinan signed these documents within weeks after he had supposedly sold Apex 1 to Aboriginal GR Financial and agreed to become its vice president. App. 6491-6502.[15] On December 5, 2008, Hallinan personally guaranteed up to $1.5 million of Apex 1's obligations to Intercept. Supp. App. 765-66.

Also in December 2008, Hallinan opened three PNC Bank accounts for Apex 1, and additional accounts for subsidiaries. Supp. App. 772-74. On each account, Hallinan identified himself as Apex 1's president. *Id.* Over the years, Hallinan opened other bank and investment accounts for Apex 1, and

[15] There are multiple dates on the contracts, all in November 2008. *Id.*

each time, the account's address was identified as Hallinan's offices in Bala Cynwyd. App. 1467-68, 6937-98. Not a single bank record for Apex 1 was addressed to Ginger, Aboriginal GR Financial, or a location in Canada. App. 1467-68. Ginger was not a signatory on any of the accounts, and he signed no checks on behalf of Apex 1. *Id*.[16]

Hallinan and his right-hand man, Gary Gordon, also set up accounts for Apex 1 (and three other companies) at PowerPay, the credit card payment processor. Supp. App. 935. For years, nobody mentioned to PowerPay that Ginger had any connection to any of the companies. App. 6999.

On March 23, 2010, a class action lawsuit was filed in Indiana against Apex 1. App. 3954-55. On May 17, 2010, Neff called attorney Susan Verbonitz of Weir & Partners, LLP ("Weir"), and told her that Hallinan wanted to hire her to represent Apex 1. App. 3937, 3955. Verbonitz already had defended several of Hallinan's other payday lending companies in lawsuits alleging illegal loans. App. 3944-46. Neff sent Verbonitz a copy of the complaint, App. 3955, and Verbonitz opened a case file in which she identified Hallinan, not Ginger, as her client contact. App. 3956-58.

[16] *See, e.g.*, Exhs. 511-12, 514-15, 541-552, 591-95.

The lawsuit alleged that Apex 1 had violated the Indiana Consumer Credit Code's Small Loans Act and the Indiana Deceptive Consumer Sales Act by issuing payday loans with outrageous finance charges. App. 3959-60. Verbonitz represented Apex 1 from about May 18, 2010, until about October 9, 2013. App. 3960-61. Throughout that time, Verbonitz's main contact at Apex 1 was Hallinan, although she occasionally spoke with Gordon and Kevitch. App. 3962-63. Verbonitz never spoke with Ginger or anybody else from a Canadian Indian tribe. App. 3962. Verbonitz took direction solely from Hallinan and "towards the end, Mr. Neff." App. 3963. Weir sent all its invoices to Hallinan or his representatives in Pennsylvania and none to Ginger. App. 1479-89. The invoices were all paid by Hallinan Payday Lending Companies. App. 1490-91.[17]

For three years, Verbonitz pursued an aggressive litigation strategy, all at the direction of Hallinan and funded by him. App. 3964-78. First, Verbonitz moved to compel arbitration and dismiss the lawsuit. App. 3965-67. The trial court denied that motion, but Verbonitz took appeals all the way to the United States Supreme Court. App. 3569-72.

Though these efforts all failed on the merits, *id.*, they stalled the litigation. While the motions and appeals were pending, the plaintiffs

[17] *See also* Exhs. 801-848, 851-874; App. 1479-89.

learned nothing in discovery other than that there had been 1,393 Indiana residents who had taken out payday loans from Apex 1. App. 3968-76. For Hallinan, even this disclosure was too much; he complained to Rubin that he never would have provided this information. App. 6342-44.

After the Supreme Court denied Apex 1's last appeal, the plaintiffs moved for class certification. App. 3976. Verbonitz, directed by Hallinan, opposed that motion. App. 3977. The Indiana court granted the motion and certified the class of 1,393 Indiana plaintiffs on May 8, 2013. App. 3978. Verbonitz then received instructions from Hallinan and Neff to "sit back, do nothing, not answer discovery," and let the plaintiffs get a judgment against Apex 1 and try to collect on that judgment in Canada against either Ginger or Aboriginal GR Financial. App. 3986-90. Verbonitz refused to do this. App. 3998-99. She felt that she had a professional obligation to respond to the plaintiffs' discovery requests, so she told Hallinan and Neff that she would withdraw as counsel. App. 3998-4000.

The withdrawal did not occur immediately. In early July 2013, Verbonitz was simultaneously drafting discovery responses and engaging in settlement discussions with plaintiffs' counsel. App. 4010-12. In connection with these discussions, Verbonitz obtained copies of Apex 1's tax returns for 2011 and 2012, which identified Hallinan as the sole owner of the company.

App. 4013-18. Verbonitz pressed Neff for more information about the returns, and on July 10, 2013, Neff told Verbonitz she would soon be terminated as Apex 1's counsel. App. 4019-26.

Two days later, Neff sent Hallinan an email warning that the Indiana lawsuit was "potentially dangerous" and that if the plaintiffs prevailed, Hallinan could face personal exposure of up to $10 million if the plaintiffs could establish that Hallinan had not actually sold Apex 1 Processing to Ginger. App. 6889-91. Neff also advised Hallinan to contact his accountant, Rodney Ermel, about submitting "corrected" tax returns and to "retroactively" transfer all business activity from Apex 1 Processing to one of the other Hallinan Payday Loan Companies in order to make it appear like Apex 1 Processing had very few assets with which it would be able to pay a settlement or judgment in the Indiana Lawsuit. *Id.*

At roughly the same time, Hallinan called Ginger and offered to pay him $10,000 a month to help defraud the Indiana plaintiffs, including by firing Verbonitz. Hallinan bragged about this scheme to Rubin in a recording played for the jury, explicitly admitting that he called Ginger and said, "look, we got a lawsuit in Indiana against us. And uh, I'll pay you ten grand a month if you will step up to the plate and say that you were the owner of Apex One Processing, and upon the successful conclusion of the

lawsuit, I'll give you fifty grand. He says, I swear to God...When can I get the first wire?" App. 6390-95.

Hallinan's statements to Rubin were corroborated by documents. On July 22, 2013, Canadian attorney Robert Banno sent a letter to Verbonitz on behalf of "Hereditary Chief Randall Ginger, and his wholly-owned entity, GR Financial." App. 6404. Banno's letter stated that GR Financial was "the 100% owner of Apex 1 Processing" and that Apex 1 Processing was terminating its legal services agreement. *Id*. On July 26, 2013, Verbonitz moved to withdraw as counsel.

On August 2, 2013, Neff sent an email to Ginger, advising him to send emails to Verbonitz, Hallinan, and Kevitch, terminating each of them from Apex 1 Processing, and directing them to "box up any and all of [their] records relating to Apex 1 Processing, Inc., and ship them to [Banno] by UPS to the Reserve Lands address of the Tribe" in West Vancouver, Canada. App. 6787-88. Ginger followed Neff's advice and sent termination emails to Verbonitz, Hallinan, and Kevitch. App. 2287, 4160-61.

Kevitch "laughed a little" when he received the email from Ginger because "[i]t was the first time I ever heard from him," and because "I didn't realize I took direction from him." App. 2287. Verbonitz also testified that this email was the only communication she ever received from Ginger.

App. 3964. Neither Kevitch nor Verbonitz actually sent any materials to Ginger. App. 2287-88, 4164.

Shortly after Ginger sent the emails to Verbonitz and Kevitch, Hallinan wired $10,000 to a Canadian bank account controlled by Ginger. App. 6737-39. At the time, Hallinan was still paying Ginger $5,000 a month as part of their longstanding arrangement, but on August 9, 2013, Hallinan sent Ginger an extra $10,000. *Id*. Hallinan then sent $15,000 payments to Ginger during each of the following eight months, with the last sent on April 2, 2014. *Id*. At Ginger's direction, Hallinan sent some of the payments to Ginger's wife, Juan Wen.[18]

On September 24, 2013, Banno sent a letter to plaintiffs' counsel stating that he represented "Aboriginal GR Financial and its Hereditary Chief Randall Ginger." App. 6405-06. Banno wrote that Apex 1 (1) "is not operational, no longer carries on business, and has not done so for several years;" (2) "has few, if any, assets"; and (3) "has "no officers or employees and is overseen by Chief Ginger, carrying on business as Aboriginal GR Financial." *Id*.

[18] Hallinan sent the payments from different companies at different times. App. 6737-39, 6758-61. Most payments were sent to Aboriginal GR Financial, Aboriginal GR Enterprises, or Wen. *Id*. Some were transmitted through third parties. *Id*.

On September 26, 2013, Neff sent emails to Hallinan, Banno, and Verbonitz to discuss strategy. App. 7066-67. In one email, Neff stressed the importance of keeping the plaintiffs' lawyers from having future contact with Verbonitz or Apex 1's local counsel in Indiana "to avoid any potential questioning of either of them as to any deep pockets or responsible party associated with Apex 1." App. 7066-67.

Neff and Hallinan hired Kenneth Dubrow, an attorney at The Chartwell Law Offices, LLP ("Chartwell"), to replace Verbonitz on the Apex 1 defense team. App. 4361. Dubrow never entered an appearance in the Indiana case, but he represented Apex 1 in settlement talks with the plaintiffs, and he also represented Hallinan at a deposition. App. 4368-70. At Neff and Hallinan's direction, Dubrow sent his legal bills to Banno in Canada to create the appearance that Ginger was his client contact. App. 4394, Supp. App. 838.[19] Hallinan paid them all. App. 4490-91.

Hallinan was deposed on February 5, 2014. App. 6407-90. Hallinan testified, *inter alia*, that Apex 1 had gone out of business around 2010, App. 4458, 4473, 6412, 6434, 6459-60; that Hallinan had sold Apex 1 to Ginger in November 2008, App. 4473, 6434; and that after the sale, Hallinan became vice president of Apex 1 earning $10,000 a month. *Id.*

[19] *See* Exhs. 911-921.

Hallinan also testified that in January or February 2009, "I decided I no longer wanted to be there and no longer wanted to receive any compensation, so I called Randy Ginger and told him: Randy, you don't need me, I'm not performing any services. I'm spending my time in Florida, and I'm taking money under false pretenses, and I'd like to end the deal." App. 4475-76, 6455-56. Hallinan also testified that made no loans to Apex 1, and he did not receive any compensation from Apex 1 since February 2009. App. 4477, 6463. Hallinan also testified that he did not employ Verbonitz to represent Apex 1 in the Indiana lawsuit and he did not know who was paying Apex 1's legal expenses. App. 4491-92, 6464.

The government proved that most of Hallinan's testimony was false. Ginger never paid Hallinan for Apex 1. App. 6737-39. Hallinan received more than $750,000 from Apex 1 between May and September of 2010. App. 4478-80. Hallinan was Verbonitz's contact at Apex 1, and his companies paid all of Apex 1's legal bills – approximately $513,516.99 to Weir, App. 7062, and approximately $46,189 to Chartwell, App. 7071.

The defendants' efforts to deceive the Indiana plaintiffs were successful. With regard to each class member, the lawsuit had sought $2,000 in statutory damages for each of five violations of the Indiana Small Loans Act. App. 4746-48. Thus, the lawsuit sought a total of $13,930,000 in

statutory damages for the 1,393 class members. *Id*. The lawsuit also sought recovery of the principal and interest on each loan as well as attorneys' fees. *Id*.

In April 2014, however, the plaintiffs agreed to settle the lawsuit for approximately $260,000. App. 4511, 4818. Although plaintiffs' counsel did not believe Hallinan had been truthful at his deposition, App. 4804-05, they also thought it would "be extremely difficult to prove that." App. 4805. One plaintiffs' lawyer, Vess Miller, explained that although he believed Hallinan "was behind Apex 1 in some form," his believing it "is not good enough for me in court to prove Mr. Hallinan is behind this in a way that will allow him to be held liable if Apex 1 is a shell." App. 4806. Miller explained that he lacked the investigative power of the government, and in a civil case had to rely on the honesty of witnesses. *Id*.

Hallinan, not Ginger, paid the settlement award. On April 18, 2014, Hallinan's CFO, Brent Kopenhaver, signed a check payable to Chartwell for $260,000, drawn on an account for one of the Hallinan Payday Lending Companies, Mill Realty Management. App. 1582.

E. Hallinan's Attempts to Obstruct Justice.

During its investigation of this case, the government served grand jury subpoenas upon Weir and Chartwell for documents relating to their

representation of Apex 1 in the Indiana lawsuit. App. 1479-80, 1504-06. Weir and Chartwell produced some responsive documents but withheld or redacted others as privileged communications with their former client, Apex 1.[20] The government filed separate motions to compel.

Hallinan did not directly oppose the motions because if he had claimed an interest in any of the Weir and Chartwell documents, it would have been inconsistent with his deposition testimony that he: (a) had sold Apex 1 in 2008, (b) had not had anything to do with the company since February 2009, and (c) had no interest or involvement in the Indiana lawsuit. Hallinan, however, also knew that some of the documents being withheld by Weir and Chartwell were highly inculpatory.

Hallinan's solution to this dilemma was to enlist Ginger again to act as a front for his interests. First, Hallinan paid more than $50,000 in legal fees for Ginger to assert privileges in the Weir and Chartwell documents and oppose the government's motions to compel. The grand jury judge, however, overruled Ginger's objections, in part because he concluded that

[20] Much of the information described in this section was summarized in the government's sealed brief in *In re Grand Jury Matter #3*, No. 15-3317, which the government incorporates. Some relevant portions of the record remain under seal, so they are not referenced here.

any privilege claims in the documents would belong to Apex 1 as an entity, not to Ginger as an individual.

Hallinan and Ginger then agreed to hire the Law Firm of Lisa A. Mathewson to make privilege assertions on behalf of Apex 1. They also agreed that Ginger, not Hallinan, had to be the person purporting to hire Mathewson on behalf of Apex 1. On October 29, 2015, Ginger, claiming to be an "authorized representative" of Apex 1, signed an engagement letter, hiring Mathewson to represent Apex 1 and challenge the grand jury subpoenas to Weir and Chartwell. App. 7055-57. Hallinan contemporaneously signed an agreement promising to pay Mathewson for representing Apex 1. App. 7058-60.

From November 2015 until July 2017, Hallinan paid Mathewson more than $414,000 to make privilege assertions on behalf of Apex 1 in order to (1) block the grand jury's access to the Weir and Chartwell documents; (2) prevent Verbonitz and Dubrow from testifying in the grand jury; and (3) prevent the government from presenting any of this evidence to the jury at his trial.[21] App. 7061. In so doing, Hallinan and Ginger

[21] Mathewson's efforts largely failed, as the grand jury judge ruled that the crime-fraud exception pierced most of Apex 1's privilege assertions. Mathewson then filed a motion for Apex 1 to intervene in the criminal trial, ECF No. 130, but this motion was denied.

repeatedly represented to Mathewson and to two district judges, that: (a) Apex 1 was a going concern; (b) Apex 1 had an interest, as an entity, in making privilege assertions; and (c) Ginger, not Hallinan, was making the privilege assertion decisions. In truth, Ginger did what Hallinan asked him to do to impede the government from obtaining and using evidence that incriminated Hallinan personally.

Hallinan also contacted two witnesses on the eve of trial. In late August and early September 2017, Hallinan sent multiple emails to Kevin Cline, the regulatory agent for Guidiville, and Walter Gray, the tribal administrator, even though Hallinan's pretrial release order had included a condition that he not contact any trial witness. Hallinan also spoke with Cline, although he did not say much more than, "it doesn't sound like you want to talk to me."

II. Procedural History

A. The Charges.

On December 1, 2016, a federal grand jury returned a 17-count superseding indictment against Hallinan, Neff, and Ginger. Counts 1 and 2 charged Hallinan and Neff with conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), in violation of 18 U.S.C. § 1962(d). Count 3 charged all three defendants with conspiracy to

commit mail fraud, wire fraud, and money laundering, in violation of 18 U.S.C. § 371. Counts 4 and 5 charged all three defendants with mail fraud and aiding and abetting, in violation of 18 U.S.C. §§ 1341 and 2. Counts 6 through 8 charged all three defendants with wire fraud and aiding and abetting, in violation of 18 U.S.C. §§ 1343 and 2. Counts 9 through 17 charged Hallinan and Ginger with international money laundering and aiding and abetting, in violation of 18 U.S.C. §§ 1956(a)(2) and 2.

The first conspiracy charge, in Count 1, involved an alleged RICO enterprise identified as the "Hallinan Payday Loan Organization," which included businesses that Hallinan owned, operated, controlled, and financed out of offices in Pennsylvania. The second conspiracy involved an alleged RICO enterprise identified as the "Rubin Payday Loan Organization," which included businesses owned, operated, and financed by Adrian Rubin, the former partner of Hallinan and a client of Neff.

Count 1 alleged that from 2007 until 2013, Hallinan and Neff conspired to use the Hallinan Payday Loan Organization to collect more than $490 million in debt from payday loans that had been issued to borrowers who lived in states like Pennsylvania, where the loans were unenforceable because of usury laws. Count 2 alleged that from at least November 2011 until at least March 2012, the defendants conspired to use

the Rubin Payday Loan Organization to collect unlawful debt from payday loans. Both Counts 1 and 2 alleged that the defendants sought to evade state usury laws by entering into deceptive arrangements with Indian tribes that were designed to give the impression that the tribes owned and operated the payday loan companies, so that the tribes could claim "sovereign immunity" from laws the defendants did not want to follow.

Counts 3 through 8 alleged that the defendants conspired to defraud and did defraud 1,393 people who brought a class action lawsuit in Indiana against one of Hallinan's payday loan companies, Apex 1 Processing, Inc. ("Apex 1"), persuading them to accept a discounted settlement on claims worth $10 million. Counts 9 through 17 alleged that Hallinan made nine monthly, international wire transfers of $10,000 to Ginger, from August 2013 through April 2014, to induce Ginger's participation in the fraud.

The indictment contained three notices of forfeiture. The first notice stated that if the defendants were convicted on Count 1, the government would seek forfeiture of their interests in the Hallinan Payday Lending Organization, including $490,000,000 in proceeds. The second notice stated that if convicted on Count 2, the defendants should forfeit their interests in the Rubin Payday Lending Organization, including $100,000.

The third notice stated that if convicted on Counts 9 through 17, Hallinan and Ginger should forfeit $90,000.

An original indictment had been returned on March 31, 2016. The superseding indictment did not add new charges and instead corrected aspects of the original charges and elaborated upon some allegations. Hallinan and Neff were arraigned on April 7, 2016, and pleaded not guilty to all charges. Ginger, believed to be in Canada, has yet to be arraigned.

B. Legality of the Tribal Model.

On September 1, 2016, appellants Hallinan and Neff moved to dismiss Counts 1 and 2 of the original indictment, on grounds that they were immune from state usury laws because of their claimed affiliations with Indian tribes. Instead of filing a supporting memorandum of law, the defendants incorporated a motion that had been filed in a criminal case pending in the Southern District of New York (*United States v. Scott Tucker, et al.*, Crim. No. 16-91). The defendants did not amend their motion after the superseding indictment was returned. Nor did they seek dismissal of Counts 3 through 17.

On December 29, 2016, the district court denied the motion to dismiss, ruling that Indian tribes may not disregard state laws when making loans to borrowers who are not on reservations. Supp. App. 1-4.

The court added that even if Indian tribes could evade state usury laws by making loans from their reservations, "Hallinan and Neff do not claim that they are Indian tribes, or members of Indian tribes, and thus are not entitled to receive tribal sovereign immunity." Supp. App. 3. "[S]imply affiliating with an Indian tribe did not give Hallinan and Neff the benefits of tribal immunity, whatever those benefits may or may not be in this situation." *Id.* (citation omitted).

On December 9, 2016, while their motion to dismiss was pending, the defendants filed a joint trial brief, which stated they would be asserting a "good faith" defense to the RICO conspiracy charges. Supp. App. 9. The defendants stated they would present testimony that Neff believed Ginger was affiliated with a tribe that enjoyed the benefit of tribal sovereign immunity under United States law, and that Neff "had performed considerable due diligence and legal research" and had come to the legal conclusion that the so-called "tribal model" of payday lending rendered state usury laws inapplicable to tribal loans. Supp. App. 11. "[T]his testimony will not be offered to establish that the tribal lending model is in fact legal but rather to show that Mr. Neff believed in good faith that it was and thus acted without the type of intent that the government must show to prove the conspiracy charge." *Id.* The defendants also stated that they

would present expert testimony on the law to support Neff's "good faith" defense. Ultimately, however, the defendants did not present expert testimony.

On September 26, 2017, the defendants stated Hallinan would "abandon the advice-of-counsel defense." App. 535.[22] The government argued that as a result, the defendants should be precluded from arguing that they relied on the advice of any lawyers connected to this case "or any other attorneys who have offered legal opinions about the legitimacy of what the defendants have described in their pretrial filings as the 'Bank Model' and the 'Tribal Model' of payday lending." Supp. App. 174-78.

Neff's counsel responded that Neff was "not going to get up there and say, 'I spoke with Laurence Tribe, and Laurence Tribe told me this was a valid model.' I do expect him to testify that in the course of looking at this, not only did I look at the case law, I conferred with other attorneys, and based on that, this is how I subjectively came to the conclusion that this was a – something that could be done." App. 536.

[22] Neff already had stated that he would not assert such a defense, but Hallinan indicated he might argue he relied on Neff's counsel. App. 137.

C. The Privilege Dispute Over an Email.

As explained earlier, Neff sent to Hallinan an email on July 12, 2013, concerning the Indiana lawsuit against Apex 1. In the email, Neff warned that Hallinan faced personal exposure of up to $10 million if the plaintiffs could prove that he had not really sold Apex 1 to Ginger. Referencing tax returns that identified Hallinan as the owner of Apex 1, Neff advised Hallinan to have his accountant, Rod Ermel, "correct" those returns to identify Ginger as the owner. App. 6890. Neff also advised Hallinan that Apex 1 should not conduct any future business. On July 16, 2013, Hallinan forwarded Neff's email to Ermel, and directed Ermel to read the paragraphs about "correcting" his tax returns. *Id*.

Ermel produced the email to the government in December 2014 along with other documents responsive to a grand jury subpoena. App. 6891. The next day, Ermel's attorney sought to recall the email on the grounds that it was privileged and had been inadvertently included in his client's production. Shortly thereafter, Hallinan's lawyers told the government that Hallinan asserted a privilege in the email.

On January 23, 2015, the government filed a motion with the grand jury judge for permission to present the email to the grand jury and served

copies of the motion on Hallinan and Neff. Only Hallinan opposed the motion.

On June 1, 2015, the grand jury judge granted the government's motion. The court found that the Hallinan had waived his attorney-client privilege by forwarding the email to Ermel, and that the crime-fraud exception pierced any work product privilege in the email.

Hallinan appealed to this Court and moved in the district court for a stay pending appeal. The grand jury judge denied Hallinan's motion for a stay, and Hallinan did not seek a further stay from this Court. The government then presented the email to the grand jury. Both indictments identified the July 12, 2013, email from Neff to Hallinan as the wire fraud predicate in Count 6 and the July 16, 2013, email from Hallinan to Ermel as the wire fraud predicate in Count 7. App. 110.

On October 28, 2016, a panel of this Court denied Hallinan's appeal on jurisdictional grounds. Hallinan moved for panel rehearing or rehearing *en banc*. On January 27, 2017, the panel issued a new opinion, which vacated its prior ruling, granted panel rehearing, and held that: (a) this Court had jurisdiction to consider Hallinan's appeal; and (b) the email was not subject to the crime-fraud exception to the work product privilege on the grounds advanced by the government. *In re Grand Jury Matter #3*, 847

F.3d 157, 160 (3d Cir. 2017). This Court added, "[n]one of this should suggest that, in the event [Hallinan] is convicted (based on the superseding indictment) and appeals, he should automatically get a new trial because the Government used the protected work product." *Id.* at 167. "That is because the Government could avoid a retrial by showing the error was harmless." *Id.*, citing *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255-56 (1988). The Court remanded the case "for further proceedings consistent with this opinion."

On February 8, 2017, the defense moved to dismiss the first and superseding indictments. App. 244-99. The government, meanwhile, moved *in limine* to admit the email based on evidence that had not been presented to either the grand jury judge or this Court. Supp. App. 15-99. The government argued that there was additional evidence that Hallinan had used the email to further the Indiana fraud, which it had been precluded from presenting to this Court under Federal Rule of Appellate Procedure 10(b). The government also argued that there was a reasonable basis to suspect that: (1) in addition to defrauding the Indiana plaintiffs, Hallinan had committed tax crimes; and (2) the email was used in furtherance of those tax crimes. The government also argued that Neff had waived any privilege claim he might once have been able to assert.

On August 11, 2017, the district court held a hearing on several pretrial motions, including those concerning the email. App. 300-510. The district court heard argument limited to the question whether the email was used to further some crime or fraud that had not been considered by this Court. The court denied the government's request to hear argument about new evidence relating to the fraud: "I mean I'm not going to overrule what they did. You have to persuade me that this is some other crime and under the law I am permitted to look at." App. 416.

On August 15, 2017, the district court issued an order denying the defendants' motion to bar the use of the July 12, 2013, email at trial and granting the government's motion *in limine* to admit the email. Supp. App. 128-32. The court also denied the defendants' motion to dismiss the indictment and stated that to the extent the defendants sought dismissal of Counts 6 and 7 because the government had presented the email to the grand jury, "[t]his argument is now irrelevant, because the Court is allowing the email to be admitted as evidence." Supp. App. 130-31.

D. The Trial.

The trial began on September 26, 2017.

During the trial, Ermel testified that for many years, Hallinan authorized him to prepare and file tax returns that identified Hallinan as

the sole owner of Apex 1. App. 1918-19, 1926-28, 1938-51, 1984, 1995-98, 2001-09. The government then moved to admit the email thread that had been the subject of the privilege dispute. App. 2019. The defendants renewed their objections, but the Court admitted the email thread as Exhibit 400. App. 2019-21.

Neff testified in his own defense over four days. App. 5126-92, 5219-5754. Neff told the jury that he had done extensive legal research on payday lending, and he described that research in general terms. The court, however, did not permit Neff to detail the legal opinions of other lawyers or to describe the contents of judicial rulings from other cases. The defense did not present any expert testimony.

The district court charged the jury on November 20, 2017, App. 5934-6017, after which the defendants preserved only one objection: they wanted the judge to instruct the jurors that to convict a person of RICO conspiracy, they had to find that the defendants had "willfully" violated the law. App. 6020, Supp. App. 179-86.

On November 27, 2017, the jury convicted both defendants of all charges. Neither Hallinan nor Neff filed Rule 29 motions. App. 48-49.

E. Post-Trial Proceedings.

All parties waived their rights to have the jury decide the forfeiture facts and opted for a bench trial on forfeiture. Supp. App. 187-88.

1. Neff's forfeiture and sentencing proceedings.

With regard to Neff, the government sought to forfeit approximately $363,334 in legal fees that Neff had received from Hallinan and Rubin to facilitate the charged RICO enterprises. Supp. App. 202. The government also sought to forfeit Neff's residence on the grounds that Neff had used it to facilitate the Hallinan Payday Lending Enterprise and as a "source of influence" over the enterprise. Supp. App. 203, 216-18.

On March 29, 2018, the district court issued a preliminary order of forfeiture, which it amended on April 5, 2018. The amended order stated that the government was entitled to a money judgment of $356,032.75 from Neff as well as 12.11% of Neff's interest in his home, the latter representing the percentage of the square footage that Neff's home office occupied within his residence. Supp. App. 312. The court concluded that although Neff used an office in his home to facilitate the RICO conspiracies, there was no evidence that he aided the conspiracies from any other part of his residence. *Id.*

On April 19, 2018, Neff's trial counsel moved to withdraw, citing "a complete breakdown of the attorney-client relationship to the extent that there are irreconcilable and irrevocable differences of opinion." Supp. App. 314-16. Neff's counsel elaborated at a hearing on April 24, 2018, stating that Neff had asked him "to present legal positions that I was unwilling to present," one of which was that there was "no intended loss whatsoever" associated with the Indiana fraud scheme. Supp. App. 322. Neff's lawyer said Neff "thinks that these arguments have tremendous merit...I didn't raise them because I didn't think they did." Supp. App. 323-24. The court granted counsel's motion to withdraw and permitted Neff to hire a new attorney for sentencing. Supp. App. 357-59.[23]

Neff's Presentence Investigation Report ("PSR") divided his crimes into three "groups," pursuant to U.S.S.G. § 3D1.2: Group I, based on the Hallinan RICO conspiracy in Count 1; Group II, based on the Rubin RICO conspiracy in Count 2; and Group III, based on the conspiracy and fraud charges in Counts 3 through 8. PSR ¶ 66. The PSR stated that the offense

[23] The court also applauded Neff's trial counsel for refusing to file what he believed was a "frivolous" motion: "Sadly, in this case, there have been more than a few occasions in which the lawyers, which have some connection with this case, have not acted either in a manner consistent with the law or their own conscience, and they have simply gone along for the ride with decisions they should not have pursued." Supp. App. 357-58.

levels for Groups I and II were both 27, and the offense level for Group III was 39. PSR ¶¶ 67-90.

The Group III calculation included a 20-level upward adjustment, pursuant to U.S.S.G. § 2B1.1(b)(1)(K), based on an intended loss amount exceeding $9.5 million. *Id*. ¶ 83. The PSR based this amount on Neff's July 12, 2013, email to Hallinan, warning that Hallinan faced personal exposure of up to $10 million if the Indiana lawsuit were successful. *Id*. Applying the Guidelines' grouping rules, the PSR concluded that Neff's total offense level was 39. *Id*. ¶¶ 91-97.

Neff's sentencing hearing occurred on May 25, 2018. At the hearing, Neff's new attorney argued that there should not be any loss associated with the Indiana fraud scheme because the plaintiffs' claim had "no fair market value" since it had not yet been adjudicated. App. 7850.

The district court asked, "[W]here do you get that idea? Claims are traded all the time. They're sold. They're assigned. They're traded. That's why in a release, you release claims. I don't understand how you say that a claim has no value. Now, it may have less value than it purports to be, but it has...an intended value." *Id*.

Neff's attorney then conceded, "I'm not saying it has no value whatsoever. I mean, obviously, that's why they're pursuing the lawsuit because they think that there is some return." *Id.*

The district court rejected Neff's no-loss argument. App. 7897-98.

> [T]he litigation financing industry, in general, establishes an unadjudicated legal claim is really measurable in money. I disagree that either a judgment or settlement is required in order to assign a value to a filed legal claim. Indeed, litigation releases are premised on the idea that unadjudicated legal claims have values, and as I have earlier pointed out, legal claims are readily sold, assigned, or traded in the open market. So that objection is overruled.

App. 7898.

The court also concluded that the intended loss attributable to the appellants' fraud scheme was $10 million. *Id.* The court, however, held that this amount substantially overstated the seriousness of the offenses, so a downward departure would be appropriate under Application Note 20C of U.S.S.G. § 2B1.1. *Id.* The court applied a loss amount of $557,200, which was the amount of a settlement offer that the defendants had extended to the Indiana plaintiffs in December 2013. App. 7890, 7900. Under U.S.S.G. § 2B1.1(b)(1)(H), such a loss amount would result in an upward adjustment of 14 levels, not 20 levels, so the court effectively granted a six-level downward departure. The court also sustained Neff's objections to the

application of enhancements based on the vulnerability of the fraud victims. App. 7899-7901.

With these adjustments, the court found that Neff's adjusted offense level for Group III was 29, not 39, and that Neff's total offense level was 32. Supp. App. 362. Using this formulation, the court held that Neff's Guidelines range was 121-151 months' imprisonment. App. 7901, Supp. App. 363.

The court then varied downward, pursuant to 18 U.S.C. § 3553(a), App. 8018, and sentenced Neff to 96 months' imprisonment, followed by three years' supervised release. The court also ordered Neff to pay a fine of $50,000 and a special assessment of $800, and the court incorporated its prior forfeiture rulings.

2. Hallinan's forfeiture and sentencing proceedings.

On April 6, 2018, and April 25, 2018, the district court held evidentiary hearings on the government's forfeiture motion regarding Hallinan. On May 16, 2018, both the government and Hallinan filed post-hearing briefs. Supp. App. 458-574. *See also* App. 7080-7106; Supp. App. 364-433 (pre-sentencing offers of proof).

On June 27, 2018, the district court entered a judgment and preliminary order of forfeiture, Supp. App. 575-86, with an accompanying

memorandum containing findings of fact and conclusions of law. Supp. App. 587-627. The court found that Hallinan must forfeit (or pay a money judgment) of $65,339,327 derived from unlawful debt collection, as charged in Counts 1 and 2, which was subject to forfeiture under 18 U.S.C. § 1963(a)(3), Supp. App. 576-77; and $90,000 involved in international money laundering crimes charged in Counts 9 through 17, which was subject to forfeiture under 18 U.S.C. § 982(a)(1), Supp. App. 577. The court also held that the government had proven that 21 other assets, including bank account funds and three cars, comprised property of the RICO enterprise, so Hallinan's interest in those assets would be forfeited. Supp. 579-83.

Both parties objected to portions of the forfeiture rulings, which the court resolved at the end of Hallinan's sentencing hearing on July 6, 2018. App. 11-20; Supp. App. 630-34. At the sentencing, the court concluded that Hallinan had a total offense level of 36, a criminal history category of I, and an advisory sentencing range under the Guidelines of 188-235 months' imprisonment.[24] App. 8165; Supp. App. 637. To reach these conclusions, the court employed much of the same analysis that it had when sentencing

[24] The court determined that the adjusted offense levels were 29 for Group I, 25 for Group II, and 33 for Group III, which resulted in a combined adjusted offense level of 36. Supp. App. 636.

Neff: e.g., finding an intended loss amount of $9.5 million, but departing downward because that figure overstated the seriousness of the offenses. App. 8160; Supp. App. 635-37.

The court also applied a two-level upward adjustment for obstruction of justice, based on a finding that Hallinan had attempted to obstruct the investigation and prosecution of his crimes. The court found that Hallinan had conspired with Ginger to hire an attorney to make privilege assertions on behalf of Apex 1, even though they knew Apex 1 was defunct, in order to block investigators, prosecutors, and the court from having access to certain documents and information in the possession of the lawyers who represented Apex 1 in the Indiana lawsuit. App. 8162-63.

The court granted a two-level downward departure to 34, based on Hallinan's age and illness. App. 8195. The court then varied downward one more level, based on its analysis of 18 U.S.C. § 3553(a). App. 8221. As a result, Hallinan's new offense level was 33, and his Guidelines range was 135-168 months' imprisonment. App. 8221. The court sentenced Hallinan to 168 months' imprisonment, three years' supervised release, a fine of $2.5 million, and a $1,700 special assessment. App. 8227. The court also modified Hallinan's forfeiture order to reduce the money judgment on Counts 1 and 2 to $64,300,829. App. 8235, 8257.

The court ordered Hallinan to self-surrender on July 17, 2018. App. 8273. Hallinan filed an appeal in this Court and moved in the district court for a stay of his surrender date pending appeal. On July 25, 2018, the district court denied that motion. Hallinan filed an emergency motion in this Court for a stay of surrender and for bail pending appeal.

On July 26, 2018, this Court denied Hallinan's motion, stating, "Appellant has not presented a substantial question of law or fact to be adjudicated on appeal."

STATEMENT OF RELATED CASES

There are several related cases. In Appeal No. 15-2475, Hallinan challenged a ruling granting the government's motion to present an email to the grand jury. On January 27, 2017, a panel of this court reversed the grand jury judge's ruling and remanded for further proceedings. *In re Grand Jury Matter #3*, 847 F.3d 157 (3d Cir. 2017).

Defendant Ginger filed a sealed appeal of a different ruling by the grand jury judge. That appeal was docketed at No. 15-3317. Ginger withdrew the appeal before it was resolved.

Apex 1 Processing, Inc. filed two separate, sealed interlocutory appeals of rulings by the grand jury judge. Those appeals, docketed at Nos. 16-1787 and 16-4631, were consolidated, and on June 23, 2017, a panel of this Court granted the government's motion to dismiss both of them.

There were related cases in the district court, including *United States v. Adrian Rubin*, Crim. No. 15-238; *United States v. Blake Rubin, et al.*, Crim. No. 14-388; and *United States v. Intercept Corp.*, Crim. No. 17-491.

The government is not aware of any other related case or proceeding that is completed, pending, or about to be presented before this Court or any other court or agency, state or federal.

SUMMARY OF ARGUMENT

1. The district court did not abuse its discretion when it admitted an email that Neff wrote to Hallinan on July 12, 2013, after determining that the crime-fraud exception pierced any work product protection in the email. The court had a reasonable basis to conclude both (a) that the defendants committed or intended to commit tax crimes, and (b) that the email was used in furtherance of those tax crimes. The court's ruling should be affirmed on the additional ground that there was a reasonable basis to conclude that Hallinan used the email to further the Indiana fraud, based on evidence not previously presented to this Court. Also, any error in admitting the email was harmless given the avalanche of other evidence of the defendants' guilt on the fraud and money laundering charges. The email was also admissible at least against Neff because he waived any privilege claim he might once have been able to assert in the email.

2. The district court did not commit plain error by not *sua sponte* entering verdicts of acquittal for appellant Neff on Counts 1 and 2 of the indictment based on insufficiency of evidence. There was abundant evidence that Neff's claim of good faith reliance on a tribal model of lending was false.

3. The district court correctly charged the jury on the elements necessary to convict the appellants of RICO conspiracy when it tracked the Third Circuit Model Jury Instructions and denied a defense request to add a scienter requirement of "willfulness" that is not found in the statute, the case law, or the model instructions. The instructions as a whole made clear that the defendants had to be aware that they were endeavoring to collect "unlawful" debts, and that was appropriate under the law.

4. The district court did not abuse its discretion when it held that although Neff could testify that he believed in good faith that his conduct was lawful, he could not support that defense by telling the jurors what other lawyers had told him or by seeking admission of judicial rulings that Neff thought supported his position. The evidence Neff sought to admit would have had a tendency to confuse and mislead the jury. The exclusion of such evidence also did not impact Hallinan, since he did not present any evidence in support of a good faith defense.

5. The district court did not plainly err by permitting Counts 3 through 17 to go to the jury. There is no merit to the appellants' claim that an unadjudicated cause of action is neither "money" nor "property" under the federal mail and wire fraud statutes. The law has traditionally recognized that "a cause of action" is a species of property. There is indeed

an entire industry dedicated toward investing in unadjudicated legal claims, and Neff personally participated in this industry while representing Rubin. Neff's appellate counsel even admitted that the Indiana plaintiffs' unadjudicated lawsuit had some value.

6. The district court did not clearly err when it found at sentencing that the intended loss attributable to the appellants' fraud scheme exceeded $9,500,000. Neff had told Hallinan that the lawsuit was worth up to $10 million at a time when the defendants were offering the plaintiffs $40,000 to settle the case.

7. The trial court did not clearly err when it concluded at sentencing that Hallinan had attempted to obstruct the investigation and prosecution of this case. After disavowing any connection to Apex 1 and testifying that Apex 1 was out of business, Hallinan spent nearly two years paying others to make privilege assertions on behalf of Apex 1 in order to block the government's access to and use of evidence relating to the representation of Apex 1 in the Indiana lawsuit. In so doing, Hallinan sought to mislead both a lawyer and two district judges into believing that: (a) Apex 1 was a going concern; (b) Apex 1 had an interest in asserting the privilege; and (c) Ginger was an authorized representative of Apex 1.

8. The district court's forfeiture rulings were supported by the law and the record. A reasonable factfinder could have found, as the court did, that assets located in five bank accounts, and two vehicles, were traceable to the RICO conspiracy charged in Count 1. A reasonable factfinder also could have concluded beyond a reasonable doubt that Hallinan had received at least $64,300,829.90 in proceeds from illegal payday lending. The court correctly rejected Hallinan's argument that this total should be reduced by some of his claimed expenses for operating his illegal business, such as those related to marketing, credit fees, and salaries.

INDEX

ARGUMENT

I. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN ADMITTING AN EMAIL BASED ON THE CRIME-FRAUD EXCEPTION TO THE ATTORNEY WORK PRODUCT DOCTRINE

Standard of Review

A district court's decision regarding the admissibility of evidence is reviewed for abuse of discretion. *United States v. Serafini,* 233 F.3d 758, 768 n.14 (3d Cir. 2000). Likewise, a district court's decision that "there is sufficient evidence of a crime or fraud to waive the attorney-client privilege" is also reviewed for "abuse of discretion." *In re Grand Jury*, 705 F.3d 133, 155 (3d Cir. 2012); *In re Impounded*, 241 F.3d 308, 312 (3d Cir. 2001).

Discussion

Both defendants/appellants contend that the district court erred when it ruled that the July 12, 2013, email from appellant Neff to appellant Hallinan was admissible because the crime-fraud exception pierced any privilege that might have applied to the email. Neither appellant, however, attempts to meet his burden of proving that the district court's ruling was an abuse of discretion. Instead, they argue as if they are entitled to *de novo* review and claim the admission of the email was error, largely based on

assertions that the district court flouted this Court's January 27, 2017, ruling. Hallinan also indirectly challenges the district court's denial of his motion to dismiss the indictment. None of the appellants' arguments has any merit.

The district court acted within its discretion when it concluded, after a fulsome hearing, that there was a reasonable basis to suspect the appellants committed or intended to commit tax crimes and that the July 12, 2013, email was used to further those crimes. Nor was there anything improper about the court's consideration of the government's motion *in limine*. This Court had remanded the case for "further proceedings" and allowed the court to consider new evidence and arguments relating to the email that had not yet been presented. Moreover, any error in admitting the email was harmless, given the avalanche of other evidence the government presented of the defendants' guilt on Counts 3 through 17. Neff also waived any privilege he might otherwise have been able to assert in the email.

A. The District Court Acted Within its Discretion.

"To show an abuse of discretion, appellants must show the district court's action was 'arbitrary, fanciful or clearly unreasonable.' *Stich v. United States*, 730 F.2d 115, 118 (3d Cir.1984). We will not disturb a trial

court's exercise of discretion unless 'no reasonable person would adopt the district court's view.' *Oddi v. Ford Motor Co.*, 234 F.3d 136, 146 (3d Cir.2000)." *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 412 (3d Cir. 2002). "If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 115 (3d Cir. 1976) (*en banc*).

Neither appellant attempts to show that the district court's decision to admit the July 12, 2013, email was "arbitrary, fanciful, or clearly unreasonable," and that no reasonable person would adopt the district court's view. Instead, they criticize the government for moving *in limine* to admit the email, which Hallinan labels an "end-run around this Circuit's decision," Br. 15, and they lambaste the judge for "[s]hockingly" accepting the government's arguments, "circumvent[ing] this Court's prior ruling, and allow[ing] the Privileged Email to be admitted at trial," Br. 19.

There is, of course, nothing improper about filing a motion, and it is irrelevant whether the defendants were "shocked" by the district court's ruling. Nor would it matter if a different judge might have ruled differently. The only appellate question is whether the district court acted within its discretion. This Court made that clear in the "close case" of *In re Grand*

Jury Subpoena, 745 F.3d 681, 691 (3d Cir. 2014), where it found no abuse of discretion.

The district court in this case is entitled to the same deference, and there is nothing in the record to suggest that its admission of the July 12, 2013, email was "arbitrary, fanciful or clearly unreasonable." *Stich*, 730 F.2d at 118. To the contrary, the court acted cautiously, judiciously, and reasonably when it issued its August 15, 2017, Order. The court correctly articulated the applicable legal test, considered all the evidence presented at the August 11 hearing, and found that there was a "reasonable basis to suspect that (1) the defendants were committing or intending to commit tax crimes, and (2) the email was used in furtherance of those crimes." Supp. App. 129-30.

In the email at issue, Neff warned that Hallinan faced personal exposure of up to $10 million if the Indiana plaintiffs could prove that he had not really sold Apex 1 to Ginger. Referencing tax returns that identified Hallinan as the owner of Apex 1, Neff advised Hallinan to have his accountant, Rod Ermel, "correct" those returns to identify Ginger as the owner. App. 6890. Neff also advised Hallinan that "for settlement discussion purposes," it would be important for Apex 1 not to do any more business, and that it would be "helpful" to have all of Apex 1's business

activity "discontinued and retroactively transferred to another one of your many operating companies for that entire 2013, year. All that will tend to confirm that Ginger owned Apex 1 and there are only a minimum amount of assets available for settlement which could possibly be supplement[ed] by some of the receivable amount due Apex 1 as well." *Id.* On July 16, 2013, Hallinan forwarded Neff's email to Ermel. *Id.*

In the grand jury proceedings, the government had asserted that the email furthered the fraud on the Indiana plaintiffs. This Court disagreed. It stated that a "party seeking to apply the crime-fraud exception must demonstrate that there is a reasonable basis to suspect (1) that the [lawyer or client] was committing or intending to commit a crime or fraud, and (2) that the...attorney work product was used in furtherance of that alleged crime or fraud." *In re Grand Jury Matter #3*, 847 F.3d 157, 165 (3d Cir. 2017), quoting *In re Grand Jury (ABC Corp.)*, 705 F.3d 133, 155 (3d Cir. 2012). The Court found that although the government "can readily satisfy the first requirement," because "there is at least a reasonable basis to believe" Hallinan committed a fraud against the Indiana plaintiffs, the government had not satisfied the second requirement. *Id.* at 165-66.

At the August 11, 2017, hearing, the government presented evidence that the email furthered different crimes, specifically, tax offenses. Accountant Ermel testified, *inter alia*, that:

- If Hallinan had truly sold Apex 1 to Ginger in 2008, as Neff claimed in the July 12, 2013, email, Hallinan was legally obligated to report that sale to the IRS, and he had not done so;

- Hallinan also would have been obligated to file amended personal returns, which he did not do;

- Conversely, if Hallinan still owned Apex 1, he had a continuing obligation to report that ownership, and after receiving the July 12, 2013, email, Hallinan filed tax returns for tax years 2013, 2014, and 2015, which did not mention any ownership in Apex 1;

- Apex 1 had a separate and continuing obligation to file tax returns with the IRS, which would have continued until Apex 1 filed a "final return," and Ermel never filed a "final return" for Apex 1 or any other return for Apex 1 since Hallinan forwarded the July 12, 2013, email from Neff on July 16, 2013; and that

- The reason why Ermel never filed any of the legally required tax returns for Hallinan or Apex 1 was because of the email or communications traceable to it.

App. 353-410.

Given that evidence, the district court had a reasonable basis to suspect that: (a) Hallinan committed or aided and abetted the commission of the crimes of willful failure to file tax returns and tax evasion, and (b) those crimes were furthered by the July 12, 2013, email. Hallinan argues

that these are either not crimes or are "crimes of inaction." Br. 21-22. He is mistaken on both fronts, and his second contention is irrelevant.

Multiple federal tax laws criminalize Hallinan's suspected conduct. *See*, *e.g.*, 26 U.S.C. §§ 7201 (any person who "willfully attempts to any manner to evade or defeat any tax" is guilty of a felony); 7203 (any person who willfully fails to file a return, supply information to the IRS, or pay tax is guilty of a misdemeanor); 7206(1) (any person who willfully makes and subscribes any tax return which he does not believe to be true and correct as to every material matter is guilty of a felony). All these crimes require some type of intentional action, whether it is the willful filing of a false return or the willful evasion of a known legal duty, but for present purposes, that does not matter. The defense cites to no legal authority, and the government is aware of none, that stands for the proposition that the crime-fraud exception applies only to crimes of "action" as opposed to crimes of "inaction."

Hallinan is also mistaken when he claims that the tax crimes "are temporally and factually disconnected from" the disputed email. Br. 22. As of July 12, 2013, Hallinan had reported losses from Apex 1 on his personal tax returns, which totaled $216,757 between 2008 and 2012. App. 2130. Those losses offset some of Hallinan's reported income from other sources,

which reduced his overall tax burden for those years. App. 2166-67. Thus, as of July 12, 2013, Hallinan knew that he had either under-reported his overall income to the IRS or that he had a continuing obligation to report his ownership of Apex 1 to the IRS. The district court had a reasonable basis to suspect that Hallinan was committing or intending to commit at least one tax crime as of July 12, 2013.

Such a reasonable basis was even more apparent by the time the court actually admitted the email into evidence at trial. App. 2019-21. By then, the judge (and the jury) had heard Hallinan brag to Rubin on a recording that he did not pay all of his taxes on his payday loan proceeds from a prior company. App. 1429, 6351-53 (“‘[w]e were scared shitless [b]ecause we weren’t paying any taxes.”).

It does not matter whether Hallinan took steps to “retroactively” amend his tax returns, as suggested by Neff, or to “proactively” commit tax crimes. In *In re Grand Jury Proceedings*, the client contemplated bribing a banker, and inquired of an attorney, who provided the client with information regarding the Foreign Corrupt Practices Act. The client proceeded with bribe, but paid it to the banker’s sister instead. This Court held that the district court did not abuse its discretion in finding that the communication furthered a crime, even though the communication led the

client to commit a different crime than the one originally planned. What mattered was that the client could use information from the communication to set a course for criminal activity.

Likewise here, Neff's email to Hallinan alerted Hallinan that, in order to maintain the fiction that Hallinan did not own and control Apex 1, tax filings should reflect that. What Hallinan decided to do, as Ermel confirmed, was to falsely omit his ownership of Apex 1 from his returns, and to fail to file returns for Apex 1 at all. The email from Neff prompted and directly furthered these offenses. The district court therefore ruled:

> In January 2017, the Third Circuit ruled that the email at issue was not subject to the crime-fraud exception to the privileges because there was not a reasonable basis to believe the email had been used in furtherance of the crime or fraud identified by the Government. That decision did not, however, foreclose the possibility that the email was used in furtherance of a *different* crime or fraud, and thus still subject to the crime-fraud exception. Indeed, for the reasons argued by the Government at the August 11 hearing, the Court finds that there is a reasonable basis to suspect that (1) the defendants were committing or intending to commit tax crimes, and (2) the email was used in furtherance of those crimes. *See In re Grand Jury*, 705 F.3d 133, 155 (3d Cir. 2012). Accordingly, the email is subject to the crime-fraud exception and may be used as evidence at trial.

Supp. App. 129-30, n.2 (emphasis in original).

At the very least, the district court's ruling was not arbitrary, fanciful, or clearly unreasonable. Even if this were a "close case" and reasonable people might differ as to the propriety of the district court's admission of

the email, "it cannot be said that the trial court abused its discretion." *Lindy Bros.*, 540 F.2d at 115. The ruling should be affirmed.

B. The Admission of the Email Can Be Affirmed on an Independent Ground.

This Court may affirm the district court on any ground supported by the record. *See, e.g.*, *United States v. Mussare*, 405 F.3d 161, 168 (3d Cir. 2005). Such an action is warranted on a ground that the district court refused to consider: that there is evidence the government was previously precluded from presenting to this Court, which establishes a reasonable basis to suspect that the July 12, 2013, email was used to further the fraud on the Indiana plaintiffs.

When this Court issued its January 27, 2017, ruling, it stated that for the crime-fraud exception to apply to the email, "an actual act to further the fraud is required before attorney work product loses its confidentiality and *we know of none here*." 847 F.3d at 160 (emphasis added). This Court added, "the only purported act in furtherance *identified by the District Court* was [Hallinan] forwarding the email to his accountant." *Id.* at 166 (emphasis added).

> Even if [Hallinan] had told the accountant to amend the returns and later gotten cold feet and called off the plan before it could be effected, there might still be a case to be made. That is because the Government "does not have to show that the intended crime or fraud

> was accomplished, only that the lawyer's advice or other services were misused."
>
> But none of that happened. [Hallinan] merely forwarded the email to the accountant and said he wanted to "discuss" it. There is no indication he had ever decided to amend the returns, and before the plan could proceed further the lawyer told the accountant to hold off. Thus [Hallinan] at most thought about using his lawyer's work product in furtherance of a fraud, but he never actually did so.

Id. at 166 (citation omitted).

As it turns out, there is evidence that would have satisfied this Court's concerns, but the government was precluded from alerting this Court to that evidence, under Federal Rule of Appellate Procedure 10(a), as it was not part of the record before the grand jury judge.

There is, it turns out, evidence that Hallinan did more than just forward Neff's email to Ermel for future discussion. In October 2014, Ermel prepared a new corporate tax return for Apex 1, which identified Ginger as the 100% owner of Apex 1. Ermel circulated this new return to Ginger and Kopenhaver, who forwarded it to Hallinan. Meanwhile, Ermel prepared new personal returns for Hallinan for tax years 2013, 2014, and 2015, and these returns no longer contained representations that Hallinan owned Apex 1. The government was not aware of all of this evidence at the time that the issue was litigated before the grand jury judge, culminating with the ruling later reviewed by this Court.

Actions taken for the purpose of concealing a crime can constitute evidence in furtherance of such a crime. *See United States v. Pecora*, 798 F.2d 614, 630 (3d Cir. 1986), citing *Grunewald v. United States*, 353 US. 391 (1957), and other cases. Where the concealment serves to both cover up past criminal conduct and enable ongoing criminal conduct, the concealment is "an act in furtherance of the conspiracy." *Pecora*, 798 F.2d at 630-31. *See also United States v. Esacove*, 943 F.2d 3, 5 (5th Cir. 1991) ("Although a completed conspiracy does not automatically give rise to an 'implied' conspiracy to conceal, concealment is sometimes a necessary part of a conspiracy, so that statements made solely to aid the concealment are in fact made during and in furtherance of the...[original] conspiracy." (internal citations omitted)).

There is a reasonable basis to suspect that the reason why Hallinan did not mention Apex 1 on any tax returns after 2013, is because he was trying to conceal the Indiana fraud and thereby further that fraud. That is exactly what Neff's email suggested. There is thus a reasonable basis to suspect that Hallinan's decision to stop claiming ownership of Apex 1 on his tax returns is directly traceable to the July 12, 2013, email. Although the district court refused to consider this additional "in furtherance" evidence

as it relates to the Indiana fraud, this Court may consider it as a separate basis for affirming the admission of the email.

C. Neff Cannot Assert a Privilege in the Email.

Rule 502(b)(3) of the Federal Rules of Evidence provides that following the inadvertent disclosure of attorney work product, the privilege holder must "promptly" take "reasonable steps to rectify the error" in order to avoid a privilege waiver. In this case, Ermel produced the July 12, 2013, email to the government on December 1, 2014. Whereas Hallinan's counsel contacted the government the next day, claimed the disclosure had been inadvertent, and sought the email's return, Neff's counsel never made a similar request.

Nor did Neff join Hallinan's opposition to the government's motion to present the email to the grand jury or Hallinan's appeal of the grand jury judge's ruling. The first time Neff asserted any privilege in the email was in February 2017. Under such circumstances, Neff has waived that privilege.

Neff claims otherwise, and cites to *In re Neff*, 206 F.2d 149 (3d Cir. 1953), and *United States v. Yurasovich*, 580 F.2d 1212, 1220 (3d Cir. 1978), for support. Both cases, however, are off-point. In each, this Court held that just because a person waives his Fifth Amendment privilege in one proceeding, that person is not compelled to testify in a subsequent

proceeding. The Fifth Amendment privilege, however, serves a different function than the work product doctrine, and they can be waived through different actions. *Compare Kastigar v. United States*, 406 U.S. 441, 461 (1972) (Fifth Amendment privilege's "sole concern is to afford protection against being forced to give testimony leading to the infliction of penalties affixed to criminal acts") (citations omitted), *with Westinghouse Elec. Corp. v. Repub. of Philippines*, 951 F.2d 1414, 1428 (3d Cir. 1991) ("the work-product doctrine promotes the adversary system directly by protecting the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation.").

Indeed, this Court's January 2017 ruling makes clear that the work product doctrine and the attorney-client privilege can be waived through different actions. *In re Grand Jury Matter #3*, 847 F.3d at 165 ("Through [Hallinan] waived the attorney-client privilege by forwarding the email to his accountant, the document still retained its work-product status because it was used to prepare for [Hallinan's] case against those suing him.").

Thus, while an individual has a Fifth Amendment privilege at a new proceeding not to incriminate himself, there is no authority applying the same rule to forfeiture of a work product privilege, which is vitiated when surrendered. Rather, to preserve a work product claim following an

inadvertent or involuntary disclosure, a party "must pursue all reasonable means to restore the confidentiality of the materials and to prevent further disclosures within a reasonable period to continue to receive the protection of the privilege." *In re Grand Jury (Impounded)*, 138 F.3d 978, 981 (3d Cir. 1998). Neff did not pursue any, let alone all, reasonable means to restore the confidentiality of the July 12, 2013, email after he learned that Ermel had produced it to the government.

Neff's privilege assertion also would fail on the merits. Even if Hallinan had not "used" this email to further a crime or fraud, Neff's transmission of the email was itself an act in furtherance of a crime or fraud. To hold otherwise would have the effect of immunizing lawyers who urge their clients to commit crimes unless the client take some step to further the crime contemplated by the lawyer. For example, if a lawyer advises a client to tamper with a government witness, the lawyer cannot be immune from prosecution simply because the client did not act on the lawyer's advice. In the July 12, 2013, email, Neff urged Hallinan to "correct" tax returns and to "retroactively" transfer Apex 1's assets to another of Hallinan's companies. Even if Hallinan had not acted, Neff could be prosecuted for giving that advice in the first place.

Neff, therefore, should be precluded from joining Hallinan's appeal of the trial court's decision to admit the email into evidence.

D. Any Error in Admitting the Email Was Harmless.

Even if the district court had abused its discretion when it admitted the email, such an error was harmless given the avalanche of other evidence proving the defendants' guilt beyond a reasonable doubt.[25] Contrary to Hallinan's assertion, the email was not "the lynchpin of the government's case." Br. 14. It was important to Counts 6 and 7 as the wire fraud predicates in those charges, but the email was not a critical piece of evidence as far as the other charges were concerned.

Far more probative were the recordings of Hallinan's conversations with Rubin. On August 28, 2013, more than a year before Ermel produced the email to the government, Hallinan boasted about the fraud scheme to Rubin:

> Hallinan: I call Randy, I said Randy look, we got a lawsuit in Indiana against us. And uh, I'll pay you ten grand a month if you will step up to the plate and say that you were the owner of Apex One Processing, and upon the successful conclusion of the lawsuit, I'll give you fifty grand. He says, I swear to God -- ...

[25] An error is harmless where the government establishes beyond a reasonable doubt that the error complained of did not contribute to the verdict. *Chapman v. California*, 386 U.S. 18, 24 (1967); *United States v. Henry*, 282 F.3d 242, 251 (3d Cir. 2002).

> When can I get the first wire? I said, well you gotta talk to your lawyer, who's an absolute expert in Canadian tribal law...And we've dealt with him in the past, I met the guy. But anyway, I said, you gotta talk to him, he has to agree to represent you, and then he's got to send letters to Weir and Partners and the local firm in Indiana, firing them. Then you get your ten grand. Didn't take a week. Then their lawyer in the termination letters to our attorneys tells them to return every stick of paper to Mr. Ginger on reserve land in Canada...Because they are protected under sovereign immunity.
>
> Rubin: Immunity. There we go.
>
> Hallinan: So anyway, so we fired Susan, we fired the other guy, and Randy is now the defendant. It's actually, it's GR Financial, a company owned by him.
>
> Rubin: Okay (laughs).
>
> Hallinan: They gotta go to Canada now.

App. 6390-95.

Likewise, in a November 16, 2012, recording, Hallinan admitted that the entire tribal model of payday lending was "a sham." App. 6368-69. Hallinan said, "I think Mr. Tucker is gonna lose, and I think it's gonna set a precedent...and I think they're gonna prove that they're farces, and let's face it, they are." *Id.*

On June 20, 2012, Hallinan bragged that this "sham" had been "my idea." App. 6346-47. Hallinan also made clear that he was aware of state laws against payday lending: "unfortunately, in this environment today in

order to build a big book you've got to run afoul of the regulators, you cannot do it. Because if you don't lend in California, and Colorado, and New York, and Florida...how are you going to build a big book." App. 6344, 6356.

The jury also saw Hallinan's emails to Neff, in which Hallinan lashed out at Guidiville for acting as if their arrangement was not a sham. In one email, Hallinan wrote, "[i]f these guys are really serious about their responsibilities, then we're dealing with the wrong Tribe. I think you should have a heart to heart conversation with them & set them straight. They will NOT have access to any of our information." App. 3028-29; Supp. App. 835. In another email, Hallinan wrote: "These guys are getting carried away with their 'ownership' & we have to put an end to it right now if we can't get this straightened out." Supp. App. 832.

The jury also saw evidence proving that Hallinan repeatedly lied at his deposition, including:

- Kevitch's testimony that he operated Apex 1 entirely in Pennsylvania at Hallinan's direction and never heard from Ginger until 2013;
- Verbonitz and Dubrow's testimony that they took direction in the Apex 1 litigation from Hallinan and Neff, not Ginger;
- Records from the IRS, banks, Ermel, and Intercept showing that Hallinan repeatedly claimed ownership of Apex 1;

- Bank records showing that Hallinan moved hundreds of thousands of dollars from Apex 1's account into his personal account;

- A recording of Hallinan using the pronoun "we" to refer to Apex 1 and criticizing Gordon for identifying 1,393 Indiana customers of Apex 1;

- Records from Weir and Chartwell, showing that Hallinan paid all of Apex 1's legal bills and always controlled the litigation; and

- Records showing that Hallinan had paid attorney Mathewson more than $414,000 to represent Apex 1.

The July 12, 2013, email is barely relevant to Counts 1 and 2, other than to confirm Hallinan's penchant for dishonesty. Thus, any error in admitting the email is harmless as to those convictions, especially given Hallinan's recorded admissions, his incriminating emails, and Derry's testimony that the contacts he and Hallinan signed were all illusory. In sum, although the email was probative of Hallinan's guilt, it was not "the lynchpin" Hallinan would have this Court believe.[26]

[26] Hallinan makes an irrelevant and erroneous claim that the email was only of only nine exhibits that the jury requested to review in its deliberations. Br. 15. The jury also requested and received copies of more than 30 transcripts of Hallinan's recorded conversations with Rubin; the July 22, 2013, letter from Robert Banno to Susan Verbonitz, which was the predicate mailing for Count 4; the September 24, 2013, letter from Banno to Richard Shevitz, which was the predicate mailing in Count 5; the August 2, 2013, email from Neff to Ginger, which was the predicate for the wire fraud charge in Count 8; and hundreds of pages of emails from Weir and Chartwell, Exhs. 791-794.

The email was relatively more important to the case against Neff for the simple reason that Neff wrote it. But even without the email, there was overwhelming evidence of Neff's guilt, including:

- Neff's email to Ginger on August 2, 2013, telling Ginger to send termination emails to Hallinan, Kevitch, and Verbonitz;
- Neff's emails to Hallinan and other regarding strategy in the Apex 1 litigation, including hiding Verbonitz from the plaintiffs' lawyers;
- Neff's emails to his co-conspirators suggesting that they change their contracts with Guidiville to create the false appearance that the tribe was receiving 51% of all payday revenues;
- Neff's emails to Guidiville insisting that the tribe drop its 36% interest rate cap;
- Neff's silence after Hallinan's email rant about Guidiville getting carried away with their "ownership;"
- The contracts Neff drafted, which negate each other, and in Rubin's case, give the false appearance that Vincent Ventriglia owned one of the lending entities; and
- Rubin and Derry's testimony that the contracts were misleading.

Neff also testified over four days, and the jury clearly found him to be not credible. For all these reasons, any claimed error in the court's admission of the email was harmless, at least as to all charges other than Counts 6 and 7.

E. The Court Correctly Denied the Defendants' Motion to Dismiss the Indictment.

The district court properly declined to dismiss the indictment because the email was admissible. In any event, there is no merit to Hallinan's contention that if the email were inadmissible, the presentation of the email to the grand jury would warrant dismissal of the indictment. For starters, Hallinan overstates the email's significance when he says it "permeated the grand jury process...and goes to the heart of all counts of conviction." Br. 26. It did not. The email's transmission is relevant to Counts 6 and 7, but it is referenced in only 2 of the 14 overt acts set forth in Count 3's conspiracy charge; the email is only minimally relevant to Count 1; and it is irrelevant to Count 2.

Moreover, Hallinan's entire "taint" argument is undermined by this Court's January 27, 2017, opinion, which stated that if Hallinan were to be convicted based on the superseding indictment, the government could avoid a retrial by showing that the error of presenting the email to the grand jury was harmless. 847 F.3d at 167, citing *Bank of Nova Scotia v. United States*, 487 U.S. at 255-56. In *Bank of Nova Scotia*, the Supreme Court stated that "as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." 487 U.S. at 254. *See also United States v.*

Calandra, 414 U.S. 338, 344-45 (1974) (an indictment cannot be dismissed based on a claim that it was obtained through incompetent evidence); *Lawn v. United States*, 355 U.S. 339, 349-50 (1958) (refusing to dismiss indictment that was based in part on privileged evidence).

An exception exists in cases where the "structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." *Bank of Nova Scotia*, 487 U.S. at 257. However, the Supreme Court has applied that exception only in cases involving discrimination in the selection of grand jurors on the basis of race or gender, where "[t]he nature of the violation allowed a presumption that the defendant was prejudiced." *Id.*

Hallinan contends that an exception applies in this case because the facts are "parallel" to those in *United States v. Helstoski,* 635 F.2d 200, 203 (1980). Br. 24-26. He is mistaken. In *Helstoski*, this Court affirmed the dismissal of an indictment which had been based on evidence protected by the Speech and Debate Clause of the Constitution. 635 F.2d at 201. In so doing, the Court stated that there was a distinction between cases when a grand jury returned an indictment based on information that had been obtained in violation of constitutional rights and "instances where what was

transpiring before the grand jury would itself violate a constitutional privilege." *Id.* at 203. This Court wrote:

> This case is distinguishable from *Calandra* and *Lawn* where the grand jury itself did not violate the accused's constitutional rights but only considered evidence obtained by others in an unlawful manner. In those cases the evidence, per se, was not constitutionally barred. In contrast, the evidence of past legislative acts that the government introduced against the congressman in this case directly contravened the speech or debate clause.

Id. at 204.

This case is not analogous. In this case, unlike in *Helstoski*, there is no suggestion that what transpired before the grand jury by itself violated a constitutional privilege. Indeed, in this case, no constitutional privilege is even implicated. The defense argument is that the grand jury impermissibly considered information that had been obtained in violation of a sub-constitutional privilege: i.e., the work product doctrine. It is precisely the sort of case like *Calandra* and *Lawn* where the defense contention is that the information was obtained in an unlawful manner. *Helstoski* is not applicable. The district court correctly declined to dismiss the indictment.

II. THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR WHEN IT DECLINED *SUA SPONTE* TO DISMISS COUNTS ONE AND TWO AGAINST NEFF FOR INSUFFICIENCY OF EVIDENCE

Standard of Review

Where, as here, a defendant did not move in the district court for a judgment of acquittal based on the sufficiency of the evidence, the claim is reviewed for plain error. *United States v. Gordon*, 290 F.3d 539, 547 (3d Cir. 2002). Such a claim "is reviewed only for a manifest miscarriage of justice – the record must be devoid of evidence of guilt or the evidence must be so tenuous that a conviction is shocking." *United States v. Avants*, 367 F.3d 433, 449 (5th Cir. 2004); *United States v. Dill*, 112 F. App'x 846, 847-48 (3d Cir. 2004) (not precedential).

Discussion

In this case, there were two separate sets of charges. Counts 1 and 2 involved RICO schemes to collect usurious payday loans. Counts 3 through 17 addressed the fraud perpetrated on the Indiana plaintiffs to persuade them that Hallinan was not a liable party in their suit. The defendants did not present a Rule 29 motion for acquittal as to any of the charges. On

appeal, for the first time, only Neff challenges the sufficiency of the evidence on the RICO charges alone.

The defense at trial regarding the RICO counts rested on the proposition that the defendants believed that the payday loans were lawful under a "tribal model," in which the loans were extended by tribes that by virtue of sovereign immunity were not subject to state usury limits. A brief discussion of that notion is therefore warranted.

The doctrine of tribal sovereign immunity holds that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Manufacturing Tech., Inc.*, 523 U.S. 751, 754 (1998). The doctrine stems from Supreme Court holdings that Indian tribes are "domestic dependent nations that exercise 'inherent sovereign authority.'" *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) (citation omitted). As dependents, the tribes are subject to plenary control by Congress. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014). "Among the core aspects of sovereignty that tribes possess – subject again, to congressional action – is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Bay Mills*, 134 S. Ct. at 2030 (citation omitted). "[T]ribal immunity applies no less to suits brought by States

(including in their own courts) than to those brought by individuals." *Id.* at 2031 (citations omitted).

Applying the doctrine of tribal sovereign immunity, the Supreme Court in *Kiowa* dismissed a lawsuit brought by an individual against an Indian tribe to enforce a promissory note, even though the tribal representative had executed the note off tribal lands. In *Bay Mills*, the Court held that tribal sovereign immunity prevented the state of Michigan from enjoining an Indian tribe from running a casino on lands that the tribe owned outside its reservation. *Id.* at 2030. Notably, the Supreme Court stated that the doctrine did not prevent states from taking actions against individual tribe members. *Id.* at 2035 ("Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license."). Additionally, "to the extent civil remedies proved inadequate, Michigan could resort to its criminal law, prosecuting anyone who maintains – or even frequents – an unlawful gambling establishment." *Id.* Thus, while tribes have immunity from suit, that immunity does not extend to individual tribe members, nor does it shield any violation of state criminal law.

On that basis, at the outset of the trial, the district court denied the defendants' motion to dismiss the indictment, ruling that tribal sovereign

immunity did not shield violations of criminal usury laws. Thereafter, Neff's defense was that he nevertheless acted in good faith, in that he purportedly believed, based on research of the opinions of others, that the tribal model was lawful and allowed tribes and their entities to make payday loans at rates exceeding those permitted by state laws.

This defense failed, however, due to an avalanche of evidence showing that Hallinan and Neff did not in fact make loans on behalf of any federally recognized tribe, but instead set up sham relationships so that they could pretend to enjoy the cloak of sovereign immunity while retaining virtually all of the profits of their usurious lending. As the district court explained in its denial of the defendants' first motion to dismiss, "even if Indian tribes could evade state usury laws by making loans from their reservations, Hallinan and Neff do not claim that they are Indian tribes or members of Indian tribes, and thus are not entitled to receive tribal sovereign immunity." Supp. App. 3 (emphasis in original).[27] "[S]imply affiliating with an Indian tribe did not give Hallinan and Neff the benefits of

[27] Neff admitted that neither he nor Hallinan were members of any federally recognized Indian tribes. App. 5541.

tribal immunity, whatever those benefits may or may not be in this situation." *Id.*

By Neff's own admission, sovereign immunity applies only to federally recognized United States tribes, App. 5228-32, and the only federally recognized tribe with which Hallinan had any relationship between 2007 and 2013 (the years addressed in the indictment) was Guidiville. Hallinan did not sign any contracts with Guidiville until May 2011, App. 2988-3005, 7000-54, and he did not collect any payday loan debt through the purported Guidiville entity until the end of June 2011, App. 2244-47. Prior to that date, the Hallinan Payday Loan Companies were collecting payday loan debt without any affiliation to a federally recognized tribe. App. 2198, 2208-13, 2278-79.

Neff testified that he believed Hallinan's activities between 2008 and 2011 were nevertheless protected by tribal sovereign immunity because of Hallinan's relationship with Ginger. Ginger, however, only claimed to be a "hereditary chief" of a Canadian tribe, not a federally recognized United States tribe.[28] Neff testified that he believed that Ginger also represented

[28] There is no evidence Ginger actually was a chief of any tribe. During a hearing away from the jury, the government confronted Neff with printouts from the Mohachat/Muchalaht website, which identified several tribal "chiefs," none of whom was Ginger. App. 5209. Neff admitted that the only information he had to support his belief that Ginger was a hereditary

the federally recognized Makah Tribe based on the email he had received from Peter Dodge stating that (a) Ginger's first wife had been a member of the Makah tribe; (b) Ginger's brother, Joseph Ginger, was the "overall chief" of related Indian communities that were all united under a "Nu-Cha-Nulth" umbrella of tribes that spanned the United States-Canada border; (c) one of the other tribes under the Nu-Cha-Nulth umbrella was the Makah tribe; and (d) Randy and Joseph Ginger "are federally recognized as hereditary leaders within a known band." App. 5241-57.

Neff presented no evidence to support this theory, App. 5211, and a rebuttal witness, Makah tribe member Ruth Greene, debunked them all. App. 5796-5824. Greene testified, *inter alia*, that the Makah tribe has a five-member tribal council, none of whom are "hereditary" or titled "chief," App. 5801-02; that the tribe is governed by a publicly available constitution and by-laws, App. 5802-04; and that these documents do not mention "hereditary chiefs," the Mowachaht/Muchalaht tribe, or Nu-Cha-Nulth, App. 5806-08. Greene testified that she never even heard of the Mowachaht/Muchalaht tribe. App. 5824.

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chief were the statements of Ginger, Dodge, and Banno, and neither Dodge nor Banno were even members of the tribe. App. 5204-11.

A reasonable factfinder, considering all the evidence and drawing all inferences in favor of the government, rationally could have concluded both that: (a) Neff's suggestion that Ginger was a hereditary chief of the Makah tribe was nonsensical; and (b) Neff's claim to have believed such nonsense was not credible. Any credibility determination by the jury is entitled to heightened deference. *See United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005) (stating that this Court "must be ever vigilant...not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting [our] judgment for that of the jury.").

Further, even if Ginger had been a "chief" of the Makah nation, his actions still would not have been cloaked with tribal sovereign immunity, because as Neff admitted, tribal sovereign immunity protects tribes, not individuals. App. 5580, 5645-57. Neff tried to get around this problem by testifying that he believed Ginger "embodied" the tribe in his status as its "hereditary chief." App. 5478. A rational factfinder could have inferred that Neff's "embodiment" theory was so illogical, Neff's claim to have believed in it was not credible.

Thus, a reasonable jury could conclude that Neff was not honest in stating a belief that association with a random, sell-proclaimed "hereditary chief" in Canada cloaked the affair in tribal sovereign immunity, even if

such immunity protected criminal violations of state law. On top of that, the government provided abundant proof that Ginger did not, in any capacity, make the payday loans, and that Hallinan and Neff acted solely for their own benefit; the "tribal" association as a sham.

The government presented the jury with Kevitch's testimony that:

- He managed Hallinan's payday lending operations out of offices in Pennsylvania, App. 2180, 2194, 2198, 2208-13, 2278-79;
- All of the employees and computer equipment related to the business were located in Pennsylvania, App. 2280-81;
- Kevitch never reported to Ginger, or anyone else from Ginger's claimed tribe, App. 2280-83; and
- Throughout the relevant time period, Hallinan provided all the funds for the payday loans and controlled all the operating accounts, App. 2219-20.

The later Guidiville relationship, which began in 2011, was similarly a sham. Derry, Guidiville's agent, testified that all the contracts he signed in connection with both the Hallinan and Rubin enterprises, all drafted by Neff, created an appearance that differed from reality. App. 2988-3005; SVA66-68. Guidiville never paid any money for the loan portfolios; never acquired the portfolios; never serviced any of the loans; and never controlled any of the money. App. 2988-90. The only asset Hallinan ever sent to Guidiville was a computer server, which Derry placed in a shed, and

which never interfaced with Hallinan's computers. App. 2998, 3013-15; SVA68-70.

When Derry emailed Neff seeking access to information about the loans in order to audit the programs, Neff refused, calling the data "highly proprietary," App. 3022-23; Supp. App. 826, and Hallinan exploded, telling Neff, "If these guys are really serious about their responsibilities, then we're dealing with the wrong Tribe. I think you should have a heart to heart conversation with them & set them straight. They will NOT have access to any of our information." App. 3028-29; Supp. App. 835. Guidiville never gained access to any information about the loans.

With regard to Count 2, both Derry and Rubin testified that the contracts Neff had drafted were all meaningless pieces of paper. App. 3068-72, 3357-77. Guidiville never paid any money for the Rubin assets, and Rubin never gave Guidiville access to his loan portfolio or any of his operational apparatus. App. 3068-69. The jury also saw evidence that Neff sought to increase the deceptive nature of the contracts by rewriting them to give the false impression that Guidiville would receive 51% of the gross loan proceeds. App. 3088-97; Supp. App. 752-55, 836-37.

The jury also heard Hallinan tell Rubin the entire tribal model was a "farce" and a "sham." App. 6368-69.

A rational factfinder considering this evidence, and drawing all inferences for the government, easily could have convicted Neff on Counts 1 and 2. The jury was not required to accept Neff's protestation of good faith. A rational factfinder could have found that the loans were unlawful, that the tribal arrangements were a sham, and that Neff was fully aware of these facts. Neff has failed to prove that those convictions constitute a "fundamental miscarriage of justice" warranting relief on plain error review. *United States v. Thayer*, 201 F.3d 214, 218-19 (3d Cir. 1999).

III. THE DISTRICT COURT CORRECTLY INSTRUCTED THE JURY ON THE LAW RELEVANT TO THE RICO CONSPIRACY CHARGES IN COUNTS ONE AND TWO

Standard of Review

When an appellant preserves an objection to jury instructions and the challenge turns on a matter of statutory construction, review is plenary. The issue is whether the charge, taken as a whole and in light of the evidence presented, fairly and adequately submitted the issues in the case to the jury. *United States v. Schneider*, 14 F.3d 876, 878 (3d Cir. 1994).

When an appellant does not object to jury instructions, review of the instructions is for plain error. *United States v. Antico*, 275 F.3d 245, 265 (3d Cir. 2001).

Discussion

The appellants preserved only one objection to the jury instructions, and it concerned the RICO conspiracy charges. App. 6020. They contend that the court should have instructed the jury that it was required to find that the defendants acted "willfully," that is, with knowledge that their conduct violated the law, and that the district court erred by instructing the jury instead that the government had to prove they acted "knowingly" and "intentionally." Hallinan Br. 29-39; Neff Br. 32-34. The appellants are

mistaken. The district court tracked the Third Circuit Model Jury Instructions, which make clear that the scienter requirement for RICO is "knowing," not "willful" misconduct. The court also told the jury that the government had to prove the defendants knew that the purpose of the RICO conspiracies was to collect unlawful debts. Such instructions, read as a whole, fairly and adequately presented the relevant issues to the jury.

The appellants also challenge other aspects of the jury instructions for which they did not preserve objections. As explained below, none of those instructions was plain error.

A. The Court's Scienter Instructions were Correct.

In this Court's Model Criminal Jury Instructions for RICO offenses, the words "knowing" and "knowingly" appear about 20 times. *See* Model Criminal Jury Instructions, Nos. 6.18.1962C – 6.18.1962D. The words "willful" and "willfully" do not appear at all. *Id.* Nothing in the cases cited by the appellants suggests that the district judge erred by tracking this court's model instructions. In *United States v. Irizarry*, 341 F.3d 273 (3d Cir. 2003), for example, although this Court "approved" a jury charge that included an instruction that the government had to prove that a RICO defendant acted "knowingly and willfully," this Court did not hold that "willfully" was the scienter requirement for a RICO conspiracy or that the

government had to prove that the defendant knew his conduct was unlawful. *See id.* at 303-04. Instead, this Court focused on whether the district court erred by not identifying "motive" as a RICO element. *Id.* (finding no error).

Likewise, although the courts in *United States v. Aucoin*, 964 F.2d 1492 (5th Cir. 1992), *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986), and the *Tucker* case in the Southern District of New York all used the word "willfully" in their RICO instructions, none of those courts required the government to prove that the defendants knew they were committing a crime. Instead, the courts held that the government had to prove that the defendant "acted knowingly, willfully and unlawfully." *Biasucci*, 786 F.2d at 513. In other words, the defendant had to take some willful action to aid in the collection of the unlawful debt; not willfully commit a crime.[29]

The district court tracked the model instructions when charging the jury on Counts 1 and 2, with slight modifications to substitute "collection of unlawful debt" for "pattern of racketeering activity." App. 5963-94. In these

[29] The jury instructions in *Tucker* are not published, but the transcript (which the government can provide) indicates that the district judge defined "willfully" as "to act deliberately and to do something that the law forbids. The defendant need not have known that he was breaking any particular law, but he must have been aware of the generally unlawful nature of his act." Tr. 3287-88.

instructions, the court repeatedly advised the jury that, to find a defendant guilty of a conspiracy to collect unlawful debt, the government had to prove that he knew and intended to participate in the affairs of an enterprise through the collection of "unlawful debt." *See* App. 5964-94.

The court tracked the statute's definition of "unlawful debt" as one that "was unenforceable in whole or in part under Federal or state law because of the laws relating to usury; and...was incurred in connection with the business of lending money or anything of value at a rate that was usurious under Federal or state law where the rate was at least twice the legally enforceable rate." *Compare* App. 5982-83 *with* 18 U.S.C. § 1961(6). The court defined usury as the "lending of money at an *illegally* high rate of interest." App. 5983 (emphasis added).

The court also referenced Pennsylvania laws, including a statute "which makes it a crime to charge a rate of interest higher than 25 percent per year on most loans to individuals." App. 5983. The court added that "Pennsylvania laws on interest limits apply to all loans made to Pennsylvania borrowers even if the lenders are physically located outside of Pennsylvania and have no offices in Pennsylvania, and even if the borrower signs a contract agreeing that Pennsylvania law does not apply and that the borrower is willing to pay an interest rate higher that the enforceable rate of

interest." *Id*.[30] Thus, the court said, "if" the jury believed the government had proven that a defendant agreed to collect debt from borrowers in Pennsylvania from loans with interest rates that exceeded twice the enforceable rate, the jury "may" consider that as evidence the defendant agreed to collect unlawful debt. App. 5984. *Cf. United States v. Scarfo*, 711 F. Supp. 1315, 1335 (E.D. Pa. 1989) (nearly identical instructions).

The court added that states other than Pennsylvania had rate limits on consumer loans that were either 36% or less, so "if" the jury believed the government had proven a defendant agreed to collect debt from borrowers in those states that exceeded twice the enforceable rate of interest in those states, the jury "may" consider that as evidence the defendant agreed to collect unlawful debt. App. 5984.

The Court also stated:

> To convict a defendant of conspiracy to violate RICO, the Government is not required to prove that a defendant knew that his acts were against the law. Instead, a defendant must generally know the facts that make his conduct fit into the definition of the charged offense, even if the defendant did not know that those facts gave rise to a crime. Ignorance of the law is no excuse.

[30] Such statements of the law were correct. 18 Pa. Cons. Stat. § 911(h)(1)(iv); *Cash America Net of Nevada, LLC v. Commonwealth Dep't of Banking*, 607 Pa. 432, 437 (Pa. 2010); *Pennsylvania Dept. of Banking v. NCAS of Delaware, LLC*, 596 Pa. 638 (2008).

> To prove a defendant guilty of conspiracy to collect unlawful debt, the Government is not required to prove that a defendant knew that the usury rates were in the states where the borrowers lived.

App. 5985.

These instructions were accurate. As a general rule, ignorance of the law is no excuse. The defendant must know the facts that make his conduct criminal. The law requires proof of "that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct,'" and "[i]n some cases, a general requirement that a defendant act knowingly is itself an adequate safeguard." *Elonis v. United States*, 135 S. Ct. 2001, 2010 (2015) (citations omitted). It is only in an unusual case, where knowledge of the facts does not inform an ordinary person of the illegality of the conduct, that a "willfulness" requirement demanding proof of knowledge of the law is imported.

Liporata v. United States, 471 U.S. 419 (1985), on which the appellants rely, was such a case. In *Liporata*, the Supreme Court held that, in a prosecution for fraudulent use of food stamps, the government must prove that the defendant was aware of the existence and meaning of the regulation that his actions violated, a requirement akin to proof of willfulness. The Court explained that the statute would otherwise criminalize "a broad range of apparently innocent conduct." This concern

does not apply with respect to RICO's prohibition against the collection of "unlawful" debt. The court instructed the jury that it was required to find that the defendants knew they were engaged in an enterprise to collect "unlawful" debt. Such a finding separates innocent from culpable conduct. It was therefore permissible to add the ordinary instructions that ignorance of the law (that is, of the prohibition of RICO under which they were prosecuted) is not a defense, and that the defendants need not know the particulars of the various usury laws, so long as they knew they were trying to collect unlawful debts.

Moreover, at the defendants' request, the court gave a good faith instruction. The court stated:

> If you find that the defendant acted in, quote, "good faith," close quote, that would be a complete defense to those charges, because good faith on the part of a defendant would be inconsistent with his acting with knowledge and intent. For purpose of a RICO charge, a person acts in good faith when he or she has an honestly held belief, opinion or understanding that the goal or objective of the conspiracy was not the collection of unlawful debt, as that term is defined above in paragraph 170, even if the belief, opinion or understanding turns out to be inaccurate or incorrect.
>
> Thus, in this case, if the defendant made an honest mistake or had an honest misunderstanding about whether the goal or objective of the conspiracy was the collection of unlawful debt, then he did not act with knowledge and intent.

App. 5990-91.

Under such circumstances, the appellants cannot show that the court's instructions on Counts 1 and 2 were erroneous. Read as a whole, the instructions required the jury to find that each defendant knew that the purpose of the charged conspiracies was to collect unlawful debts, without any requirement that the defendant knew the particulars of the laws that made the debts wrongful, or knew that his own conduct was illegal. These requirements were consistent with the model instructions and sufficient to separate wrongful conduct from otherwise innocent conduct.

B. The Court's Other Instructions Were Not Plain Error.

Neff raises another complaint about the jury instructions that he did not raise below, which derives from an assertion that "[a] fundamental misunderstanding of the law has infested this case like a cancer." Br. 12. According to Neff, the court violated his constitutional rights by accepting "without critical analysis or qualification" the government's position that tribal sovereign immunity did not shield the defendants from prosecution for RICO. Br. 12-13. Notably, Neff makes this claim even though he does not appeal the district court's denial of the defendants' first motion to dismiss, which had been based on the same argument.

Neff finds particular fault in the court's instruction to the jury on the limits of tribal sovereign immunity. Br. 16-17.

The court instructed, in part:

> Tribal sovereign immunity does not provide a tribe or its members with any rights to violate the laws of any states. Instead, tribal sovereign immunity limits the means by which a state can enforce its laws against an Indian tribe. Tribal sovereign immunity does not provide a tribe or its members with any immunity from criminal prosecution.

App. 5985-86.

Neff claims that the court's description of the law was "wrong," and that this error of law was "pernicious." Br. 17.[31] Since Neff did not raise this objection below, he must prove that (1) the court erred; (2) the error was obvious under the law at the time of review; and (3) the error affected substantial rights, that is, the error affected the outcome of the proceedings. *Johnson v. United States*, 520 U.S. 461, 467 (1997). If all three elements are established, this Court may, but need not, exercise its discretion to award relief. *Id*. That discretion should be exercised only in cases where the defendant is "actually innocent" or the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Olano*, 507 U.S. 725, 736 (1993).

[31] Neff also claims error in the district court's description of Pennsylvania's anti-usury laws, Br. 15, n.5, and in its instruction that "ignorance of the law is no defense" to the RICO charges, Br. 29-31. As explained in the text, those instructions were correct.

Neff cannot even satisfy the first part of the test, because the court correctly described the law. As explained earlier, sovereign immunity protects a tribe from civil suit. It does not immunize any individual, whether a tribe member, "hereditary chief," or otherwise, for criminal conduct outside the territorial jurisdiction of the tribe. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

In *Michigan* v. *Bay Mills Indian Community*, 134 S. Ct. 2024, 2034-35 (2014), the Court made clear that although sovereign immunity meant Michigan could not sue a tribe to block a casino, the state could use many other means – including criminal prosecutions of the casino's operators and patrons – to "enforce its law on its own lands."

Even Neff acknowledged on cross-examination that tribal sovereign immunity does not shield individuals, Native American or otherwise, from the enforcement of a state's criminal laws. App. 5645-47 (specifically admitting that neither Guidiville's tribal chairwoman nor Ginger were immune from state prosecutions for murder, bank robbery, and usury). Additionally, during the trial, Neff's counsel repeatedly assured the court

that he was only going to argue "good faith," not that Neff's view on the law was correct or that the law was ambiguous. *See, e.g.*, Supp. App. 11 (the defense evidence "will not be offered to establish that the tribal lending model is in fact legal but rather to show that Mr. Neff believed in good faith that it was").

Neff nevertheless claims a "consensus in American law during the indictment period" that tribal sovereign immunity "provides protection from criminal laws meant for regulatory purposes (like usury statutes)." Br. 18. That is incorrect. The cases he cites, such as *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818 (10th Cir. 2007) (holding that a tribe as an incident of sovereignty may issue motor vehicle registrations and titles which must be respected by the state outside reservation lands), and *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691 (9th Cir. 2004) (holding that that provisions of California law permitting the use of emergency light bars only by "authorized emergency vehicles" must authorize such use by emergency vehicles of a tribe traveling between non-contiguous parts of a reservation), say nothing about the enforcement of criminal laws. They address the use of civil process and sanctions directed against a tribe or its entities. *See also, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987) (preempting state regulation of

gaming). The same is true of the many law review and similar articles Neff now cites. Neff does not establish that the district court's conclusion, resting on the Supreme Court's decisions in *Bay Mills* and elsewhere, and explained in the previous section of this brief, was plain error.

Nor may he show a reasonable possibility that any error affected the verdict. As set forth at length in the preceding part of this brief, the defendants' arrangements with "tribes" were nothing but a sham. The evidence overwhelmingly showed that, even if a tribe could lawfully violate state usury limits, the conduct here had nothing whatsoever to do with tribal lending. Neff therefore is not entitled to relief under plain error review.[32]

[32] The decision in *People v. Miami Nation Enterprises*, on which Neff relies, is informative. There, as Neff emphasizes, an appellate court held that tribes engaged in payday lending were protected by tribal sovereign immunity from a state action for injunctive relief, restitution, and civil penalties (not addressing criminal law). 166 Cal. Rptr. 3d 800 (Cal. App. 2014). But the state Supreme Court reversed, upon finding that the lending operation was run entirely by outsiders, and the tribes exercised no control, made no investment, incurred no liability, and obtained a "minimal" economic benefit. 386 P.3d 357, 375-79 (Cal. 2016). All of the same was true here.

IV. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION WHEN IT BARRED NEFF FROM TESTIFYING ABOUT THE OPINIONS OF OTHER LAWYERS AND THE SUBSTANCE OF RULINGS FROM OTHER CASES

Standard of Review

A district court's decision regarding the admissibility of evidence is reviewed for abuse of discretion. *Serafini*, 233 F.3d at 768 n.14.

Discussion

Neff argues that the district court deprived him of due process by limiting the evidence that he could present in support of a good faith defense. Br. 37-47. More specifically, he claims that the court wrongly prevented him from describing the details of court rulings from other cases and admitting the judicial opinions themselves as evidence. Neff also claims a constitutional right "to present a complete defense, which must take precedence over an otherwise applicable evidentiary rule." Br. 37. Hallinan, meanwhile, argues that by limiting Neff's evidence, the court prejudiced Hallinan's defense since Hallinan was charged with conspiracy, and "in order for the jury to find a conspiracy between them, Neff must also be guilty." Br. 52. All of the appellants' arguments are baseless.

A. The Court Properly Limited Neff's Description of Third-Party Legal Opinions.

Prior to trial, the parties engaged in substantial litigation over the scope of permissible expert testimony on laws relating to consumer lending and tribal sovereign immunity. The government argued that it would be improper for either side to present expert testimony on the governing law, because such testimony would tend to "usurp the District Court's pivotal role in explaining the law to the jury." *First Nat'l State Bank v. Reliance Elec. Co.*, 668 F.2d 725, 731 (3d Cir. 1981). The defendants countered that they should be permitted to present experts to testify about the existence of a "universe of information" on the laws relating to payday lending that was "publicly available to attorneys" in order to corroborate Neff's anticipated testimony that he consulted this "universe of information" before providing advice to payday lenders such as Hallinan and Rubin. App. 227.

On August 16, 2017, the district court issued an order, unchallenged on appeal, stating that the court would allow expert testimony "only regarding (a) the history, practices, and customs of the short-term consumer lending industry, including the history and development of the 'Tribal Model' of payday lending (but not its legality); and (b) the process an attorney providing legal advice in the payday lending field would have followed at the relevant time to determine the legality of the Tribal Model."

Supp. App. 133. In a footnote, the court stated, "[t]he jury's role is limited to determining the facts." *Id.* While the jury could consider the reasonableness of a belief for the purpose of "determining whether the belief was honestly held...the parties may not elicit testimony regarding the objective reasonableness – or lack thereof – of that belief." *Id.* (citations omitted).

The defendants ultimately decided not to present expert testimony on any legal issue. Instead, Neff testified about numerous legal authorities he consulted and the views he formed as a result. He was permitted to explain his reasoning at length, and testified over the course of four days. Neff testified, for example, that he had read the National Banking Act; the Supreme Court's 1978 opinion in "*Marquette*";[33] the Truth in Lending Act; and a South Carolina case involving a borrower named "Cades."[34] App. 5131-59. Neff also testified that he reviewed Cohen's Handbook of Federal Law, App. 5219, and "started reading multiple U.S. Supreme Court cases about Indian law and the origins of the Indians' sovereignty and sovereign immunity." App. 5220. Neff testified that he also reviewed the Native

[33] *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978).

[34] *Cades v. H&R Block, Inc.*, 43 F.3d 869 (4th Cir. 1994).

American Business Development Act, an executive order signed by President Clinton, the Indian Gaming Resort Act, and decisions from federal appeals courts and state Supreme Courts. App. 5220-21. Neff identified several of those cases as "C*abazon*," "*Montoya*," a 2010 Colorado Supreme Court case, "St. Regis," and the "AmeriLoan case."[35] App. 5227-31, 5238, 5257, 5288. Neff testified he also reviewed an opinion letter prepared by a law firm called Preston Gates. App. 5225.

Neff testified that after conducting this legal research, he came to believe that Indian tribes could lawfully operate short-term lending businesses and could "involve non-Indians as part of the arm of the tribe operation." App. 5223-24. Neff also testified that after reading the Preston Gates opinion letter, "it seemed to confirm my thinking that a tribal lending program was something that could be developed if it were structured properly." App. 5225. As Neff also explains, Br. 18-20, he was permitted to elicit from several participants in the payday lending industry their view that the tribal lending model was lawful.

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[35] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Montoya v. United States*, 180 U.S. 261 (1901); *Cash Advance & Preferred Cash Loans v. Suthers*, 242 P.3d 1099 (Colo. 2010); *Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York*, 278 F. Supp. 2d 313 (N.D.N.Y. 2003); and *Ameriloan v. Superior Ct.*, 169 Cal. App. 4th 81 (Cal. Ct. App. 2009). Neff also mentioned the "*Pluckett*" and "*Bottomly*" cases, App. 5231, but it is not clear what those are.

All that the district court barred was a description of the details of some of the authorities Neff said he had read. For example, when Neff's counsel tried to elicit information about the specific allegations in *Cades*, the court stated that such testimony "would call then for the jury to evaluate the merits of that lawsuit." App. 5161. The court likewise precluded Neff from describing the details in *Montoya*.[36] App. 5230. The court also indicated that it would not permit Neff to introduce copies of the cases themselves. App. 5215.

The district court did not abuse its discretion. To be sure, Neff was permitted to present a good faith defense, premised on the notion that he believed the tribal lending practice was lawful. But the submission of cases and legal opinions to the jury presented a tremendous risk of confusion. The fact of the matter is that, as the district court ruled and instructed the jury, tribal sovereign immunity did not shield the defendants from criminal

[36] Neff claims the court also "silenced Neff's effort to explain *Cabezon*," which he says was "crippling to the defense." Br. 42. The court, however, sustained only an objection to the form of a question. App. 5227. Neff's counsel rephrased his question, and Neff answered it. App. 5228.

Neff also complains that the district court precluded him from admitting the Preston Gates opinion letter, Br. 42, but Neff did not actually move its admission. The court also did not rule on the government's objection to Neff's attempt to describe the details of *St. Regis*, because Neff's counsel moved on to a different question. App. 5257.

prosecution.[37] Thus, were Neff permitted to introduce the fragments of cases on which he says he relied, there was a great risk of misleading, confusing, and distracting the jury, on the basis of opinions rendered in different cases on different facts.

For instance, Neff now states that in *Cabazon*, the Supreme Court "concluded that a state's criminal laws could be superseded by Tribal Sovereign Immunity." Br. 42. The Court concluded nothing of the kind. Instead, the Court held that state or local governments could not enforce their anti-gambling laws to activity occurring on a tribal reservation because those laws were *more regulatory than criminal*. 480 U.S. at 211-12.

Additionally, if Neff could have offered the details of judicial rulings from other cases, the government would have been compelled to do likewise. For example, Neff complains that the district court prevented him from discussing the details of the Colorado Supreme Court's decision in *Cash Advance & Preferred Cash Loans v. Suthers*, 242 P.3d 1099 (Colo. 2010), which Neff claims "provided a scholarly, comprehensive analysis of relevant Supreme Court, Courts of Appeals, and District Court decisions

[37] As explained in the preceding part of this brief, Hallinan on appeal does not challenge that fundamental ruling of the district court, while Neff does so only indirectly by challenging the jury instructions.

involving Tribal Sovereign Immunity and preemption of State law over tribal commercial enterprises." Br. 44.

The *Suthers* court, however, remanded the case for further proceedings, and on February 18, 2012, the trial court issued an opinion that mentioned Hallinan by name and eviscerated his and Neff's entire legal theory. *State v. Advance*, 2012 WL 3113527 (Colo. Dist. Ct. Feb. 18, 2012). At issue in that case was whether Colorado officials could enforce administrative subpoenas against two tribal entities that owned and operated payday lending companies. The companies had once been owned by Scott Tucker and his associates, one of whom was a "non-Indian man named Charles Hallinan," but the tribal entities took them over. *Id*. The district court held that although tribal sovereign immunity shielded the tribal entities from having to comply with the subpoenas, "this broad immunity is not unlimited." *Id.* at *11.

> If Tucker's grand scheme was to insulate himself from state scrutiny by associating with these tribes, it was not a very good scheme because he and all his non-tribal officer associates remain subject to investigation. The State can subpoena Messrs. Tucker, Fontano, Hallinan and any other non-tribal officer or non-tribal entity to its heart's content, and thus can freely investigate whether Tucker and his associates were and still are the true lenders in this case.

Id.

In other words, on February 18, 2012, a Colorado judge opined that tribal sovereign immunity did not protect Hallinan against the enforcement of any state law, let alone state criminal laws. The judge's opinion was relevant, because after its issuance, the Hallinan Payday Lending Enterprise continued collecting unlawful debt for 18 months and the Rubin Payday Lending Enterprise continued collecting unlawful debt for six months. Under Neff's logic, the government should have been able to introduce this legal opinion into evidence, notwithstanding the fact that it was expert in nature, filled with hearsay, and Neff might have personally disagreed with the district judge.

The court acted within its discretion in barring the admission of specific cases. Neff could not try to circumvent or undermine the court by rearguing the law to the jury or suggesting that the law was ambiguous. *See United States v. DeMuro*, 677 F.3d 550, 565 (3d Cir. 2012) (affirming exclusion of evidence that the defense argued was critical to a good faith defense where the evidence "could have opened the door to jury nullification.").

The court did permit Neff to present the jury with one document containing a third party's legal opinion, but Neff now complains that the court erred when it instructed the jury that it could consider the document

and any other documents Neff read only for their effect on Neff's state-0f-mind. Br. 40-41. Neff raises this objection now even though his trial counsel endorsed the limiting instruction. *See generally* App. 5196-5217.

The document was an email thread from 2006 (identified as Defense Exhibit 3), which included representations from Peter Dodge, who Neff said was a representative of Ginger and the Mowachat/Muchalaht Tribe. App. 5205-06. In the email, Dodge stated that Ginger was the hereditary chief of Mowachat/Muchalaht tribe as well as a band of more than a dozen Indian communities that spanned the United States' border with Canada. *See* App. 5199-5216.

Neff sought to testify that it was this email that led him to conclude that Ginger's tribe was federally recognized by the United States government so that tribal sovereign immunity shielded any payday lender, such as Hallinan, from state criminal usury laws. App. 5200. The government raised numerous objections to the email, including that it was hearsay; it contained false statements about Ginger; it was misleading; there was no foundation for it; and it contained inadmissible opinions. App. 5200-02.

The court conducted a hearing out of the jury's presence at which Neff testified about why his communications with Dodge led him to conclude

that Ginger was the chief of a federally recognized United States tribe. App. 5204-11. When it was done, the court described Neff's logic as "a stretch," comparable to believing comic books. App. 5211. The court, however, ultimately permitted the defense to admit the email and publish it to the jury, App. 5245, subject to a limiting instruction that the jury could consider the document "not for the truth of the matter," but for the effect the document "had on Mr. Neff's state of mind." App. 5219.

Neff now criticizes the limiting instruction as a "stern warning" that "severely limited" and "disparaged" what the jury would hear. Br. 40. The court, however, committed no error in delivering the instruction. To the extent Neff wanted to offer the Dodge email to prove the truth of its contents – i.e., that Ginger was a hereditary chief of a federally recognized United States tribe (statements which are actually false) – the document should have been excluded under Rule 802.

In sum, Neff was permitted to testify at length about his state of mind, but the district court acted within its discretion in judiciously limiting Neff's ability to present the jury with legal opinions or out-of-court declarants, so as not to confuse the jury and produce a legal debate between the parties before the jury that the district court itself was required to resolve.

B. The Court's Rulings on Neff's Testimony Did Not Affect Hallinan.

Hallinan did not testify, and he presented no other evidence to suggest that he believed that his actions were legal. Nonetheless, Hallinan claims that the district court's curtailment of Neff's testimony prevented Hallinan from presenting his "sole defense." Br. 44-53. Nowhere does Hallinan attempt to explain how Neff's state-of-mind has any bearing on his own state-of-mind.

Apparently realizing this deficiency in his argument, Hallinan claims that since he and Neff were charged with conspiracy, "in order for the jury to find a conspiracy between them, Neff must also be found guilty." Br. 52. Hallinan, however, is not charged with conspiring only with Neff. Count 1 alleged that Hallinan and Neff "and other persons known and unknown to the Grand Jury, including Co-Conspirator No. 1" conspired to collect unlawful debt through the Hallinan Payday Lending Enterprise. App. 77. Count 2 accused Hallinan of conspiring with people other than Neff, "including Adrian Rubin," to collect unlawful debt through the Rubin Payday Lending Enterprise. App. 90.

A jury could have acquitted Neff on Counts 1 and 2 while simultaneously convicting Hallinan of the same charges. Thus, Hallinan was not affected by the court's evidentiary rulings on Neff's testimony.

V. THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR WHEN IT DID NOT *SUA SPONTE* DISMISS COUNTS 3 THROUGH 17 BASED ON A THEORY THAT UNADJUDICATED LAWSUITS ARE NOT MONEY OR PROPERTY

Standard of Review

As in issue IV, the matter is reviewed for plain error.

Discussion

Both appellants argue that the district court plainly erred by permitting Counts 3 through 17 to go to the jury. They claim that an unadjudicated cause of action, such as the Indiana lawsuit against Apex 1, cannot be "money" or "property" under the federal mail and wire fraud statutes. They are mistaken.

The mail and wire fraud statutes prohibit the use of the mails or wires to further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343. Both crimes are "limited in scope to the protection of property rights." *McNally v. United States*, 483 U.S. 350, 360 (1987). However, the term "property" in this context includes intangible property, such as confidential business information, *Carpenter v. United States*, 484 U.S. 19, 25 (1987); patents, *Cleveland v. United States*, 531 U.S.

12, 21 (2000)[38]; and standardized test score reports, *United States v. Hediathy*, 392 F.3d 580, 594-95 (3d Cir. 2004).

In *United States v. Hird*, 913 F.3d 332 (3d Cir. 2019), this Court held that an "entitlement to collect money" from a legal judgment is also a "property interest" protected by the mail and wire fraud statutes, a ruling which settles the issue presented in this case. The indictment in *Hird* alleged judges participated in a ticket-fixing scheme at the now-defunct Philadelphia Traffic Court. *Id.* at 338. The alleged scheme involved dismissing tickets, finding alleged violators not guilty, and reducing fines, all of which allegedly deprived the City of Philadelphia and the Commonwealth of Pennsylvania of money which "would have been properly due as fines and costs." *Id.*

Two defendants entered conditional guilty pleas and reserved the right to appeal the sufficiency of the allegations. *Id.* at 339. In their appeals, the defendants argued that the indictment alleged a deprivation of "an

[38] The issue in *Cleveland* was whether the mail fraud statute applied to a defendant who fraudulently obtained a license to operate a video poker machine from the Louisiana State Police. 531 U.S. at 15. The Court held that it did not, reasoning that licenses were not property in the hands of the official licensor. *Id.* In so doing, the Court distinguished Louisiana's interest in video poker licenses from a patent holder's interest, in part because "a patent holder may sell her patent." *Id.* at 23. As explained in the text, litigation plaintiffs can and often do sell their rights to collect on unadjudicated causes of action.

entitlement that does not yet exist because a person must be adjudicated (or plead) guilty before they must pay any fines or costs." *Id.* at 343. None of the traffic violations directly associated with the defendants had resulted in a guilty judgment. *Id.* "As a result, they argue, the Government cannot claim here that it was cheated of an entitlement, because they were only fines and costs that the people *might* have owed *if* they had been found guilty." *Id.* (emphasis in original).

This Court rejected that argument:

> Accepting this argument "would permit the alleged conspirators" to take advantage of their "unique position" in this case "to enter into a scheme to commit fraud and then hide behind the argument that the success of their fraud precludes prosecution under the 'money or property interest' requirement of the mail and wire fraud statutes."
>
> ...
>
> Appellants cannot rest on the very object of their scheme (to work on behalf of favored individuals to obviate judgments of guilt and the imposition of fines and costs) as the basis to claim that there is no fraud.
>
> ...
>
> Even if some of the cases in the extra-judicial system would have been judged not guilty in a real adjudication it is (as the District Court correctly noted) the intent of the scheme, not the successful execution of it, that is the basis for criminal liability.

Id. (citations omitted).

This Court concluded that "the indictment's allegation that the scheme had an objective of depriving 'Philadelphia and...Pennsylvania of

money *which would have been properly due* as fines and costs' is not undermined by the lack of guilty verdicts." *Id.* at 344 (emphasis in original).

In this case, the indictment alleged that the defendants devised and participated in a scheme to defraud the Indiana plaintiffs "out of a cause of action that the defendants believed could be worth as much as $10 million." App. 107, 109. Just as in *Hird*, the defendants acted to thwart the judgment by deceiving the victims into foregoing any possible collection.

Neff claims that *Hird* actually supports his appeal, Br. 57,[39] by suggesting that *Hird* involved the deprivation of "mandatory" fines and costs associated with "the judgments that would have [been] imposed on traffic ticket recipients," whereas in this case, "all the Plaintiffs had was an amorphous unadjudicated claim that...was never a final judgment." *Id.* This is a false distinction based on a misunderstanding of both *Hird* and the Indiana lawsuit.

There were no "mandatory" fees or costs that the government would have been able to impose in *Hird*, because there was no guarantee that a person accused of a traffic violation would have been adjudged guilty. There were only "amorphous unadjudicated" claims of motor vehicle violations

[39] Neff cites to an earlier version of the *Hird* precedential opinion, which was later superseded in immaterial respects after he filed his brief. Hallinan does not address *Hird*.

that never became "final judgments." Such claims were no different in kind than the allegations in the Indiana lawsuit that Apex 1's payday loans to the 1,393 class members had violated the Indiana Small Loans Act, claims that carried statutory damages of $2,000 per violation per payday loan. App. 4746-48. *Hird* does not support the appellants' argument for dismissal of Counts 3 through 17; *Hird* forecloses it.

Even before *Hird*, appellants' challenge to the viability of Counts 3 through 17 lacked merit. In *United States v. Henry*, 29 F.3d 112 (3d Cir. 1994), this Court stated that, "[t]o determine whether a particular interest is property for purposes of the fraud statutes, we look to whether the law traditionally has recognized and enforced it as a property right." *Id.* at 115. In 2005, the Supreme Court held that a legal entitlement to collect money is "something of value" and thus property under the mail and wire fraud statutes. *Pasquantino v. United States*, 544 U.S. 349, 355-56 (2005). Thus, "fraud at common law included a scheme to deprive a victim of his entitlement to money." *Id.* at 356.

A cause of action has also traditionally been recognized as "a species of property protected by the Fourteenth Amendment's Due Process Clause." *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485 (1988). *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428

(1982). *See also Ministry of Defense & Supp. for the Armed Forces of the Islamic Rep. of Iran v. Elahi*, 556 U.S. 366, 388 (2009) (the word "property" as used in various statutory phrases "surely can refer both to tangible property, such as real estate or valuables in a safe-deposit box, and to intangible property interests, such as a claim, [or] a cause of action").

This Court, for example, has held that an unadjudicated cause of action is considered property of a bankruptcy estate, "if the claim existed at the commencement of the filing and the debtor could have asserted the claim on his own behalf under state law." *In re Emoral, Inc.*, 740 F.3d 875, 879 (3d Cir. 2014).

Appellants claim to find support for their challenge to Counts 3 through 17 in two Takings Clause cases, including one decided by this Court. Neff Br. 58; Hallinan Br. 41, citing *Bowers v. Whitman*, 671 F.3d 905 (9th Cir. 2012), *Rogers v. Tristar Prods., Inc.*, 559 F. App'x 1042 (3d Cir. 2012) (not precedential). *Bowers* and *Rogers*, however, were concerned with when a property interest "vests" so that the government cannot take it without providing just compensation, *Bowers*, 671 F.3d at 913-14; *Rogers*, 559 F. App'x at 1045, and not whether an unadjudicated cause of action is "property" to begin with. In fact, *Bowers* makes clear that there are some property rights that are constitutionally protected, such that they are

safeguarded by due process, but not vested for Takings Clause purposes. 671 F.3d at 912, citing *Perry v. Sindermann*, 408 U.S. 593 (1972). The mail and wire fraud statutes protect against the use of fraud to deprive a victim of money or property, not "vested" property. *Bowers* and *Rogers* are inapt, as is *In re Kane*, 628 F.3d 631 (3d Cir. 2010), a case cited by Hallinan, Br. 41, for the principle that a woman lacked a "vested" property interest in marital property because there was not yet a judgment in a pending divorce action.[40]

Furthermore, unlike the video poker licenses in *Cleveland*, unadjudicated causes of action can be bought and sold. Indeed, there is an entire industry dedicated toward investing in unadjudicated legal claims. Entities known as "litigation funding" or "litigation financing" companies often agree to advance money to a plaintiff who has an unadjudicated cause of action in exchange for a share of the proceeds if the lawsuit is ultimately successful. *See* Terrence Cain, *Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater*, 89 Chi.-Kent L. Rev. 11

[40] Also off-point is *United States v. Zauber*, 857 F.2d 137 (3d Cir. 1988), a case cited by Neff as an example of this Court finding plain error where a district court allowed mail and wire fraud charges to go to the jury. Br. 53-54. The indictment in *Zauber* did not allege an actual or intended loss of money or property. 857 F.2d at 143.

(2013); *Lawyers Funding Group, LLC v. Harris*, 2016 WL 233669 (E.D. Pa. 2016) (describing a local lawsuit involving one of these companies).

Neff, himself, represented a litigation financing company called National Lawsuit Funding, which was owned by Rubin. It is, therefore, no wonder that at Neff's sentencing hearing, Neff's counsel refrained from arguing that the Indiana lawsuit had "no value whatsoever. I mean, obviously, that's why they're pursuing the lawsuit because they think that there is some return." App. 7850.

That concession is dispositive. Although one might dispute the "value" ascribable to an unadjudicated legal claim, the fact that it is "something of value" means that it is a form of "property" under the mail and wire fraud statutes. *Pasquantino*, 544 U.S. at 355; *McNally*, 483 U.S. at 358. The district court did not plainly err by accepting the jury's guilty verdicts on Counts 3 through 17.

VI. THE DISTRICT COURT DID NOT CLEARLY ERR WHEN IT DETERMINED THAT THE INTENDED LOSS ASSOCIATED WITH THE DEFENDANTS' FRAUD EXCEEDED $9.5 MILLION

Standard of Review

A district court's decision regarding the interpretation of the Sentencing Guidelines, including what constitutes "loss," is plenary. Factual findings, such as the amount of the loss, are reviewed for clear error. *United States v. Napier*, 273 F.3d 276, 278 (3d Cir. 2001).

Discussion

Neff argues that the district court erred when it determined that the intended loss associated with the fraud on the Indiana plaintiffs exceeded $9.5 million.[41] Br. 59-63. In an attempt to obtain plenary review, he suggests that the error was in the court's interpretation of "loss" in Section 2B1.1 of the Guidelines. Br. 5. Neff's argument, however, is mostly factual. Br. 59-63. Neff contends that the district court erroneously based its intended loss calculation on his July 12, 2013, email to Hallinan, in which Neff warned that Hallinan faced personal exposure of up to $10 million if the lawsuit were successful. Br. 61-62. Neff asserts that his warning was

[41] Neff appears to assert that the court found an actual loss of more than $9.5 million. Br. 59. That is not accurate. The court's finding was based on an intended loss amount.

simply an assessment of the "worst-case scenario," and could not form the basis of the court's intended loss assessment. Br. 63. He is wrong both legally and factually.

Neff's legal argument is based on the same fallacy underlying his theory that the indictment did not allege federal crimes: namely, that an unadjudicated cause of action cannot be "property" under the mail and wire fraud statutes. Br. 60-61. As explained previously, a cause of action is "something of value," *Pasquantino*, 544 U.S. at 355, even if it never results in a final, executable judgment, *Hird*, 913 F.3d at 345. Thus, the issue at sentencing involves ascribing a value to that unadjudicated cause of action, which is a factual determination.

The application notes provide that in determining the "loss" associated with a fraud, "loss is the greater of actual loss or intended loss." § 2B1.1 app. note 3(A); *United States v. Feldman*, 338 F.3d 212, 215 (3d Cir. 2003). Intended loss "means the pecuniary harm that the defendant purposely sought to inflict; and...includes intended pecuniary harm that would have been impossible or unlikely to occur...." § 2B1.1 app. note 3(A)(ii). Pecuniary harm "means harm that is monetary or that otherwise is readily measurable in money." *Id.* app. note 3(A)(iii).

Although the government bears the burden of proving the applicable loss amount by a preponderance of the evidence, "the burden of production may shift to the defendant once the government presents prima facie evidence of a given loss amount." *United States v. Diallo*, 710 F.3d 147, 151 (3d Cir. 2013). In this case, the government presented *prima facie* evidence that Neff intended to deprive the Indiana plaintiffs of a cause of action he feared could be worth as much as $10 million.[42]

Notably, this is not the "worst-case scenario." An attorney for the Indiana plaintiffs testified that the lawsuit sought approximately $13,930,000 in statutory damages, plus principal and interest on each loan as well as attorneys' fees. App. 4746-48. The $10 million figure, however, represented the pecuniary harm that Neff knew or reasonably should have known was a potential result of the fraud scheme. Neff warned Hallinan of his $10 million exposure at roughly the same time the defendants were proposing a settlement offer of $40,000. App. 6392-93. Thus, the intended loss was approximately $9,960,000.

[42] The government did not seek to quantify the actual loss in this case, but Neff incorrectly states that his victims "were fully aware of Hallinan's position." Br. 62. The Indiana plaintiffs never learned that Hallinan owned, operated, and controlled Apex 1, or that Apex 1 had millions of dollars in assets before Hallinan diverted that money to himself. App. 4804-06.

Neff did not provide any counter-evidence. He argued, however, that a more appropriate intended loss amount should be $557,200, which was the amount of a settlement offer that the defendants had extended to the Indiana plaintiffs in December 2013. App. 7890, 7900. The district court accepted the government's evidence and concluded that the intended loss associated with Counts 3 through 8 was $9,960,000. App. 7898.[43] Such a finding was "plausible in light of the record viewed in its entirety," so it should not be reversed. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). Neff's appeal of the district court's loss determination should be denied.

[43] The court then departed downward based on a finding that the loss amount overstated the seriousness of Neff's offense, and sentenced Neff as if the intended loss were $557,200.

VII. THE DISTRICT COURT DID NOT CLEARLY ERR WHEN IT FOUND AT SENTENCING THAT HALLINAN HAD ATTEMPTED TO OBSTRUCT JUSTICE

Standard of Review

The district court's factual determination of obstruction of justice is reviewed for clear error. Any question regarding the legal interpretation of the guideline is reviewed under a plenary standard. *United States v. Powell*, 113 F.3d 464, 467 (3d Cir. 1997).

Discussion

Hallinan argues that the court clearly erred when it found that he attempted to obstruct justice by hiring attorney Mathewson to assert privileges on behalf of Apex 1 in order to block the government's access to, and use of, evidence of Hallinan's personal crimes. Br. 53. Hallinan claims that the district court's finding was unsupported by the evidence and inconsistent with the court's prior rulings. Br. 53-56. He also contends that the court misconstrued the applicable Guideline, Br. 53, but he does not explain how. Hallinan is mistaken on all points.

Section 3C1.1 provides for a two-level upward adjustment in a defendant's offense level if the defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with

respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense." U.S.S.G. § 3C1.1. "Obstructive conduct can vary widely in nature, degree of planning, and seriousness." *Id.* app. note 3. The enhancement applies, *inter alia*, to "conduct prohibited by obstruction of justice provisions under Title 18," *id.* app. note 4, such as 18 U.S.C. § 1512(b), which makes it a crime to engage in "misleading conduct toward another person" with intent to delay or hinder the provision of information to an official proceeding.

The record is replete with evidence that Hallinan conspired with Ginger to mislead others, and attempted to mislead others, in order to hinder the investigation and prosecution of his crimes. In so doing, Hallinan tried to mislead both Mathewson and two federal district judges into believing that Apex 1, as an entity, had an interest in evidence of Hallinan's personal crimes, and that Ginger was authorized to assert privileges on behalf of Apex 1.

The evidence that Hallinan tried to block from both the grand jury and the petit jury came in four forms: (1) documents in Weir's possession concerning its representation of Apex 1 in the Indiana lawsuit;

(2) documents in Chartwell's possession concerning its representation of Apex 1; (3) testimony of Verbonitz about her representation of Apex 1; and (4) testimony of Dubrow about his representation of Apex 1. Hallinan knew that he could not assert any personal privileges in such evidence, and he knew that he could not purport to assert privileges on behalf of Apex 1, given his deposition testimony that (a) he had sold Apex 1 in 2008; (b) he had no dealings with Apex 1 since February 2009; (c) Apex 1 had gone out of business in 2010; and (d) he had no personal involvement in the Indiana lawsuit against Apex 1.

Hallinan's initial solution was to pay $50,000 for Ginger to raise privilege objections to the grand jury subpoenas. The objections, however, were overruled, in part because the grand jury judge held that any privilege belonged to Apex 1 as an entity, not Ginger as an individual. Hallinan and Ginger then agreed for Ginger, purporting to be an "authorized representative" of Apex 1, to hire Mathewson to assert privileges on Apex 1's behalf.

On October 29, 2015, Ginger signed an engagement letter with Mathewson to challenge grand jury subpoenas that had been served on Weir and Chartwell, and Hallinan signed a separate third-party payor agreement. App. 7055-60. Over the next two years, Hallinan paid

Mathewson more than $414,000 to assert privileges for "Apex 1" in order to block the government's access to and use of evidence that incriminated Hallinan, but did not expose Apex 1 to prosecution.[44]

At Hallinan's sentencing hearing, the district court found the government had proven Hallinan had at least attempted to obstruct justice. The court stated:

> Although the valid assertion of attorney/client privilege cannot, itself, constitute obstruction of justice, here, there is evidence that Apex 1 was defunct and would not have made any privilege assertion, but for Hallinan's payment to Mathewson. In this matter, the assertion of privilege was misleading to the Court, was a sham organized to protect Hallinan, and to prevent the effective prosecution of this case.

Id. at 8162-63.

The court also rejected Hallinan's claim that this finding was inconsistent with its past rulings – a claim Hallinan reiterates in his appeal. Br. 53-54. The court referenced its prior ruling and stated: "what the Court had previously...found is that Hallinan had attempted to influence, but had not succeeded in influencing Mathewson. Under the guidelines, this attempt constituted an obstruction under the facts of this case." App. 8163. The district court was correct. Section 3C1.1 applies to attempts to obstruct or impede the administration of justice.

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[44] The government repeatedly stated that it had no intention to prosecute Apex 1 because "we don't prosecuted dead entities." App. 8082.

Hallinan's other appellate arguments are essentially contentions that the court drew incorrect inferences from the evidence. Hallinan claims, for example, that the record does support the court's finding that Apex 1 was defunct. Br. 54. He is wrong. Hallinan testified at his deposition that Apex 1 had gone out of business around 2010, and the grand jury judge had made a factual finding that, "for all intents and purposes, Apex 1 is dead." App. 319.[45]

Hallinan also claims the record does not support the court's statement that Hallinan "attempted to influence" Mathewson. Br. 54. He is mistaken. A jury found beyond a reasonable doubt that Hallinan had paid Ginger $10,000 a month to make false claims regarding Apex 1 in the Indiana lawsuit. It was reasonable for the district court to infer that Hallinan and Ginger had reprised their fraud scheme with regard to the hiring of Mathewson, especially since Mathewson stopped making privilege

[45] Hallinan also claims that whether Apex 1 is defunct is irrelevant because this Court held in *ABC Corp.*, 705 F.3d at 142, that defunct corporations have standing to assert privileges. He is mistaken. The issue of whether a defunct corporation can assert privileges was not litigated in *ABC Corp.* or any other case before this Court. The weight of federal authority holds that defunct entities have no privileges. *SEC v. Carrillo Huettel LLP*, 2015 WL 1610282, at *3 (S.D.N.Y. Apr. 8, 2015) (citing numerous cases).

assertions for Apex 1 at roughly the same time when Hallinan stopped making payments to her.[46]

Hallinan may argue that different inferences should be drawn, but he cannot show that the district court's findings were "clearly erroneous."

[46] Hallinan misleadingly states that his fee arrangement with Mathewson was "fully disclosed." Br. 55. Mathewson initially refused to identify who was paying her fees and only did so under court questioning. Mathewson also opposed government subpoenas for records of Hallinan's payments to Mathewson and only produced those records after being compelled to do so repeatedly.

VIII. THE DISTRICT COURT'S FORFEITURE RULINGS WERE SUPPORTED BY THE LAW AND THE RECORD

Standard of Review

On appeal from a bench trial, such as the forfeiture proceedings in this case, this Court "review[s] a district court's findings of facts for clear error and exercise[s] plenary review over conclusions of law." *In re Frescati Shipping Co., Ltd.*, 886 F.3d 291, 300 (3d Cir. 2018) (citation omitted).

Discussion

Appellant Charles M. Hallinan raises three challenges to the district court's forfeiture rulings. His objections are without merit.

The evidence at trial proved that the Hallinan Payday Lending Enterprise collected approximately $488,348,509 in gross proceeds from payday loans processed by Intercept during the conspiracy charged in Count One.[47] The Hallinan Payday Lending Enterprise also collected $2,226,857 in gross proceeds from payday loans through PowerPay. Supp. App. 591. In total, therefore, Hallinan received $490,575,366 in gross

[47] The district court found that Intercept actually had transferred $490,904,533 in payday loan payments to the Hallinan Payday Loan Companies. Supp. App. 591. However, at Hallinan's sentencing, the government volunteered that this figure included $2,555,903.14 in funds collected through MTE in 2009, and that Hallinan was no longer associated with MTE in 2009, so those receipts should be excluded. App. 8234-36.

receipts from the crime charged in Count 1. Hallinan did not own or operate the Rubin Payday Lending Enterprise charged in Count 2, but he received $100,000 for brokering the relationship between Rubin and Guidiville. Supp. App. 592.

Hallinan did not segregate legal payday lending receipts, i.e., those from borrowers who lived in the six states where payday lending was legal (Delaware, Idaho, Nevada, South Dakota, Utah, and Wisconsin), from his receipts of payments from borrowers who lived in the other 44 states and the District of Columbia. Supp. App. 432-33, 456. Instead, Hallinan combined his payday lending receipts into one pool of funds, which Intercept maintained in a single bank account. *Id.* Hallinan also directed Kevitch to reinvest most of these pooled receipts into new payday loans to borrowers across the country, including in prohibited and regulated states. App. 7579; Supp. App. 456-57. On any given day loan payments were collected, and new loans were extended from the same bank account. Supp. App. 432-33, 456-57. Thus, to the extent Hallinan issued some legal payday loans, he did so with money derived from illegal payday loan receipts.

Hallinan did not present any evidence that he actually had made any legal payday loans, or that any of his payday loan receipts had been derived from legal loans. Supp. App. 615. The government, however, presented

evidence indicating that approximately 4.79 percent of Hallinan's "leads" – people targeted as potential customers – lived in states where payday lending was permitted. Supp. App. 413-17, 461. This evidence consisted of data from Apex 1LG that out of 303,816 leads acquired by Hallinan Payday Lending Companies in a given time period, only 14,556 were for people who lived in the six states where payday lending was legal. *Id*.

The district court, while noting that not all "leads" resulted in the extension of loans to borrowers, concluded that it was reasonable to extrapolate from the lead data that approximately 4.79 percent of the loans issued by the Hallinan payday loan companies were likely made in states where payday lending was legal. Supp. App. 614-15.[48] As a result, the court concluded that it would reduce Hallinan's payday lending gross receipts by 4.79 percent to determine the amount of Hallinan's RICO "proceeds." Supp. App. 615.

The court also ruled, over the government's objection, that in determining Hallinan's RICO proceeds, it would deduct the amount of principal extended to borrowers from Hallinan's gross receipts from

[48] "[A]lthough Hallinan challenges the Government's method of extrapolation, Hallinan does not provide any affirmative evidence of his own regarding which loans were extended in states where payday lending was legal. As a result, Hallinan has not met his burden to overcome the evidence of total receipts introduced by the government." *Id*.

unlawful payday lending. Supp. App. 616-17. The amount of funds that Hallinan loaned to borrowers was approximately $423,276,692.[49] Supp. App. 617. Subtracting this amount from Hallinan's gross payday lending receipts and then reducing that figure by 4.79 percent resulted in a total of $64,300,829.90. App. 8235. The court concluded that this amount represented Hallinan's forfeitable RICO proceeds. App. 11.

The court also found that the government had proven that 21 specific properties were directly forfeitable as "interests" in the RICO enterprise charged in Count 1. App. 14-17; Supp. App. 620-23. The first 13 of these properties were financial accounts belonging to various Hallinan Payday Loan Companies.[50] App. 15-16. The next five properties were enterprise funds moved into financial accounts in Hallinan's name. App. 17. The last three properties were vehicles purchased with enterprise funds. *Id.*

[49] The court's order lists the amount as $424,741,582, but this includes $1,465,160 lent out by MTE in 2009. Supp. App. 770.

[50] The first three accounts were held in the name of Hallinan Capital Corporation ("HCC"). App. 15. In the district court, Hallinan contended that HCC was not part of the RICO enterprise. The court, however, concluded that "HCC was the umbrella company for all of Hallinan's payday lending activity, and therefore was part of the [enterprise]." Supp. App. 622. Hallinan does not challenge that finding in his appeal.

A. The Government's Tracing Methodology Was Legally Sound.

In his first objection on appeal, Hallinan challenges only the court's findings with regard to the five financial accounts in his name: a Morgan Stanley account, two Bank of America accounts, a Bank of Leumi account, and a TD Bank Account (Properties 14 through 18).[51] A government witness testified by affidavit that he had reviewed records from 45 different financial accounts over a 10-year period, and had analyzed the flow of more than $950 million through the accounts and provided the court with summaries of his analysis. *Id*. The analyst specifically traced the funds in Properties 14 through 18, which totaled $484,293.59, from bank accounts belonging to HCC, Apex 1, and Blue Water Management, Supp. App. 405-09, all of which were components of the charged Hallinan Payday Lending Enterprise, Supp. App. 592, 622; Exhs. 2200, 2500. The court credited the

[51] The accounts are identified in Paragraph 17, subparagraphs p through r, of the court's forfeiture order. App. 17.

Hallinan also claims that the only basis for the forfeiture of two automobiles, Properties 20 and 21 (identified in subparagraphs 17(t) and (u) of the forfeiture order), was that the money used to purchase them flowed from Property 16. Br. 59. This is incorrect. Hallinan purchased the two automobiles on the same day in 2015 by trading in another car, purchased with enterprise funds, and adding about $94,528.53 that Hallinan funneled from HCC accounts through the same personal account that later held the funds identified as Property 16.

tracing analysis and found that "Hallinan's right, title, and interest" in all five accounts should be forfeited to the United States. App. 18.

Hallinan does not dispute the accuracy of the analyst's tracing. Instead, Hallinan claims the court erred when it held that assets contained in the five accounts were directly forfeitable as interests in the Hallinan Payday Lending Enterprise. Br. 56-59. According to Hallinan, the analyst employed a tracing method that "is not accepted in this Circuit because it does not distinguish illegal from legal sources." Br. 56. More specifically, Hallinan claims the analyst's use of accounting principles referenced in *United States v. Banco Cafetero*, 797 F.2d 1154 (2d Cir. 1986), is impermissible in light of *United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1990). Br. 57-58. *Voigt*, however, was sharply limited in *United States v. Stewart*, 185 F.3d 112, 129 (3d Cir. 1999), and it has been undermined further by the Supreme Court's ruling in *Luis v. United States*, 136 S. Ct. 1083 (2016).

In *Voigt*, the government sought to forfeit jewelry that had been purchased with funds from a bank account in which money laundering proceeds had been commingled with other funds. 89 F.3d at 1081. Records showed that there had been numerous intervening deposits and withdrawals into the account subsequent to the deposit of the tainted funds

and prior to the purchase of the jewelry. *Id.* at 1082. This Court found that the jewelry was not directly forfeitable under 18 U.S.C. § 982 because it was impossible to say that the jewelry was "traceable to" property "involved in" the money laundering. *Id.* In a footnote, this Court stated that interpreting "traceable to" literally would avoid problems plaguing other courts that have attempted to devise a workable tracing analysis for commingled funds, and referenced the Second Circuit's decision in *Banco Cafeteria* as an example. *Id.* at 1087 n.22.

In *Stewart*, this Court held that the government could directly forfeit a convicted money launderer's account at Merrill Lynch into which the defendant had deposited $3 million in criminal proceeds. 185 F.3d at 128-29. At the time of the deposit, there was already $160,000 in the account, and that money appeared to be "legitimate." *Id.* at 118. At the sentencing hearing, "the Government used appropriate records to trace the $3 million" into the personal account, but the district court concluded, based on *Voigt*, that the money was not directly forfeitable because it was in a commingled account. *Id.* at 129. This Court reversed "because the facts of *Voigt* are distinguishable from the facts of this case." *Id.*

This Court recognized that *Voigt* appeared to stand for the principle that an account containing both tainted and untainted funds cannot be

directly forfeited, especially in light of a statement in a footnote that commingled cash in an account could be forfeited only as a substitute asset even if one could separate out the amount subject to forfeiture. *Id.*, citing *Voigt*, 89 F.3d at 1088 n.24. This Court said that statement was dicta because *Voigt* was not a case in which "one readily could separate out the amount subject to forfeiture." *Id.* "We do not see any difficulty, however, in separating out the tainted $3 million from the untainted $160,000 that the Account contained." *Id.*

Voigt's vitality has been further undermined by the Supreme Court's decision in *Luis*. That case concerned the pretrial restraint of a criminal defendant's assets, pursuant to 18 U.S.C. § 1345. In holding that the restraint of "innocent" assets violated a defendant's Sixth Amendment right to a fair trial, the Court endorsed the use of tracing rules to distinguish between tainted and untainted assets and noted that courts "have experience separating tainted assets from untainted assets." *Id.* at 1095-96 (citations omitted).

Regardless, nothing in *Voigt* or any other case precludes the use of any particular set of accounting principles to conduct such a tracing. This Court's passing reference to *Banco Cafetero* in a footnote did not make it impermissible to use the accounting principles discussed in that case. Thus,

the district court did not clearly err in accepting the analyst's conclusions, which Hallinan does not contest with any specificity.

B. There Was Sufficient Evidence to Support the $64,300,829 Money Judgment.

Second, Hallinan presents a challenge to the forfeiture money judgment that is essentially a claim that there was insufficient evidence to support the court's finding that he collected at least $64,300,829 in unlawful debt. Br. 59-62. This Court's review, therefore, is "highly deferential." *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 430 (3d Cir. 2013) (en banc). The question is whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact" could have rendered the same verdict. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979) (emphasis in original).

In this case, the government presented evidence that, when viewed in the light most favorable to the prosecution, would have supported a money judgment far in excess of $64,300,829. In fact, the government's evidence supported a money judgment of $490,575,366, which constituted the receipts the Hallinan Payday Lending Companies had collected between 2007 and 2013, from Intercept and PowerPay. Supp. App. 591-92. Hallinan

presented no evidence, and the government is aware of none, that any of those collections were legal.[52]

The court nonetheless held that Hallinan would have to forfeit only about 13.1% of his payday loan proceeds by: (a) giving Hallinan the benefit of the doubt and assuming that he must have made some legal payday loans; and (b) subtracting the amount of money that Hallinan issued in loan principal from the gross receipts figure. The first reduction was based on an analysis performed by the government of data provided by Apex 1LG, which indicated that 4.79% of Hallinan's "leads" – people targeted as potential customers – lived in one of the six states where payday lending was permitted. Supp. App. 413-17, 461.

Hallinan claims that the government's analysis was flawed because "99.85 percent of leads never became loans," Br. 60-61, but his assertion is meaningless. Regardless of how many leads resulted in loans, it was undisputed that all loans originated from leads. App. 2400-08. The district court, therefore, did not clearly err when it held that the government's extrapolation method was sufficient to establish the total receipts of the business. Supp. App. 614-15. As the court stated, "[g]iven RICO's broad

[52] The government also proved, and Hallinan does not contest, that he received $100,000 from Rubin for Rubin's collection of unlawful debt.

purpose, a defendant cannot shield himself from liability simply by mixing legal and illegal businesses to such a degree that the legal business cannot be separated out." Supp. App. 615.

Further, Hallinan offered no affirmative evidence or calculation of his own regarding the amount of loans made in states where payday lending was legal. *Id*. The district court found that Hallinan failed to meet his burden to overcome the government's evidence as to the total legal receipts because he failed to provide any affirmative evidence to the contrary. *Id*. For all of these reasons, the district court's reliance on the lead data was reasonable, and its finding that Hallinan had received at least $64,300,829 in illegal payday loan proceeds was not clearly erroneous.

C. The Court Properly Refused to Subtract Hallinan's Claimed "Direct Costs" from the Money Judgment.

Hallinan's final argument is that the district court erred by failing to reduce the money judgment for what he describes as the "direct costs of the various payday lending businesses." Br. 63. Hallinan claims he incurred $59,009,749 in such "direct costs," which included expenses for "marketing, credit fees, and salaries." Br. 63. In making this argument, Hallinan uses different terminology than he used in the district court, where he sought to reduce the money judgment by "direct operational costs" that included acquisition expenses, advertising and promotional

expenses, Black Oak expenses, credit card collection fees, credit verification expenses, Intercept fees, ACH returns and recoveries, and bank service charges." Supp. App. 607.

This is not just a semantic distinction. The district court determined that the principal loaned to borrowers were the "direct costs" of the Hallinan Payday Lending Enterprise and could be deducted from the forfeiture money judgment, whereas "the 'direct operational expenses' Hallinan lists cannot be deducted." App. 615-16. The court explained that, "allowing a defendant to deduct regular business expenses would punish efficient enterprises and reward inefficient ones." *Id.* "That does not comport with the goals of criminal forfeiture." *Id.*

Moreover, if a convicted RICO offender, such as Hallinan, could reduce his forfeiture exposure by subtracting "direct operating expenses," it would lead to bizarre results. A drug trafficker would seek to deduct expenses associated with buying and maintaining drug trafficking paraphernalia and paying the people who manufactured, processed, transported, and distributed the controlled substances. A bank robber could deduct the cost of his getaway car. The list of illogical examples is endless.

Hallinan is a convicted loanshark. From at least 2007 until 2013, he conspired to violate RICO, which has a forfeiture statute that the district court aptly described as "mandatory, broad, and sweeping in its scope." Supp. App. 609. *See* also *Russello v. United States*, 464 U.S. 16, 26 (1983) ("the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."). It is one thing to hold, as the district court did, that a forfeiture money judgment should be reduced by the principal of the illegal loans Hallinan issued. Supp. App. 617.[53] It is quite another to suggest that Hallinan should be able to deduct the money he paid to market his illegal business or keep it operational. Hallinan's final grounds for appeal is without merit and should be rejected.

[53] The court's opinion suggests that it was concerned about the Eighth Amendment implications of accepting the government's view that the principal should not have been deducted, because that could lead to double-counting of the same proceeds. Supp. App. 609-12. The government's view is that the term "proceeds" under RICO means "gross proceeds," so the principal should not have been subtracted.

CONCLUSION

For the reasons stated above, the government respectfully requests that the judgment of the district court be affirmed.

Respectfully submitted,

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CERTIFICATION

1. The undersigned certifies that this brief contains 31,993 words, exclusive of the table of contents, table of authorities, signature block, and certifications, and therefore complies with the limitation on length of the brief stated in the Court's order in these matters dated February 4, 2019.

2. I hereby certify that the electronic version of this brief filed with the Court was automatically scanned by OfficeScan Real-Time Scan Monitor, version 10.5, by Trend Micro, and found to contain no known viruses. I further certify that the text in the electronic copy of the brief is identical to the text in the paper copies of the brief filed with the Court.

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CERTIFICATE OF SERVICE

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