Case Nos. 18-2282 and 18-2539

United States Court of Appeals

for the

Third Circuit

UNITED STATES OF AMERICA

– v. –

WHEELER K. NEFF,

Appellant in 18-2282

(E.D. Pa. No. 2-16-cr-00130-002)

UNITED STATES OF AMERICA

– v. –

CHARLES HALLINAN,

Appellant in 18-2539

(E.D. Pa. No. 2-16-cr-00130-001)

ON APPEAL FROM THE JUDGMENTS ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA IN CASE NOS. 2-16-CR-00130-001 AND 2-16-CR-00130-002, EDUARDO C. ROBRENO, U.S. DISTRICT JUDGE

BRIEF FOR DEFENDANT-APPELLANT CHARLES HALLINAN AND JOINT APPENDIX
Volume 1 of 17 (Pages A1 to A20.11)

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JURISDICTIONAL STATEMENT

Appellant Charles Hallinan appeals from a final judgment of conviction entered on July 6, 2018 in the United States District Court for the Eastern District of Pennsylvania for violations of Title 18, U.S.C. §§ 1962(d), 371, 1341, and 1342 in criminal case number 2:16-cr-00130-ER-1. A timely notice of appeal was filed on July 10, 2018. ECF No. 509. This Court has jurisdiction pursuant to 28, U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the District Court erred in admitting a privileged email contrary to this Circuit's ruling, which formed the entire basis for certain counts of conviction and was essential to the government's proof of scienter.

2. Whether the District Court erred in failing to charge the jury on willfulness where Appellant's sole defense depended on that element.

3. Whether the wire fraud counts of conviction should be vacated because an unvested interest in pending litigation is not "money or property."

4. Whether the District Court's curtailment of the testimony of codefendant Wheeler Neff infringed upon the right of Appellant to present his defense.

5. Whether the District Court improperly imposed an obstruction of justice enhancement at sentencing simply because Appellant paid the legal fees of a payday lending corporation.

6. Whether the government failed to prove beyond a reasonable doubt its right to forfeit certain real property because of a flawed tracing analysis; and failed to prove its right to a money judgment because it used statistically insignificant estimates.

PRELIMINARY STATEMENT

Charles Hallinan, the appellant, was tried and convicted for participating in a business that legal experts and prominent law firms concluded was completely legal: payday lending. Specifically, Appellant was convicted of partnering with Native American Tribes to offer high interest, short term loans to borrowers that he believed were exempt from state usury laws due to the Tribes' inherent sovereign immunity. The tribal lending model was prevalent in the payday loan industry and supported by certain caselaw. Although there remains no federal governance over payday lending, the federal government here has used RICO to convert Pennsylvania's state usury law into a fourteen year sentence of imprisonment for Appellant, a 78 year old man with no criminal history and two life-threatening forms of aggressive cancer.

Most of the facts in this case were uncontested: Appellant owned certain companies involved in the provision and collection of payday loans; he partnered with tribes who asserted their sovereign tribal immunity to be exempt from state usury laws; and the loans were far in excess of the usury rates in some states, including Pennsylvania. There was also no dispute that prominent law firms such

as Greenberg Traurig and even some state courts attested to the legality of the tribal lending model. What was disputed was Appellant's good faith – whether he entered into these partnerships with Native American Tribes believing that the state usury laws did not apply because of the Tribes' sovereign immunity.

Appellant's defense, however, was undercut at every turn. Indeed, this case already involved an interlocutory appeal to this Circuit. During the grand jury proceedings, the government received a privileged email that became the center of the government's proof and the sole basis for certain counts. It concerned legal advice given by codefendant Wheeler Neff, a Delaware lawyer, to Appellant. Although clearly privileged, the government argued that it fell into the crime-fraud exception. In an interlocutory appeal, this Circuit Court rejected the government's argument, holding that the email was privileged, should not have been used in the grand jury, and any conviction flowing from it may be vacated unless the government can show harmless error.

Undaunted, the government did much more than use the email in the grand jury. In direct contravention of this Circuit's decision, it extensively used the email at trial. The email formed the only basis for two wire fraud counts, constituted overt acts in others, and was proffered again and again as evidence of Appellant's intent and lack of good faith. The unprecedented nature of this criminal prosecution

against tribal lending was only surpassed by the unprecedented actions of the government in circumventing this Circuit's clear directives.

In addition to the introduction of this email, Appellant's defense was severely undercut when the District Court refused to include a willfulness instruction in the jury charge. The jury was told that to find Appellant guilty of RICO, they only need conclude that he intentionally made loans in excess of state usury laws with full knowledge of what he was doing. The District Court refused to charge the jury on willfulness—that Appellant knew that his conduct was unlawful and intended to do something the law forbids. Thus Appellant's good faith defense, which depended on his belief that tribal sovereign immunity made the loans exempt from state usury laws, was obliterated. It was his belief in the legality of his conduct that was his sole defense—not that the loans were made or that they exceeded state usury rates.

The use of the Privileged Email and the lack of proper jury instructions was further compounded by severely restricting the testimony of the most important witness in the case—Appellant's lawyer, codefendant Wheeler Neff. During his testimony, Neff was not permitted to talk about the cases he reviewed or the legal sources he studied in any detail. He was allowed to mention some case names, but denied the ability to explain them with any specificity. The government used these limitations to portray Neff as someone who only did surface research as opposed to the months and detailed analysis that he took, evidencing his intent to obey the law

– not disregard it. For Neff it was an abrogation of his right to testify in support of his defense; for Appellant it was curtailing the testimony of his most important witness in presenting his good faith defense.

There were additional errors at sentencing and during the forfeiture hearing, but they would have been irrelevant if Appellant were able to present his defense. The jury would have seen how seriously and diligently the defendants researched the tribal lending model; and if the correct jury instructions were given, the jury would have been able to properly evaluate the defendants' good faith defense. For all of these reasons, and as described in more detail below, Appellant's conviction should be vacated.

FACTS

Payday loans are short term loans typically made to individuals with poor credit. A1041-43. The loans are usually a few hundred dollars and meant to allow an individual to pay bills that are immediately due without having to wait until their next payday. Id. Most banks and other financial institutions do not offer payday loans for a number of reasons: (1) the default rate is extremely high; (2) collecting on any default is near impossible; and (3) even if collection was possible, the cost of collecting on such a modest debt would be much more expensive than the value of the loan itself. A5762-63. A payday loan business thus requires high interest rates or fees to be viable. A5763 (testifying that the default rate on payday loans in this

case was almost one third). For example, the most common interest rate cap on loans for licensed lenders is 36%. A1033. However, a 36% interest rate on a two week payday loan of $300 would only generate $4.15 interest – far too little to cover the extremely high rate of default, to say nothing of all of the marketing, servicing, and collection fees. A5327-28.

States have wildly different laws regarding the legality of payday lending. An ongoing policy debate has led 17 states to prohibit payday loans; 27 states to permit some payday loans; and 6 states to allow payday lending without restrictions. A7091.

The Tribal Model of Payday Lending

The "Tribal Model" of payday lending relied on the legal premise that Native American Tribes were sovereigns, so, if the Tribe made the loan, the state's usury laws would not apply. The Tribal Model flowed from the seminal Supreme Court decision that California gaming law did not apply to tribal gaming operations. A5228; *see California v. Cabazon Band of Mission Indians*, 480 US 202, 209 (1987). The Supreme Court then extended that holding "to activities of a tribe whether on or off the reservation, even when the activity is commercial rather than governmental." *Kiowa Tribe v. Manufactural Technicians*, 523 U.S. 751 (1998).

In the wake of *Kiowa*, two leading state court decisions held that state usury laws may not apply to tribal payday lenders. A5344; *State ex rel Suthers v. Cash*

Advance and Preferred Cash Loans, 205 P.3d 389 (Colo. Ct. App. 2008) ("[I]f, after a hearing, the trial court determines that the Cash Advance and Preferred Cash Internet lending businesses under investigation are arms of the respective Tribes, then Cash Advance and Preferred Cash are immune from any enforcement action, unless their immunity has been waived."); *Ameriloan v. Superior Courts*, 169 Cal. App. 4th 81 (Cal. Ct. App. 2009) (holding that tribal sovereign immunity applied to a state's action to enforce consumer payday lending laws). Justice Thomas recognized these developments in a 2014 dissenting opinion concerning tribal sovereign immunity. *See Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014) (J. Thomas, dissenting) (criticizing the Court's tribal immunity jurisprudence because it has been "exploited in new areas that are often heavily regulated by States," such as payday lending and campaign finance laws).

Prominent law firms issued legal opinions concluding that the Tribal Model was legal. One opinion from October 2013 issued by Greenberg Traurig on behalf of its client, Tribal Lending Enterprises / Micro Loan Management ("TLE/MLM"), stated without reservation that "TLE/MLM's status as an arm of the Tribe means that states lack any legal ability to regulate activities by TLE/MLM absent the enactment of federal laws by the Congress. That has not happened. State usury laws and licensing procedures simply do not apply to TLE/MLM." A7245-53; *see also* A7224 (concluding that if a tribal lending program meets certain requirements then

"the loans made by [the tribal entity] and National's servicing of the loans made by the [tribal entity] are not subject to state law or regulation"). Both of these tribal entities had had business relationships with Mr. Hallinan.

Appellant's Payday Loan Activities

The basic facts concerning Appellant's activities were mostly undisputed. Appellant had formed agreements with tribes who offered payday loans that exceeded some state usury rates; and he provided capital for these operations and received the overwhelming majority of the profits. Counsel made it clear in the opening:

> We set up these business deals to capture the benefit of tribal sovereign immunity, that's what we did. And we made loans in several states with varying interest rates but always in partnership with Indian tribes which were sovereign. That was our belief, that we were making proper, good faith, collectible loans. So the case is not really about what we did, because we did all this stuff. The case is about what was on our minds . . . .

A1008.

The Indiana Lawsuit

The wire fraud counts of conviction involved a class action in Indiana state court involving Apex 1 Processing, Inc. ("Apex 1"). The complaint alleged that Apex 1 was the lender for payday loans that violated Indiana's loan and interest laws. A3960. Apex 1 Processing asserted that it was owned by Aboriginal GR Financial, which was a tribal entity. A4223.

Plaintiffs' counsel contested the owner of Apex 1. While a stock purchase agreement indicated it was a company purchased and owned by Chief Randall Ginger, (A6495), it continued to appear among various companies on Appellant's personal tax returns. A4223-24. During the litigation, Neff wrote a Privileged Email to Appellant, which is discussed extensively in Section I, *infra*, noting this discrepancy and suggesting that Appellant speak to his accountant about amending his taxes. A6889. Appellant testified in a deposition that he had previously owned Apex 1, but had sold it to Aboriginal GR Financial. A6434. Meanwhile, Assistant United States Attorney Joel Sweet, who participated in the criminal investigation here, sent a letter to a payment processor concerning the ownership of Apex 1 and copied all counsel in the Indiana case. A7296. Sweet wrote:

> According to Intercept's documents produced to the government, Apex 1 is owned by Charles M. Hallinan . . . . However in a motion to withdraw as counsel for Apex 1, Inc. filed in *Edwards v. Apex 1, Inc.* [] counsel for Apex 1 states that Apex 1 is owned by another entity namely GR Financial.

Id.

One of the lead attorneys for the plaintiffs testified at Appellant's trial that he "didn't believe that Randall Ginger Aboriginal hereditary chief [was] the owner of the company anymore." A4816. However, he settled the case because "proving that was going to be difficult, extremely difficult, if not impossible, and it was a risk in the case that I would win every legal issue in the case, I could prove 100 percent that

this should be a class action and 100 percent that these loans violated Indian law and I could get a judgment from a judge . . . ." Id. He further testified that he did not want to name Appellant in the litigation because he feared that the court may find the arbitration term binding. A4878. Plaintiffs made a settlement demand for $550,000 and ultimately the case was resolved for $260,000. A4511.

The jury returned a verdict of guilty on all counts.

Sentencing

Appellant was sentenced on July 6, 2018. The Sentencing Guidelines calculation was driven by the contents of the Privileged Email. Counts one and two, the two RICO counts, resulted in an offense level of 29. This included a two-point enhancement for obstruction of justice, which was unfounded and is discussed in section V, *infra*.

The wire fraud counts related to the Indiana litigation and resulted in a much higher guidelines level of 39. The wire fraud counts were driven by a loss amount of $10,000,000. This figure was taken directly from the Privileged Email. In that email, Neff told Appellant that the "potential exposure" of the Indiana case could be $8 - $10 million. The Court rejected the argument that the loss amount should be calculated based on the difference between the settlement demand and the actual settlement, which would have been $290,000. The Court did grant a six-level

departure finding that the $10 million loss overstated the severity of the offense, but still sentenced Appellant to fourteen years' imprisonment.

Forfeiture

The parties agreed to a bench trial for all forfeiture determinations. The government conceded that it must prove forfeiture beyond a reasonable doubt. *United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994). The District Court conducted a two-day forfeiture hearing at which various witnesses testified: (1) law enforcement agents; (2) Michael Kevitch, the chief operating officer of some of the payday lending companies; (3) Christine Lacey, the former personal assistant of Appellant who subsequently stole over a million dollars from him; and (4) defense expert Gregory Cowhey.

At the conclusion of the hearing and after post-hearing briefing, the District Court ordered the forfeiture of multiple accounts and automobiles based on the government's tracing of funds using a first-in-last-out analysis of certain bank accounts as described in *United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986). The District Court rejected defense counsel's argument that the tracing methods in *Banco Cafetero* had been rejected in this Circuit and that the government had not sufficiently separated out tainted from non-tainted funds under this Circuit's decision in *United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996).

The District Court further found that the government had proven its right to a money judgment of a little more than $64.3 million, which represented the amount of interest and fees paid by borrowers on payday loans. A11-13. However, the District Court refused to reduce the amount by direct costs (exclusive of overhead and taxes). A8246-47.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This Court is familiar with this case, as an appeal of matters during the grand jury phase of it was decided in In Re: Grand Jury Matter, 847 F.3d 157 (3d Cir. 2017). The only other related proceeding of which counsel are aware is the indictment against Randall Ginger which remains pending in the District Court.

SUMMARY OF ARGUMENT

The District Court committed six fatal errors that affected the fairness and integrity of the proceedings below. At trial, the District Court erred in finding the Privileged Email admissible based on the crime-fraud exception, despite this Circuit's holding to the contrary, and this error infected the entire trial. The District Court erred in failing to charge willfulness, and thus fatally undermined Mr. Hallinan's ability to present his good faith defense. The District Court erred in applying wire fraud charges to the Indiana litigation settlement, as the plaintiffs in that case were not deprived of an established property interest, and thus so no fraud could have occurred. The District Court erred in severely limiting Mr. Neff's

testimony about the due diligence he conducted, which informed his, and his client's, good faith belief in the legality of their business.

The District Court erred during sentencing in applying an "obstruction of justice" enhancement for the hiring of an attorney, and proper assertion of attorney-client privilege, thus significantly lengthening Mr. Hallinan's sentence. And the government's forfeiture presentation was based on pervasive methodological errors relating to small sample size that materially increased the forfeiture amount paid by Mr. Hallinan.

These errors prevented the jury from properly evaluating Appellant's good faith defense and led to other errors at sentencing and in the determination of forfeiture. These missteps require that Appellant's conviction be vacated.

ARGUMENT

I. THE GOVERNMENT'S INDICTMENT AND CONVICTION RELIED ON PRIVILEGED ATTORNEY WORK PRODUCT

The government fought relentlessly throughout this case to be able to introduce into evidence an email sent from Appellant's then-attorney, Wheeler Neff. A6889 (the "Privileged Email"). The Privileged Email was the subject of motion practice before the grand jury, an interlocutory appeal to this Circuit, an information letter, a motion for reconsideration that was granted by this Circuit, a motion to dismiss the Superseding Indictment, and a motion *in limine* the government filed right before trial to admit the Privileged Email notwithstanding this Circuit's ruling.

The government knew the risk it was taking by hinging its case and charges on a privileged document:

> But getting back to the hypothetical possibility that [the indictment] could be tainted, that's entirely our risk. That would cause us potential harm, I suppose, presumably Appellant would seek to dismiss the indictment and that's really a risk that it's up to us to decide whether we want to take that risk. We've looked at the law, we feel comfortable with our facts. We believe it's worth taking the risk to present this e-mail.

A248. This Circuit implied that because Appellant's indictment was based in part on the Privileged Email, any conviction based on the indictment would be vacated unless the government were able to prove harmless error:

> None of this should suggest that, in the event Doe is convicted (based on the superseding indictment) and appeals, he should **automatically** get a new trial because the Government used the protected work product. That is because the Government could avoid a retrial by showing the error was harmless.

In re Grand Jury, 847 F.3d 157, 167 (3d Cir. 2017) (citing *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255-56 (1988)). This Circuit's decision did not even contemplate that the government would directly circumvent this Circuit's opinion and use the Privileged Email at trial.

Why is this one document so important? Because it was the lynchpin of the government's case. As discussed in more detail below it was: (1) two of the overt acts charged in Count Three, A102; (2) the entire basis for Counts Six and Seven, A110, at 45; (3) relied on by the government to prove motive for Counts Three

through Seventeen - the mail fraud, wire fraud, and money laundering counts, *see infra*; (4) the sole basis for the finding of loss amount at sentencing, A8159-60; (5) the only communication between Appellant and Neff introduced at trial regarding the ownership of Apex 1, which bore on all counts of the indictment; and (6) one of only nine exhibits requested by the jury in its deliberations and after receiving it the jury returned a guilty verdict a mere two hours later. A6298; A6326. The government thought it was "worth taking the risk" because it knew that the worth of its criminal case hinged on this key piece of evidence.

The Privileged Email should have never been used in the grand jury and it should never have been used at trial. This Circuit already determined it was privilegd and not subject to the crime fraud exception. The government deliberately made an end-run around this Circuit's decision and there must be ramifications for its bad faith. Its inclusion in the grand jury and at trial warrants that Appellant's conviction be vacated.

A. Procedural History

1. The July 12, 2013 Email

During the government's grand jury investigation, Appellant's accountant produced the Privileged Email, dated July 12, 2013, which contained legal advice given to Appellant by his attorney, codefendant Wheeler Neff. A6889. The Privileged Email was produced without Appellant's knowledge.

The Privileged Email was integral to the government's theory of the case. The Superseding Indictment was based on two different theories: (1) for the RICO counts and associated money laundering counts, Appellant was alleged to have engaged in the collection of an unlawful debt by misrepresenting that the lender on certain payday loans were companies, like Apex 1, that were owned by Native American tribes who were not subject to state usury laws; and (2) for the wire and mail fraud counts, Appellant was alleged to have lied about his ownership of Apex 1 in the Indiana litigation, prompting a lower settlement. The Privileged Email was germane to both theories because it discussed the sale of Apex 1 to Native American Chief Randall Ginger and the inconsistent documentary evidence of that sale. If Appellant did not sell Apex 1, it would support the government's theory that Appellant was collecting an unlawful debt and made misrepresentations about his ownership to the class action plaintiffs.

The Privileged Email was also a key piece of evidence for the government in trying to dispute Defendants' good faith defense. In the Privileged Email, Neff warned that although Apex 1 was sold to Chief Ginger, it still appeared on Appellant's tax returns and the class action plaintiffs might use that fact to try to pierce the corporate veil and seek damages against Appellant. Neff concluded:

> [T]o correct the record as best we can at this stage, and present Apex 1 as owned by Ginger as intended, it would be helpful if Rod Ermel could correct your tax returns and remove the reference to the K1s on the returns and re-file those returns.

A6890. Under the Government's theory of the case, Neff's advice that Appellant amend his taxes was a nefarious attempt to cover up the fact that Appellant owned Apex 1. *See, e.g.,* A6037 ("This is the email, July 12th, 2013 email that Wheeler Neff sent to Charles Hallinan warning him of a $10 million judgment potentially and saying essentially, cook the books . . . ."). It added an element of consciousness of guilt, which the government harped on throughout the case.

2. This Circuit Held The Privileged Email Was Not Subject To The Crime-Fraud Exception And Should Not Have Been Used In The Grand Jury

After Ermel produced the Privileged Email, the government filed a motion with the grand jury Judge to allow it to present the Privileged Email to the grand jury arguing that it met the crime fraud exception. The grand jury Judge granted that motion. A8316. Appellant immediately appealed on June 10, 2015. Both parties and this Circuit invested a significant amount of time on the appeal. On January 12, 2016, this Court heard oral argument. *In re: Grand Jury Matter #*3, No. 15-2475 (ECF No. 003112447970) (3d Cir. Oct. 28, 2016). When it was discovered that the Government had already presented the Privileged Email to the grand jury even though an appeal was pending, the oral argument was then followed by a request for supplemental briefing on mootness, which was fully briefed on June 2, 2016.

This panel issued its first opinion on October 28, 2016, which declined to reach the issue as to whether the Privileged Email met the crime-fraud exception,

and dismissed the appeal on procedural grounds. *Id.* at 2. Judge Ambro issued a lengthy dissent, which disagreed that there was a procedural bar, and substantively found that the Privileged Email did not meet the crime fraud exception because it was not used in furtherance of any crime or fraud. *Id.* at 24.

On November 14, 2016, Appellant filed a petition for rehearing by the panel or rehearing *en banc*. The petition for rehearing was successful, and on January 27, 2017, more than a year and a half after the government's grand jury motion was initially granted, the panel unanimously found that the email was privileged, did not meet the crime-fraud exception, and should have never been used in the grand jury as a basis to indict the Defendants. Moreover, the panel implied that any conviction based on the indictment would be vacated unless the government were able to show harmless error. *In re Grand Jury*, 847 F.3d at 167 ("None of this should suggest that, in the event Doe is convicted (based on the superseding indictment) and appeals, he should automatically get a new trial because the Government used the protected work product. That is because the Government could avoid a retrial by showing the error was harmless.").

3. Undeterred, The Government Filed A Motion With The District Court Judge To Use The Privileged Email At Trial

The government did much more than simply present the Privileged Email before the grand jury, infecting the indictment—it unabashedly used the Privileged Email at trial to secure the Defendants' convictions. The government was forced to:

multiple counts of conviction depended on it. *See* Section III, *infra*. Even after this Circuit clearly disallowed use of the Privileged Email, the government moved *in limine* for an order to use the Privileged Email at trial, arguing that although this Circuit had already determined that the Privileged Email did not meet the crime-fraud exception and should not be used, this Circuit only considered whether the Privileged Email furthered wire fraud and did not consider whether it furthered certain tax crimes. The government thus wanted another bite at the apple – attempting to nullify the year and a half interlocutory appeal.

Although it was initially unclear to what specific crimes the Government referred, the government has now more concretely identified the crimes as: (a) a scheme to willfully aid and abet Apex 1 to not file tax returns in subsequent years; (b) a scheme to willfully fail to amend Appellant's personal tax returns; and (c) failing to tell the IRS during a 2015 audit that Appellant owned Apex 1. Govt's Reply To Motion for Bail Pending Appeal, ECF No. 003112967022 (June 26, 2018). As discussed below, (b) is not even a crime, and the others are temporally disconnected and could not have been furthered by the Privileged Email. Moreover the government could have raised any of these theories on appeal and declined to do so, waiving these arguments. Shockingly, the District Court accepted the government's arguments, circumvented this Court's prior ruling, and allowed the Privileged Email to be admitted at trial.

B. The Use Of The Privileged Email Mandates The Reversal Of Appellant's Conviction

The government's use of the Privileged Email in the grand jury tainted the entire superseding indictment. As described *infra* it was the only basis for certain counts, made up two overt acts in the conspiracy counts, and was a key piece of evidence for both the RICO and wire fraud charges. Even when this Court ruled that the Privileged Email should not have been used at all before the grand jury and any conviction therefrom could be dismissed subject to a harmless error review, the government doubled down. It did not seek a superseding indictment untainted by the use of the Privileged Email and disregarded this Court's order and used the Privileged Email at trial, making it a centerpiece in its case. As described below, it was clearly instrumental in the jury's decision to convict.

Manifestly, the government's "tax crime" crime fraud theory was pretextual and the District Court should not have entertained its eleventh hour, recast arguments. *See Pub. Interest Research Group of N.J. v. Magnesium Electron, Inc.*, 123 F.3d 111, 116 (3d Cir. 1997) ("The law of the case doctrine directs courts to refrain from re-deciding issues that were resolved in earlier litigation."). Indeed, the government had waived these arguments by not raising them during grand jury motion practice (or even referencing them on appeal), deciding instead to first raise them on the eve of trial. *See United States v. Burnett*, 773 F.3d 122 (3d Cir. 2014) ("[A] litigant cannot jump from theory to theory like a bee buzzing from flower to

flower."); *New Castle County v. Hartford Acc. and Indem. Co.*, 970 F.2d 1267 (3d Cir. 1992) ("[T]his kind of eleventh hour concoction undermines judicial economy as well as the responsible (or irresponsible) litigant' credibility with the court . . . .).

More to the point, however, the government's new theory that the Privileged Email furthered some future tax crimes has no factual basis and is legally inept. None of the government's proffered tax crimes were furthered by the conveyance of the Privileged Email to Appellant's accountant. "[E]vidence of a crime or fraud, no matter how compelling, does not by itself satisfy both elements of the crime-fraud exception." *In re Chevron Corp.*, 633 F.3d 153, 166 (3d Cir. 2011). Rather, it is only "misuse of work product in furtherance of a fraud," that causes the scale to tip in favor of breaking confidentiality. Third Circuit Decision, at 15. Here, the "crimes" the government argued were furthered by the transmission of the Privileged Email were: (1) failing to amend Appellant's taxes to exclude the ownership of Apex 1 (notwithstanding that the government claimed that Appellant owned Apex 1); (2) failing to admit to the IRS during a later audit that Appellant owned Apex 1; and (3) failing to file tax returns for Apex 1 in subsequent years. The government's new tax theory is woefully deficient.

First, failing to amend one's taxes is not a crime. There is no statute or IRS regulation that criminalizes failing to amend previously filed taxes even if one knows there were prior misrepresentations. *See, e.g., Broadhead v. Commissioner*, 14

T.C.M. (CCH) 1284 (1955) (rejecting the government's position that the taxpayer evaded taxes for not filing an amended return); *Taylor v. C.I.R.*, 74 T.C.M. (CCH) 1197 (1997) ("The failure to file amended returns does not evidence an intent to evade taxes."). Moreover, the government's bewildering argument is that if "Hallinan had truly sold Apex 1 in 2008, he would have been obligated to amend his personal tax returns for tax years 2009 through 2012 . . . ." A. 8055-56. The government's entire theory of the case, though, is that Mr. Hallinan did not sell Apex 1 and thus the notion that he should have amended his taxes to remove it is wholly contradictory.

Second, all of these purported tax crimes are crimes of inaction: failing to file taxes, failing to amend taxes, failing to tell the IRS that you own a company. By definition the Privileged Email could not further a crime whose premise is that no action was taken. It was the exact problem identified by this Court in its determination that the crime fraud exception did not apply: "If he had followed through and retroactively amended his tax returns, we would have no trouble finding an act in furtherance . . . . But none of that happened," and thus the in-furtherance prong was not satisfied. *Id.* at 166. Neither Appellant, his accountant, nor anyone ever took any steps on the basis of the Privileged Email.

Third, all of the crimes are temporally and factually disconnected from the Privileged Email. The Privileged Email concerned amending prior taxes to remove

Apex 1 from the list of companies owned by Appellant – a concrete action that was never carried out. The Privileged Email said nothing as to whether future taxes should or should not be filed; it contemplated nothing about what would be said to the IRS during an audit that had not yet even been noticed; and it spoke nothing of amending other tax returns. The government has strung together a series of purported criminal acts that were simply not contemplated by the legal advice in the Privileged Email. Moreover, Appellant's accountant has been consistent that none of his subsequent actions were prompted by the Privileged Email. A2152 (testifying he merely put a flag on the Privileged Email and stuck it in a drawer); A2036 (testifying that he only "skimmed over" the attorney work product in the email because "those type of things, that's foreign to me.").

The government still misunderstands what the in-furtherance prong requires: that the delivery of the Privileged Email to Appellant's accountant furthered an ongoing criminal act. None of these purported tax crimes were even in progress at the time the Privileged Email was forwarded; there is no connection between the Privileged Email and any subsequent actions; and nothing was furthered in response.

C. The Use Of The Privileged Email As A Basis For The Superseding Indictment Warrants A Reversal Of The Jury's Verdict

The use of the Privileged Email before the grand jury as a primary basis for the Superseding Indictment tainted the charges and the Indictment should have been dismissed.

First and foremost, multiple counts explicitly depend on the Privileged Email. Counts Six and Seven charge that Appellant committed wire fraud by sending the Privileged Email. They should have been dismissed. Count Three charges that Appellant conspired to commit fraud and uses the transmission of the Privileged Email as two of the overt acts. This also counsels in favor of dismissal. *See also United States v. Adkinson*, 135 F.3d 1363 (10th Cir. 1998) (vacating conviction when it was not clear that jury unanimously found defendant had committed the same overt act); *but see United States v. McDade*, 28 F.3d 283 (3d Cir. 1994) (noting for pretrial purposes that if two overt acts in a § 371 conspiracy were invalid due to the speech and debate clause it would not necessarily require dismissal of the indictment because "[r]etention of these overt acts in the indictment does not necessarily mean that the prosecution will attempt or will be permitted to prove them at trial.").

Second, the Superseding Indictment was heavily influenced by the Privileged Email. Although as a general rule a court should not look behind the four corners of the indictment after a conviction, there are exceptions into which this case falls. In *United States v. Helstoski*, 635 F.2d 200 (3d Cir. 1980), this Circuit considered whether an indictment based in part upon evidence protected by the speech and debate clause could be dismissed. This Circuit acknowledged the Supreme Court's dicta in *United States v. Calandra*, 414 U.S. 338 (1974), that as a general rule a court should not look behind the four corners of the indictment. *Helstoski*, 635 F.2d at

203. However, this Court stressed that *Calandra* involved the collection of tainted evidence outside of the grand jury process, which differs from "instances where what was transpiring before the grand jury would itself violate a constitutional privilege." *Id*. ("Of course, the grand jury's subpoena power is not unlimited. It may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law."). Thus, the distinguishing factor is whether it was a grand jury investigative action that violated a privilege (e.g. compelled testimony or subpoenaed documents) or an action removed from the grand jury process.

In *Helstoski*, this Court rejected the notion that a court should only look at the four corners of the indictment or, alternatively, should undertake a sufficiency of the evidence analysis when the grand jury's independence was called into question. In rejecting both arguments, this Circuit repeated the District Court's opinion:

> The repeated references to Speech or Debate material throughout the indictment makes it specious to assert that the grand juries did not throughout consider this evidence. . . . The receipt of evidence in violation of Helstoski's Speech or Debate privileges permeated the entire grand jury process. The entire proceeding was tainted by such evidence.

Id. at 202. This Circuit concluded that "where the infection cannot be excised, we are unwilling to adopt an interpretation limiting a right the Court has told us is so vital that it must be treated with sensitivity." Id. at 205.

There are parallel facts here. The grand jury was used by the government to violate attorney work product privilege. It is no less deserving of protection than the speech and debate clause. *See Leviton Mfg. Co. v. Shanghai Meihao Elec., Inc.*, 613 F. Supp. 2d 670, 722 n.24 (D. Md. 2009) (describing the attorney client privilege as "largely sacrosanct"); *Bowling v. Hasbro, Inc.*, 582 F. Supp. 2d 192, 211 (D.R.I. 2008) ("This Court has an obligation to safeguard the virtually sacrosanct privacy of the attorney-client privilege."); *UPMC v. CBIZ, Inc.*, No. 3:16-cv-204, 2018 WL 2107777 (W.D. Pa. May 7, 2018) ("However because the attorney-client privilege and the protections that it affords are of the utmost importance, manifest injustice would occur if the Court were to compel production of these privileged materials . . . .") (citations omitted). Like in *Helstoski*, the Privileged Email permeated the grand jury process: it formed the entire basis of two counts, made up overt acts in the indictment, and goes to the heart of all counts of conviction. It is not a discrete piece of evidence that is easily excised – it is perfuse; and the only remedy is dismissal.

D. The Inclusion Of The Privileged Email At Trial Warrants A New Trial

Even had the Superseding Indictment not been tainted, the use of the Privileged Email at trial would warrant a new trial. Evidentiary rulings are reviewed for abuse of discretion, *United States v. Starnes*, 583 F.3d 196, 213-14 (3d Cir. 2009) and the underlying legal conclusions are reviewed *de novo, United States v. Serafini*, 233 F.3d 758, 768 (3d Cir. 2000). Erroneous rulings require a new trial when it

affects a "substantial right of the party." Fed. R. Evid. 103(a); Fed. R. Crim. P. 52(a). To prove harmless error, the government has the burden to establish that it "is highly probable that the error did not affect the result." *Hill v. Laeisz*, 435 F.3d 404, 420 (3d Cir. 2006); *United States v. Gonzalez-Flores*, 418 F.3d 1093 (9th Cir. 2005) (burden of proof is on the government); *see generally Chapman v. California*, 386 U.S. 18, 23 (1967) ("An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless."). Here, it is unquestionable that the error did affect the result.

First, the email is specifically set forth as an overt act for Count 3 of the Superseding Indictment – the conspiracy to defraud. It also is the sole basis for counts 6 and 7 of the Superseding Indictment, which both allege substantive wire fraud counts. All of these counts immediately fail.

Second, the Privileged Email permeated the indictment and the entire trial. It was improperly used by the government to prove every single count of conviction. Counts 1 and 2 charged that Appellant usuriously lent money using payday lending companies such as Apex 1 under the auspices that the companies were owned by Native American Tribes. The government argued that the agreements with Native American Tribes were contrived and that payday lenders such as Apex 1 were actually owned by Appellant. It was the same Apex 1 referred to in the Privileged Email and the same tribal chief, codefendant Randal Ginger, who the government

argues did not really own Apex 1. Count 3 charged Appellant and Neff with hiding the ownership of Apex 1 from the Indiana class action plaintiffs – a charge based entirely on an interpretation of the Privileged Email. Finally, the remaining counts are derivative substantive counts or accompanying money laundering counts.

Third, and unsurprisingly, the Privileged Email was used extensively throughout trial to support the government's case. *See, e.g.* A967 ("You're going to hear that Neff even sends Hallinan an e-mail,. . . ."); A969 ("There is an e-mail where Neff warned Appellant that the case could be worth $8 to $10 million and Appellant might have to pay that."); A2021-47 (testimony of Rod Ermel discussing the Privileged Email at length); A5069 (questioning Special Agent Anette Murphy on the Privileged Email); A6071 (cross-examination of Wheeler Neff on the Privileged Email); A6071 (displaying the email to the jury and characterizing it as anything but "garden variety legal advice"); A6096 ("Wheeler Neff indicated to Charles Hallinan, in that July 12, 2013 e-mail, that Charles Hallinan faced exposure of $8 to $10 million."); A6098 ("There's the July 16 e-mail that Charles Hallinan sent to Rod Ermel, which forms the basis of Count 7 . . . ."); A6037 ("This is the email, July 12th, 2013 email that Wheeler Neff sent to Charles Hallinan warning him of a $10 million judgment potentially and saying essentially, cook the books . . . .").

Finally, we know how important it was to the jury because it was one of only nine exhibits out of thousands that the jury requested during its deliberations.

Shortly after the jury began deliberating, it requested nine exhibits: (1) the Privileged Email; (2) three documents related to Susan Verbonitz's withdrawal as counsel in the Indiana case, which was prompted by the inclusion of Apex 1 on the taxes referenced in the Privileged Email; (3) a recording between Appellant and cooperating witness Adrian Rubin; and (4) productions made by two law firms in the case that worked on the Indiana litigation. A6298. Save the recording, all of the exhibits concerned whether Appellant owned Apex 1 and the ramifications of including Apex 1 on his tax returns. Thus, all flow from the Privileged Email itself. The jury was fixated on the Privileged Email and series of events that it prompted in the Indiana case. It seemed to be the most important issue in the jury's deliberations.

The government's herculean efforts to use this email evidences how important the government viewed it to be. The email was used extensively in the trial, before the grand jury, and forms the basis for counts in the indictment. It most certainly affected the outcome of the trial and requires Appellant's conviction be vacated.

II. THE DISTRICT COURT ERRED IN FAILING TO CHARGE THE JURY ON WILLFULNESS

Not only did the government's case center on a privileged email that this Circuit clearly said should never have been used, the District Court refused to charge the jury on willfulness, which completely eviscerated Appellant's good faith defense. Counsel for Appellant were clear throughout the trial: this was not a case about whether loans were made or if the interest rates on those loans exceeded the

state usury laws. Rather, the sole defense was that the defendants acted in good faith, i.e. without knowingly intending to do something the law forbids. Appellant's counsel opened the trial by explaining to the jury that

> Charlie Hallinan always intended to operate within the law as he has for half a century as a businessman. He went into these partnerships with these Indian tribes in absolute good faith believing that their delivery of sovereign status made the business deal workable, making the interest rate exportation legal and proper, making the loans collectible. In good faith we believed if you have an Indian partner, then you have sovereignty, then you can export your interest rate.

A1007. The District Court completely nullified Appellant's sole defense when it refused to charge the jury on willfulness. It thereby prevented the jury from focusing on the central and really only issue in the case: whether Appellant believed his actions were lawful because tribal sovereign immunity preempted state usury laws. Instead the jury was forced to consider only whether Mr. Hallinan intentionally made loans at interest rates that exceeded some state usury laws, which was not in dispute.

A. Standard of Review

"Where, as here, a party has timely objected at trial to a jury instruction given by the district court, our review of the legal standard expressed in the instruction is plenary." *United States v. Waller*, 654 F.3d 430, 434 (3d Cir. 2011) (internal citation omitted). "A jury instruction, taken as a whole, must inform the jury of the correct legal standard." *Harvey v. Plains Twp. Police Dep't*, 635 F.3d 606, 612 (3d Cir. 2011) (citing *Limbach Co. v. Sheet Metal Workers Int'l Ass'n*, 949 F.2d 1241, 1259

n. 15 (3d Cir.1991)). "When a jury instruction is erroneous, a new trial is warranted unless such error is harmless. An error is harmless if it is "highly probable" that the error did not contribute to the judgment." *Id.* at 612 (citing *Advanced Med., Inc. v. Arden Med. Sys., Inc.*, 955 F.2d 188, 199 (3d Cir. 1992)).

B. The Jury Should Have Been Instructed On Willfulness

The RICO statute does not on its face include a specified *mens rea* requirement. *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 908 (3d Cir. 1991). However, this does not mean that a court may choose to forgo instructing the jury on scienter. Dispensing of scienter as an element of a RICO violation would abrogate "[t]he contention that an injury can amount to a crime only when inflicted by intention" which "is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 250 (1952). As such, "[t]he purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, [and] to strip the defendant of such benefit as he derived at common law from innocence of evil purpose." *Id.* at 263, 249.

In keeping with this tenet, the Supreme Court has held that "offenses that require no *mens rea* generally are disfavored" and "that some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an

element of a crime." *Staples v. United States*, 511 U.S. 600, 605–06 (1994) (internal citations omitted). The lengthy prison sentences issued for RICO violations also weighs heavily in favor of imposing a meaningful *mens rea* requirement. "Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*." *Id.* at 616. Congress has made no indication that RICO is intended as a strict liability crime, the penalties are quite severe, and thus a *mens rea* element is required.

For this case, part of that *mens rea* element necessitates a willfulness instruction. In *Liparota v. United States*, 471 U.S. 419 (1985), the Supreme Court held that for crimes that may encompass legal and illegal conduct, a willfulness instruction is essential. In *Liparota*, the defendant had been convicted of unlawfully obtaining and possessing food stamps. The Supreme Court vacated Liparota' s conviction for failure to give a willfulness instruction, reasoning that the jury must differentiate conduct that a reasonable person should know is illegal – such as "the possession of hand grenades," *id.* at 432, and conduct like the unlawful possession of food stamps where criminality is not immediately apparently because illegality depended on other regulations and rules. *Id.* Since *Liporata*, the Supreme Court has read in *mens rea* requirements for crimes such as owning an automatic weapon (*Staples*, 511 U.S. at 605–06) and making threats (*Elonis v. United States*, 575 U.S.

--, 135 S. Ct. 2001, 2011 (2015)), demonstrating the extent to which the Supreme Court disfavors any statute lacking a component that the defendant have reason to know that his conduct is unlawful.

In this case Appellant's entire defense depended on the fact that he believed his conduct was lawful because tribal sovereign immunity rendered the state usury laws inapplicable. The collection of an unlawful debt is exactly the kind of crime that needs a willfulness element – it is not conduct that a reasonable person would necessarily know is illegal. Indeed, payday lending is lawful in many states. *See* A7091. The average person is likely familiar with payday loans, has seen advertisements or store fronts, and would naturally believe that they are legal. If RICO's collection of an unlawful debt were read without a willfulness requirement, it would 'criminalize a broad range of apparently innocent conduct." *Liporata*, 471 U.S. at 426. If the government need only prove that Appellant knew what his actions were and intentionally carried them out, then good faith would not be a defense at all in this case.

While the District Court relied on the Third Circuit's Criminal Model Jury Instructions in crafting its charge, it failed to incorporate the model's discussion that, in cases in which *Liporata* applies, i.e. where the statute lacks a *mens rea* requirement, the term "'knowingly' [has] a different meaning than" that given in the typical "knowingly" instruction. *See* Third Circuit Model Criminal Jury Instruction

No. 5.02, comment at 10. The comment goes on to say that in those cases, the type of knowledge required to commit the offense "is similar to the most frequently used definition of 'willfully.'" *Id*. Instruction 5.05 explains that "[t]he important difference between willfully…and the most frequently used definition of knowingly, as stated in Instruction 5.02, is that willfully requires proof beyond a reasonable doubt that the defendant knew his or her conduct was unlawful and intended to do something that the law forbids; that the defendant acted with a purpose to disobey or disregard the law." *See* Third Circuit Model Criminal Jury Instruction No. 5.05, comment at 16-17; *Starnes*, 583 F.3d at 210.

This error was compounded by the District Court's ignorance of the law instruction by charging that the "government is not required to prove that the defendant knew his actions were against the law." A5989. While mistake of law is often not a defense, commentary to the Third Circuit model jury instructions make clear that "where the state of mind element requires awareness that the conduct is against the law, ignorance or mistake about whether the conduct violates the law would negate the state of mind element." This charge reinforced the notion that the government need not prove willfulness and the defendants' belief that tribal sovereign immunity preempted state law was not a defense.

This Circuit has not yet explicitly held that a willfulness charge is required to support a conviction under RICO's collection of an unlawful debt provision, but it

has previously approved of a jury instruction that read a willfulness requirement into a RICO indictment. *See United States v. Irizarry*, 341 F.3d 273, 304 (3d Cir. 2003). Both the Second and Fifth Circuits have likewise approved of jury instructions requiring a showing of willfulness to convict on RICO conspiracy charges. *See United States v. Aucoin*, 964 F.2d 1492, 1498 (5th Cir. 1992) (holding that RICO charge contained the proper *mens rea* element where "jury was instructed that…'the Government must prove beyond a reasonable doubt that the defendant knowingly and willfully conducted or participated in the conduct of the affairs of the enterprise through the collection of an unlawful debt.'"); *United States v. Biasucci*, 786 F.2d 504, 513 (2d Cir. 1986) (holding that a conspiracy to commit a RICO offense requires a finding "that the defendant acted knowingly, willfully and unlawfully"). Moreover, in the only other payday lending RICO case of which counsel is aware, *United States v. Tucker*, Judge Castel gave a willfulness instruction for those very same reasons. *United States v. Tucker*, No. 1:16-cr-00091-PKC, ECF No 308 at 4-5 (S.D.N.Y. Oct. 13, 2017).

C. Failure to Charge Willfulness Was Not Harmless Error

It is indisputable that the District Court's failure to include a willfulness instruction was not harmless, because lack of willfulness was the entirety of the defense's case. Where "[u]nder the jury charge as given, [a defendant's] defense at trial…amounted to a concession of guilt" the defendant is entitled to a new trial.

United States v. Bah, 574 F.3d 106, 114 (2d Cir. 2009). Here, the lack of a willfulness charge frustrated Appellant's sole defense, requiring a reversal. *See United States v. Blair*, 456 F.2d 514, 520 (3d Cir. 1972) (reversible error occurs where the trial court fails to "give the substance of a requested instruction relating to any defense theory for which there was any foundation in the evidence").

Appellant's sole defense was clear from the opening statement: "the case is not really about what we did, because we did all this stuff. The case is about what was on our minds…." A1008. More specifically, it was not whether the defendants knew they were making loans or knew that that interest rates may exceed state caps—it was whether they believed their conduct was unlawful. The charge, however, entirely failed to provide an avenue for the jury to find Appellant not guilty, even if the jury believed Hallinan and Neff were "businesspeople following what [they] clearly understood and in good faith believed to be the legal markers of the boundaries within which [they] had to operate." A1006.

The District Court instructed the jury that, in order to find Appellant guilty, they only need find that he acted "knowingly" and "intentionally" in the collection of an unlawful debt. The District Court defined "knowingly" as acting while "conscious and aware of the nature of his actions" A5998-99 and "intentionally" as acting with a "conscious desire or purpose to act in a certain way or cause a certain result; or…acting in that way and would be practically certain to cause that result."

A5999. "Unlawful debt" was simply defined as an unenforceable debt under state or federal law incurred during the business of lending money. A5982-83.

The fault in the instructions was further compounded by the District Court's curtailment of Neff's testimony. As discussed below in Section IV, the District Court would not permit Neff to explain his legal research in any detail or the efforts the defendants went in ensuring the tribal model was legal. It excluded key pieces of evidence that informed that belief such as the tribal ordinances and public opinions of prominent law firms. Thus, not only did the District Court fail to allow the jury to consider whether the defendants willfully acted in a way the law forbids; it did not even allow Neff to fully explain what pains he took to ensure his conduct did not violate the law.

In short, the jury was told that it could find Appellant guilty of violating RICO if he intended to collect a debt that exceeded state usury rates and was conscious of his actions. There was no room for the jury to find Appellant not guilty if he believed his actions were lawful because the tribes were sovereigns.

D. The District Court's Good Faith Instruction Did Not Cure Its Error in Refusing to Charge on Willfulness

The District Court's good faith instruction was not a replacement for its failure to charge on willfulness because it suffered from the very same inadequacy. The District Court's charge focused the jury only on whether the Defendants' good faith

frustrated the knowledge and intent elements of RICO and not whether they did not have the intention of doing something the law forbids:

> [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 . . . 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 an unlawful debt, **then he did not act with knowledge and intent**. Good faith is a defense that is inconsistent with the requirements of the RICO charge that both the defendants acted with **knowledge and intent**.
>
> . . .
>
> In deciding whether the government proved that the defendants acted **knowingly and intentionally or, instead, whether they acted in good faith**, you should consider all of the evidence presented in the case that may bear upon the defendants' state of mind.

A5990-91. The good faith instruction thus lacks the same willfulness language – it focused on whether the defendants acted with knowledge and intent, and made no mention that it would be a complete defense if the defendants held a good faith belief that their conduct was lawful. *See* Commentary to Third Circuit Model Jury Instructions 5.05 (describing a good faith defense to crimes with a willfulness *mens rea*: "Good faith, in the sense of the defendant's honest belief that his or her conduct was lawful, is a defense to any offense in which the mental state element requires proof that the defendant was aware that his or her conduct was unlawful (e.g., willfully as defined in this instruction).").

The Court's good faith instruction did not cure the lack of a willfulness charge—it amplified the error by repeating to the jury that the choice was between knowingly and intentionally on the one hand and good faith on the other. The jury was simply never instructed that the government must prove that the defendants knew they were and intended to do something the law forbids; and the good faith instruction did not cure this failure. With these instructions, Appellant's good faith defense was a non-entity for the jury. The lack of the willfulness instruction was a fatal error that destroyed Appellant's sole defense.

III. THE GOVERNMENT DID NOT PROVE WIRE FRAUD BECAUSE UNVESTED LITIGATION IS NOT PROPERTY

Appellant's convictions on conspiracy to commit fraud (Count Three), mail fraud and aiding and abetting mail fraud (Counts Four and Five), wire fraud and aiding and abetting of wire fraud (Counts Six and Seven) were clear misapplications of the law. All five counts rely on an allegation that Appellant schemed to defraud plaintiff class action attorneys by concealing his ownership of Apex 1. A94-A110. However, an unvested cause of action is not a property interest under federal law. The mail and wire fraud statutes are specifically "limited in scope to the protection of property rights," and Appellant's conviction cannot stand. *McNally v. United States*, 483 U.S. 350, 360 (1987).

A. Standard of Review

Appellant did not raise this argument below. Where a party has failed to make a contemporaneous objection, the federal rules recognize a limited right to appeal. Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). The court may review an error under Rule 52(b) if (1) there was an error, (2) the error is clear or obvious, (3) the error materially prejudiced the substantial rights of the defendant, and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 732 (1993).

B. The Court Committed a Clear and Obvious Error by Applying the Mail and Wire Fraud Statutes to an Unvested Property Right

The government proceeded on a novel theory that a defendant can criminally defraud plaintiffs in a civil class action lawsuit by providing false information during a deposition that theoretically may prompt a lower settlement. If accepted, it would turn any intentional misstatements during civil litigation into a felony. According to the government, the speculative difference between the actual settlement and what could have been a larger settlement is the "property" out of which Defendant deprived the class action litigants. Certainly, wire and mail fraud statutes were never meant to reach such conjectural conceptions.

Mail fraud and wire fraud require proof that the individual intended to defraud another of "money or property." 18 U.S.C. §§ 1341,1343. The statutes are "limited

in scope to the protection of property rights." *McNally*, 483 U.S. at 360. A property right under the mail and wire fraud statutes may be intangible, but only if the property has "long been recognized." *Carpenter v. United States*, 484 U.S. 19, 25, (1987); *see also United States v. Hedaithy*, 392 F.3d 580, 590 (3d Cir. 2004) (property rights are those that are "traditionally recognized") (citing *United States v. Henry*, 29 F.3d 112, 115 (3d Cir. 1994)).

There is no precendent for the government's theory. However, courts have in other contexts concluded that there are no vested property interest in a cause of action before final judgment. For example, in *In re Kane*, 628 F.3d 631 (3d Cir. 2010), this Court held that a woman lacked a vested property interest in the equitable distribution of marital property in a pending divorce action, because there was not yet a judgment. Other courts have held in Taking Clause cases that there is no vested property interest in a cause of action until a final judgment is awarded. *Bowers v. Whitman*, 671 F.3d 905, 914 (9th Cir. 2012) ("[A] party's property right in any cause of action does not vest until a final unreviewable judgment is obtained."); *Rogers v. Tristar Prods., Inc.*, 559 F. App'x. 1042, 1045 (Fed. Cir. 2012) ("[N]o vested right attaches until there is a final, unreviewable judgment."). These cases stem from the uncertain and unexpected ways in which litigation can proceed that is dependent on numerous incalculable factors including: the merits of the case, the way in which the complaint is pled, what is produced in discovery, rulings on motions, depositions of

witnesses, the composition of any jury, and the settlement inclinations of the parties as the case proceeds through its different phases. Naturally, courts are disinclined to speculate about whether and to what extent there is a property right in the midst of litigation.

Here, the "property" identified by the government, a larger settlement, would have been contingent on a number of things: (1) a successful motion to pierce the corporate veil; (2) Appellant's inclusion in the lawsuit and surviving a motion to dismiss; (3) surviving a motion to arbitrate; (4) plaintiffs succeeding in the lawsuit; (5) damages being calculated; and (6) any appeals. Of course, none of this happened nor would it have happened according to testimony of the plaintiff attorney. The plaintiff class action lawyer who testified, Vess Allen Miller, stated that they did not want to add [Appellant] to the lawsuit "for strategic reasons . . . [because] if I had amended [to] add [Appellant], I likely would have been removed to federal court . . . [and] likely would've been compelled to individual arbitration and the entire case would've gone away if I had added [Appellant] at that time." A4878. Plaintiff counsel also had already received correspondence from the government about Mr. Hallinan's possible ownership of Apex 1 Processing well before the settlement. A4956; A7296 (letter from Joel Sweet).

Miller further testified that the class action plaintiffs represented to the Judge in the Indiana case that he should approve the settlement because it was in line with

another payday lending case that had just settled. A4944 (testifying that the settlement amount was based on taking a settlement in another payday lending case and applying it to the number of loans in the Indiana case).

The government's property interest is not only undefinable and indefinite, but it is wildly speceulative. Qualifying every piece of litigation as property would set a dangerous precedent. It would greatly expand what the Supreme Court has stated in *McNally* and what the wire and bank fraud statutes are meant to address. Thus, because the plaintiffs lacked any traditionally recognized property interest, the convictions for mail and wire fraud are clear error. *Hedaithy*, 392 F.3d at 590.

C. The District Court's Misapplication of the Mail and Wire Fraud Statutes Materially Prejudiced Appellant And Affected The Fairness Of The Criminal Case

It is incontrovertible that Appellant was materially prejudiced by the District Court's error. If the plaintiffs did not have "money or property" of which they could be deprived, then all of the wire and bank fraud counts would be dismissed. Moreover, the sentencing guidelines calculations were driven by the purported value of this property. The District Court granted a fourteen-level enhancement for the value of the fraud, (A8159-60), which accounted for nearly half of the 36 total offense levels for the fraud and money laundering crimes (A8165). This led the District Court to sentence Appellant, a 78 year old man with aggressive prostate and bladder cancer, to fourteen years' imprisonment – an effective death sentence. The

prejudice is irrefutable and the unfairness to Appellant if the wire fraud and bank fraud counts should have been dismissed is certain.

IV. THE CURTAILMENT OF WHEELER NEFF'S ABILITY TO TESTIFY PREVENTED APPELLANT FROM PRESENTING HIS SOLE DEFENSE

As discussed in Section II, *supra*, the District Court's jury charge did not provide an avenue for the jury to acquit if it determined that neither defendant meant to violate the law because of their belief in tribal sovereign immunity. Even had such an instruction been given, however, the District Court undercut that defense by disallowing key testimony from the most important witness in the case: Wheeler Neff.

There is no other more protected constitutional right in criminal trials as the right of a defendant to fully and fairly present his defense, but the District Court unquestionably violated that right when it unconstitutionally curtailed Neff's testimony by preventing him from explaining the legal sources he consulted that led to his good faith belief that tribal sovereign immunity preempted state usury laws. The defendants' sole defense at trial was that they acted in good faith and these errors, compounded by the District Court's refusal to give a willfulness jury instruction (part II, *supra*), prevented the defendants from fully presenting that defense.

A. The District Court Erred In Preventing Neff From Testifying Fully About His Legal Research

Defendants' sole defense was clear: based on the extant legal authorities of the time and the practice of the industry, Neff and Appellant had a good faith belief that by partnering with Native American Tribes, the payday loans would not be subject to state usury laws. Neff was the most important witness to set forth that belief. He sought to testify as to his research, the seminars he attended, the tribal ordinances that were passed – everything that informed the defendants' good faith belief. This testimony was significantly hampered, though, by the government's constant objections, sustained by the District Court, any time Neff attempted to testify in any detail about his efforts to ensure the Tribal Model was legal. These restrictions prevented Neff from exercising his constitutional right to fully testify in his defense, and Appellant's constitutional right to present witnesses to support his defense. Because it infringed upon their sole defense, it requires a new trial.

The District Court refused to let Neff testify as to the detailed research he performed and discuss details about the cases that he consulted, but would only let him generally reference all of the facts that informed his good faith belief:

> THE COURT: . . . Now, what maybe needs to be done is as a result of those opinions he took a certain course of action . . . . Now I think maybe we will go as far as to the say that there were certain decisions that came down from the Court. We're not going to get into that, what Court was that, what law was applied, what happened in each of the cases. . . . I think that what you can do, there were a series of decisions

> of the Court and as a result of that, you know, he pursued that. But I mean I agree with the Government that this seems fairly far afield.

A5163 The District Court likened Neff's defense to reading a "comic book" and then telling the jury he believed it. A5211. It ultimately decided that Neff could mention the case names and what he did as a result of the cases, but could not discuss the facts or reasoning in the cases. *Id.*

The District Court also refused to let into evidence certain tribal ordinances and legal opinions that Neff reviewed, which would have supported that testimony. More specifically, in adherence to the Tribal Model the tribal partners passed ordinances, which established the payday lending program with Appellant and that the District Court deemed hearsay or unauthenticataed even though the import of it was not the truth of the matter, but the fact that the ordinances were seen by the defendants and informed their good faith belief. A5791; A7126; A7254. The District Court also disallowed the admission of the legal opinions by Greenberg Traurig and others, which were reviewed by Neff and Appellant and would have corroborated Neff's testimony and the Defendants' good faith belief that they were not acting willfully. A5594; A7216. To be clear, neither Neff nor Appellant raised a formal advice of counsel defense. The import of the legal opinions was not that they entered into an attorney-client relationship with those lawyers who provided such advice. However, just like the caselaw and treatises, the legal opinions were

yet additional sources that the Defendants reviewed and that evidences their good faith efforts to ensure the Tribal Model was legal.

Questioning from defense counsel was necessarily guarded as Neff's lawyer kept having to preface each question with limiting instructions to Neff just so it would not elicit an objection. See A5131 ("[A]nd again without getting into the details, is there a pretty big Supreme Court opinion that deals with exportation of interest rates by banks?"); A51424 ("And again, I don't want to get into extended discussions on case law, but were there Supreme Court cases that affected the way you looked at this . . . . ."); A5219 ("[W]ithout getting into specific case names and that kind of stuff, what other source materials did you look at to try and familiarize yourself with Federal Indian Law?"). A5227 ("All right and again, without getting into specific cases, was there a fairly bit Supreme Court case that said Indian gaming could take place?"); A5398 ("And I don't want to get into the case, but there was a reference in that email to the *Struthers* case . . . .");

Even with defense counsel walking on egg shells to try to elicit as much as possible about the Defendants' good faith belief, the Court continuously upheld all objections that the government made when Neff tried to explain his research in any detail:

> MR. WARREN: All right. We were talking about legal challenges to the program, okay? Without getting into case names or anything like that, did these legal challenges involve the exportation of the interest

rates permissible in Delaware to states where they were not permissible?
NEFF: Yes. In the first case, the one I identified, the allegations were -
MR. DUBNOFF: Objections, your Honor.
THE COURT: Sustained.

A5164.

NEFF: [T]here's the common law method of becoming federally recognized under the *Montoya case*, which is a 1901 Supreme Court case that lays out the various criteria for a Tribe to be recognized as, in fact, a Tribe . . . .
MR. WARREN: Okay, the three criteria are what? Do you recall what they are?
NEFF: Yes –
MR. DUBNOFF: Your Honor we're getting into the substance there.
THE COURT: It's criteria, it doesn't matter so sustained.

A5230.

MR. WARREN: Did you look at any case which dealt with the ability of a Canadian tribe to assert rights under United States Law?
NEFF: Yes, there was a case, the *St. Regis* case where a Canadian Tribe had actually and did actually come in –
MR. DUBNOFF: Objection, Your Honor, we're getting into the substance.

A5257.

MR. WARREN: Is there any portion of the Dodd-Frank Act that pertained to Indian tribes?
NEFF: Yes. The definition of state –
MR. DUBNOFF: Objection, Your Honor. Now we're getting into the content again.
MR. WARREN: Well I can rephrase. . . . [W]hat provisions had an effect on your beliefs concerning the validity of the model?
MR. DUBNOFF: Objection, Your Honor.
THE COURT: Well, as a result, not what provisions. I think as a result of his review what did he conclude.

A5305.

MR. WARREN: Okay. Was this [Tribal Loan] program something you were talking about disclosing to the Delaware Bank commissioner's office?
NEFF: Yes, I was going to basically explain the program to them and they – Delaware I believed had a state of the art short-term consumer loan –
MR. DUBNOFF: Objection.
NEFF: -- statute.
THE COURT: Sustained.

A5318-19.

MR. WARREN: All right. You told us that this deal was structured somewhat differently than the aboriginal GR Financial deal.
NEFF: Yes. This was again a – me responding to the Colorado Supreme Court decision of November 2010 which defined arms of the –
MR. DUBNOFF: Objection.
THE COURT: Sustained.

A5334.

MR. WARREN: Why in your mind did you believe that was not necessary [to have the server on tribal lands]?
NEFF: There was a case out there, *Kiowa*, that –
MR. DUBNOFF: Objection, Your Honor.
THE COURT: Sustained.

A5336.

MR. WARREN: Without mentioning specific cases, why in your mind did you believe that the server did not have to actually be on tribal land?
MR. DUBNOFF: Objection, Your Honor. Legal opinion.
THE COURT: Sustained.

A5336-37.

MR. WARREN: Was the server a necessary component in our mind of the ability of the tribe and the private investors to share sovereign immunity?
MR. DUBNOFF: Objection.
THE COURT: Yeah, sustained.

A5350.

> MR. WARREN: Was it absolutely necessary though [to have a server on tribal lands], is that what you said here?
> NEFF: No, it wasn't ---
> MR. DUBNOFF: Objection, Your Honor. Objection, Your Honor.
> THE COURT: Sustained.
>
> A5356.

Again and again, the District Court and prosecutor prevented Neff from explaining his good faith beliefs; and again and again the jury was implicitly told by sustaining the objections that his legal research did not matter. It presented Neff as merely reading comic books.

B. The Curtailment Of Neff's Testimony Unconstitutionally Infringed Upon Appellant's Right To Put On His Sole Defense

The right to present a defense includes "at a minimum . . . the right to put before the jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). Here, the Defendants only defense was good faith, and "Courts are particularly reluctant to deem error harmless where, as here, the error precludes or impairs the presentation of an accused's sole means of defense." *United States v. Carter*, 491 F.2d 625, 630 (5th Cir. 1974).

This case parallels in many respects *United States v. Kohan*, 806 F.2d 18 (2d Cir. 1986), where Kohan's sole defense was good faith. The defendant was accused of defrauding a bank by aiding another individual, Fellouris, in cashing two fraudulent checks. Kohan's defense was that he lacked intent and thought the checks were genuine. To support his defense, he wanted to introduce the testimony of his

roommate who was present for conversations where Fellouris implied that the checks were real. The District Judge erroneously barred the testimony of Kohan's roommate on hearsay grounds even though it was offered not for the truth, but to show Kohan's good faith and lack of intent. The Second Circuit concluded that the District Court erred, adversely affecting Kohan's right to a fair trial, by not allowing the roommate to testify fully about the conversations: "When an erroneously evidentiary ruling precludes or impairs the presentation of a defendant's sole means of defense, we are reluctant to deem it harmless." *Id.; see also United States v. Certified Envtl. Servs., Inc.*, 753 F.3d 72, 89 (2d Cir. 2014) (remanding for new trial when district court improperly excluded evidence of government's regulatory advice to defendant); *United States v. Eisenstein*, 731 F.2d 1540, 1545 (11th Cir. 1984) (reversing conviction when District Court sustained "hearsay objections to defense counsel's questions about [defendant's] disclosure to his attorney");.

Here, Neff was precluded from testifying as to legal authorities he reviewed and other reliable information which would all support the good faith belief that Appellant thought the tribal payday lending arrangements were lawful. He was likewise barred from introducing tribal ordinances and legal opinions he reviewed, which would have corroborated his testimony and evidenced the defendants' good faith. Judge Robreno barred the testimony and evidence even though it was not

offered for the truth, but to show good faith. Thus an evidentiary ruling impaired the presentation of Appellant's defense and it was not harmless.

This problem is amplified because Neff and Appellant were charged with conspiracy. Therefore, not only was Neff's testimony relevant as to Appellant's good faith, but also in order for the jury to find a conspiracy between them, Neff must also be guilty. A similar situation was explored in *United States v. Harris*, 733 F.2d 994 (2d Cir. 1984), a defendant was not allowed to put on his parole officer and attorney who would support his duress defense. The District Judge excluded the testimony on the ground of hearsay, but the Second Circuit noted that it was offered as to his state of mind and because it was his only defense, his conviction was reversed. Moreover, the Second Circuit held that the exclusion of Harris's witnesses also warranted a new trial for his codefendant because they were charged with conspiracy and "[t]he federal courts follow the bilateral approach to conspiracy [] under which unless at least two people commit the act of agreeing, no one does." *Id.* at 1005 (citing *United States v. Rosenblatt*, 554 F.2d 36, 38 n.2 (2d Cir. 1977)). In short, if Harris had been allowed to present his defense and the jury had accepted it, then there would be no one with whom the codefendant could have conspired. The same holds true here.

V. THE OBSTRUCTION OF JUSTICE ENHANCEMENT WAS INAPPLICABLE

The District Court enhanced Appellant's sentence for obstruction of justice (U.S.S.G. § 3C1.1) based solely on Appellant's payment of attorney's fees for Apex 1. Its factual findings were clearly erroneous, and its construction of the Guideline was legal error subject to plenary review. *See United States v. Collado*, 975 F.2d 985, 990 (3d Cir. 1992); 18 U.S.C. § 3742(e).

The government has been insisting that paying fees for Apex 1 was obstructive since Apex 1 first appeared below. The grand jury court rejected that argument repeatedly, and recognized Apex 1's privilege. *See, e.g.*, *USA v. Grand Jury Matter #1*, No. 2:14-gj-00631-RBS-3, ECF No. 91 (E.D. Pa. Dec. 23, 2015) (granting intervention over objection that Apex 1's "attorney is being paid [to] … obstruct this investigation" (ECF No. 78) (Oct. 15, 2015)); ECF No. 161 (Nov. 14, 2016) (rejecting "fraud on the Court" objection); ECF No. 180 (Nov. 22, 2016) (same).

Until sentencing the District Court consistently rejected the government's obstruction argument. Indeed it expressly held – after an evidentiary hearing in which Apex 1's counsel, Lisa Mathewson testified – that Apex 1 had valid privileges and legitimate reasons to assert them. Mem. as to Charles M. Hallinan, Wheeler K. Neff, ECF No. 327 (Dec. 5, 2017). It then wholly rejected the government's obstruction argument:

> The Government asserted that … Hallinan … hired Mathewson for the sole purpose of invoking Apex 1's attorney-client privilege to block the government's access to information that would reveal the prior fraud he committed with respect to the Indiana litigation.
>
> …
>
> However … [b]ased upon Mathewson's testimony, there is no evidence, aside from the Government's speculation, that Apex 1's assertions of privilege were not legitimate.

Id. at 29-30. The court emphasized that "Apex 1, a subject of the grand jury investigation, had an interest in keeping the corporation's privileged communications with its attorneys private." *Id.* That interest continued post-Indictment, as the court upheld the privilege assertion over later communications as well. *See id.* 28.

At sentencing, the District Court unexpectedly reversed its position without any basis, finding that (1) "Apex 1 was defunct, and would not have made any privilege assertion, but for Hallinan's payment" of fees; and (2) while Hallinan did not succeed in influencing Mathewson, he "attempted to influence" her. The record does not support those findings, and the payment of fees here is not obstructive as a matter of law.

First, the court's finding that Apex 1 was "defunct" was both unsupported and legally irrelevant. Factually, not only were Apex 1's corporate registrations current, but it was a subject of the grand jury investigation, responded to subpoenas, was named in the Indictment, and held active bank accounts frozen by

the government. Legally, even a corporation that *is* "defunct" (as Apex 1 was not) has standing to assert privilege. *In re Grand Jury (ABC Corp)*, 705 F.3d 133, 142 (3d Cir. 2012).

Moreover, the court's assertion that Apex 1 would not have asserted its privileges "but for Hallinan's payment to Mathe[w]son" is likewise flawed factually and legally. Factually, no evidence in the record supports it, and Apex 1's incentives to assert privilege undermine it.

Finally, the District Court's finding that Appellant "attempted to influence" Mathewson's representation of Apex 1, is unsupported by anything in the record – other than an invalid inference from the mere payment of fees. Mathewson testified that Appellant's payment of fees was not conditioned on a particular course of action, and that neither Appellant nor his counsel attempted to influence her.

Indeed despite two years of pursuing this issue below, the government has identified no case holding that a target's payment of fees is obstructive when it (1) permits a party to make a *valid* privilege assertion, and (2) is fully disclosed and comports with the Rules of Professional Conduct. *Cf., e.g., United States v. Werzelbacher*, 591 F. App'x. 387 (6th Cir. 2014) (paying witness's fees in exchange for silence merits obstruction enhancement); *United States v. Quintero*, 33 F.3d 1133 (9th Cir. 1994) (undisclosed payor raises conflict concern). The

details of this payment arrangement were scrutinized over the course of two years, in the grand jury, pretrial, and at trial. The District Court's claim to have been "misl[ed]" fails factually and legally. Reversal is required.

VI. THE DISTRICT COURT ERRED IN ORDERING THE FORFEITURE OF SPECIFIC PROPERTY AND AWARDING A MONEY JUDGMENT

The District Court also made errors in its determination of forfeiture. More specifically, the District Court: (1) improperly held that the government could seize monies in commingled bank accounts where it could not distinguish tainted from legitimate funds; (2) ordered a money judgment that relied on a statistically infirm estimation of the illegal proceeds; and (3) refused to deduct direct costs from its proceeds calculation.

A. The Government's Tracing Method Was Flawed

The government employed a tracing method for commingled accounts that is not accepted in this Circuit because it does not distinguish illegal from legal monies. At the forfeiture hearing, Investigator Piccione, a financial analyst for the government, testified that when he examined the bank records of Appellant's many companies – only some of which involved payday lending - there were "endless transfers" in and out of the different accounts he examined. A7405-06 (testifying that his tracing analysis was "very, very difficult" due to "voluminous transfers between accounts"). Piccione explained that "money didn't just flow one way" and "because of the endless transfers, and the way in which they were executed" he had

difficulty "com[ing] up with the end use of the proceeds." *Id.*; *see also* A7407 (testifying that the sheer volume of transfers, literally, precluded [him] from . . . tracing the source monies, the proceeds, to more than what" he had set out in his affidavit).

Piccione testified that he based his analysis on tracing accounting principles he drew from "a court case called *Banco Cafetero*." A7423. In *United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986), the Second Circuit approved of a variety of tracing methods in commingled accounts with multiple transfers including the "lowest intermediate balance" rule, or the first-in last-out rule, where it is assumed that illegal proceeds are the last monies withdrawn from the account. 797 F.2d at 1159. Piccione employed the lowest intermediate balance rule. A7419-20.

Piccione's reliance on *Banco Cafetero* renders his analysis inconsistent with controlling precedent in this Circuit. In *United States v. Voigt*, 89 F.3d 1050 (1996), this Circuit considered the forfeitability of certain jewelry purchased with funds from a commingled account. *Id.* at 1084. Noting the difficulty that such a scenario presents for the purposes of tracing criminal proceeds, this Court held, "the term 'traceable to' means exactly what it says," that once funds are commingled it will be "difficult, if not impossible" to identify the illegal funds. *Id.* The panel cited approvingly Judge Easterbrook's rationale from the Seventh Circuit, describing

tainted funds in commingled accounts as "a drop of ink falling into a glass of water," which cannot then be separated out. *Id.* (citing *In re $448,342.85*, 969 F.2d 474, 476 (7th Cir. 1992)). In a footnote in *Voigt*, this Circuit specifically distinguished its holding from *Banco Cafetero Panama*, noting that it wanted to "avoid the problems plaguing other courts that have attempted to devise a workable tracing analysis for tainted property that has been commingled in a bank account with untainted property." *Id.* at n.22. Rather, *Voigt* held that "once a defendant has commingled laundered funds with untainted funds such that they cannot be divided with difficulty," the government must resort to the substitute asset provision. 89 F.3d at 1088; *see also United States v. Stewart*, 185 F.3d 112 (3d Cir. 1999) (reaffirming *Voigt* and finding commingled funds could be separated out only because the account was immediately frozen after the illegal proceeds were deposited).

In this case, *Voigt* controls, and the government must prove beyond a reasonable doubt that it can clearly identify the tainted funds, which it did not do for certain property. First, the accounts identified by the government as properties 14-18 in the Indictment are commingled accounts with intermediate transfers such that separating out tainted amounts is impossible. Specifically, Property 14 is an investment account, which received more than $1.2 million dollars from other sources and had intermediate transfers over a four year period. A7074. Property 15, a personal Bank of America account, compounds this error as it represents funds

flowing from Property 14 through a PNC bank account, and then into the Bank of America account. Properties 16, 17, and 18 also represent personal bank accounts, which received what the District Court determined were tainted funds from Hallinan Capital, but also included legitimate funds with intermediate transfers. A7076-77 (evidencing three years of transactions after the tainted money entered the account);. Finally, the only basis for the forfeiture of Properties 20 and 21, both automobiles, was that the monies used to purchase them flowed from Property 16. A7078-79.

B. The Government Did Not Prove Its Right To A Money Judgment Beyond A Reasonable Doubt

The District Court's determination that the government was entitled to a money judgment of over $68 million was faulty for two reasons: (1) these funds represented interest and fees paid on payday loans across all states, but payday lending is only prohibited in 17 states; and (2) to the extent the government proved its right to a money judgment at all, the District Court should have deducted direct costs.

1. The Government Did Not Sufficiently Differentiate Illegal Versus Legal Payday Loan Proceeds

The entire basis for the government's money judgment was Exhibit 500-E, a chart listing all of the funds distributed to and collected from borrowers who took out payday loans. It was indiscriminate as to the state in which the borrower lived.

The government conceded that payday lending was wholly legal in six states and allowed with regulations in another twenty-seven states. A7091 (Baetzel Aff.).

The government attempted to approximate the percentage of illegal loans, but its method was statistically infirm. The measurement that the government proffered, and that the District Court accepted, was based on customer leads –data that is collected online in an attempt to find payday loan candidates. Leads, however, bear little correlation to the number and quality of finalized loans. During the forfeiture hearing, Michael Kevitch, the former Chief Operating Officer of Hallinan Capital Corp., testified as to the significance of the customer leads:

> Q. . . . I would measure the number of leads that a lead generator would send to us and of that percent – of that pool, we would only pre-approve less than one percent, because a lot of them were dupes. And of that one percent, we would pre-approve, roughly ten to 15 percent would be funded.

A2406-07. Thus, when a third party company forwarded leads to one of the payday lending companies, the chance of a lead turning into a loan was at best 15% of 1%. Put in the reverse, 99.85% of leads never became loans. Using leads was simply not a reliable way to determine any of the characteristics of the payday loans that were made.

While the government can use reasonable extrapolations to calculate illegal proceeds, the government's method in this case of predicting the qualities of all loans based on leads that almost never turn into loans was not a reasonable or statistically

significant extrapolation – especially when the government had to prove its right to the money judgment beyond a reasonable doubt. *See United States v. Fatico*, 458 F. Supp. 388 (E.D.N.Y. 1978) (courts liken proof of guilt beyond a reasonable doubt to between 75% and 95%); *cf. Jensen v. Lick*, 589 F. Supp. 35 (D.N.D. 1984) (medical test evidenced proof beyond a reasonable doubt because "the material furnished by the plaintiff establishes that the test can be relied upon with 95% confidence in the accuracy of the test result"); *Ethyl Corp. v. Envtl Prot. Agenc*y, 541 F.2d 1 (D.D.C. 1976) ("Typically, a scientist will not so certify evidence unless the probability of error, by standard statistical measurement, is less than 5%. That is, scientific fact is at least 95% certain."). Here it was over 99% certain that there was no correlation between leads and loans.

Moreover the small sample size of the leads also make any correlation statistically insignificant. Bryan Smith from Intercept estimated that there were over 1.4 million loans processed through the payment processor, Intercept. A7530. The government, however, relied on approximately 300,000 leads to try to prove the characteristics of those loans. Based on Kevitch's testimony, 300,000 leads would have resulted in on average 450 loans. Thus, the government effectively used a 450 loan sample to extrapolate the states in which 1.4 million loans were given – a 0.03% sample size, which does not even come close to being statistically significant. A7795 (noting that "statistical significance being, at a minimum, five percent"); *see*

generally Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) ("Considerations such as small sample size may, of course, detract from the value of statistical evidence"); *C.G. v. Pa. Dept. of Educ.*, No. 1:06-cv-1523, 2011 WL 3608383 (M.D. Pa. Aug. 16, 2011) (rejecting expert report in school discrimination case on a preponderance standard because the sample size was only between 0.5% and 0.9% of the total enrolled students); *United States v. Cortez-Galaviz*, 495 F.3d 1203 (10th Cir. 2007) (rejecting evidence because of the "exceedingly small sample size, which does not appear to be statistically significant"); *Jama v. Esmor Correctional Services, Inc.*, No. 97-3093(DRD), 2007 WL 1847385 (D.N.J. June 25, 2007) ("The Supreme Court has recognized that samples may qualitatively be too small to yield reliable statistical evidence.") (citing *Mayor of Philadelphia v. Educ. Equal. League*, 415 U.S. 605, 620-21 (2007)).

It is the government's burden to prove beyond a reasonable doubt its right to a money judgment and it must do so with competent and reliable evidence. Here, it did not even come close. "Proof beyond a reasonable doubt means proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own lives." Third Circuit Model Jury Instruction 1.03. The government's statistically insignificant method of distinguishing legal versus illegal payday loans should give no one confidence.

2. The District Court Otherwise Erred In Refusing To Deduct Direct Costs

Even had the government met its burden of proving its right to a money judgment beyond a reasonable doubt, Appellant would still be entitled to deduct the direct costs of the various payday loan businesses. *See United States v. Masters*, 924 F.2d 1362, 1369-70 (7th Cir. 1991), *United States v. Lizza Industries, Inc*., 775 F.2d 492, 497 (2d Cir. 1985) (upholding the District Court's forfeiture calculation, which deducted direct costs, but not overhead), *United States v. Riley*, 78 F.3d 367 (8th Cir. 1996) (noting that proceeds is something less than gross receipts), *United States v. Elliott*, 727 F. Supp. 1126, 1128 (N.D. Ill. 1989) (deducting direct costs from the forfeiture calculation). Appellant presented the expert report of Gregory Cowhey at his forfeiture hearing. A7334; A7658; *see also* A7691. Based on a review of Appellant's financial records, he determined that the various payday loan companies incurred direct costs of $59,009,749. This amount represented costs such as marketing, credit fees, and salaries. It specifically did not include overhead such as office space, supplies, or taxes, which Appellant conceded are not deductible. *See Lizza Industries*, 775 F.2d at 497; A7340. The District Court erred in not deducting these direct costs from its calculation of illegal proceeds.

CONCLUSION

Appellant's criminal case was tainted from the very beginning. The government invaded his attorney work product privilege, which formed the direct

basis of multiple counts of conviction and used extensively throughout trial to prove a lack of good faith – Appellant's sole defense. The jury was not even allowed to consider the defense, though, as the District Court refused to charge the jury on willfulness. It convicted Appellant without having to even determine whether the government proved he did not have a good faith belief that tribal sovereign immunity preempted state law. And the most important witness in the trial – Wheeler Neff – was not even allowed to testify fully and introduce documents into evidence that he reviewed to demonstrate the lengths to which both defendants went to ensure that the Tribal Model was legally sound. Appellant has effectively been sentenced to life imprisonment for a crime that many said was wholly legal and he was not even allowed to present his defense. His conviction must be vacated.

Dated: November 14, 2018

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CERTIFICATE OF COUNSEL UNDER RULE 9 AND 21 OF THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT REGARDING BAR MEMBERSHIP

In compliance with Rule 21(d) of the Rules of the United States Court of Appeals for the Third Circuit, I, MICHAEL M. ROSENSAFT, ESQ., AND I, REBECCA A. KINBURN, ESQ., and ANDREW K. STUTZMAN, attorneys for the Appellant, CHARLES M. HALLINAN, certify that we are members of the Bar of this Court

/s/ *Michael M. Rosensaft*
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/s/ *Andrew Stutzman*
Andrew K. Stutzman

Dated: November 14, 2018

CERTIFICATE OF COMPLIANCE WITH RULE 32(A), FEDERAL RULES OF APPELLATE PROCEDURE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) per this Court's Order dated October 15, 2018. The brief contains 15,829 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) as this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman Style.

/s/ *Michael M. Rosensaft*
Michael M. Rosensaft

Dated: November 14, 2018

CERTIFICATE OF COUNSEL UNDER RULES 25, 28, AND 32 OF THE FEDERAL RULES OF APPELLATE PROCEDURE AND LOCAL APPELLATE RULES REGARDING THE PDF FILE AND HARDCOPY OF THE BRIEF

In compliance with Rules 25, 28, and 32 of the Federal Rules of Appellate Procedure and Local Appellate Rules, I, MICHAEL M. ROSENSAFT, ESQ., attorney for the Appellant, CHARLES M. HALLINAN, certify that the PDF file and Hard Copy of the brief are identical.

/s/ *Michael M. Rosensaft*
Michael M. Rosensaft

Dated: November 14, 2018

CERTIFICATE THAT A VIRUS CHECK WAS PERFORMED

I, MICHAEL M. ROSENSAFT, ESQ., attorney for Appellant, CHARLES M. HALLINAN, certify that a virus check was performed on my computer before the PDF file of the brief was electronically mailed using Symantec virus detection program.

/s/ *Michael M. Rosensaft*
Michael M. Rosensaft

Dated: November 14, 2018

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA v. CHARLES M. HALLINAN	Honorable Eduardo C. Robreno 2:16-cr-00130-ER

NOTICE OF APPEAL

Notice is hereby given that the defendant in the above action, Charles M. Hallinan, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order of Judgment dated and entered in this action on July 6, 2018 (a copy of which is annexed hereto as Exhibit A).

Dated: July 10, 2018

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AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Eastern District of Pennsylvania

UNITED STATES OF AMERICA

v.

CHARLES HALLINAN

FILED
JUL 06 2018
KATE BARKMAN, Clerk
By _____ Dep. Clerk

JUDGMENT IN A CRIMINAL CASE

Case Number: DPAE2: 16CR000130-001

USM Number:

Edwin Jacobs, Esq.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

X was found guilty on count(s) 1s,2s,3s,4s,5s,6s,7s,8s,9s,10s,11s,12s,13s,14s,15s,16s & 17s.
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18: 1962(d)	RICO Conspiracy.	December 2013	1s
18: 1962(d)	RICO Conspiracy.	December2013	2s
18: 371	Conspiracy.	December 2013	3s
18: 1341 & 2	Mail fraud.	December 2013	4s
18: 1341 & 2	Mail fraud.	December 2013	5s
18: 1343 & 2	Wire fraud.	December 2013	6s

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty ou count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

July 6, 2018
Date of Imposition of Judgment

Signature of Judge

Hon. Eduardo C. Robreno, U.S. District Judge
Name and Title of Judge

Date signed: 7/6/18

A3

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1A

DEFENDANT: CHARLES HALLINAN
CASE NUMBER: DPAE2:16CR000130-001

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18: 1343 & 2	Wire fraud.	December 2013	7s
18: 1343 & 2	Wire fraud.	December 2013	8s
18: 1956(a)(2)(A) & 2	Money laundering.	December 2013	9s
18: 1956(a)(2)(A) & 2	Money laundering.	December 2013	10s
18: 1956(a)(2)(A) & 2	Money laundering.	December 2013	11s
18: 1956(a)(2)(A) & 2	Money laundering.	December 2013	12s
18: 1956(a)(2)(A) & 2	Money laundering.	December 2013	13s
18: 1956(a)(2)(A) & 2	Money laundering.	December 2013	14s
18: 1956(a)(2)(A) & 2	Money laundering.	December 2013	15s
18: 1956(a)(2)(A) & 2	Money laundering.	December 2013	16s
18: 1956(a)(2)(A) & 2	Money laundering.	December 2013	17s

AO 245B (Rev. 02/18) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: CHARLES HALLINAN
CASE NUMBER: DPAE2:16CR000130-001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

168 MONTHS. This term consists of 168 months on counts 1, 2, and 4 through 17, and a term of 60 on counts 3, all such terms to run concurrently, to produce a total term of 168 months.

X The court makes the following recommendations to the Bureau of Prisons:
It is recommended that the Defendant be designated to FMC Butner.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

X before 2 p.m. on July 17, 2018 .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: CHARLES HALLINAN
CASE NUMBER: DPAE2:16CR000130-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

3 YEARS.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (check if applicable)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. X You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violeuce. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: CHARLES HALLINAN
CASE NUMBER: DPAE2:16CR000130-001

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstauces, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstauces, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probatiou officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (iucluding an organizatiou), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the persou and confirm that you have notified the person about the risk.
13. You must follow the iustructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: CHARLES HALLINAN
CASE NUMBER: DPAE2:16CR000130-001

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall provide the U.S. Probation Office with full disclosure of his financial records to include yearly income tax returns upon the request of the U.S. Probation Office. The defendant shall cooperate with the probation officer in the investigation of his financial dealings and shall provide truthful monthly statements of his income, if so requested.

The defendant is prohibited from incurring any new credit charges or opening additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with a payment schedule for any fine or restitution obligation. The defendant shall not encumber or liquidate interest in any assets unless it is direct service of the fine or restitution obligation or otherwise has the express approval of the Court.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: CHARLES HALLINAN
CASE NUMBER: DPAE2:16CR000130-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 1,700.00	$ 0.00	$ 2,500,000.00	$ 0.00

X The determination of restitution is deferred. _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered until after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees iu the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	$ _____	$ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required uuder Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: CHARLES HALLINAN
CASE NUMBER: DPAE2:16CR000130-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A X Lump sum payment of $ 2,501,700.00 due immediately, balance due

☐ not later than _____, or
X in accordance with ☐ C ☐ D, ☐ E, or X F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:
The fine and special assessment are due immediately and shall be paid in full within 90 days of the date of this judgment.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defeudant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecntion.

☐ The defendant shall pay the following court cost(s):

X The defendant shall forfeit the defendant's interest in the following property to the United States:
See exhibit A to this judgment and commitment order for the Court's ruling on forfeiture.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitntion interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

EXHIBIT A

FORFEITURE

1. As a result of the offenses charged in Counts One and Two of the Superseding Indictment, as to which the jury found Defendant Charles M. Hallinan guilty, and pursuant to 18 U.S.C. § 1963(a), Hallinan shall forfeit to the United States (1) any interest in, or property or contractual right of any kind affording a source of influence over any enterprise which Hallinan has established, controlled, conducted, or participated in the conduct of, in violation of 18 U.S.C. § 1962, see 18 U.S.C. § 1963(a)(2)(D); and (2) any property constituting, or derived from, any proceeds which Hallinan obtained, directly or indirectly, from unlawful debt collection, in violation of 18 U.S.C. § 1962, see 18 U.S.C. § 1963(a)(3).

2. Based on the record, the Court finds, beyond a reasonable doubt, that the value of any property constituting, or derived from, any proceeds which Hallinan obtained, directly or indirectly, from unlawful debt collection, in violation of 18 U.S.C. § 1962, as a result of the offenses charged in Counts One and Two of the Superseding Indictment, is $64,300,829.90.

3. Based on the record, the Court finds, beyond a reasonable doubt, that the Hallinan Payday Lending Enterprise ('HDPLE"), as described in Paragraph 8 of the Court's findings of fact, is an enterprise that Hallinan has established,

controlled, conducted, or participated in the conduct of, in violation of 18 U.S.C. § 1962. Therefore, Hallinan shall forfeit to the United States any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over the HPDLE, pursuant to 18 U.S.C. § 1963(a)(2).

4. This sum is subject to forfeiture pursuant to 18 U.S.C. § 1963(a)(3).

5. Therefore, a money judgment in the amount of $64,300,829.90 is hereby entered and ordered against Hallinan.

6. As a result of the offenses charged in Counts Nine through Seventeen of the Superseding Indictment, as to which the jury found Hallinan guilty, and pursuant to 18 U.S.C. § 982(a)(1), Hallinan shall forfeit to the United States any property, real or personal, involved in the commission of the offenses charged in Counts Nine through Seventeen of the Superseding Indictment, or any property traceable to such property.

7. Based on the record, the Court finds, by a preponderance of the evidence, that the value of any property, real or personal, involved in the commission of the offenses charged in Counts Nine through Seventeen of the Superseding Indictment, or any property traceable to such property, is $90,000.

8. This sum is subject to forfeiture pursuant to 18 U.S.C. § 982(a)(1).

9. Therefore, a money judgment in the amount of $90,000 is hereby entered and ordered against Hallinan.

10. The money judgments ordered in Paragraphs 5 and 9 of this Order shall run concurrently.

11. The Court finds, by a preponderance of the evidence, that the Government has established that, as a result of Hallinan's acts and omissions, the proceeds that Hallinan obtained from the commission of the offenses charged in Counts One and Seventeen of the Superseding Indictment, that is, $64,300,829.90 in proceeds, and the property involved in the money laundering offenses charged in Counts Nine through Seventeen, that is, $90,000, cannot be located upon the exercise of due diligence, and have been commingled with other property that cannot be subdivided without difficulty.

12. Therefore, pursuant to 18 U.S.C. § 1963(m) and 21 U.S.C. § 853(p), the Government is entitled to forfeit substitute assets equal to the value of the proceeds that Defendant Neff obtained as a result of his commission of the offense charged in Counts One and Two of the Superseding Indictment, that is, $64,300,829.90, and the property involved in money laundering charged in Counts Nine through Seventeen of the Superseding Indictment, that is, $90,000.

13. The United States has identified the following specific substitute assets in which Hallinan has a right, title or interest which the Government seeks to forfeit pursuant to 18 U.S.C. § 1963(m), 21 U.S.C. § 853(p), and Federal Rule of Criminal Procedure 32.2(b)(2)(A):

a. All right, title and interest in real property located at 641 N. Spring Mill Road, Villanova, Pennsylvania, with all improvements, appurtenances and attachments thereon.

14. Pursuant to 18 U.S.C. § 1963(m) and 21 U.S.C. § 853(p)(2), Hallinan's right, title and interest in the property identified in Paragraph 13(a) of this Order is hereby forfeited to the United States.

15. Upon entry of this Order, the United States is authorized to seize the property identified in Paragraph 12(a) of this Order.

16. The net proceeds from the forfeiture and sale of the property identified in Paragraph 13(a) of this Order shall be applied against the $64,300,829.90 and $90,000 forfeiture money judgments ordered in Paragraphs 5 and 8 of this Order, in partial satisfaction thereof.

17. Based on the record, the Court finds, beyond a reasonable doubt, that the following specific property is

property that is an interest in the RICO enterprise, which Hallinan established, controlled, conducted, or participated in the conduct of, in violation of 18 U.S.C. § 1962, as charged in Counts One and Two of the Superseding Indictment:

a. All funds in account number 009418321146 in the name of Hallinan Capital Corp., at Bank of America;

b. All funds in account number 6236347844 in the name of Hallinan Capital Corp., at Citizens Bank;

c. All funds in account number 9943232101 in the name of Hallinan Capital Corp., at Vanguard;

d. All funds in account number 6236347690 in the name of Apex 1 Lead Generators, at Citizens Bank;

e. All funds in account number 6236347771 in the name of Blue Water Funding Group, LLC, at Citizens Bank;

f. All funds in account number 6236347879 in the name of Mill Realty Management, LLC, at Citizens Bank;

g. All funds in account number 88044257268 in the name of Apex 1 Processing, at Vanguard;

h. All funds in account number 271501789868 in the name of Apex 1 Processing, Inc., d/b/a Cash Advance Network, at Power Pay, EVO Payments International;

i. All funds in account number 271501796475 in the name of Apex 1 Processing, Inc., d/b/a Instant Cash USA, at Power Pay, EVO Payments International;

j. All funds in account number 271501796327 in the name of Apex 1 Processing, Inc., d/b/a Paycheck Today, at Power Pay, EVO Payments International;

k. All funds in account number 27150179590 in the name of Fifth Avenue Financial, Inc., d/b/a My Next Paycheck, at Power Pay, EVO Payments International;

l. All funds in account number 271501796665 in the name of Palmetto Financial, Inc., d/b/a My Payday Advance, at Power Pay, EVO Payments International;

m. All funds in account number 271501796707 in the name of Sabal Financial, Inc., d/b/a Your Fast Payday, at Power Pay, EVO Payments International;

n. Funds in the amount of $92,587.23 in account number 623021206, in the name of Charles Hallinan, at Morgan Stanley;

o. Funds in the amount of $58,461.62 in account number 009466692476, in the name of Charles Hallinan, at Bank of America;

p. Funds in the amount of $20,665.75 in account number 009001408711, in the name of Charles Hallinan, at Bank of America;

q. Funds in the amount of $100,930.00 in account number 7101622806, in the name of Charles M. Hallinan, at Bank of Leumi;

r. Funds in the amount of $211,648.99 in account number 4300263160, in the name of Charles Hallinan, at TD Bank;

s. One (1) 2014 Bentley Flying Spur bearing Vehicle Identification Number SCBEC9ZA7EC092360;

t. One (1) 2015 Mercedes Benz S550 bearing Vehicle Identification Number WDDUG8FB3FA123337; and

u. One (1) 2015 Mercedes Benz S550V4, bearing Vehicle Identification Number WDDUG8FB3FA123322.

18. Therefore, Hallinan's right, title, and interest in the property identified in Paragraph 17(a)-(u) of this Order is hereby forfeited to the United States.

19. Upon entry of this Order, the United States is authorized to conduct any discovery necessary to identify, locate or dispose of property subject to forfeiture, in accordance with Federal Rule of Criminal Procedure 32.2(b)(3).

20. The net proceeds from the forfeiture and sale of the property identified in Paragraphs 13(a) and 17(a)-(u) shall be applied against the $64,300,829.90 and $90,000 forfeiture money judgments, in partial satisfaction thereof.

21. Pursuant to 18 U.S.C. § 1963(l), the United States shall, upon entry of this Order, post on an official internet government forfeiture site (http://www.forfeiture.gov) for at least thirty consecutive days, notice of the Government's intent to dispose of the property identified above in Paragraphs 13(a) and 17(a)-(u) of this Order in such manner as the Attorney General may direct. This notice shall state that any person, other than Hallinan, having or claiming a legal interest in any of the property subject to this Order must file a petition with the Court within sixty days after the first day of publication on the official internet government forfeiture site. This notice shall state that the petition shall be for a hearing to adjudicate the validity of the petitioner's alleged interest in

the property, shall be signed by the petitioner under penalty of perjury, and shall set forth the nature and extent of the petitioner's right, title or interest in each of the forfeited properties and any additional facts supporting the petitioner's claim, and the relief sought.

22. The United States shall also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property identified above in Paragraphs 13(a) and 17(a)-(u) of this Order, or to his or her attorney, if he or she is represented, as a substitute for published notice as to those persons so notified. If direct written notice is provided, any person having or claiming a legal interest in any of the property subject to this Order must file a petition with the Court within thirty (30) days after the notice is received.

23. Any person, other than Hallinan, asserting a legal interest in the property identified above in Paragraphs 13(a) and 17(a)-(u) of this Order may, within the time periods described above for notice by publication and for direct written notice, petition the court for a hearing, without a jury, to adjudicate the validity of his or her alleged interest in the subject property, and for an amendment of the order of forfeiture, pursuant to 18 U.S.C. § 1963(l) and 21 U.S.C. § 853(n).

24. After disposition of any motion filed under Federal Rule of Criminal Procedure 32.2(c)(1)(A) and before a hearing on a petition filed under 18 U.S.C. § 1963(l) or 21 U.S.C. § 853(n)(2), discovery may be conducted in accordance with the Federal Rules of Civil Procedure upon a showing that such discovery is necessary or desirable to resolve factual issues pursuant to Federal Rule of Criminal Procedure 32.2(c)(1)(B).

25. The Court shall retain jurisdiction to enforce this Order, and to amend it as necessary, pursuant to Federal Rule of Criminal Procedure 32.2(b)(2)(C).

26. The Clerk of Court shall deliver a copy of this Judgment and Final Order of Forfeiture to the Federal Bureau of Investigation, the United States Marshal, and counsel for the parties.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	CRIMINAL NO: 16-130-02
	)	
WHEELER K. NEFF,	)	
	)	
DEFENDANT.	)	
	)	

NOTICE OF APPEAL

Notice is hereby given that the Defendant in the above named case, WHEELER K. NEFF, hereby appeals to the United States Court of Appeals for the Third Circuit from the Judgment of Sentence and Conviction entered in this action on May 29, 2018.

RESPECTFULLY SUBMITTED,

s/Adam B. Cogan
ADAM B. COGAN, ESQUIRE
PA ID NO.: 75654

ATTORNEY FOR THE DEFENDANT

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Eastern District of Pennsylvania

UNITED STATES OF AMERICA
v.
WHEELER K. NEFF

JUDGMENT IN A CRIMINAL CASE

Case Number: DPAE2: 16CR000130-002

USM Number: 75206-066

Adam Cogan, Esq.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 1s,2s,3s,4s,5s,6s,7s & 8s after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18: 1962(d)	RICO Conspiracy	8/2/2013	1s
18: 1962(d)	RICO Conspiracy	8/2/2013	2s
18: 371	Conspiracy	8/2/2013	3s
18: 1341 & 2	Mail fraud	8/2/2013	4s
18: 1341 & 2	Mail fraud	8/2/2013	5s
18: 1343 & 2	Wire fraud	8/2/2013	6s

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

5/29/18 mailed
M. Dubroff, AUSA
A. Cogan, Esq.
U.S. Marshal
U.S. Prob.
U.S. Pretrial
FW
Fiscal

May 25, 2018
Date of Imposition of Judgment

Signature of Judge

Hon. Eduardo C. Robreno, U.S. District Judge
Name and Title of Judge

Date signed: 5/29/18

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A20.2

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1A

DEFENDANT: WHEELER K. NEFF
CASE NUMBER: DPAE2: 16CR000130-002

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18: 1343 & 2	Wire fraud	8/2/2013	7s
18: 1343 & 2	Wire fraud	8/2/2013	8s

DEFENDANT: WHEELER K. NEFF
CASE NUMBER: DPAE2: 16CR000130-002

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

96 MONTHS. This term consists of 96 months on each of counts 1s,2s,4s,5s,6s,7s & 8s, and a term of 60 months on Count 3s, all such terms to run concurrently, to produce a total term of 96 months.

X The court makes the following recommendations to the Bureau of Prisons:
It is recommended that the Defendant be designated to FCI – Fort Dix.

☐ The defendant is remanded to the custody of the United States Marshal.

X The defendant shall surrender to the United States Marshal for this district:

X at 2:00 ☐ a.m. X p.m. on July 9, 2018 .

☐ as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: WHEELER K. NEFF
CASE NUMBER: DPAE2: 16CR000130-002

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

3 YEARS. This term consists of 3 years on each of counts 1s through 8s, all such terms to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   X The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (check if applicable)

4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. X You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: WHEELER K. NEFF
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STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: WHEELER K. NEFF
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ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall provide the U.S. Probation Office with full disclosure of his financial records to include yearly income tax returns upon the request of the U.S. Probation Office. The defendant shall cooperate with the probation officer in the investigation of his financial dealings and shall provide truthful monthly statements of his income, if so requested.

The defendant is prohibited from incurring any new credit charges or opening additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with a payment schedule for any fine or restitution obligation. The defendant shall not encumber or liquidate interest in any assets unless it is direct service of the fine or restitution obligation or otherwise has the express approval of the Court.

DEFENDANT: WHEELER K. NEFF
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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 800.00	$ 0.00	$ 50,000.00	$ 0.00

X The determination of restitution is deferred _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS $ _____ $ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for ☐ fin ☐ restitution.

☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: WHEELER K. NEFF
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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A X Lump sum payment of $ 50,800.00 due immediately, balance due

☐ not later than _____, or
X in accordance with ☐ C ☐ D, ☐ E, or X F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:
The fine and special assessment are due immediately and shall be paid in full within 90 days of the date of this judgment..

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

X The defendant shall forfeit the defendant's interest in the following property to the United States:
See exhibit A to this judgment and commitment order for the Court's ruling on forfeiture.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

Exhibit A

FORFEITURE

1. A money judgment in the amount of $356,032.75 is entered and ordered against Defendant Neff pursuant to 18 U.S.C. § 1963(a)(3).

2. Defendant Neff's right, title and interest in the following property is forfeited to the United States as a substitute asset pursuant to 18 U.S.C. § 1963(m):

a. All right, title and interest in real property located at assessor's parcel number 075210000000500, Walnut Creek, Glen Elder, Kansas, with all improvements, appurtenances and attachments thereon.

3. The net proceeds from the forfeiture and sale of the property identified in Paragraph 2(a) of this Order shall be applied against the $356,032.75 forfeiture money judgment ordered in Paragraph 1 of this Order, in partial satisfaction thereof.

4. Twelve point eleven percent (12.11%) of Defendant Neff's right, title, and interest in following property is forfeited to the United States pursuant to 18 U.S.C. § 1963(a)(2)(D):

a. Real property located at 118 School Road, Wilmington, Delaware, with all improvements, appurtenances, and attachments thereon.

5. The Court shall retain jurisdiction to enforce this Order, and to amend it as necessary, pursuant to Federal Rule of Criminal Procedure 32.2(b)(2)(C).

CERTIFICATE OF FILING AND SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d)(1)(B) and Third Circuit L.A.R. 31.1 and 113.4, I hereby certify that on this date I caused one copy of the foregoing Brief for Defendant-Appellant Charles Hallinan and Joint Appendix (Volume 1) to be served electronically using the Court's ECF system, and via U.S. mail, on the following counsel:

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Unless otherwise noted, copies have been sent to the court on the same date as above for filing via Express Mail.

Dated: New York, New York
November 14, 2018

/s/ Michael M. Rosensaft
Michael M. Rosensaft