UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 18-2282

UNITED STATES OF AMERICA,

Appellee,

v.

WHEELER NEFF,

Appellant.

BRIEF FOR APPELLANT AND APPENDIX VOLUME I

APPEAL FROM THE JUDGMENT OF SENTENCE AND CONVICTION ENTERED ON MAY 29, 2018, IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, AT NO. 16-CR-00130-002 BY THE HONORABLE EDUARDO C. ROBRENO

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This appeal is from a final judgment entered in the United States District Court for the Eastern District of Pennsylvania on May 29, 2018, the Honorable Eduardo C. Robreno, in the prosecution of a criminal case for violations of Title 18, U.S.C. §§1962(d), 371, 1341 and 1343 at Criminal case number: 2:16-cr-00130-ER-2.

A timely notice of appeal was filed by Wheeler Neff on June 8, 2018. APX 1-2.[1]

The judgment is appended hereto at APX 3-12.

The District Court had jurisdiction by virtue of Title 18, U.S.C. §3231. Jurisdiction of this Court is conferred by Title 28, U.S.C. §1291 and Title 18, U.S.C. §3742(a).

[1] "APX" is used herein to refer to Volume I of the appendix appended to this brief. "A" is used herein to the joint appendix filed in this matter.

STATEMENT OF THE ISSUES

I. Whether the District Court erred in instructing the jury in a way that: usurped the province of the jury to find a key element of the offense charged; confused the mens rea of counts 1 and 2 with inconsistent and contradictory language; and, failed to articulate that willfulness was the proper mental statement?

Preservation and Ruling:

Neff preserved part of this issue by timely objection which the District Court denied. A60-20-A6021.

Standard of Review:

Appellate review regarding whether the jury instructions stated the proper legal standard is plenary. United States v. Shaw, 891 F.3d 441 (3d Cir. 2018). To the extent that Neff did not preserve this issue, appellate review is for plain error. United States v. Riley, 621 F.3d 312, 322-323 (3d Cir. 2010).

II. Whether the evidence was sufficient to sustain a conviction as to counts 1 and 2 (the RICO counts) as a matter of law?

Preservation and Ruling:

This issue was not raised in the trial court.

Standard of Review:

Where the defendant fails to object at trial, appellate review regarding whether the evidence was sufficient to sustain a conviction is limited to a finding of plain error. United States v. Castro, 704 F.3d 125, 137-138 (3d Cir. 2012).

III. Whether the District Court denied Neff's right to present a defense by precluding him from explaining to the jury why he believed the law supported his conclusion that the tribal lending program he helped design was legal?

Preservation and Ruling:

Neff preserved this issue by timely objecting to the restrictions placed on his testimony at trial. The District Court denied relief. A5199-A5201, A5211-A5212, A5215, A5218-A5219, A5234-A5245.

Standard of Review:

The standard of review regarding whether a District Court erred in excluding evidence is for abuse of discretion. Where, however, the exclusion concerns whether a defendant's right to present a defense was violated, the District Court's decision is reviewed de novo. United States v. Markey, 393 F.3d 1132, 1135 (10th Cir. 2004).

IV. Whether the District Court erred in admitting Exhibit 400 against Neff at trial where the admission of the evidence contravened the law of this case?

Preservation and Ruling:

Neff preserved this issue by timely objection. The District Court denied the objection. A2019-A2022.

Standard of Review:

In determining whether the crime fraud exception applied, the standard of review is abuse of discretion. In Re Grand Jury, 705 F.3d 133, 155 (3d Cir. 2012).

V. Whether the evidence was sufficient to convict Neff of mail and wire fraud where the allegation was that he deprived plaintiffs of the full amount of an unvested claim in a pending civil lawsuit?

Preservation and Ruling:

This issue was not raised in the trial court.

Standard of Review:

Where the defendant fails to object at trial, appellate review is limited to determining whether there was plain error. United States v. Castro, 704 F.3d 125, 137-137 (3d Cir. 2012).

VI. Whether the District Court properly held Neff accountable for an amount of loss based on his depriving plaintiffs of an unvested claim in a civil lawsuit?

Preservation and Ruling:

This issue was raised by objection. DE[2] 457 and 471, A7847-A7898. The District Court denied the objection. A7898, Statement of Reasons at 5-7.

[2] DE refers to the District Court's docket entries.

Standard of Review:

When the interpretation of the correct guideline range at sentencing depends upon what constitutes loss under the Guidelines, this court exercises plenary review. United States v. Free, 839 F.3d 308, 319 (3d Cir. 2016).

CONCISE STATEMENT OF THE CASE

Pursuant to F.R.A.P. 28(i), Wheeler Neff respectfully joins in, incorporates and adopts by reference the Concise Statement of the Case set forth by Charles Hallinan in his brief.

Neff, however, would add the following:

The question at trial was whether attorney Wheeler Neff, after nearly 70 years of living a life unblemished by any criminal charges or professional discipline, decided to abandon all of that to embrace a conspiracy with Charles Hallinan and others to openly engage in widespread lending practices that he knew violated both state statutes throughout the country and the federal racketeering law. This fateful decision, otherwise inexplicable, was, as the theory went, motivated solely by his receipt of normal legal fees he charged to other clients.

Neff was a sole practitioner for 17 years in Delaware with considerable experience in the lending and banking fields as a former Deputy Attorney General and Counsel to the Office of the Delaware State Bank Commissioner, and Senior Vice President and General Counsel to the banking and credit card operations of

Beneficial Corporation and its three federally-chartered banks. Amongst his clients were various payday lenders. A5228-A5190.

In 2016, the government charged that the advice Neff rendered to clients with respect to their payday lending activities rendered him guilty of a RICO conspiracy and mail/wire fraud, the government proceeding to trial under the theory that: 1) Neff violated RICO by conspiring with his clients to charge payday lending customers interest rates that exceeded state usury laws; and, 2) Neff conspired to commit mail/wire fraud by devising a scheme to defraud the Plaintiffs in an Indiana class action lawsuit involving payday lending by concealing information regarding Charles Hallinan's position with respect to a payday loan processing company. A66-A121.

After a nearly two-month jury trial, Neff was convicted of all counts of the indictment.

At sentencing, Neff's Guideline calculations at the fraud counts drove his sentence, the District Court initially concluding that Neff was responsible for causing a staggering amount of loss in excess of $9.5 million to the Indiana Plaintiffs under USSG §2B1.1 based on Exhibit 400, an email Neff had sent to Hallinan which this Court previously ruled was protected work product at an interlocutory appeal which the District Court, nevertheless, admitted at trial. A7898, Statement of Reasons at 5-7.

After departing and varying downward, the District Court sentenced the nearly 70 year old Neff to 8 years incarceration, 3 years supervised release and a $50,000 fine. APX at 5-9.

Neff filed a timely notice of appeal on June 8, 2018. APX 1-2.

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 Appellant, Wheeler Neff, was an attorney who, during 2007-2013, represented various payday lenders doing business in affiliation with Native American tribes. The rates of interest charged on these loans exceeded the stated rates of interest in certain of the states in which the customers accessed the loans through online sources. During the indictment period (2007 to 2013), Neff reasonably and accurately believed, however, that the affiliation of entities that serviced the lending activities of Native American tribes protected under the established doctrine of Tribal Sovereign Immunity afforded both the tribe and the servicer immunity from state regulatory restrictions on interest rates since such immunity can only be abrogated by federal legislation which was (and is) non-existent in the area relevant here.

The government argued, and the Court wholly accepted, however, that Neff's understanding of the law of Tribal Sovereign Immunity was completely wrong and charged the jury that such immunity had no relevance in this case.

The Court erred in this rejection, because under certain circumstances such immunity did permit tribes and affiliated entities to make such loans on and off reservation property. This view was, at minimum, the preeminent legal opinion existing in the country during the indictment period. The Court's categorical

rejection of the tribal lending model led initially to the commission of at least three serious errors with respect to the jury instructions in this case.

First, in regards to the charge of RICO conspiracy in Counts 1 and 2 that were predicated on the agreement to collect an unlawful debt, the Court effectively charged the jury that the loans were unlawful and thus usurped the province of the jury to find that element of the offense.

Second, the Court gave conflicting and confusing instructions on the critical mental state element of the RICO conspiracy charges. The Court simultaneously charged that Neff did not have to know that the loans were unlawful (and that his ignorance of the law was no defense) but that a good faith defense was offered, presupposing the necessity of proof that he did know the loans were unlawful.

Third, the Court failed to charge the jury that the requisite mental state for the RICO conspiracy charges was willfulness. The nature of these allegations made it necessary for the jurors to find that Neff believed, in bad faith, that Tribal Sovereign Immunity did not legitimize the tribal lending model and that he therefore knew and intended for the loans the model created to be unlawful.

Moreover, the evidence was insufficient as a matter of law to sustain the conviction on the RICO conspiracy charges. There was absolutely no proof that Neff willfully entered into an agreement knowing that the loans involved were illegal and intending to help collect that which he knew to be unenforceable debt.

The Court further erred in admitting government Exhibit 400, a memo this Honorable Court previously ruled protected by the work product privilege. The document was not exempted from that privilege by the crime fraud exception, and its admission severely prejudiced Neff inasmuch as it constituted several critical aspects of the charges against him.

Neff's conviction on Counts 3-8 for violations of the mail/wire fraud and conspiracy statutes must be reversed, as the evidence failed to support the finding that any "money or property" of alleged victims was the subject of any scheme to defraud. These counts were predicated on the theory that Neff and Hallinan deceived Plaintiffs in an Indiana state court class action suit about Hallinan's status with respect to Apex 1 (the entity sued there) in order to deter the Plaintiffs from joining Hallinan personally in the case.[3]

At the time of the alleged misrepresentations, the Plaintiffs had no "money or property" of which they could be deprived. An unadjudicated civil claim is not money or property that may be the subject of a mail fraud conviction. All the plaintiffs had was a claim against Apex 1 that had not matured into a final judgment. Neither money nor property (tangible or intangible) was the subject of

[3] The record is clear that the Plaintiffs were aware of Hallinan's position in Apex before the case settled and settled it anyway because joining Hallinan would have resulted in removing the case to federal court where an arbitration clause would have likely been enforced, limiting their recovery.

the alleged deprivation, and the consistent law of the Supreme Court and this Circuit require reversal of these convictions.

Finally, even if the mail/wire fraud counts are sustained, the Court improperly attributed to Neff a loss of over $9 million. The Federal Sentencing Guidelines regarding calculation of loss do not sustain the notion that an unadjudicated civil claim can be either an actual or intended loss sufficiently quantifiable to support the attribution of the amount utilized by the District Court. The Guidelines create a stricter standard for the attribution of loss than even the statutes themselves, and a proper application of those Guidelines would yield no loss here.

ARGUMENT

I. THE COURT FATALLY PREJUDICED NEFF BY INSTRUCTING THE JURY IN A WAY THAT:

A. USURPED THE PROVINCE OF THE JURY TO FIND A KEY ELEMENT OF THE OFFENSES CHARGED;

B. CONFUSED THE MENS REA ELEMENT OF COUNTS 1 AND 2 WITH INCONSISTENT AND CONTRADICTORY LANGUAGE; AND,

C. FAILED TO ARTICULATE THAT WILLFULNESS WAS THE PROPER MENTAL STATE ELEMENT.

A fundamental misunderstanding of the law has infested this case like a cancer.

That misunderstanding has resulted in serious, substantive errors on multiple levels that critically skewed this process and repeatedly violated Neff's right to a fair trial under the Fifth and Sixth Amendments. The misunderstanding led to the jury instruction errors set forth in this Section, prevented the Court from properly determining the insufficiency of the evidence with respect to Counts 1 and 2 (Issue 2), and led the Court to improperly limit Neff's efforts to present his defense to the jury (Issue 3).

This misunderstanding resulted from the Court's acceptance, without critical analysis or qualification, of the government's position that, during the indictment period, a lender issuing payday loans in a state with interest rate caps was *ipso facto* guilty of criminal usury and subject to prosecution under the RICO statute, regardless of whether the lender is an Indian tribe or an entity affiliated with a

Tribe which could otherwise invoke the established doctrine of Tribal Sovereign Immunity in defense to that claim. That position was reflected at various times, see, e.g., DE 79 (Response to Defendant's Motion to Dismiss); DE 281 at 22-27 Transcript of 9/14/17 Pre-Trial Conference), A1020, A1050-A1053, but was announced bluntly at the Charge Conference when the government proclaimed that a tribe, even acting alone, would "absolutely" be criminally liable for payday loans it made in Pennsylvania. A5900.

The government insisted that there was no room for discussion, debate or jury consideration of the issue. The government demanded that the Court determine, as a matter of law, that Tribal Sovereign Immunity was irrelevant here and that the loans issued were therefore illegal, barring Neff from explaining to the jury that legal precedent at the time recognized circumstances in which tribal lending of this type was permitted. A5881-A5882, A5886. Neff objected to this demand. A5886-5887.

Neff sought a fairly level field on which he could demonstrate to the jury that the extensive research he did into tribal lending during 2007 to 2013 reasonably and accurately informed him that Tribal Sovereign Immunity did, in certain circumstances, offer a safe harbor to internet lending programs run in affiliation with Native American tribes and that the model his clients employed was within that harbor. By such a demonstration, he would have challenged the

element of the offense that required that the loans be "illegal" and would have powerfully supported his position that at no time did he act with the requisite knowledge and intent to be deemed a RICO conspirator.

Indeed, both defendants rightfully expressed surprise at the Charge Conference that the government's theory was changing into one that demanded that the issue of the lawfulness of the loans be judicially foreclosed. The defense pointed out that the Indictment did not charge that all tribal payday lending was criminal or suggest that Tribal Sovereign Immunity was irrelevant. A5872-A5888. Instead, the Indictment alleged that the defendants engaged in "sham business arrangements" (Count 1 at #20-22, Count 2 #19) with tribes, leaving open the premise that legitimate arrangements of that nature would not have produced illegal loans. A72-A73, A87. Neff thus expected that what the government would have to prove beyond a reasonable doubt was that the arrangements here were not of the type that Tribal Sovereign Immunity would legitimize, and that he acted knowing of their illegitimacy with the intent to issue and collect unlawful loans.

However, the Court never leveled the field or gave Neff that chance. Embracing the government's position, the Court conclusively dismissed Tribal Sovereign Immunity as irrelevant and presented the jury with a judicial finding that this loan activity was unlawful. In the charge, the Court fulfilled the promise it made during Neff's testimony that "ultimately the Court is going to find that this

was illegal." A5299-A5300.[4] This determined an element of the offense and forced Neff to present his good faith defense from the crippled position of a person asserting that he honestly held a belief in the lawfulness of his conduct while the Court was simultaneously telling the jury that it was unquestionably criminal. He was wrongfully put in the same position of a tax protestor trying to convince a jury that he honestly believed that wages are not income.

The Court presented Neff's guilt to the jury as a matter of apparent simplicity. To prove the RICO conspiracy, the government only needed to show that Neff "agreed to collect debt from loans from borrowers living in Pennsylvania with loans at interest rates that exceeded twice the enforceable rate of interest"; as such debts were "unenforceable." A5983-A5984.[5] As no one contested that payday loans exceed such rates, Neff would be a RICO conspirator unless, of

[4] In denying Neff's Motion to Dismiss, the Court ruled that any activity off of a reservation had no tribal immunity protection and that, as neither Neff nor Hallinan was a tribe, neither could claim Immunity in any event. DE 123, passim.

[5] The Court's categorical declaration that loans in Pennsylvania above a certain rate were *ipso facto* unenforceable omitted an element of Pennsylvania law that plainly supported Neff's position. The Corrupt Organizations Act, Title 18, Pa.C.S. § 911 (b)(iv), lists as a "prohibited" activity the "collection of any money. . .in . . . satisfaction of a debt which arose as the result of the lending of money . . .at a rate of interest exceeding 25% per annum . . ., **where not otherwise authorized by law."**[emphasis added] Under certain circumstances, the law of tribal sovereign immunity *authorized* these loans and pre-empted state law. The jury was denied the right to consider that.

course, Tribal Sovereign Immunity made those loans lawful. That was the core of Neff's defense, a core the Court gutted in its charge to the jury:

> Tribal sovereign immunity is a legal rule that protects federally recognized Indian tribes from being sued. Within the United States, federally recognized Indian tribes are domestic dependent nations that exercise inherent sovereign authority. This sovereign authority is dependent on and subordinate to only the federal government and not the states. That means that only the Congress may decide whether and under what circumstances to regulate activity occurring within the boundaries of an Indian Reservation. Unless Congress expressly permits them to do so, individual states do not have the authority to apply their laws to Indian tribes. Outside an Indian reservation, however, absent express federal law to the contrary, Indian tribes and members of Indian tribes are subject to state law otherwise applicable to other citizens of that state. Tribal sovereign immunity does not provide a tribe or its members with any rights to violate the laws of any states. Instead, tribal sovereign immunity limits the means by which a state can enforce its laws against an Indian tribe. Tribal sovereign immunity does not provide a tribe or its members with any immunity from criminal prosecution. A5985-A5986.

While the Court gave a "good faith defense" charge, A5990-A5992, the entire instruction left the jury no real option but to reject Neff's claim. Once the Court instructed that the loans were illegal and Neff's foundational argument on Tribal Sovereign Immunity was frivolous, the burden on the government to prove bad faith was practically non-existent. As Neff was clearly not, as the government sarcastically alleged, "the world's dumbest lawyer" A6027, the only conclusion the Court left the jury was that after decades of honorably practicing law in the banking and lending field, he inexplicably joined a RICO conspiracy to collect

unlawful debts and was now trying to justify his conduct with an argument that was transparently false.

By definitively instructing the jury that Tribal Sovereign Immunity could not, under any circumstances, even arguably make these loans legal and enforceable, the Court was wrong. This error of law was most pernicious because it corrupted the jury's consideration of whether, from 2007 to 2013, Neff willfully joined a criminal enterprise, actually believing that the tribal lending model created and collected unlawful debts in violation of §1962(d).

Had the jurors been allowed to focus on all relevant issues, they would have concluded that while Neff was not the dumbest lawyer in the world, he was no criminal either. They would have understood that Neff had a sound legal basis to believe that the tribal model of his clients was not a "sham" and that it properly availed itself of the legitimate protection of tribal immunity. They would have also seen that during the indictment period, mainstream legal analysis either recognized the legality of the tribal model or, minimally, acknowledged that states ability to regulate it was highly questionable. They would have recognized that few if any voices at that time were as categorically certain as the Court was in Its jury charge that the model was unassailably criminal.

Evidence of the mainstream nature of Neff's belief emerged from the record of this case and a review of scholarly writings of then and today.

Neff tried to explain his understanding of the law to the jury in accordance with the good faith defense charge the Court agreed to give. As detailed in Argument III, however, the Court consistently limited his ability to do so.

Furthermore, Neff was not the only witness to state that a belief in the legitimacy of the tribal lending model was pervasive during the relevant period. The government's own witnesses gave evidence that a legion of attorneys, CPAs, and others involved in the tribal payday lending industry came to the same conclusion that Neff did: that tribes and tribal entities, in affiliation with non-tribe members with expertise in the industry, could take advantage of Tribal Sovereign Immunity and loan money in states in which the interest rate would otherwise exceed the state cap.

Michael Kevich was a payday lender for fifteen years. It was important to him that the tribal payday lending process was lawful, and he consulted with his own counsel and representatives of the various tribes, all of whom shared that belief. A2349-A2363. His dealings with tribes were done on the basis of public documents (tribal ordinances and written agreements) that gave no hint that anyone thought they were evidence of a crime.

Bryan Smith, the co-president of Intercept, the company that physically transferred the money in payday lending, testified that Intercept serviced 100-200 payday lenders from 1993 to 2013, with tribal lenders comprising five of his top

ten clients. A2495-A2496. During these years, the clearing banks and their lawyers, the tribes and their lawyers, and his own in-house counsel never suggested that the tribal lending model was illegal. He repeatedly stated that at no point during that period did he believe that the model was illegal and never heard any party to any of the transactions assert such concerns or refuse to engage in the business. A2649-A2650, A2690-A2693, A2699-A2705, A2919-A2928, A2948, A2968.

Michael Derry, the representative of the Guidiville Tribe, testified that Robert Rosette, the tribe's long-trusted lawyer, brought the tribal lending model to the tribe. A3155-A3156. No one connected with the tribe ever thought that anything was illegal. A3156-A3161. The Guidiville Tribe, which is still engaged in the business of tribal payday lending today, used major law firms with expertise in tribal law and in-house lawyers and CPAs to ensure that they were using a best practice model for payday lending. None of these professionals ever opined that tribal lending, inside or outside the reservation, was illegal. A3124-A3129, A3136-A3137, A3200.

Even the self-professed lifelong fraud and liar, Adrian Rubin, admitted that long before Neff ever offered him legal advice, other lawyers he consulted told him that tribal lending was legal. A3613-A3614. Indeed, he admitted that no

lawyer he ever met while engaged in tribal lending ever warned that the process was otherwise.[6]

These testimonies reflected the consensus in American law during the indictment period that made it wholly improper for the Court to unequivocally dismiss the relevance of Tribal Sovereign Immunity. That consensus was that such immunity: 1) is not confined to acts occurring only on reservations; 2) provides protection from criminal laws meant for regulatory purposes (like usury statutes); and, 3) protects the activities of non-tribal entities properly associated with tribes in commercial ventures. Scholarly literature of that period also reflects this consensus.

In American Indian Law, Sixth Edition, (West Publishing 2015), the Honorable William Canby, Senior Judge of the United States Court of Appeals for the Ninth Circuit, explains that from at least 1831, the Supreme Court has recognized that the inherent power of a tribe to exert sovereign immunity is limited only by federal law. P. 76. This immunity has curtailed the attempts of states to apply *criminal* laws against tribes and individuals from the tribes with regard to activities occurring *outside* tribal lands, as recognized in Prairie Band Nation v. Wagnon, 475 Fed. 3d. 818 (10th Cir. 2007) (the regulatory but criminal Kansas

[6] Even the government's expert admitted that while he believed that a tribe could not export its loan rates to jurisdictions with interest caps, his view was not unanimous and that, to reach his view, he had to conclude that at least one important decision of the Supreme Court was wrong. A1162-A1165.

Motor Vehicle Code held not to apply against individuals who had their vehicles registered on tribal lands only but operated off-reserve lands in Kansas) and Cabazon Band v. Smith, 388 Fed. 3d. 691 (9th Cir. 2008) (California Motor Vehicle Code held inapplicable). Id. at page 95. See also, California v. Cabazon Band of Mission Indians, 480 US 202, 209 (1987) (gaming restrictions inapplicable).

Moreover, Judge Canby explains that the Supreme Court critically reaffirmed the importance and applicability of Tribal Sovereign Immunity "to activities of a tribe whether on or off the reservation, even when the activity is commercial rather than governmental." Id. at page 99, citing Kiowa Tribe v. Manufactural Technicians, 523 U.S. 751 (1998) and Michigan v. Bay Mills, 134 S.Ct. 2024 (2014). The definitive quote from Kiowa is:

> Tribes enjoy immunity from suits on contracts whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.

523 U.S. at 760.

In addition, this immunity is not limited to the tribes themselves but can be passed on to entities considered "arms of the tribe." As of his 2015 work, Judge Canby could refer to California v. Miami Nation, 166 Cal.Rptr.3d. 800 (2014), a case where a tribal corporation and its economic development authority engaged in

payday lending were held immune from regulation under state law for activities on or off the reservation, since Tribal Sovereign Immunity is not lost when a Tribe contracts with non-tribal members to operate businesses formed by the tribe and where the tribe intends to convey its sovereign immunity to that entity. Id. at 805-810, 816-817.[7]

Judge Canby recognizes that the broad application the Supreme Court has given to tribal immunity has been sharply criticized by some members of the Supreme Court. Justice Thomas, for example, dissented in Bay Mills, and called for the Court to overturn Kiowa, specifically bemoaning the fact that Kiowa allows Tribal Sovereign Immunity to prevent regulation in new areas, such as payday lending, that are often heavily regulated by the states. 134 S.Ct. at 2052. Judge Canby, however, explains that for the immunity to be overcome and regulation permitted, Congress alone must act. Id. at 102.[8]

In Nathalie Martin and Joshua Schwartz's *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at*

[7] A year after that case was decided and the book was published, the California Supreme Court did not believe the evidence sufficiently established that the entities there were functioning to meet the arm of the tribe test the Court thought applicable. See, Owen v. Miami Nation Enters, 386 p. 3d. 357 (Cal. 2016). However, that "arms of the tribe" could be shielded by Tribal Sovereign Immunity was not questioned.

[8] Interestingly, the Judge also opines that such immunity is not simply available to federally recognized tribes but extends to tribes recognized only by the states or through common law recognition. Id.

Risk?, 69 Wash & Lee L. Rev. 751 (2012), the authors make the following critical points which are echoed in other scholarly writings:

- The Kiowa decision precludes the claim that tribal immunity applies only on reservation lands:

> Tribal sovereign immunity was once thought to be confined to governmental, on-reservation activity and thus did not extend to off-reservation conduct. However, after the Kiowa decision . . . a federal common law default rule of immunity for all tribal activity, on and off reservation, was articulated by the Supreme Court. By declining to draw a distinction between tribal activities on and off reservation land, and choosing to defer to Congress, the Court held that tribal sovereign immunity applies to virtually all tribally-owned enterprises, whatever the industry and wherever located." P. 769-770; See also, *Risks and Benefits of Tribal Lending,* Vol. 2 Issue #1, American Indian Law Journal p. 398 (May 2013) (tribal sovereign immunity "applies without distinction between on-reservation or off-reservation activities, and between governmental or commercial activities."); *Update on Tribal Loans to State Residents,* originally published in Vol. 69, #2 of The Business Lawyer (2013).

- Kiowa means that "[i]t is presumptively true . . . that an internet-based payday lender that is formed, funded and run by a tribe for the benefit of the tribe is entitled to tribal sovereign immunity." P. 777; *Update on Tribal Loans to State Residents, supra.* (a Colorado trial Court even held that if the "arms" of the tribe were "shams" the immunity would not be lost).

- Tribal sovereign immunity applies to entities that function as "arms of the tribe" and a corporation can fulfill that role, p. 774, 777. The precise criteria for determining who is an arm of the tribe is an area in considerable flux with opinions from Colorado and California listing various factors for assessment, p. 779; See also, *Risks and Benefits of Tribal Lending, supra.,* at 411 *(* the immunity also protects "subordinate secular or commercial entities acting as arms of the tribe from state regulation and legal action." Id. The Supreme Court "has not yet taken a

case addressing the specific kind of business entities, such as payday lending operations, entitled to tribal sovereign immunity.")

- While payday lending can be criticized on public policy grounds, critics must "not question the right of tribes to utilize tribal sovereign immunity to engage in payday lending," p. 788; *Update on Tribal Loans to State Residents, supra.* ("most agree that Federally recognized sovereign tribes had the authority to engage in internet lending to state residents without those tribes being subjected to state authority.") Regulation of such lending requires specific Congressional action, p. 788.

These principles are also discussed in: Adam Mayle, *Usury on the Reservation*, 31 Rev. of Banking & Fiduciary Law 1054 (2012); Hilary B. Miller, *The Future of Tribal Lending Under the Consumer Financial Protection Bureau*, American Bar Association Business Law Today (2013); Victor Lopez, *When Lenders Can Legally Provide Loans Above 1000% Is It Time for Congress to Consider Federal Interest Cap on Consumer Loans?,* 42 Journal of Legislation 36 (2016); Shane Mendenhall, *Payday Loans: The Effect of Predatory Lending,* 32 Ok. City L. Rev. 299 (2007).[9]

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[9] The themes expressed in the articles published during the indictment period still resonate today. In Professor Creppele's 2018 analysis, he concludes that tribal model payday lenders, on or off tribal lands, "are entitled to sovereign immunity." *Tribal Lending and Tribal Sovereignty,* 66 Drake L. Rev. 1, 24 (2018). While courts continue to struggle to find an accepted test for an "arm of the tribe" determination, the arms are clearly entitled to protection as well. P. 35-42. Other articles published in 2018 similarly reflect that even today the kind of categorical condemnation of tribal lending issued by the Court is not supportable: Richard B. Collins, *To Sue And Be Sued: Capacity And Immunity Of American Indian Nations*, 51 Creighton L. Rev. 391, 421 (March, 2018) ("Tribal immunity has defeated attempts to sue lenders under such laws. This in turn has led to criticism

The prevailing opinion of the day thus lends no support to the Court's unequivocal repudiation of Neff's central defense. But once the Court repudiated it, the government took full advantage in closing argument.

Eagerly following the Court's lead, the government belittled the notion that Tribal Sovereign Immunity provided any sort of defense to Neff, reminding the jury that the Judge proclaimed: "Tribal sovereign immunity gives no protection whatsoever." A6027. Such immunity only applies to tribes in civil lawsuits, and Neff knew it, the government claimed. A6093-A6094. Reducing the case as simplistically as had the Court, the government announced that if Neff agreed to

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of this deployment of immunity."); Grant Christensen, *A View from American Courts: The Year in Indian Law 2017,* 41 Seattle U. L. Rev. 805, 890 (2018) ("Some tribes have opted to operate or help facilitate payday lending because tribal entities are otherwise exempt from state usury laws."); David Horton, *Borrowing In The Shadow Of Death: Another Look At Probate Lending*, 59 Wm. & Mary L. Rev. 2447, 2465 (May 2018) ("To this day, it remains unclear whether the [National Banking Act] preempts such a surgically tailored complaint. In addition, lenders forged alliances with Native American tribes in order to invoke sovereign immunity--a gambit that has also divided courts."); Note, *Rent-A-Tribe: Using Tribal Immunity To Shield Patents From Administrative Review*, 93 Wash. L. Rev. 1449, 1462 (October, 2018) ("because . . . tribes are each entitled to structure themselves as they see fit - establishing governing bodies, creating offices, and hiring employees - there is a question as to who is protected by tribe immunity.")

collect one debt where the rate exceeded 25% in Pennsylvania, he was guilty of Counts 1 and 2. A6253. Tribal Sovereign Immunity, *per* the Court, only applied to matters occurring on reservation lands and was no defense to a criminal charge based on internet loans. A6257.

The government argument highlighted the critical errors contained within a jury instruction this Honorable Court must assess in its entirety. United States v. Hodge, 870 F.3d 184, 205 (3d. Cir. 2017). Where objections were raised, the review is plenary and reversal is necessary where the language used was capable of confusing the jury. United States v. Shaw, 891 F.3d 441 (3d. Cir. 2018). Put another way, an instruction is error when it misleads the jury on a correct legal standard or does not adequately and accurately inform them of the applicable law. United States v. Quattrone, 441 F.3d 153, 177 (2d. Cir. 2006); United States v. Prado, 815 F.3d 93, 100 (2d. Cir. 2016). See also, Rosemond v. United States, 575 U.S. 65 (2014).

But even where a sufficiently precise objection is not made, the plain error standard will still require reversal where an obvious error affects substantive rights and calls into doubt the integrity of the proceedings. Shaw, supra., at 454 n.16. Errors in jury instructions have been so held. United States v. Riley, 621 F.3d 312, 322-323 (3d. Cir. 2010), and while not a *per se* rule, the omission of a central element of an offense ordinarily constitutes plain error. United States v. Dobson,

419 F.3d. 231, 239 (3d. Cir. 2005) (error regarding intent and knowledge requirement).

A. The Instruction usurped the province of the jury to find that the loans were illegal/unenforceable.

The Court's dismissal of Tribal Sovereign Immunity was, *de jure,* a *de facto* determination of an element of the offense; that is, that the loans were illegal and thus unenforceable.

To convict Neff on Counts 1 and 2, the government had to prove that he agreed to conduct the affairs of the enterprise "through the collection of unlawful debt." A76 (Count 1, at # 32). The debt knowingly collected during 2007 to 2013 had to be "unlawful," A79-A83, (Count 1 at #39, 49, 52 and 54), since collecting *unlawful* debts was the "criminal objective" Neff and others supposedly furthered in violation of §1962(d). Salinas v. United States, 522 US 52, 63-65 (1997). By effectively charging the jury that the loans were unlawful, the Court relieved the government of its burden of proving that element of the crime, causing a fundamental due process violation. Bennett v. Super. Graterford Corr. Inst., 886 F.3d. 268, 284 (3d Cir. 2018); United States v. Korey, 472 F.3d 89, 93 (3d. Cir. 2007). The words of then Judge Gorsuch in United States v. Makkar, 810 F.3d 1139, 1143-1144 (10th Cir. 2015) resonate here:

> Before a district court may issue an instruction permitting the jury to infer the presence of even a single essential element from a set of facts the inference must — at the least — be shown capable of leading a

> rational trier of fact to the conclusion that the element in question is proven to the level demanded by the applicable standard of proof. [citation omitted] Neither may a district court ever issue instructions that effectively relieve the government of proving each essential element specified by Congress.

Instead of charging the jury, in accord with the Indictment, that the loans would be illegal if the government proved that the business arrangements with the tribes were "shams" and not entitled to tribal immunity, the Court erroneously ruled out Tribal Sovereign Immunity altogether. Neff's counsel objected to the Court determining the legitimacy of the loans, A6020-A6021, but regardless of the sufficiency of that objection, the preempting of the jury consideration of the lawfulness of the loans was plain error. United States v. Makkar, supra.

B. The instruction confused the *mens* rea element of Counts 1 and 2 with internally inconsistent and contradictory language.

The Court's instructions on the mental state element of the RICO conspiracies charged were consistently inconsistent, making them, at best, fatally confusing, and, at worst, a directed verdict of guilty against Neff. While initially charging that the government had to prove that Neff "agreed to participate in the enterprise with the *knowledge and intent* that the collection of an unlawful debt . . . would be committed by a member or members of the enterprise" A5972, the Court then juxtaposed that instruction with one that made knowledge and intent a given in this case: "if you believe the government has presented evidence demonstrating that the defendants agreed to collect debt from loans to borrowers living in

Pennsylvania with loans at interest rates that exceeded twice the enforceable rate of interest, you may consider such evidence as evidence that the defendants agreed to collect unenforceable debt." A5983-A5984.

But the Court then directly contradicted the idea that a conviction even required proof of Neff's "*knowledge and intent* that the collection of an *unlawful* debt . . . would be committed" by charging that Neff's ignorance of the *unlawful* nature of the loans was immaterial:

> To convict a defendant of conspiracy to violate RICO, the government is not required to prove the defendant knew that his acts were against the law. Instead, a defendant must generally know the facts that make his conduct fit into the definition of the charge defenses, even though the defendant did not know that those facts gave rise to a crime. Ignorance of the law is no excuse. . . the government is not required to prove that the defendant knew [w]hat the usury rates were in the states where the borrowers lived." A5985.

And at virtually the same time the Court was charging that Neff's guilt required proof that he "knew" that the objective of the conspiracy was "the collection of unlawful debt" and that he joined "intending to help further or achieve the . . . objective of the collection of unlawful debt", A5989-A5990, the Court reinforced Its "ignorance of the law is no defense" instruction by charging that the "government is not required to prove that the defendant knew his acts were against the law." A5989. The jurors thus faced an irreconcilable conundrum: to convict Neff, he had to *know* that the object of his agreement was the collection of an *unlawful* debt, and he must intend that his confederates collect the debts he

knows to be *unlawful*; but his *actual knowledge* of the unlawful nature of the debts is not important.

To compound this labyrinth of contradictory instructions, the Court gave the "good faith defense" instruction. Having admonished the jury that the government did not have to prove Neff's knowledge of the unlawfulness of the loans and that his ignorance of the law was no defense, the Court now told them that his good faith belief that the object of his agreement "was not the collection of unlawful debt" *would* be "inconsistent with the requirement of the RICO charge that both Defendants acted with knowledge and intent" otherwise necessary components for his conviction. A5990-A5991.[10]

These instructions presented a fatal paradox undoubtedly resulting from the Court's refusal to reject the government's categorical condemnation of all tribal payday lending. To recognize that during the Indictment period a wide spectrum of courts, lawyers, banks and scholars recognized that Tribal Sovereign Immunity legitimized the tribal lending model would have upset the principal pillar of the Court's approach to this case. But having arrived at the unshakeable position that Tribal Sovereign Immunity was irrelevant, and that the loans were unlawful, the

[10] Of course, the Court told the jury that whatever Neff said about his research into the legality of the loan program was not to be considered on the merits but only bore on whether he honestly held a belief that the Court otherwise charged them was wrong as a matter of law. A5991-A5992.

Court could simply not accommodate the respectful request of Neff that the jury be allowed to consider that issue unburdened by the Court's predetermined view.

Regardless of why these critical instructions were so confused and contradictory, they were plainly erroneous and fatally prejudiced Neff.

As this Court has recently held, where an ambiguity, inconsistency or deficiency in jury instructions creates a reasonable likelihood of relieving the government of its burden of proof, a serious due process violation results. Bennett, supra. at 268. To apply the accepted maxim that a jury is presumed to follow the Court's instructions, Francis v. Franklin, 471 U.S. 307, 322 (1985); Hodge, supra. at 205, is to underscore the critical problem these conflicting instructions presented. As the Supreme Court has said:

> Nothing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.

Francis v. Franklin, at 325. While an "ignorance of the law is no defense" charge is proper in many cases, it was an error to give that instruction here. The Third Circuit Standard Criminal Jury Instructions specifically note that while "traditionally ignorance of the law was not a defense, 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." Official Commentary §5.05. That the Court gave a "good faith defense" instruction properly reflected that the government had to prove Neff believed, in bad faith, that his actions did amount to creating and collecting illegal/unlawful debts. His "ignorance or mistake" about that was a complete defense but the Court's "ignorance of the law" instructions wholly negated that, to Neff's ultimate prejudice.

As the mental state component was the critical issue under Counts 1 and 2, instructions that irreconcilably confused that pivotal matter must require a new trial.[11]

C. The Court failed to charge that willfulness was the correct mental state element.

The defense preserved its request that willfulness (in a form consistent with this Court's Standard Criminal Jury Instructions §5.05) be charged as the relevant mental state (DE 289 and 304) and objected at the close of the charge that it was not given. A6020-A6021. This error alone, and in conjunction with those above, requires a new trial.

[11] In an 11/16/17 filing, DE 304, counsel both requested a charge on willfulness and asserted that an ignorance of the law instruction be omitted. If this did not sufficiently raise the objection to preserve this issue for non-plain error review, the confusion created by these instructions was obviously erroneous and fundamentally tainted the conviction. Dobson at 239.

The RICO statute does not contain a prescribed *mens rea* in either its substantive or conspiratorial form. Genty v. Resolution Trust Corp. 937 F.2d 899, 908 (3d. 1991). To determine whether willfulness was the correct mental state element, the Court needed to undertake the inquiry prescribed by the Supreme Court and exercise "particular care" to avoid construing a statute to dilute or dispense with a mental state "where doing so would 'criminalize a broad range of apparently innocent conduct.'" Staples v. United States, 511 U.S. 600, 610 (1994).

The RICO activity here was not narcotics trafficking or anything generally understood to be criminal. Rather, it was tribal payday lending, a widespread, highly public activity in which millions of borrowers throughout the country and numerous online lenders engage each year. Particularly during the indictment period and up to 2016, that activity had never been even charged as a criminal RICO predicate, making this exactly the kind of case in which an individual needed to have effective notice that their actions crossed the criminal line.

Indeed, the *sui generis* nature of this prosecution juxtaposed with the legal community's consensus during the period that tribal lending was legal made giving a willfulness charge here more compelling than other cases the Supreme Court has recognized. See, Morissette v. United States, 342 US 246 (1952) (theft requires proof that a defendant did not reasonably believe the item was abandoned); Liparota v. United States, 471 US 419 (1985) (proof that the defendant knowingly

acquired food stamps is insufficient to sustain a conviction; criminal liability can only attach where it was proven that he knew that he acquired them illegally); Staples v. United States, 511 US 600 (1994) (proof that a defendant knew the illegal characteristics of the weapon that made it fully automatic is required); Elonis v. United States, 135 S. Ct. 2001 (2015) (where the key element of sending threats in interstate commerce was the threatening nature of the message, the government could not simply prove that a reasonable person might consider the message to be a threat*)*.

Here, the jury was told that the "knowing" component of the RICO conspiracy could be satisfied if Neff knew what the maximum rate of interest was in Pennsylvania and could do the math to figure out that loans from Hallinan's companies would exceed it. But to properly convict Neff, the jury had to find that despite the research that led him and many others to conclude that Tribal Sovereign Immunity gave safe harbor to these loans, Neff subjectively knew that tribal lending was criminal usury and purposely tried to break the law.

The failure to charge on willfulness was error that requires a new trial.

II. THE EVIDENCE AS TO COUNTS 1 AND 2 WAS INSUFFICIENT TO SUSTAIN A CONVICITON AS A MATTER OF LAW.

The argument set forth in Section I above is respectfully incorporated herein by reference.

Neff readily acknowledges that in raising a sufficiency of evidence claim, this Honorable Court engages a deferential review, assessing the evidence in a light most favorable to the government and asking if any rational trier of fact could have found the elements beyond a reasonable doubt. United States v. Shaw, supra. at 452. Neff also acknowledges that his trial counsel failed to articulate a Rule 29 motion at the close of the evidence. Nonetheless, as the insufficiency of the evidence here resulted in a miscarriage of justice, plain error can and must be found. See, United States v. Castro, 704 F.3d 125, 137-138 (3d Cir. 2012) ("[t]he prosecutor's failure to prove an essential element of the charged offense does constitute plain error and so can be understood as a miscarriage of justice [citing cases].")

The evidence under Counts 1 and 2 was insufficient for two related but independent reasons.

First, Tribal Sovereign Immunity was relevant to whether the loans were unlawful when they were issued/collected during 2007 to 2013. The applicable law acknowledged circumstances where a non-tribe servicing entity could assist an "arm of the tribe" in making such loans on or off a reservation. But whether such

business arrangements legitimately fell into the protection of Tribal Sovereign Immunity or were "shams" was neither presented to the jury nor proved by any articulated legal standard. The proof that the loans were "illegal" was thus not made out.

Even more fundamentally, the government failed to prove Neff's bad faith. No proof existed that Neff entertained any subjective belief that the advice he was giving over the relevant time period was advice he knew to be illegal. He endeavored in all respects to guide his clients to conform their conduct to what he believed the law required to secure the safe harbor his research taught him Tribal Sovereign Immunity provided. And viewing Neff through the objective lens of the legal climate of the indictment period, if he did subjectively believe the tribal model was illegal, he was one of the rare lawyers in the field who did. Across the board, lawyers for the banks, tribes, facilitating agencies, or other lenders raised no concern, and nothing in the scholarly writing, case law, or legislative activity during this time put anyone on notice that tribal payday lending was a criminal enterprise. The appropriate "test" for an entity being an "arm" of the tribe may have been in flux,[12] and lawyers could debate what "optics" were needed to satisfy whatever test was used, but there was no evidence during the indictment period that Neff rejected the consensus opinion of his day that a properly structured

[12] And largely still is. See, Creppele, *Tribal Lending and Tribal Sovereignty,* supra. note *6* at 35-42.

affiliation agreement would afford an entity the benefit of Tribal Sovereign Immunity.

The proof of the necessary mental state to convict him under §1962(d) was absent, and these counts should be dismissed.

III. THE TRIAL COURT DENIED NEFF'S RIGHT TO PRESENT A DEFENSE BY PRECLUDING HIM FROM EXPLAINING TO THE JURY WHY HE BELIEVED THE TRIBAL LENDING PROGRAMS WERE LEGAL.

The Court's categorical rejection of the core of Neff's defense precipitated one final error, which, like the others, denied him due process.

Whether grounded in the Sixth Amendment guarantee of compulsory process or the Fifth Amendment guarantee of due process, the Constitution promises a defendant a meaningful opportunity to present a complete defense, which must take precedence over an otherwise applicable evidentiary rule. Indeed, even if the black letter law says that evidence is inadmissible, the exclusion of evidence that works to deprive a defendant of his right to present a defense is reversible error. Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."); Holmes v. South Carolina, 547 U.S. 319, 324 (2006); Crane v. Kentucky, 476 U.S. 683, 690 (1986). This right to present a defense includes, "at a minimum, . . . the right to put before a jury evidence that might influence the determination of guilt."

Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987); accord Washington v. Texas, 388 U.S. 14, 19 (1967).

Repeatedly throughout this proceeding, Neff was denied this fundamental right.

Neff proffered to testify that he believed the tribal lending program was legal.[13] See, DE 129, the Defendant's Exhibit List. The government objected to his explaining specifically why the legal authority that he scrupulously researched reasonably supported that view. A complete effort to present that "good faith defense" required Neff to do more than simply tell the jury what he believed; he needed to demonstrate that his belief was objectively well founded. While a good faith defense can be tried regardless of the objective reasonableness of the belief, Third Circuit Standard Criminal Jury Instruction – Good Faith Defense, §5, the reasonableness of that belief makes it far more likely that a person (particularly a lawyer) honestly believed it.

The government demanded that Neff be precluded from "suggesting to the jury that his conduct was lawful because of sovereign immunity." DE 287 at

[13] Under the Mowachaht/Muchalaht tribal lending program, the lender was to be a tribal entity/"arm of the tribe" and the servicer a corporation owned by the tribal lender, with Hallinan employed to operate the servicer, consistent with the Preston Gates Advisory Opinion discussed infra. Under the later Guidiville tribal lending program, the tribal lender and the tribal servicer were both created by the tribe pursuant to tribal law, were to be 100% owned by the tribe and were "arms of the tribe", with Hallinan employed to operate the servicer, consistent with Cash Advance v. State ex rel. Suthers, 242 P.3d 1099 (Colo. 2010) discussed infra.

paragraph 8 and A5121-A5122. As the Court deemed such immunity irrelevant pretrial, the government suggested that "[a]ny claim by Neff to the contrary would amount to an impermissible appeal for jury nullification." Id. Noting that Neff's counsel's opening statement argued that state interest rate caps were "unenforceable because of a doctrine known as Tribal Sovereign Immunity," Id., the government wanted the defense to be barred from making "a similar claim again." Id. "It is one thing for Neff to testify that he believed his conduct was lawful at all times relevant to the indictment; it is quite another to testify that his conduct was actually lawful." Id.

When Neff took the stand and sought to admit the materials he relied on to establish his state of mind, the government wanted the exhibits addressed on a "one-by-one basis." A5199-A5202.

The Court initially concluded that the exhibits were hearsay and inadmissible under Evidence Rule 403, and that a limiting instruction would be given. Id. The Court then ruled that Neff could discuss the cases he relied upon by name but not discuss their contents:

> Well, this is a stretch, but the issue is all along, which is I read in the comic books and therefore, you know, I believed it. Your question is what happened, do you believe the comic books. That's a problem when you go to sources, whether it's cases or whether they're letters or whether they are statements made by people. The less foundation, I suppose, the less likely they are to be believed. Actually, it would be better for you. If you've got a lot of foundation, it would be better for

> you. So, that's where we are and I think the road that we have taken is that we are going to allow the content.
> Now, the question is whether the content is going to include this kind of written documents. If we allow content, we're not going to allow the cases themselves. You are not going to introduce, you know, Marberry versus Madison. We are not going to do that.

A5211.

While the Court recognized the evidentiary value to Neff of showing the jury the "foundation," the Court was resolute that It would not allow documents that would raise "problems with a lawyer's opinions." A5212. Abandoning the document by document approach, the government now objected to "any discussion about the details of the case or any attempts to admit the cases" and the Court agreed: "We are not going to admit any . . ." A5215.

As Neff took the stand, the Court issued a stern warning to the jury that severely limited what it was allowed to hear and disparaged what it would hear:

> Mr. Neff, the defendant who is on the witness stand, is expected to testify as to the sources he consulted and the conclusions he reached concerning the legality of the Hallinan and/or Rubin companies payday lending programs. As I instructed you during voir dire, what the lawyers in their questions and the witnesses in their testimony, including Mr. Neff, make comment on the law in order to put their conduct in context. You must accept the law from me and me, only, even if contrary to what a witness has testified to or a lawyer has argued. And I will instruct you on the law at the conclusion of the case.
>
> Moreover, to the extent that documents may be admitted on this point, they are not being admitted for the truth of the matter. That is, for what they say is true. But they are admitted solely to show what, if

> any, effect the document or documents had on Mr. Neff's state of mind. So, it's not for the truth of what the document says or the effect, if any, that the document or documents had on Mr. Neff's state of mind. So, you must follow this limiting instruction in this case. A5218-A5219.

In this instruction, the Court anticipated for the jury what its final charge would be; that is, that Tribal Sovereign Immunity was irrelevant and Neff's views were wrong. The jury could hear that Neff believed certain notions about tribal lending but would be denied the opportunity to receive evidence as to what convinced him, and could possibly convince them, that his belief was reasonable and well-founded, and that by he was not willfully joining a RICO conspiracy. A5211-A5215, A5293-A5301.

The Court then repeatedly excluded critical evidence Neff offered.

Neff was precluded from explaining his understanding of Cades v. H and R Block, Inc., 43 F.3d 869 (4th Cir. 1994) which involved Beneficial National Bank's Refund Anticipation Loan (RAL) program of the 1990's, a program with which Neff was personally involved, and which was important to Neff's consideration of whether federal law preempted state usury laws. A5159-A5164. The Cades Court specifically concluded that the interest rate limits of a state where a lender was chartered could be exported to a state with otherwise more restrictive usury laws. Cades would have allowed Neff to explain to the jury why his belief that a tribe

also had the ability to export interest rates had more than reasonable support under federal law.[14]

Neff was also precluded from admitting the 2003 Preston Gates Advisory Opinion, a document penned by a respected law firm, which specifically sanctioned the tribal model as a valid method for exporting interest rates otherwise in contravention of state usury laws. A5224-A5226.

After the government addressed Neff regarding whether a tribal council member could be criminally prosecuted for usury committed outside tribal lands during cross examination, A5227-A5229, the Court silenced Neff's effort to explain California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), in which the Supreme Court concluded that a state's criminal laws could be superseded by Tribal Sovereign Immunity where the statute at issue (dealing with gaming regulations) was more regulatory than prohibitory and the doctrine of Tribal Sovereign Immunity thus limited its application to the tribe. A5733-A5734.[15]

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[14] In similar fashion, the Court precluded Neff from explaining to the jury the similarity of the RAL program that had been validated in Cades with the County Bank Program with which Charles Hallinan was initially involved. A5159-A5173.

[15] The Court's decision to exclude Neff from discussing Cabazon was particularly crippling to the defense in light of the government's closing argument that challenged the proposition that Tribal Sovereign Immunity could defeat a state law that made the charging of interest rates that excess of the state's usury rates illegal. A5582-A5583; the government arguing in closing that if Neff believed in Tribal Sovereign Immunity he was the world's dumbest lawyer because Tribal Sovereign

The Court further precluded Neff from delving into the substance of Montoya v. United States, 180 U.S. 261 (1901) which explained how an Indian tribe could obtain federal recognition under the common law, A5230-A5232, and Canadian St. Regis Band of Mohawk Indians v. New York, 278 F. Supp. 2d 313 (N.D.N.Y. 2003), which held that Canadian tribes may be entitled to tribal status for purposes of pursuing recourse under federal law. A5257. These cases supported Neff's claims that he believed in good faith that the Mowachaht/Muchalaht Tribe did not need to have prior federal recognition for Tribal Sovereign Immunity to apply and that even a tribe solely on Canadian land (the Mowachaht/Muchalaht spanned the U.S./Canadian border) could have rights under federal law.

Neff was also denied the right to discuss Ameriloan et al., v. The Superior Court of Los Angeles County, 86 Cal. Rptr. 3rd 572, 169 Cal.App. 4th 81 (2008) which confirmed that tribes have absolute immunity from suit in state or federal court and that Tribal Sovereign Immunity extends to for-profit commercial internet payday loan entities functioning as arms of the tribe acting as service providers to benefit the tribe and with some tribal oversight. A5285-A5289. In the same vein, Neff was barred from explaining why service providers were not required to function on tribal lands. A5336-A5337, A5350, A5356. While the

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Immunity does not protect against the enforcement of a state's criminal laws. A6027.

Court instructed the jury that Tribal Sovereign Immunity was irrelevant outside reservation lands, expounding on Ameriloan would have allowed Neff to explain that such a view was not mainstream in any sense and Ameriloan was critical to explaining why Neff believed that having a tribal service provider operating in Bala Cynwyd, in conjunction with a tribal lender operating on tribal reserve lands, was an acceptable legal practice.

Finally, the Court prevented Neff from discussing the Colorado Supreme Court decision, Cash Advance v. State ex rel. Suthers, 242 P.3d 1099 (Colo. 2010). That case provided a scholarly, comprehensive analysis of relevant Supreme Court, Courts of Appeals, and District Court decisions involving Tribal Sovereign Immunity and preemption of State law over tribal commercial enterprises. Cash Advance also provided a working analysis and definition of "arms of the tribe" which refined Neff's thinking in establishing the Guidiville lending program with the tribe's attorney in early 2011.[16] A5334-A5335, A5388-A5389.

This systematic preclusion of the right to present a defense violated clearly established precedent.

In United States v. Moran, 493 F.3d 1002 (9th Cir. 1997), the Court reversed a tax fraud conviction where a defendant was precluded from testifying about what

[16] In the 2012 Cash Advance case the District Court on remand specifically held that even a business arrangement in which the tribe received only a 1% share of the gross revenue did not affect the tribe's sovereign immunity or federal preemption rights so as to invalidate the tribal lending program.

her CPA told her regarding IRS filing requirements. The government's objection was sustained on hearsay and Evidence Rule 403 grounds, even after the government examined her about a letter she supposedly got from an attorney questioning her tax practices.

The Circuit concluded that the excluded evidence went to the heart of her effort to rebut the government's proof of intent and supported her good faith reliance of her reading of the law:

> The burden is on the government to negate the defendant's claim that he had a good faith belief that he was not violating the tax law. "Good faith reliance on a qualified accountant has long been a defense to willfulness in cases of tax fraud." The defendant is entitled to testify about the tax advice he received—subject, of course, to cross-examination—and exclusion of this testimony is error. Not only is testimony about the reliance on qualified experts relevant to establishing this defense, but the defendant "[has] the right to tell the court his own version of the tax advice on which he claim[s] to have relied." Such testimony does not constitute hearsay when not offered for the truth of the matter stated. Because there is an intent element in fraud cases, good faith belief in legality also provides a defense to the fraud counts.

Id., at 1013 [citations omitted] In this and other cases turning on proof of the defendant's knowledge and intent, the denial of evidence bearing upon that issue will constitute reversible error. United States v. Phillips, 731 F.3d. 649 (7th Cir. 2013) (Posner, J.); United States v. Makkar, 810 F.3d 1139, at 1147 (Gorsuch, J.); United States v. Gluk, 831 F.3d 608 (5th Cir. 2016).

As a lawyer accused of criminal collusion with a client, Neff had an acute need to explain that his research into the immunity issue was part of a professional obligation to give proper advice to keep a client within the bounds of the law. A key part of that was to have the jury appreciate fully the sources he consulted. In United States v. Carvin, 39 F.3d 1299 (5th Cir. 1994), the conviction of an attorney for conspiring with his client to violate mail/wire fraud by deceiving investigators about the solvency of an insurance company was reversed where the trial court barred testimony from a seasoned lawyer about "the ethical constraints under which attorneys operate" in the field of regulatory transactions. Id. at 1302-1305. Representing a client in the context of a regulatory investigation presents a complexity that translates into a particular need in the defense of a charge of fraud that arises from the representation:

> These are some of the complex considerations facing a lawyer whose client is using or has used his services to accomplish a fraud. To the extent that they guide his conduct, they are directly relevant to his intent. We therefore join our Eleventh Circuit colleagues in holding that a lawyer accused of participating in his client's fraud is entitled to present evidence of his professional, including ethical, responsibilities, and the manner in which they influenced him. Exclusion of such evidence prevents the lawyer from effectively presenting his defense.

Id. at 1308-1309.

To show the jury the substantive, authoritative documents he found to support his conclusions and to affirm his professional responsibilities would have

allowed Neff to demonstrate that he did not, after four decades of practicing law, cross a line into criminality. See also, United States v. Kellington, 217 F.3d 1084 (9th Cir. 2000) (reversing conviction).[17] Neff had the right to fully explain the professional considerations that animated his decisions and the manner in which the law allowed him to fulfill them. However, in strictly interpreting the rules against him, the Court undercut Neff's ability to show that the law amply supported his good faith belief that the advice he gave was correct. As Judge Gorsuch has written, "[w]hen an error deprives a defendant of "important evidence relevant to a sharply controverted question going to the heart of [the] defense, . . . substantial rights [are] affected [internal citation omitted]." United States v. Makkar, supra., at 1149.

The restriction on Neff's right to present a defense was reversible error. [18]

[17] Even attorneys charged with conspiring with clients in clearly illegal conduct have been permitted to describe their professional duties in an effort to explain that they acted not with criminal intent but within the legitimate bounds of legal representation. United States v. Kelly, 888 F.2d 732, 743 (11th Cir. 1989); United States v. DeLucca, 630 F.2d 294, 301 (5th Cir. 1980); United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978). See also, United States v. Acevedo, 882 F.3d 251 (1st Cir. 2018).

[18] Pursuant to F.R.A.P. 28(i), Wheeler Neff respectfully joins in, incorporates and adopts by reference the parallel argument set forth by Charles Hallinan in his brief.

IV. THE DISTRICT COURT ERRED IN ADMITTING THE JULY 12, 2013 EMAIL AGAINST NEFF IN CONTRAVENTION OF THE LAW OF THE CASE.

Pursuant to F.R.A.P. 28(i), Neff respectfully joins in, incorporates and adopts by reference the argument made by Hallinan that the Court committed reversible error in admitting at trial the July 12, 2013 email from him to Hallinan (Exhibit 400).

Neff did not waive his right to contest the admission of this email at trial by not joining in Hallinan's previous appeal at the grand jury stage. Neff fully participated in the August 11, 2017 hearing on the admission of Exhibit 400 and the Court's Order of August 15, 2017 admitting it was not specifically limited to Hallinan. A300-A509 and DE 203 at footnote 2. Moreover, when Exhibit 400 was admitted at trial, both defendants objected, and the government made no protest that Neff had no standing to do so. A2019-A2022.

That Neff did not challenge the use of the exhibit by the grand jury surely did not waive any objection he properly raised to its admission at trial. In Re Neff, 206 F. 2d. 149 (3d Cir. 1953). In Neff, this Court held that "it is settled by the overwhelming weight of authority that a person who has waived his privilege of silence in one trial or proceeding is not estopped to assert it as to the same matter in a subsequent trial or proceeding." Id. at page 152. The Court rejected the idea that a grand jury proceeding and the subsequent trial "were merely two successive

phases of a single proceeding so that the defendant's waiver of her privilege in the one carried through to the other." Id.

That In re Neff involved a Fifth Amendment privilege and the present case involves work product doctrine is inconsequential. The distinct nature of a grand jury proceeding from a trial dictates that questions of the admissibility of evidence are not normally resolved in the former setting but wait upon latter. This well established principle flows from the Supreme Court holding in United States v. Calandra, 414 US 338 (1974) that the grand jury "may consider incompetent evidence but it may not itself violate a valid privilege, whether established by the Constitution, statutes or the common law." Id. at 346. The grand jury is an investigatory body and when matters shift to the adjudicatory realm, it is there that challenges to the admissibility of evidence should be made. Id. at 348. See also United States v. Yurasovich 580 F. 2d. 1212, 1219-1220 (3r. Cir. 1978); United States v. Gary 74F. 3d. 304, 320 (1st Cir. 1996).

The work product privilege was fully preserved by both Neff and Hallinan. As the privilege is designed to provide protection against adversaries, only through Neff's active disclosure to an adversary could he waive it. United States v. Massachusetts Institute of Technology, 129 F.3d 681, 687 (1st Cir. 1997); United States v. Deloitte LLP, 610 F.3d 129 (D.C. Cir. 2010); Westinghouse Elec. Corp. v. Republic of Phil., 951 F.2d 1414, 1431 (3d Cir. 1991).

The inadvertent disclosure of the memo by Hallinan's accountant also did not operate as a waiver of the privilege with respect to Neff since "the holder" of the privilege took reasonable steps to rectify the error under FRE 502(b). The "holder" of the work product privilege is principally the client. While the attorney may share in the ability to raise it, if any disagreement exists between them as to whether a waiver should be granted, counsel must defer to the client's wishes. See, Restatement Third of the Law Governing Lawyers, Section 90 (2017). See also, Fred C. Zacharias, *Who Owns Work Product*, 2006 Ill.L.Rev. 128 (2005); SEC v. McNaul, 271 F.R.D. 661, 667 (D. Kan. 2010). As Neff was aware that Hallinan had moved to challenge the inadvertent disclosure, he had no need to take any further steps to protect the privilege since the Client was properly invoking the means to rectify the inadvertent disclosure.

Hallinan's argument regarding the error of the trial Court in admitting this memo demonstrates that the crime/fraud exception this Court rejected in In Re Grand Jury, 847 F.3d 157, 166 (3d Cir. 2017) was not made out by any subsequent showing by the government. Simply because Neff wrote it does not automatically satisfy the "in furtherance of" prong of that exception. If the crime/fraud exception became applicable any time a lawyer gave advice, the work product privilege would be swallowed whole.

This exhibit significantly prejudiced Neff. It was the underlying basis his conviction at counts 3-8 of the indictment and the Court's affixing of a $10 million plus loss at his sentencing. All of the counts were tainted by the admission of Exhibit 400 and his conviction must be reversed.

V. THE GOVERNMENT FAILED TO PROVE THAT NEFF COMMITTED MAIL/WIRE FRAUD BECAUSE AN UNVESTED CLAIM IN A CIVIL LAWSUIT DOES NOT CONSTITUTE MONEY OR INTANGIBLE PROPERTY.

Neff's conviction at counts of conspiracy to commit mail and wire fraud (Count 3) and mail fraud (counts 4 and 5) and wire fraud (counts 6, 7 and 8) were predicated on the allegation that he devised a scheme to defraud the Plaintiffs in an Indiana class action lawsuit involving payday lending by concealing information regarding Hallinan's position in Apex I. The civil claim was ultimately settled by mutual agreement after the Plaintiffs learned of Hallinan's role in the company.[19]

This was plain error.[20] An unvested cause of action is not intangible property within the definition of the mail and wire fraud statutes.

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[19] Plaintiffs' counsel made a "strategic" decision not to join Hallinan. A8477-A8488. Even with full knowledge of his status, joining Hallinan would have created diversity jurisdiction, leading to removal to federal court where the arbitration clause and class action waiver would have been routinely enforced pursuant to AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011), vastly limiting Plaintiffs' recovery. Id.

[20] Plain error exists where the government fails to prove each essential element of the crime beyond a reasonable doubt as that failure affects substantial rights, and seriously impugns the fairness, integrity and public reputation of judicial proceedings. See, e.g. United States v. Jones, 471 F.3d 478 (3d Cir. 2006)

Title 18, U.S.C. §§ 1341 and 1343 prohibit the use of the mails and wires in furtherance of "any scheme or artifice to defraud" to obtain *money or property*. As the Supreme Court has held, the mail/wire fraud statutes protect against the deprivation of property and the crimes are "limited in scope to the protection of property rights." McNally v. United States 483 U.S. 350, 360 (1987).

At the time of Neff's alleged misrepresentations, all the plaintiffs "had" was an un-adjudicated civil claim, something that is neither money nor property and has never, to Neff's knowledge, been held to be the proper subject of a violation of §1341 or §1343. Whether the plaintiffs allegedly changed their negotiation posture with respect to settlement based on the charged deception does not make this mail/wire fraud. Neither their unadjudicated civil claim, their hope for the greatest recovery possible, nor their expectation that the negotiating process would be fair was "money or property" Neff could have "deprived" the Plaintiffs of to make out an offense under these statutes.

In Carpenter v. United States, 484 U.S. 19, 25 (1987), the Supreme Court concluded that the mail and wire fraud statutes extend to protect against the deprivation of intangible property, as long as those "intangible" interests have "long been recognized as property." Id. at 26. Consistent with Carpenter, this Court has allowed "intangible property" to be the basis of a mail/wire fraud charge

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(finding plain error where the government did not make out a cognizable case of health care fraud).

only where the interest has been "traditionally recognized as a property right." United States v. Heaithy, 392 F.3d 580, 590 (3rd Cir. 2004) citing United States v. Henry, 29 F.3d 112, 115 (3rd Cir. 1994). See also, Singh, Lyons & Scudieri, *Mail and Wire Fraud*, 54 Am. Crim. L. Rev. 1555 (2017), ("whether intangible property interests are covered by the mail and wire fraud statutes largely depends on whether they are traditionally recognized as a property interest.").

In Cleveland v United States, 531 U.S. 12, 23 (2000), the Supreme Court strictly limited the definition of what constitutes intangible property under these statutes. The Court unanimously held that a license in the hands of the government was not property that could be the subject of a mail fraud regardless of whether "the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim." Id. at 15.

Consistent with Cleveland, this Court has strictly curtailed the applicability of mail/wire fraud in cases involving the alleged deprivation of "intangible property."

In United States v. Zauber, 857 F.2d 137, 147 (3d Cir. 1988), the defendants steered pension fund money from one pension fund, Magten Asset Management Corporation, to another, the Omni Fund, in exchange for kickbacks. While the Omni investment yielded returns to the pension fund as promised, the returns were

half of what Magten would have yielded. For the first time on appeal, the defendants raised the claim that there was no deprivation of money or property since the *res* of the fund remained untouched. The government countered that the switch from Magten to Omni caused a loss of hundreds of thousands of dollars to the fund in the form of *diminished returns*. Id. at 140-146. This Court, however, adamantly disagreed and dismissed the mail and wire fraud counts, finding plain error:

> We have sought, in vain, to find an actual money or property loss to the pension fund. In this case defendants Coar and Scotto, as trustees of the pension fund, had the power and the authority to invest the fund's monies with others. We fail to see what the defendants "appropriated" in this case. The investment with Omni provided its guaranteed rate of return. Neither that return nor the corpus itself suffered a loss. The alleged kickbacks were paid with Omni's profits, not the pension fund's. [citation omitted]
>
> As the Supreme Court reiterated in McNally, "'[t]here are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute.'" [citations omitted]; see also Evans, 844 F.2d at 42 (applying rule of lenity in rejecting government's theory that its right to control the transfer or resale of United States military weapons from one foreign country to another is a property right within *McNally*). The charge in the indictment that defendants acted against the interest of the fund does not state a violation of the mail and wire fraud statutes as they are currently written. The charge that defendants concealed their activities in order to leave the money with Omni likewise fails to allege a violation of the mail and wire fraud statutes. The charges that defendants violated the investment contract by approving inadequately collateralized and imprudent loans and using holdback accounts to pay overdue interest

> also fail to allege a violation of the mail and wire fraud statutes. None of these alleged actions caused a loss to the pension fund.

Id. at 147.

In United States v. Henry, 29 F.3d 112 (3d Cir. 1994), the defendants engaged in a classic bid-rigging scheme to determine in which bank it would deposit funds of the Delaware River Joint Toll Bridge Commission. Id. at 113. "Bank A" was tipped off about the other bids so that it could prevail. Id. The trial court dismissed the indictment as not cognizable under the mail/wire/bank fraud statutes.

Affirming dismissal, this Court framed the question as "whether a fair bidding opportunity is a property right of the competing banks." Id. at 114. Once the Commission deposited its money, of course, those deposits would be considered "property" of the bank in question. However, as "the money had not yet been deposited and there is no way of knowing to which, if any, of the bidding banks it would have gone," the issue became "whether the competing banks' interest in having a fair opportunity to bid for something that would become their property if and when it were received is in itself property." Id. at 115. The Court's answer was simple: "We conclude that it is not." Id.:

> "The competing banks' interest in a fair bidding opportunity does not meet [the test of *Carpenter*]. Clearly each bidding bank's chance of receiving property – the deposits if its bids were accepted – was, at least in part, dependent on the condition that the bidding process would be fair. This condition, which is all that the bidding banks

> allegedly lost, was thus valuable to them, but it is not a traditionally recognized, enforceable property right. At most, the condition is a promise to the bidding banks from those in charge of the process that they would not interfere with it. It is not a grant of a right of exclusion, which is an important aspect of traditional property. [citation omitted] Violation of this condition may have affected each bidding bank's possible future receipt of property, but that does not make the condition property." Id. at 115.

Like the banks seeking the deposits in Henry, the Indiana Plaintiffs were seeking an adversary's money, not through a bidding process, but through a pending civil litigation. The government's theory that Neff and Hallinan deprived them of the chance to get *more* money in their lawsuit by not conducting the litigation fairly, specifically by misrepresenting facts about Apex I, fails for the same reason the theory failed in Henry: the misrepresentations did not deprive the Plaintiffs of any "money or property," intangible or otherwise, cognizable under the mail/wire fraud statutes.

Henry also rejected the notion that that a cognizable fraud occurred under these statutes simply because a defendant has a financial motive in committing the fraud. While the scheme in Henry produced massive "deposits for Bank A, and favorable loan treatment and campaign contributions" to the defendant and his political allies, Id. at 116, McNally v. United States, 483 U.S. 350 (1987), teaches that a monetary benefit to the party perpetrating the deception does not automatically convert the matter to one within the purview of the federal fraud

statutes. See also, United States v. Antico, 275 F.3d 245, 267 (3rd Cir. 2001)(dismissing mail and wire fraud counts where the scheme involved obtaining conforming use zoning permits through fraudulent misrepresentations).

Neff's position is also supported by United States v. Hird, 901 F.3d 196 (3d Cir. 2018). In Hird, the defendants operated a ticket-fixing scheme that deprived the local government of mandatory fines and costs that were "part and parcel" of the judgments that would have imposed on traffic ticket recipients. Those judgments were property, Hird held, since the indictment alleged that money and property was deprived through the complete corruption of the judicial process, resulting in the local governments being deprived of the non-discretionary fine and cost judgments they would have had but for the fraud.

Neff, however, was not alleged to have deprived the Indiana Plaintiffs of a final judgment or their day in Court. The parties reached a $260,000 settlement, a recovery more favorable than a similar payday lawsuit the Plaintiffs had recently settled. Prior to that settlement, all the Plaintiffs had was an amorphous un-adjudicated claim that, regardless of how much either side thought it might be worth at some point, was never a final judgment or any other form of "property" the Plaintiffs *had* that Neff could *deprive them of* by a misrepresentation during litigation in violation of the federal mail/wire fraud statutes.

Other courts have concluded that in the context of the Fifth Amendment's

Takings Clause, extinguishing a cause of action does not constitute the taking of a vested property interest unless the claim has become a final judgment. Bowers v. Whitman, 671 F.3d 905, 914 (9th Cir. 2012); Rogers v. Tristar Prods., Inc., 559 Appx. 1042, 1045, 2012 WL 16660604, at *2 (Fed. Cir. 2012) Id. at 1045. [21] If an un-litigated claim is not property in the context of the Takings Clause, it surely cannot constitute property under the mail/wire fraud statutes where the Rule of Lenity demands that any ambiguity in a criminal statute be construed in favor the defendant. Pasquantino v. United States, 544 U.S. 349, 383 (2005) (Ginsburg, J. dissenting) (wire fraud).

Put simply, to constitute mail/wire fraud, a victim has to have something that is property that the defendant, through misrepresentations, tries to get from them. The Plaintiffs here had nothing that fits any recognized definition of money or property at the time of the alleged deceptions. Even if Neff intended to deceive his opponent in civil litigation in an attempt to limit financial exposure, such ethically aberrant actions simply are not a fraud punishable under these statutes. The government's broad interpretation of the mail/wire fraud statutes here would effectively subject every alleged misrepresentation in pending civil litigation that might diminish a theoretical recovery to a federal fraud charge contrary to the

[21] Moreover, due process deprivation of property under the Fifth Amendment require state action, see, e.g. Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988) and neither Neff nor Hallinan were governments which could (or did) deprive the Indiana plaintiffs of their right to bring suit.

Supreme Court's long stated admonition that not all "frauds" should be subject to federal prosecution through operation of these statutes. Kann v. United States, 323 U.S. 88 (1944).

Neff's convictions Counts 3-8 must be vacated.

VI. THE DISTRICT COURT ERRED IN CONCLUDING THAT NEFF WAS RESPONSIBLE FOR A GREATER THAN $9.5 MILLION LOSS.

While Neff did not raise the issue of whether his conduct with respect to the Indiana litigation properly constituted mail/wire fraud at trial, he did argue at sentencing that his conduct resulted in no amount of loss under the Guidelines. DE 457 and 471, A7847-A7898.

The District Court, however, rejected Neff's contention and found that Neff caused the Indiana Plaintiffs a loss of more than $9.5 million based on his July 12, 2013 email to Hallinan (Exhibit 400).[22] A7898, Statement of Reasons at 5-7.

[22] After affixing Neff's Guidelines range at a level 35 for counts 3-8 based on his causing a greater than $9.5 million loss to the Indiana Plaintiffs, the Court applied the grouping rules under USSG §3D1.4 which ratcheted up Neff's Guideline from 27 at count 1 and at count 2 (the RICO counts) to a combined adjusted offense level of 37. The Court then departed downward under USSG §2B1.1 Note 20(C) to a total offense level of 32 which, with Neff's criminal history category of I, affixed his Guideline Range at 121-151 months. See, Statement of Reasons at 5-7. The District Court then varied downward and sentenced Neff to 96 months incarceration and a $50,000 fine. Statement of Reasons at 5-7, APX 5-10. If no amount of loss were found by the District Court, Neff's offense level at counts 3-8 would have been 15 and his combined offense level would have been 29 after application of the grouping rules at which he would have faced a Guideline Range of 87-108 months before the Court considered a variance. The error in affixing Neff's Guideline range was not harmless. Molina Martinez v. United States, ___

The loss determination at sentencing was improperly based on the same theory that wrongly supported the mail fraud convictions. The law defining loss under the Guidelines, however, is even more demanding than the requirements of the mail/wire fraud statutes. Indeed, while USSG §2B1.1 directs a Court to determine whether the loss in any case was "actual" or "intended," a "loss" is cognizable in this carefully defined context only if there is proof that either a victim who **once had** money (or something readily measurable in money) and lost it due to the defendant's fraudulent misrepresentations (an actual loss), or, that a defendant specifically intended (but failed) to take money (or something readily measurable in money) from a victim who **had** it when the fraudulent misrepresentations were made (an intended loss).

In referring to both actual and intended loss, the Guidelines utilize the term "pecuniary harm." See USSG §2B1.1 Note 3. Pecuniary harm is narrowly defined as "harm that is monetary or that otherwise is readily measurable in money." USSG §2B1.1 note 3(A)(iii). As this Court has held in United States v. Free, 839 F.3d 308 (3rd Cir. 2016), "the gravamen of any loss calculation is concrete, monetary harm to a real-world victim." Id. at 319. The concept of "loss" thus has a narrow meaning under the Guidelines, that is, a "pecuniary harm suffered or intended to be suffered by victims." Id. at 323. While a defendant may be found

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U.S. ___, 136 S.Ct. 1338 (2016).

to have deceived another, unless the harm can be placed into the defined framework of a pecuniary harm that is reasonably subject to a real-world calculation, the loss must be considered zero and no enhancement under §2B1.1 otherwise applies. Id. at 319 to 323.

Here, the Indiana Plaintiffs never had any money (or anything **readily** measurable in money) that the defendants took or tried to take from them by misrepresentation. The Guidelines' use of the word "readily" in USSG §2B1.1 Note 3(A)(iii) reinforces the view that speculation as to whether something has monetary value is not a proper mode of analysis.

USSG §2B1.1 Note 3(A)(ii) of the Guidelines affirms this analysis in its illustrations of cases in which an intended loss can be attributed to a defendant who failed to cause all the monetary loss he sought due to factors outside of his control. A defendant who is ensnared in a government sting operation, and one who makes a fraudulent claim against an insurance policy exceeding policy limits firmly believes that the victim **has the money which he seeks to obtain** at the time he makes his fraudulent misrepresentations. An intended loss is attributed because had he been able to fulfill his present intention, a victim would have been separated from money he or she had in hand. In the present case, however, the Plaintiffs never had $8-10 million.

With respect to actual loss in cases involving fraud, the government must show a but-for causation that establishes that the victims relied upon the defendant's material misrepresentations to their financial detriment. United States v. Stein, 846 F.3d 1135, 1153 (11th Cir. 2017). Where that reliance is not shown, an actual loss figure cannot be derived. Id. at 1142; United States v. Isaacson, 752 F.3d 1291, 1305-06 (11th Cir. 2014).

Here, Plaintiffs' counsel, Vess Miller, testified that he knew Hallinan's role at Apex and could have had joined Hallinan but chose not to for the tactical reason that joining Hallinan would have exposed the suit to removal to Federal Court where the arbitration clause would likely have been enforced. A8477-A8488. The settlement of approximately $260,000 occurred after they were fully aware of Hallinan's position. Whatever deception the defendants engaged in regarding Hallinan's position was thus not a factor in the plaintiffs' acceptance of the settlement amount. As the alleged misrepresentation did not figure into that determination, there was no actual loss here.

Nor was there an intended loss under the Guidelines. The Guidelines require a showing that the defendant "purposely sought to inflict" a pecuniary harm to support an "intended loss." § 2B1.1 note 3 (A) (ii). The use of the word "purposely" is important because the "intended" loss is not simply the risk the victims were exposed to by the defendant's actions; a deeper analysis of what the

defendant subjectively sought by way of an actual deprivation of something the victims possessed is needed. See, United States v. Diallo, 710 F.3d 147 (3d Cir. 2013); United States v. Geevers, 226 F.3d 186, 188 (3d. Cir. 2000).

The District Court attributed the loss in this case based on the contents of Exhibit 400 in which Neff discussed a possible range of exposure for Hallinan in the Indiana case. The memo, however, was no more than what any lawyer would have given a client defending a civil case: a best and worst-case scenario of what the exposure might be to guide considerations of settlement. In the Indiana case, that exposure would have included statutory penalties that are arguably not includable in a Guidelines calculation of loss. See, USSG §2B1.1 note 3 (D). See also, United States v. Morgan, 376 F.3d 1002 (9th Cir. 2004).

But the basic point is that at that point Neff could not be charged with seeking to cause the other side a "loss" that is "measurable in money" since the Plaintiffs "had" nothing of quantifiable value at that time. What they "had" was an un-adjudicated civil claim which had no value that the Guidelines would allow a court to affix a loss figure and vastly increase the sentencing range.

Neff was properly accountable for no amount of loss and his sentence must be vacated.

CONCLUSION

For the reasons set forth above, the judgment of conviction should be reversed and Neff discharged. Otherwise, Neff should be granted a new trial. Minimally, the sentence imposed in this case should be vacated and the matter remanded for resentencing.

RESPECTFULLY SUBMITTED,

s/ADAM B. COGAN
PA ID NO.: 75654

s/BRUCE A. ANTKOWIAK
PA ID NO.: 25506

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, ADAM B. COGAN, ESQUIRE, and I, BRUCE A. ANTKOWIAK, ESQUIRE, attorneys for the Appellant, WHEELER NEFF, certify that we are members of the Bar of this Court.

s/ADAM B. COGAN_____
ADAM B. COGAN, ESQUIRE

s/BRUCE A. ANTKOWIAK
PA ID NO.: 25506

DATED: November 13, 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 15,579 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 Office Word 2011 in 14 point Times New Roman style.

s/ADAM B. COGAN_____
ADAM B. COGAN, ESQUIRE

DATED: November 13, 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, ADAM B. COGAN, ESQUIRE, attorney for the Appellant, WHEELER NEFF, certify that the PDF file and Hard Copy of the brief are identical.

s/ADAM B. COGAN_____
ADAM B. COGAN, ESQUIRE

DATED: November 13, 2018

CERTIFICATE THAT A VIRUS CHECK WAS PERFORMED

I, ADAM B. COGAN, ESQUIRE, attorney for Appellant, WHEELER NEFF, certify that a virus check was performed on my computer before the PDF file of the brief was electronically mailed using Avira Free Antivirus Version 3.10.3.98 software.

s/ADAM B. COGAN_____
ADAM B. COGAN, ESQUIRE

DATED: November 13, 2018

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was served by email and/or the Court's Electronic Case Filing System upon:

Mark B. Dubnoff
James A. Petkun
Counsel for the United States

Date: June 8, 2018

/s/ Adam B. Cogan
Adam B. Cogan

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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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

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

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 SERVICE

THAT I, ADAM B. COGAN, ESQUIRE, hereby certify that on November 14, 2018, the **APPELLANT'S BRIEF** was served on the following in electronic and paper form:

MARK DUBNOFF, ESQUIRE
UNITED STATES ATTORNEY'S OFFICE
615 CHESTNUT STREET
SUITE 1250
PHILADELPHIA, PA 19106

RESPECTFULLY SUBMITTED,

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

ATTORNEY FOR THE APPELLANT