74879-3

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Washington State Supreme Court

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In The Supreme Court of WA State

REPLY BRIEF

Of

Shaw Rahman

v.

Boeing

Supreme Court Case No. ~~91503-2~~

COA No. 74879-3

Petitioner/Appellant:

Pro se, Plaintiff, Shaw Rahman

Respondent:

Boeing Company, Kari Fogelman, Kristi Patterson, Kimberly Yeaton, KimbrerlyTrulson, Ken Neathe, Russ Jones, Andrew Wright, Larry Little, Steve Miller,

Respondent:

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Appellant:

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A ORIGINAL

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I. REPLY TO: INTRODUCTION

Plaintiff, holds onto, *Sunnyside Valley Irrigation Dist V Dickie,* [Substantial evidence is "defined as a quantum of evidence sufficient to persuade a rational fair minded person the premise is true,p1-33] that through, Boeing's properly hiring process, he was selected for a fulltime job as a level 4 project manager, with specific job description (42 USC, i.e "make " and "enforce" contractual relationship) & was performing per agreement under WAC 192-150-210-6(e), per the standard Boeing performance management **agreement[1]**:CP 4838-4851 for his task assigned, set forth at the beginning of the employment on 4/01/2008 CP4847. He had no further manifestation of mutual agreement or ascent for any other task, or task that he did not have been allowed to have training for, such as Delmia and HEI related tasks. He had not pushed off or delegate any task, [No evidence exists.] rather tasks were delegated by SnS Domain management and Kari Fogelman. Plaintiff places for deliberation to a "rational trier of fact, holding on Sunnyside Valley Irrigation to justify under PERC 116,Santore 28, reasonable & actual compliance doctrine (1) What was Plaintiff's specific, employment mutual agreement(terms) & task assignment by management in direction (condition of workplace), in scope of his employment WAC 192-150-210-6/42 USC, between 3/28/2008-12/31/2008 period of performance in question, & if they were breached by employer's & defendants' illegal act(2)Was he was performing those specific PM[2] tasks in agreement[1], progressively/successfully/satisfactorily with

commendation; Susan Carlson's appreciationCP5078-5079;CP4309/P008,CR May2,2008:

__ **BOEING PRIDE**;CORRECTION IN CLERK'S PAPER (CP6118-6192) page CP6127 line 14, was structured.;CP6131 line 4 Yeaton intentionally harbored.CP6136 line 16 Matters on Hillary;CP6137 line 18:after she had denied.;CP6139 line 2 Rather Plaintiff managed; CP 6140 line 16 "line 21-22 of page"; CP6149 line 6 : Bob Munger;CP6150,line 18 plaintiff was harassed in ;CP6154 line 16: came to know the same issue.;CP6156 line 6: trulson;CP6157 line 2 ; Trulson's report to Steve;CP6160 line 11 exist in Plaintiff; CP616 line 10 disparate treatment.;CP6175 line 13 applies for Su .;CP5208 line 9 Boeing policy;CP5210 line 2 "to sign falsified";CP5212 line 7 back and forth HillaryDep:CP61880; KYdep: CP6189; NorrisDep:CP6191;KPDep:CP6191;KTDep:CP6191;KenDep(CP6191); **PM[2]** Project Management, SUMMARY JUDGEMENT REFERENCED BR#, DEFINED BY CP# CP6118-6192: BR956-957(CP2496-2497);BR92 (CP2813);BR95(CP2815);PIP/BR 917:CP2911 -CP2912; LATE ENTRY TO BLOCK POINT FOR SU 5.23 BR350 (CP4506) changed by RAM (New discovery) BR3636(CP5812); BR912:(CP2906); BR12 (CP2838);BR682(CP2700);BR56(CP2779);BR959(CP2499);BUDGET: CP4290; INTEGRATED TESTFAILURE:CP6014:NOIPST/IFT:CP5999;ANDREW WRIGHT CP5997HELPING 1

CP4613.]without false pretexts by defendants (3) Were defendants and declarants "Engadin in falsification to create pretext, to discriminate (violating RCW 49.60, title VII, federal and constitutional law) him in performance and employment (4) Does his lawful "retaliation" constitute insubordination on purported behavioral concern(5) Did employer provide work safe returnable environment or contact him properly[via email or permanent residence address, defense excuses on sending fax when no operational contact Fax number in HR record, or prextext on Fedex which could not have received at Plaintiff's Seattle address on Aug 05,2008, the same morning defendants purports that plaintiff was supposed to meet on a return to work at Boeing lobby with Larry Little or Kari Fogelman] or <u>for a safe return to work</u>, without malicious discriminating grudge or devoid of threat of trespassing, arrest or being walked off [CP3882].(6) Were the CAMs and suspension, illegal untruthful acts, which took place without notice, that followed unlawful termination (7) Did trial court discriminate him violating standards of Fairness in justice ,including procedural and 14th amendment, for asserted claims "reviewed- mandated" and amended claims. All asserted claims both state claim[Div-1, CP ,Mandate] , federal and constitutional are supported with substantial evidence to withstand being "conclusory". That Plaintiff has been discriminated in employment violating protected categories, in combination of race;[national origin], religion [creed/principle of Islam in creed,(wrongful act)retaliation, holding Sunnyside Valley Irrigation Dist V Dickie. Along with all claims Plaintiff produces appropriately, via production & persuasion-pretext that each /elements /of his claims are well reasoned & stated well (IRAC),

<u>APPENDIX 0::</u>AW-1 (CP3867-3880);H1 (CP3883, 4513);OT SIP&T guideline was followed and accepted: CP5120-5122;OVERTIME ETS CP3996-4011;DCCS (CP3994-3995;4207;4114-4127);FEAR CP3991-3992; STEVE CP3989;MS CP4079-4078;SLA (CP4505);WH1 (CP5110);WH2(CP5111); <u>FE#1 (CP5113);FE#2(CP5112);</u> JB 1-9 : CP4861-4870; IWA 1-13: CP4871-4883; IWA 14(CP4884); IWA #4: CP5114;IWA 15-20 (CP4885-4891); FLEX(CP4024);OVER(CP4023);PLAINTIFF WORKED AT NIGHT when he had VPN connection(CP4018);Limited work Relationship with Lean Howard CP4279-4289 for PMO status and Capabilities Test related matters.; MS-CP4079;scapegoating with team building not PLA's SOW(CP4080);Cover-up job descript. CP4616;BR80-82(CP4676-4678);BR104 CP4687; BR109(CP4689); BR120(CP4733);BR853(CP477)-BR854(CP4771);Sarita B security CP89; BR139(CP4900);

holding WA State(RCWs , Div -1, CP], federal & constitutional law, appropriately, under Macdonald Douglas v. Green, 411 , with compelling evidence , contradicting each of declarants testimony both written and verbal ,that Boeing and its defendants' proferred explanation is unworthy or credence, false and discriminatory [See appendix 0-5, Shaw Rahman's declaration in response to each written declarant's response and testimony, that evidentiary support exists that while Plaintiff performed within his agreement[1], declarant were Engadin, wrongful act[tort(s)] to evade their own task responsibility (of Business analyst Gerry Larson, Andrew Wright's project or Hillary G. undertaken-delegated task), discriminating Plaintiff, in employment [CP6118-6196]. Therefore discriminatory motive, - unlawful in nature and supported with evidence, which were intended towards Plaintiff, existed, after recruitment. All Elements of disparate treatment present(Appendix AAA). Both orders of trial court in summary judgment, in granting each defendant's release[by fraud], were unlawful. Plaintiff had been discriminated in trial court, despite Plaintiff's objection to short cut,[Pendant supporting Motion to compel, testimony for witnesses, & discovery, were not allowed, in violation of 14th amendment CP3825,3852,3849,3847], (i)in depositing additional witnesses when motions were pendant , which went "unanswered", by judge till summary judgment's order - which would have required, Plaintiff to file a motion of continuance of discovery. Judge discriminated Plaintiff. Plaintiff was threated to have held in contempt to complete discovery to depose addition witnesses: Nick Zandyeh; Mark Pethe, Steve Rzesutek _Russ Jones provided false statement to Kimberly Trulson, per Kimberly Trulson written evidence to Steve Miller, derogatory to Plaintiff ,exerting influence per Kimberly Trulson testimony CP4334-4337);Team building not Plaintiff responsibility CP 4080-4083; Rescheduled ICA meeting ICA 4050-4052;Boeing ETS system "allowed to enter(as correct entry)" partial time before it was restricted ,following SIPT& guideline CP4018-4019; [discrepancy]; SME support CP 4129-4064.;OT #1 (CP4352); APPENDIX: 1:: FEA (su 5.21) CP4415 (okayed in agreement for Kari Fogelman to delegate to Hillary) CP 4519;SICK (CP 4899-4900); Andrew to Hillary task delegation by SnS management and Kari Fogelman: CP4515-4520;CP4311-4314;Per Management approval as evidence from Jeannie Holt's email to Ken Naethe CP4319-4321; CP6099; All hands meeting (CP 4420); WENT BACK (CP 4418); HBACKUP (CP 4419);CDG IWA (CP 440-14414); OVER (CP 4351-4353);Mandatory training completed CP 4364-4377; Worked with BOM export focal CP 4390;

(ii) trial court overlooked, objection to short cut discovery which was set by original case schedule by 3/31/2015 (iii) repeated motion for recusal, to obtain justice under a different judge other than J. Downing, by J. Richard Jones(African American) when the obvious and actual bias was stated in CR 16 response and meeting, via motion to Judge Spearman, for reassignment, to DJA, per 28 USC section 455, 154 , for defense's influence . Plaintiff pleaded, in a discriminatory court, which violated summary judgment standards, stated earlier, in appendix of opening brief. Notice pleading is not the [only] way to assert each "cause" for each factual statement of claim. Each asserted claims in amended claims which are supported with evidence, therefore are appropriate. Defense counsels disrespectfully address Plaintiff, with arrogance and abusive manner, violating attorney conduct. II.REPLY TO: RESP. TO ASSIGNMENT OF ERRORS: encompassed, overlooked claims & error by trial judge, stated in page 4-37 of opening brief. Plaintiff, a victim of "discrimination", whose merit has been established in federal court, petitions for relief [RCW 49.60.030(2)], for review of his appeal at Supreme court, per statement of his

__ Plaintiff asserts that **tort[v]** outrage[vii] , **independent** (recognizable/-ed/analogous to tortuous character] , **tort** [v], specific in **particular kind of overt** /illegal acts (an act of **tortious**[act,viii] character), exists that caused mental/psychological & physical pain [psychologist report, IMR not allowed] for legal damage done to PLANITFF BY DEFENDANTS, in ("any act in ")furtherance[iii] of "conspiracy" in limitations period, in addition to the 'causes of action' (inclusive & prior to denial of ESD on purported "work related misconduct" , by collaborative acts of the defendants ,as conspirator & coconspirator(s)[liability established]; holding assertion of the defense counsel at page 27 line 2-3, (direct evidentiary support exists).[see Appendix B]; BLACK LAW DICTINARY ,383(4th ed 1968), Therefore causes of " 2 or more acts of 18 USC , chapter 1961 have been infringed " , for common law civil conspiracy liability--Most consistent with the principles for suit under 18 USC chapter1964(c), for 1962(d), as a result of chapter 1961's 'causes' of action, under RICO: App AAA:"A-K"). _Also See Response to Answer for Prima Facie case on unlawful termination &retaliation, Div-1 opening & Reply Briefs CP4422-4433;4521-4603;APPENDIX 2 : BR 108 (CP2826); P1 & P2: CP5078-5079; ETS (CP4690)[balance] , fixed [CP4738] but scapegoated [CP4770]; PRIDE (CP4613); COVERUP (to formulated a job description that was not the original employment) (CP4616) (made after suspension , changing terms and condition of employment.); JD CP 4622-4625; Kimberly Trulson to Steve Miller Email CP4636; PIP (CP 4641-CP 4642);false CP4766-4767;4782-4783; H14 (CP5086) ; H15(CP5087) H16(CP5091); H17(CP5091) H17(CP 5092);HHH(CP5093);AP1-AP4: (CP5094)-CP5097; Hallway conversation with Ken Naethe, untruthfully reported to Cynthia Steven (No behavior concern):CP5098-5100; SICK (CP5080-82);CP4712,4734; Kari Fogelman complaining before even vacation was deferred and not taken to Larry Little; CP4739-4740; RJ1(CP4729); Corporate investigation CP4650-4714; CP 4737; Kari Fogelman complaining about Plaintiff tailgated to enter Boeing premise , untruthfully to instigate management :CP 4733; BR 1386 (CP4914); PIP (flatulently curved showing dates written and due dates in future , no deliverable was due per ICA deliverable schedule) CP 4916-4917; Discrimination in Performance not shared with Plaintiff /was signed by Plaintiff, before suspension/terminationCP4918;

conclusion: ORDER REVIEW. And does not agree to an error as such, holding, his constitutional rights of Appeal under 14th amendment, in a nondiscriminatory court. Trail court erred in providing justice for each and every claim stated under RCW, federal & constitution holding, Article III standing of the Plaintiff – a victim of "discrimination".

III. REPLY TO: RESPONSE TO ISSUES PERTAINING TO ASSIGNMT OF ERROR

(1)Issues exist pertaining to assignment of error clearly stated in (II) above. Standards and standing in review applies appropriately, with meaningful analysis, rules of law and authority, with evidentiary, support (IRAC) that there is no unsupported claim that is conclusory, holding Sunnyside Valley Irrigation Dist V Dickie, Therefore this court must not act contrary to standard of review in a wrongful act or determination, that is unconstitutional or violates law. (2)Plaintiff appropriately produced evidentiary support, with appropriate legitimate , MacDonald Dogulas, 411. , to establish existence of elements required to assert prima facis case of "disparate treatment"[see elements in appendix AAA see elements: That he was performing satisfactorily, during a fulltime job role that he had agreement to perform specific task per WAC 192-150-210-6-e ,between him and Kari Fogelman or Boeing company. (3)That Boeing failed in persuasion and production , in obstruction of justice, influence, conspiracy/secrecy[admitted by defense attorney under penalty of perjury, Def. Answer page 27 line 2-3] , in discovery , deposition of named witnesses, in intentionally failing, to produce material evidence. See motion to compel & Sup. Motion violating 14th Amendment.

_Plaintiff Requested training to Kari Fogelman (bias) denial of (Required knowledge" for Enovia to Delmia SnS, "synch process" ,for software required (Enovia and Delmia), CP 4358-4362; 4380-4382;4501-4503;4380-4382;BR106(CP3995); BR107(CP3994)BR108(CP4730); BR114(CP4731);B117(4636);BR118(CP4637);BR119(CP4732);BR279(CP5083);BR1492(CP5117);BR1493(CP5118);BR1494(CP5024);BR1495(CP5025);BR1400(CP5026);BR1500(CP5027);BR1501(CP5028); BR1513(CP4655);BR1514(CP4655);BR1515(CP4656);BR1522(CP5080);BR1523(CP5081);BR1532(CP4804)BR1532(CP4804);BR1540(CP5098);BR1541(CP5099-5100); BR1535(CP5101); KF1040(CP4724); BR1538(CP5102);BR1539(CP5103);BR1575(CP5104);BR1576-70(CP5105-5107); KF1041(CP4725); KF1042(CP4726); EXHIBIT: 5-1 (CP4961) thru 5051 (CP5011); EXHIBIT : 9-1 (CP 5012) thru 9-5 (CP 5016); Performance (CP 2491-2514); HR Advice to Protest CP3770

holding Cary v Pihpus, intentionally discriminating Plaintiff maliciously. Plaintiff produced sufficient burden of proof. Holding Sunnyside Valley Irrigation Dist V Dickie. Therefore a rational trier of fact , a fair minded person of the truth, can conclude that there is legitimate/lawful reasons exist & that defendants collaboratively acted, to defraud[elements of fraud stated in opening brief], falsified statements, in act and intent , that is "discrimination" in employment intentionally &, provided WA ESD fraudulent "causes" actionable under criminal & civil law , while he was employed & after termination. EEOC v Boeing holds. A repeated pattern of conduct that is unlawful and illegal at work ,under both WA state law & federal laws against discrimination, motivated defendants, to discrimination, starting 4/25/2008 & well into limitations period, even after termination, changing terms & "condition of employment". Therefore "discrimination" with "marked intent and motive" was indeed a substantial factor that motivated the defendants. Gordon v US holds appropriately.CP6118-6196. NOT unsupported or conclusory. (4)Plaintiff asserted sufficient factual basis for his amended claims, & claims of 14, 13, 7th amendment , that he was discriminated in trial court in violation of 28 USC section 455,154, which has sufficient basis & evidentiary support of discrimination , that had taken place in limitations period. (5)Therefore the asserted claims reside well on holding for each RCW, federal & constitutional law. They are meritorious. (6)The trial court-orders' suffered from discrimination, abuse of discretion & are "unconstitutional".

Circumstantial evidence along with direct evidence exists: for each prima facie case,(1) Plaintiff was a member of protected, class (2)He was qualified (3)Adverse action was drawn unlawfully towards him by defendants(3) the replacement was of different protected class characteristics. That defendant's proferred explanation violated EEOC v Boeing, unworthy. "Causation" exists in each claim within the statutory framework.- proving the "real reason "of adverse action ,was evidenced with tort/wrongful acts-infringement of "protected characteristics(inference proven with direct evidence, race/national origin ,stereotyping as Iranian holding ARMAN.(see Pla. resp to sum judgment), in performance discrimination, reoccurring motivated malicious acts(reliance on protected traits exists, therefore, liability attached for recovery – impermissible motivating factors exists in defendants disparate treatment at work towards plaintiff.(42 USC.2000e -5g(2)(B).) Desperate treatment indeed is a "cause of action " Araburu v Boeing Co., 112 F. 3d 1398 (10th Cir,1997) holding Intersectional & multi-dimensional causes of discrimination claims, exists in violation of behavior-race, ethnicity as factors of discrimination, for "equitable resolution" contrary to Discrim. By Proxy, future of title VII, 70 NYUL Rev 11341199-1230(2004); Differential treatment – discriminatory discernible intent, exists that were sufficiently severe & pervasive, Meritor Savings Bank v. Vinson.[2]

IV. REPLY TO: STATEMENT OF THE CASE: A). See PROCEDURAL HISTORY in opening brief. Trail court discriminated Plaintiff. The entire docket has been designated and is in scope per de no vo analysis standards. B.) FACTUAL STATEMENT:At the time of Employment Plaintiff accepted and interviewed with defendant Kari Klaus / Kari Fogelman and Trina Goehring, following a Boeing structured process of recruitment. Plaintiff according to Boeing's Standard of performance management , signed "agreement[1]" with Kari Fogelman for task assignment , per managerial direction (NOTE: under WAC 192-150-210-6-e. The managerial direction is a nested element, under the agreement WAC 192-150-210-6, and can take place only under agreement, i.e first recruiting takes place for a job description then Boeing performance management contract at management direction was agreed on in agreement[1], that, Plaintiff performed according to this manifested mutual ascent (Hearth's Coms) in execution , work progress, reasonable & actual compliance doctrine applies, [PERC 116, Santore 28] for delivery appropriately supported with substantial evidence. He along side helped in other project managers per request to the best of his ability and knowledge. See Plaintiff's declaration, Delmia/HEI/Su 5.21 work for which he had been discriminatorily denied training and was discriminated in performance review, in violation of agreement[1] and 42 USC[make /enforce], --- no, "nondiscriminatory" basis exists, or no "reasonable lawful managerial direction" violation exists . Kari Fogelman ,even after denying needed "required Knowledge", [per Russ Jones testimony] or training for Delmia, (manufacturing

____ Kari Fogelman Discriminated Plaintiff in Performance not shared with Plaintiff or was signed by Plaintiff, before suspension or termination of Plaintiff, CP4918; APPENDIX 3: KYDep : Exhibit #7:CP 3883 :APPENDIX 4:-APPENDIX 5 (Declaration of Shaw Rahman).BR 45 (CP2770); BR457(CP2346); BR667(CP2001);BR651(CP1969); BR952(CP2492); BR253(CP2258); BR94(CP2815); BR682(CP2700); Several places **had Email in HR Contact Rec.CP5326,2917**: email address:email_shah@yahoo.com); Andrew Scapegoating plaintiff, to update Status Deck of Su 5.21 when it was he who should update his capability, CP 4922; delegating his responsibility outside of agreement. Plaintiff requested, Training need of task assigned, CP 4936;Per Management funds were available for KBE CP 4945-4946; EXHIBIT : 5-1 (CP4961) thru 5051 (CP5011); EXHIBIT : 9-1 (CP 5012) thru 9-5 (CP 5016); Performance, (CP 2491); Plaintiff was not allowed to have required Delmia knowledge to assemble SLA BR 764(CP2876). Plaintiff verbally complained to HR who interpreted Kari is responsible for the situation BR104(Hallway conversation)earlier stated by Ken Naehte to Cyntha Steven; https://en.wikipedia.org/wiki/Klaus

software product) assigned task , that was not in agreement[1] ,intentionally to discriminate ,in performance & pay , while Plaintiff was performing [under WAC 192-150-210-6e], satisfactory, evidenced with exhibits "Boeing pride nomination " and email exhibits of Susan Carlson within his task agreement, set by standard managerial direction in of (WAC 192-150-210-6, set by employment security Administrative code of WA State / or mutual ascent] and Boeing's standards of performance management. Plaintiff did not have any other agreement of any kind with Boeing company or Kari Fogelman. As evidenced via amended claims CP 1968-2919 with Plaintiff's declaration that bear evidentiary support , that Kari Fogelman ,declarants and defendants , collectively falsified regarding Plaintiff's task performance . Plaintiff performed his mutually agree task, accordingly towards delivery timeline and the then management disclosed targeted completion ,block point release timelines, progressively, see status reports, email of meeting minutes to all attendees with needed information, projects' ongoing schedule for deliverables. In response to Page 6 paragraph 2 , (see response to declarant and defendants declaration statement in Shaw Raman declaration [CP6118-6196]). That purported (i)"failed to complete task assigned",(ii) "reports from various Boeing employees because of Plaintiff's failure to perform", or "attendance", or for meeting or "failure to provide teams with purported needed information" are all purported "FRAUD",conclusory(who ,what, how, where, authority & had been responded with sufficiency of evidence.

__Defendants created fraudulent return to work, pretext, Plaintiff was not to meet anyone on 06 Aug 2008, Aug 07, 2008, CP 4694 no verification found (EEOC v Boeing).Lena Howard stated false pretext per Sarita B. CP4694, that Plaintiff piggybacked to enter premise. Kari Fogelman complains before Plaintiff took vacation or per guideline entered time CP4739- 4740; ICA Su 5.22 combined work progress for all deliverables and resources CP 5773-5811.Plaintiff, after contributing his gathered knowledge; requested Brent S. who owned the capability Su5.21(even not Plaintiff task) to contribute his information, without being reluctant, that he retained, to create P415 ,450 deliverables Brent , Andrew , Hillary participated. Hillary Flatters behooves Kari Fogelman CP4272-4276.("as good manager"); [pretext overcomes, Same Actor inference] .Per Ken Naethe written testimony plaintiff retaliated to sign untruthful suspension memo CP 5382(Q3);Desperate Treatment /involuntary servitude Su5.21 CP4224;"Progress meter folder" which contained deliverables (such as action log, resided in)[even after stating to , Kari Fogelman she complaints to HR 5026-5028, CP 4149.STEVE CP3989-3991;Combined ICA project progress deliverable, for Plaintiff (his Test Plan shared with team) and the team (CP4026);Kari Fogelman discriminated Plaintiff from pay and performance, in PE (CP4750-4757)without "cause", did not share with Plaintiff & did not complete the evaluation fairly, till after his suspension. Susan Carlson's appreciation CP 5078-5079;CP4309 (in P008 and CR project management task, May 02 2008);BOEING PRIDE CP4613.EEOC complaint CP4608-4611:Motion in support of motion to compel CP3820-3826(disputing alternate summary judgement date) 8.

Alongside plaintiff did not, or intend or had any motive to commit any SIP&T guideline violation, push off or evade or delegated any of his agreement[1]'s task under, WAC 192-150-210-6-(e) holding PERC 116, Santore 28. See Appendix regarding task delegation. As a result defendants proffered explanation, or persuasion fails to satisfy "as lawful pretext " . EECO v Boeing, still holds. Defendants' discriminated Plaintiff, and there is no nondiscriminatory reason exists, that is not intended or motived to discriminated him ,changing terms and condition of agreement of employment, in pay and performance, that adversely affected his livelihood[Human Rights]-unlawful; appropriate premise asserted for SOX violation in the same limitations period for cover ups for discoverable information. (1) In response to page 7 para 1, 2/page 8 : – **see,** CP6118-6196; regarding training of 2 months later (see exhibit regarding identified training from Boeing project management classes in PE & needed Microsoft office software products; PLA earlier responded; one to one meeting in respect **to,** "Empty handed or identify and discuss any documents or Make excuse why not done, Or producing work", or regarding: overtime pay/ took some assignment off his plate(exhibited via Kari Fogelman's delegating task to Hillary)–all are responded[PLA's response to declaration statements of Hillary Gerry, Andrew Wright, or Russ Jones (for identifying Boeing training classes],**are** answered with evidentiary support - Plaintiff worked, within capabilities under defined terms. See exhibits PERC 116. No delegation or performance issue existed. B.FACTUAL STATEMENT: Plaintiff was a project manager level 4, at Service and Support Domain which had apparently 3 parts: PIMS (Assemble and Authoring), Service bulletin[SB](Norris Harper was assigned PM, after plaintiff's arrival).Plaintiff was not involved in service bulletin which produces maintenance bulletin for aircraft maintenance, Plaintiff was involved in software service & support, software integration capabilities in agreement[1] at the beginning of the employment, for scheduling project reviews (holding on PERC 116, Santore,28),

__Suspension CAM CP4612;CAMs and written complaint to Boeing HR CP 4617-4620; Verbal meeting email was never shared with ,in discrimination to, Plaintiff (CP4772-\BR912); Post Suspension memo (12th Aug, EAP) CP 4640; (8th Aug 2008)CP 4638; Kimberly Trulson Spearing Fear CP3991-3993;(2)Nick Zandyeh provided CPI /SPI Cost matrix (CP4099) for all Su capabilities.3. Defense counsel oppressed &temped with in deposition, discovery & oral argument conf. w/viral infection, to engaged to argue, we hold on to 18 USC 1961, section 1512,1513. In Tort claim: Defendants' purpose, to defraud & victimize: accomplished/obtained via means "of fraud, discrimination, tort, wrongful acts, conspiracy, collaboratively" employed (by Boeing, Defense) for acts of torture/tortious nature along with ESD denial, by trial court & Boeing. Collaborative conspiracy/discrimination/tort exists prior to suspension, by declarants.

meetings, budget(IWA)forecasting project status reporting, statement of work development[or in case where DELMIA required knowledge for SLA reliable SME involvement, for needed "required" knowledge],coordinating various cross functional project teams, initiating & planning, controlling & closing projects, Plaintiff performed progressively holding on PERC,116 that work was progressing successfully & he has delivered projects to announced block point delivery time frame, & via weekly PMO meeting thru Boeing's accepted official Status reporting methods &templates, keeping informed of any obstacle, issues &progress status for each capability in his agreement.CP3483-3511. As a result he did not failed to "complete" work assignment and was progressing successfully & did not FAIL to progress or advance in capability whose "completion" dates were much later and after his termination date, to "complete" & which had dependency [See WBS/ICA plan]on other tasks in project plan . Defendants take resort to vagueness & fraud, inconsistency, are conclusory. Each weekly progress was status-ed to PMO [propagated to executives approved by PMO supervisors] for each capability in his agreement [1]. Teams members were provided needed information, as discussed in each official meeting, via email to all attendees, to progress task & the dependency for any foreseeable "issue" as obtained in the meeting, as a result, except for times that he was "sick out of office", his assigned tasks per his agreement[1] did not have lack of his "attendance" for showing up/failed to provide information to teams members, rather helped capability:Su5.21/5.23 to progress from lagged behind deliverable that started in 2006

___EXHIBIT, RJ (CP4813)[Su 5.20];Su 5.20, Su 5.19 [CP5012-5016]; Su 5.22 (CP 5017-5020);Su 5.21 test CP 4085;Still No IPST was performed for Su 5.21 it was close to release deadline, CP4232-4260[deadline]; CP4239; to expedite release without block point sliding impact to a later date. Plaintiff didn't have any task in agreement[1] for Su 5.21(who's project manager was Andrew wright), as the Project manager to lead Su 5.21 activity , Ken Naethe falsified in his written email to discriminate Plaintiff. CP 4689 (BR109); Integrated Ica Su 5.22 progressed successfully, CP 4177-4201;4156-4170; 4025-27;SnS, Management divided ICA project into 2 parts IT & business much later after Plaintiff lead the entire project himself, CP4034-35;4028;4046;4150-4155;Per added items in PE (CP3881) Plaintiff helped others in PE,CP 3799-3812;3867-3881;Employer discriminated Plaintiff from interviewing with corporate investigator CP4737(bias).Plaintiff performed/WAC 192-150-210-6(e)/CP 4026(bullet128),P415. Kari Fogelman unfairly assigned IT deliverables to Plaintiff when he was a domain PM for ICA,CP4150 &George Bivino was IT PM; [Differential treatment exhibited , Defendants provided no recognition]

whose project manager was Andrew Wright [CP6300], who reported via Joe Imhof to Ken Naethe. Therefore there is no evidence that Plaintiff evaded, Push off or delegated any of his own job responsibilities, improperly, we hold on to PERC 116, for WAC 192-150-210-6-e, in response to [CP 3485,3574-3577,3522-3523] , There is no evidence that Plaintiff "delegated or had any job responsibility to delegate" Rather Kari Fogelman "delegated" task to Hillary and Hillary provided service to Kari Fogelman as her "dotted line" manager while she worked for Kat Fournier (HillaryDep)[CP 5329-5337]. Plaintiff held on to SIP&T guideline to report his sick absence to Norris Harper(backup) who he was in transition with according to SIP&T attendance guideline. Therefore no "attendance performance" issue existed that "violated guidelines". One to one meeting with Kari Fogelman, constituted (i) explicit exclusion of SU 5.21 for involvement of Andrew Wight, as project manager per Kane Naethe's (owner's)approval for "specific agreement[1]", Plaintiff's task assigned, was signed(ii) an initial meeting to meet Tim Sayers who she reported to for introduction (iii)Plaintiff carried a pad and pen to these meetings for note while project status reporting was done thru PMO where Kari Fogelman was as a participant informed with other PMO supervisors reviewed & completed deliverable document for each capability[status, with issues & completion of documents for progress, Su5.21 Plan CP5995] .(iv) Therefore defendants untruthfully stated regarding any deliverable document which progressed accordingly to the block point release time & officially disclosed to PMO for each assigned task in agreement[1]. Plaintiff had no

"excuses", as the obstacles /issues were officially

___ Kimbery Yeaton with discrimination grudge , falsified to VPs of Boeing Company , CP 3993.No reasonable ETS,SIP&T or guideline violation was found to enter time at the end of work hour, because Boeing laptop & docketing system had instrumental / power up issue, & a trouble ticket was created and informed to Kari Fogelman for Friday time entry, CP3996-4020; Delmia work related charge line was requested in Project management effort to Finance Manager.Kat Fournier,CP4396-4400;CDG's appropriate status provisioning focal identification was requested, CP 4339; Plaintiff Adjusted /FLEX time CP4024-4023; Emails to discover & evasion of discoverable docuemtnsCP1942-1957 to defense counsel. Judge's denial of Recusal after recusal motion to chief judge & judge presidingCP3102-3104;3188-3190. Per BR1281, funds were available(Su5.21)for Brent deliverable-docs;BR1277Andrew W. to covert with Brent BR1277(6352);BR1281(CP6353)

revealed to PMO where Kari Fogelman & other PMO supervisors participated on a weekly basis. Plaintiff has held on consistently that he pleads under WAC 192-150-210-6-e /42 USC, for agreement[1] in (i) above. The status reports, Line of sight and meetings, towards delivery of these assigned capabilities per agreement, are usable work product disclosed to all participants, which include, deliverable, task dependency information , expected completion ,issues, (WBS). We hold onto EEOC v Boeing. Because of the incomplete/undone deliverables for capabilities from previous project managers, such as Su 5.21,and on coming highly visible project related to ICA, additional work hours need was also discussed if a separate charge line was needed for ICA SU 5.22, in one to one meeting and later on in discussion with SnS Finance manager Kat Fournier per corporate process. Therefore identified issues, discussion of deliverable and management of project charge line separation, were discussed in one to one meeting. Plaintiff submitted time in two separate charge lines and worked to bring the prior arrival lagged behind project to align with, block point release, for delivered capabilities. All work hours went thru proper approval process and any work hours that was not authorized was "mutually" accepted [adjusted by Kat Fournier. still Ms. Fogelman complains to HR after suspension on 31 July 2008] adjustable (3 hrs).Manifestation of mutual ascent existed in overtime pay or ETS submission for each time period, that suffered instrumental [laptop]issues ,that were disclosed to Kari Fogelman with evidentiary support. Kari Fogelman delegated task, to Hillary who needed work hours, not in agreement[1]. Task were progressing, [Susan Carlson, Boeing pride]satisfactorily.

1. Plaintiff worked on to help Su 5.21 in Front end analysis(FEA) (CP4415) that Kari Fogelman delegated to Hillary asking Plaintiff to identify item he could think for her , since she needed hours, CP[8% CP 4311]; Hillary was assigned by Kari NOT Plaintiff or her task or push of or delegate, CP 4312; Documents transition took place from Andrew to Hillary for Andrew W.'s task Not Plaintiff's CP 4319-4320; Hillary Per Kari Fogelman's authority took task delegated by her and informed to both, plaintiff and her , per her testimony; CP3885-3889; not task in plaintiff's agreement[1]. Pendant Motion and subpoena for witnesses, & discovery was not allowed, in violation of 14th amendment : CP 3825,3852,3849,3847;

There is no deliverable (that were not dependent on other dependency), due, till time of Plaintiff's suspension as PIP show deliverables dates that were much later, after his suspension or termination. Here defense takes resort to vagueness ,conclusory remarks to word "complete" when task assigned to him had competition date much later or were delivered as completed via official PMO status reporting for Su 5.19, su 5.20,[CP 5783 100%completion].As a result there was no performance issue. PERC ,116, Orwick v City of Seattle., proven with evidentiary support. Plaintiff performed according to his agreement[1] that declarants falsified to create unworthy pretext.[CP3486-3487] in response: such as Gerry Larson, Hillary Okrent Grilley, Andrew Wright, Kristi Patterson, Kimberly Yeaton, Kimberly Trulson, Larry Little, Ken Naethe. Plaintiff didn't delegate or push off any of task in his agreement rather these declarants knowingly falsified in taking resort to evasion of their own responsibility, and tactic. EEOC v Boeing holds appropriately.[CP 3574-3575, 3522-3523]. Plaintiff performed accordingly and followed SIP&T attendance guideline, ETS time entry , PERC 116 holds appropriately. Defendants still has not produced phone call logs , from discovery(CP2927-29380), in response to [CP 3500-3503,3487-3488]. Kari Fogelman herself , Boeing HR Cynthia Stevens, Kristi Patterson, Tim Sayers, Kimberly Trulson, collaborated in assisting and illegally disciplining via fraudulent CAMs and suspension notice, suspension memo & post suspension memos including termination memos, flatulently reporting to WA ESD, depriving in unemployment benefit. No behavioral concern was found. See Response to Verbal, Written warning, Plaintiff followed SIPT guideline when he was sick. Causes of Action for independent Tort & RICO, existed (prerequisites) for Article III victim PLA.

1. __Plaintiff (PLA) suggested, Digital signature, to be signed by the writer of the user guide Hillary Okrent Grilley (CP4966) for Andrew Wrights capability Su 5.21, when document were transitioned to her by approval of Kari Fogelman, and assigned to obtain information from Andrews project (Su 5.21) teams to provide information to the documents needed to complete the deliverables, which he was helping Andrew W.CP4985.Sum. Judgmt response, surreply appendices', opening brief of this court's appeal inclusive BR 222(CP2376,4210);BR875(CP2480);BR878(CP2481);BR109(CP2827);BR115(CP28330;BR119(CP4732);

Understanding Kari Fogelman's intent of fraudulent and illegal act(of untruthful report to Kimberly Yeaton of Plaintiff performance , (see Kimberly Yeaton testimony Kari Fogelman didn't truthfully reported to her),until, May 29, 2008, there were no plausible SIP&T performance guideline violation took place by Plaintiff supported with direct evidence. Plaintiff, from a distance observing the untruthful CAM did not take them in his hand (or throw [what], let alone crinkled up[evidence of crinkled up CAM?], or pound on the table with what?]) --are fraudulent. Kari Fogelman insisted P340 deliverable was written by Gerry Larson when P340 showed it was a "complete rewrite" [evidence in motion to compel, un produced by Defense.] by Sue Naylor another Business Analyst, when Plaintiff stated that the information Kari Fogelman. provided besides CAM are untruthful, as he retaliated "verbally" in refusing to sign and cautioned, her not give him those (falsified factual memos) that established clearly, "a causal link" that plaintiff retaliated to " untruthful and illegal act at work, by Kari Fogelman & Kimberly Yeaton, for untruthfully, issuing of CAMs to discipline, which also was "caused by/Causation" untruthful reporting to Kimberly Yeaton by Kari Fogelman (per admission of Kimberly Yeaton, supported with direct testimony). It was a " a cause" for verbal retaliations, before Plaintiff exercised his statutory written retaliation rights(protected, retaliation act under WLAD/RCWs) by filing compliant to Boeing HR following corporate investigators' instruction, to file "complaint/protest", holding WA state law, for a re-occurring illegal act , in employment, as a result of discrimination at Boeing collectively by Kari Fogelman, Kimberly Yeaton, Kristi Patterson, (assisted by Cynthia Stevens and Tim Sayers) to Boeing HR, WHEN Kari Fogelman knowingly and willingly

untruthfully reported, regarding Plaintiff's work performance to Kimberley Yeaton. Plaintiff;" refused to sign" & retaliated against ,invidious discriminatory animus[exhibited with, Ken Naethe's instruction call security, Larry Little's:What Yes, Yes, sing it, sing it,Kari Fogelman's anger/calling security when Defendants Engaged in fraudulent act, Kari Fogelman's shouting, fury, Kimberly Yeaton's falsification, knowingly to VPs)[class based/on national origin (Iranian), disparately treated (replacement was not of)Bangladesh origin, creed (Islam/wrongful act, to subject Plaintiff involuntarily, in servitude, to fraud), discriminatory animus; PLA promptly left the room pulling door to shut(which defendant exaggerates as door slamming to hide their illegal acts at work, hostility to fraudulently implicate plaintiff of purported "SIP&T guideline violation or not following "managerial direction " , when Plaintiff remained under WAC 192-150-210-6, scope of employment, and performed [PERC 116, Santore 28], per agreement. As the walls were sound penetrate-able next door Ken Naethe's meeting, was overheard and Plaintiff understood that this CAM session was deliberately (intension)formulated, to provoke illegal act at work, by Kari Fogelman and her collaborators. An unlawful hostile work environment prevailed. None came to see rather Ken Naethe came to Speak with Plaintiff, at Plaintiff's desk when Plaintiff had a downstairs hallway conversation with him[Ken Naethe falsified to Cynthia S. & HR], where Plaintiff refused to sign the fraudulent CAMs on 29th May 2008. CAMs were signed the next day May 30, 20008, dated with Kari Fogelman & Kimberly Yeaton's signature, confirming, retaliation" Employee refused to sign" evidenced [of retaliation] appropriately. As Plaintiff left the room, as a result of invidious/discriminatory animus, fraud, hostility, untruthful ,illegal act, by the stated defendants on May 29, 2008 , as a result of defendants' discrimination , Plaintiff became a victim of fraud, discrimination,

__ Per CP 5125 line 10, -3E is unlawful because Plaintiff didn't fail follow management's instruction for his assigned SOW to cause insubordination, 3E, per WAC 192-210-150-6-e. under agreement[1]. Plaintiff Submitted necessity, for overtime: CP5122;Kari Fogelman untruthfully states to Maus corporate HR, CP 5120;When Sick DAY SIP&T GUIDELINE WAS FOLLOWED .Defendants did not provide discoverable call record. Causes of insubordination CP5117 by Kari Fogelman does not justify a cause, in correlation to CP 5125 line 10; Plaintiff requested, Training need of task assigned,CP 4936; Boeing Management

illegal acts by his management of Boeing, who were larger and bigger than him , and who worked after the CAM meeting till July 31 ,2008, without being "frightened or surprised". It was Kari Fogelman who came near to Plaintiff at his desk, and handed the singed 2 CAMs , in person , at Plaintiff's desk on 30th May 08. Plaintiff performed agreed task accordingly afterwards according to SIP& T guideline: delivering all capability status to PMO officially, with all elements ,informing Boeing management , he even insisted to hold meeting after coming back to office, after being sick[CP4418](Kari Fogelman cancelled Meeting NOT plaintiff). Plaintiff did not receive any training for out of agreement task assigned, that violated 42 USC, or WAC 192-150-210-6, terms and condition. After denial of training for Delmia, Kari Fogelman knowingly assigned Delmia (a manufacturing software product) and Delmia HEI No dash related task, that involved "requirement for Delmia SME knowledge" or for Delmia SME. See Russ Jones testimony, whose training classes were suggested by Russ jones[CP5357-5363].Plaintiff in written, retaliated against; out of agreement task agreement, which Kari Fogelman knowingly continued, as a result of discriminatory animus & harassment, at work abusing managerial authority, to a subordinate employee Plaintiff, with intent &motive, that violated 42 USC & contractual agreement[1] that Plaintiff retaliated verbally, cautioning her abuse of managerial direction, De Beers Consol. Mines v .US, holds appropriately. See no Delmia task deliverables agreed on. Plaintiff continued [PERC 116] according to his assigned task. Not "one" task, within his agreement[1]" was "pushed off / delegated" rather he did his due diligence, to help others to "complete" their task which lagged behind

& started in 2006 (Su5.21/NISP/PBBC/KBE),see Russ Jones Dep. EEOC v Boeing. The

Plaintiff needed training & was flexible to accept training for task/software requirement was answered CP4359; Su 5.22 ICA George was assigned as IT PM; BR465(CP4030);BR476(CP4031); BR763(CP4201); BR477(CP4032);BR462(CP4034)-(BR463)(CP4035);BR466(CP4046);BR475(CP4064): BR763,765; Plaintiff Spoke with Cynthia that plaintiff ran into an accident. CP5116;On, 4/28 /08(Monday) "when you called Norris" sick [Kari Fogelman (Kari F.) confirms she was aware of sickness], Plaintiff worked at night hours reported 4.5 she acknowledges Plaintiff checks her email. Plaintiff proves he has made efforts to understand SLA regarding Delmia software to understand BR 764;BR468(CP4150); BR469(CP4151);BR470(CP4152); BR472(CP4153); BR473(CP4154);BR474(CP4155); BR765(CP4203); BR547(CP4171); CP4172(BR540);

status reports evidence completed delivery of capability & related efforts ,in "completion of delivery" & he "performed according to "project management ,per job, per JD, project management role 4; as evidence demonstrate. PERC 116 , Santore, 28; holds, we hold on to EEOC v Boeing, that defendants' proffered explanation is flatulent, - their pretext is unworthy or credence. The same untruthful information was propagated to a "without notice" **suspension**[Plaintiff was not aware of suspension till he reached the suspension room, after being asked to meet Kibmerly Trulson at her desk, where he was instructed to meet at certain upper level room],**a "reoccurring pattern** of untruthful conduct" at work, on July 31, 2008. As "2 page" ,"non separated" suspension document was handed over to him for accepting the untruthful CAM, Plaintiff "marked" the untruthful sentences with his pen & refused to sign, retaliating verbally & standing up to wrongful, illegal act at work, that was,(per Ken Naethe's admission as intentionally inaccurate, removed from video deposition by Defense, a reoccurring, wrongful acts ,when defendants were aware(prior to) of protected status of the Plaintiff., the act was internationally inaccurate, fraudulent, wrongful which Plaintiff cautioned defendants, repeatedly to refrain from wrongful act, that discriminated him at work. Plaintiff was retaliated against, & against Boeing's policy of retaliation, when he exercised his statutory right verbally & in written against illegal act at work(a statutory protected act) ,defendants did not disclose PIP till discovery which proves that there was no deliverables due, till suspension & that per Kimberly Trulson's report to Steve Miller, "PIP wasn't readout": Plaintiff had no knowledge of 45 days time period other than he was told that Boeing will contact him, he will not contact Boeing/be on its premise until he, is contacted, to return to work, if seen on premise could be arrested

___ BR55(6199);BR114(6220);BR222(6223);Kari Fogleman Delegated Hillay task CP6229;Plaintff did not ask for her help for task that was in his SOW. Plaintiff was not alone did not have required Delmia knowledge to assemble SLA BR 764. Plaintiff followed guideline to sign off & explains the ETS time entry inability to help desk, followed instruction as he entered time, BR 139; Corp. Investigation CI 1-6; JOHN DROUANT CP3770, TO EXPRESS CONCERN, PROTEST TO HR & MGMT. advised Defense attorney, pressurized(tempered) with Plaintiff even when he disclosed he has deferred oral argument because of viral, throat infection at ,Sum Jugmt waived oral argument 06 March,2008.CI 1`-12 : CP4901-4913; BR1386(CP4914);22-14(CP5050);MS-CP4079; CP1716 email; In response to, scapegoating with resource recruitment /team building CP4080 not in Plaintiff's (PLA) SOW

,contrary to line 11 of page 12, of Def. answer. Ken Naethe (who mentored Kari Fogelman) reviewed, assisted and assisted in intentionally inaccurate [fraudulent] suspension, was aware of Plaintiff's protected status, prior to suspension. Knowing the "wrongful act and untruthful –suspension-2-page- paper", Larry P. Little, with invidious, discriminatory animus towards Plaintiff, pressurized Plaintiff [Plaintiff retaliated "involuntary servitude"[as if he is a slave], stated he cannot understand why he is getting this CAMs when he is being interviewed for managerial role , people from far away knows about his good work."], "What , Yes Yes , sing it sing it" (engaging in wrongful act) , just "prior to" the wrongful act, he started calling "Mohammad Mohammad"(implying his protected status). Defendants exaggerate Plaintiff's , verbal refusal and attempts "to stop" them from illegal act as "angry outburst", --which establishes, (all elements of RETALIATION CLAIM ,exist see appendix AAA) as a "causal link" , to stop illegal act, at work , by defendants, well established , asserting "retaliation " claim, under WA state and federal law,[established before]. As the Plaintiff was escorted off right after completion of reading the 2 page suspension paper, (that was not produced till today, (tempering with victim, threatened with contempt, threatened "NOT ONE WORD" in deposition), no other, document was within Plaintiff's knowledge till discovery-produced suspension memo. OR, PIP with dates beyond his suspension or termination date in PIP. No further instruction was given, other than refraining to be on Boeing premise or, contacting Boeing, contrary to page 14, line 6-12; Therefore no undeliverable document existed that were due, till his suspension, & the statement was based on <u>wrongful Cause</u>, or no just cause at all, as a result of discrimination or discriminatory animus towards Plaintiff who had a different protected status other than all of the named defendants. As Kari Fogelman accompanied

-Per action item , in EXHIBIT 22-14 ;plaintiff worked with Kristi Patterson (BR 547-549 defined CP) in obtaining information to request Amir to initiate server data process this was the first time Plaintiff received information to advance to Amir by SnS management after requesting twice via Team meeting ,See action of . On server acquisition Corporate investigation BR 66,80-82 (CP defined)proves discrepancy that on 8Aug 2008, Friday plaintiff was not supposed to pick up badge which is fraud.(9:01 am email from Kimberly Trulson. Plaintiff delivered schedule plan for Su 5.21suggestions/help per his role CP4971

rather (she was amused, abusing Boeing's managerial "practice" or ethics. She was not visibly shaken, or had safety concern) than staying at the suspension room, escorting plaintiff, Kari Fogelman obviously was not "intimidated". Boeing security didn't engage in calming Plaintiff down at suspension, rather watched the incident from afar when, Plaintiff was already seated & Kimbery Trulson, readout suspension 2 page document, that plaintiff refused to sign, in retaliating against the defendants who were bigger than him, & did not act erratic or, intimidating. What object defendants refer Plaintiff purportedly throws/what arm he flailed is unknown(conclusory). He stood up, just before he asserted this matter needs to be escalated to upper management, was leaving room in retaliation against defendants' invidious, discriminatory animus, hostility, wrongful act & reminded them of wrongful acts in protest, per corporate investigator's advice(John D) in retaliation. Ken Naethe testified he reviewed the suspension 2 page document, & it was intentionally inaccurate, was curved with flatulent(lied)sentences; Plaintiff reminded Ken Naethe of his attribute addressed by Kari Fogelman(addressed earlier).PIP was never readout by anyone Kim. Trulson's report to Steve Miller. EEOC v Boeing & Orwick v.City of Seattle. Suspension memo was handed by Kim Trulson which, after first page of flatulent statement

__Plaintiff asserts that defendants willingly were engaged in harassment, classes-based stereotypical discrimination (contextual &alternate methods) that meet all necessary elements required to establish prima facie case of disparate treatment(see appendix AAA) of stated EEOC protected categories, meeting as putative discriminators with intent, when he proves, "treating comparator(s)" [comparator centric analysis],similarly situated, different protected status- member, Andrew Wright (male, different supervisors, Hollings v Atl Co., 188 f.3d 652659(6th Cir,1999) or Hillary Ok-rent Grilley(female, - sex bias-, same shared supervisor Kari Fogelman, similarly situated ('grooming' discriminated Plaintiff), Wright v Murray Guard , Inc 455 f.3d 702 710(6th cir (2006) ; Ercegovich v Goodyear 154, F.3d 344, 352(6th cir 1998)[identity traits exists, who were treated move favorably], while plaintiff was flexible("as core value of business organization , Empl Reg, for the Changing workplace, 165(2004), to accept training(special Delima/Enovia training to perform for Delmia "required knowledge". Objectionable trait based (against legally protected traits, stereotyping as Iranian) illegal acts prevails which is impermissible at work. Discriminatory intent ("Perfect !, Piling ion ") ,with intentional untruthful reporting – discrete actions by declarants' proves presence of the structural element necessary to assert discrimination at workplace[bias in decision making & tasks assignment by Kari Fogelman, Ken Naethe, & Boeing management, evidenced via falsification to Cynthia Stevens HR]. Cognizable. Identity based protections has been violated as result of discrimination(acceptable in empirical comparison) that caused damage/detrimental/ harm to plaintiff: terminating ,suspending or otherwise discriminating unlawfully proven with sufficiency of evidence, by predominated class members - the defendants violated Macdonald Douglas, v Green ,411(No nondiscriminatory reason exists).[1] Plaintiff didn't push off or delegate any of his task in agreement when it was near deadline CP4972

Plaintiff refused to sign, the untruthful document & returned to her, asking for a copy. See Dispute over return to work. V. ARGUMENT/A)STANDARD OF REVIEW: Genuine issue of material fact exists , that is (a)clearly disputable, as a matter of law , (b)that sufficient showing & elements essential, exists in each of Plaintiff's claims, that NOT defendants, but plaintiff, is the moving party, entitled for relief, & for recovery of all claim under state ,federal and constitution law, in regards to each specific & substantial fact genuine (issue exist), which are not "mere allegation or Speculation" , CR 56(e), in regards to: (i) Therefore summary judgment was improper, contrary to Does v State Dept of Trasnp. No reasonable mind would , draw conclusion that, Plaintiff[Male, replaced by a female of different class characteristics of stated EEOC category], was "NOT discriminated & NOT defrauded" by defendants, when he was progressing and advanced work satisfactory , supported with evidence, & holding WAC 192-150-210-6-e , PERC 116, Contrary, to Marquis v City of Spokane, on grounds of class-based discrimination . Sum. Judgement. was improper. B) REPLY:APPEAL IS UNSUPPORTED BY MEANINGFUL ANALYSIS/AUTHORITY: Contrary to defendants statement which is conclusory, irrelevant, or embody cryptic argument, Plaintiff asserts statement supported with Law & reason within the statutory frame-work of WA state ,federal &constitutional law, holding standards of review, not unsupported by meaningful analysis or authority, contrary to, Cowiche Canyson Conservancy v Bosely(to deny attorney fee for fraud & conduct)&State v Elliott Or insufficiently argued, contrary to State v Marintorres. Defendants failed to assure a returnable workplace safe environment & falsified in return to work, condition.Plaintiff pleads(Standards)discrimination, of trial court's by procedural, judicial justice in factual claims analysis C)REPLY:PRODUCED EVIDENCE TO EST A

--- Plaintiff Was Not Supposed To Pickup Badge On Friday Morning; BR 80 (defined in CP)States His Manager Kept The Badge ;No PIP Was Provided See Kimberly Trulson Testimony To Steve Miller. ETS Was (3 Hr) Needed When Kari F. Was On Vacation Which Was Adjusted By Kat Fournier, Kari F Falsified To Kimberly Trulson BR 853-854(Defined in CP) After Suspension On July 31 2008;Work Products Were Delivered, For Su 19,20; Establish (EST), above.

PRIMA FACIA CASE OF DISPARATE TREATMENT UNDER WLAD: Plaintiff re-asserts, Boeing & defendants collaboratively engaged in illegal suspension following unlawful CAMs, subsequent termination, **desperately**(all elements asserted in prima facie case of Desperate Treatment, Apndx AAA), negligence, bias in Boeing's corporate investigation, preemptive constructive removal, hostility/harassment at workplace, in illegal acts that are wrongful)**treating him** ,violating his protected statuses: Race and /or national origin well supported with the elements of Peji disparate treatment model as federal case law, actionable in Superior court, while he performed task under WAC 192-150-210-6-e& PERC 116,Santore 28, progressing satisfactorily, substantiated with evidence,-Not self-serving assertion, contrary to, Grimwood,110; In addition, Defendants didn't let Plaintiff assert his deposition testimony violating summary judgement standard. Therefore summary judgement was improper Contrary to Page 18, see Plaintiff's response to declarant and defendants,CP6118-6196 with corrections in opening and reply brief page1, Plaintiff had been discriminated by J. Downing from court rule set original discovery time shortcutting 3/31/2015 discriminating. Defendants tempered with to file Mr. Prater's, transcript [whether to evade spelled as Prator]& deposing other deponents or completing discovery. Mr. Prater was a colleague & referee of Plaintiff for the position, Plaintiff was recruited for: who was able to testify regarding Plaintiff's demeanor & was an appropriately named witness in discovery. Prater Deposition. Plaintiff disclosed relevancy of prater testimony in his summary judge resp. & surreply. In response to Page19: Plaintiff committed[Resp Sum Jdgmt] no egregious misconduct & retaliated exercising statutory rights, verbally, prior to suspension meeting, holding RCW, against reoccurring, Intentionally perpetrated illegal acts by his supervisors-collaborators, using untruthful

BR# in Scope of Pla. Sum Jgmt Resp, CP 3858-5128; 1968-2919: Plaintiff performed within his agreement [1] under WAC 192-15-210-6-e, for capabilities in Definition of work statement, tasks & didn't undertake task or leadership for which he did not have technical content knowledge or required training for such knowledge or skill, was denied, to assemble SLAs(a Delmia SME /specialist task; Plaintiff spoke with Ms Stevens, HR, she interpreted Kari is responsible for the situation.BR104:CPdefined:HallwayConversation);

corrective action memos and fraudulent suspension notice, (which has not been produced yet, that Plaintiff marked with his pen). See appendix failed return to work dispute, over any returnable work safety without being arrested, or purported SIP&T attendance guideline violation. Plaintiff provided notice per SIP&T guideline & calling his back up, Trina Goehring, Norris Harper or Kari Fogelman and her back up which Kari Fogelman falsified. Still the call record has not been produced, violating Macdonald Douglas, 411; Contrary to page 19 para 2, Hadley v. Baxendale in appendix, & WAC 192-150-210-6 (ESD) regulation for scope of employment in WA state, appropriately applicable. Plaintiff disclosed his liability (by defendants) and damages in amended initial disclosure separately at trial court. Page 20 para 1, by each decomposed factual allegation supported with evidence, Plaintiff refers to the statement of claims of Div- 1 and amended Claims, that are well substantiated with rule and analysis (IRAC), contrary to judge Downing's order, which discriminated plaintiff with purported "absence of evidence", "vague , ambiguous" , as a result, the order, is fraudulent per standards of review. Not speculative or devoid of admissible evidence that were produced by defendants. Plaintiff re-asserts response to overcome same actor inference, See SAME ACTOR INFERENCE REPLY, supported with testimony and evidentiary support that, elements to overcome same actor inference well established, that discrimination, hostility, harassment, & disparate treatment ,based on race/national origin, were "causes" , that motivated Kari Fogelman to " favor" other employees more favorably , differently than Plaintiff. A strong inference established that the elements of disparate treatment, vividly were present for the grounds that Kari Fogelman had a behooving relationship with Hillary Okrent Grilley and vice versa evidencing that Hillary "had been" delegated task by Kari Fogelman quite frequently

__Plaintiff is not aware if Kari Fogelman. is a Delmia SME or she wrote SLA as Delima SME , it was never disclosed to him), or provide project leadership support for which he did not have any task under agreement[1]/title VII/42 USC. BR109-115; No substantial anomaly found BR 878all deliverable location s was disclosed to all participants, management. Kari F. falsified Plaintiff was buying and selling stock or properly agreement done on his machine. BR 875. Andrew Scapegoating plaintiff, to update Status Deck of Su 5.21 when it was he who should update his capability, CP 4922; delegating his responsibility outside of agreement. Plaintiff requested, Training need of task assigned, CP 4936;

that she had been providing service to Kari Fogelman, and were Engadin a flattery/grooming/ behooving relationship to Kari Fogelman, to persuade to adhere to her, in service provisioning. Hillary who was of a different race, national origin, color & was replacement of Plaintiff. Causes exist, Contrary to Hills v BCTI Income Fund. Per evidence Kari Fogelman delegated task to Hillary ,NOT plaintiff. Plaintiff also refused to deliberately sign [that Hillary should sign with digital signature] for CDG documents written by her, that was performed by Hillary, in regards to CDG documents delivery [overrules on other grounds by McClarty v Totem Elec.,]. Evidence establishes that Kari Fogelman abused & neglected authority as a manager to fraudulently engage Boeing HR to assist to write untruthful CAMs and suspension memo when Plaintiff did not violate any SIP&T guideline. Plaintiff exercised his statuary right to file written complaint to Boeing HR, in retaliation against discrimination that violated WA state law. An act of malice, invidious discriminatory animus & discrimination motivated her, in abuse of power and willful negligence to discriminate Plaintiff who was performing, for the duration of period 3/2008 till12/2008, for his assigned capabilities & task. Furthermore Kari Fogelman discriminated Plaintiff, in performance review, & did not share the review even till or after Plaintiff's termination or prior to suspension Nor Boeing or she, allowed to interview with Corporate investigator, as a result of discrimination, even till suspension date, another wrongful act, that is illegal EXISTED, knowing plaintiff's protected status,–A clear evidentiary support of discriminatory intent & discriminatory grudge, exists which is not legitimate. Therefore "discriminatory motive" was present, in the same actor's act & intent, to continually discriminate Plaintiff, via a pattern of conduct. Kari Fogelman was motivated by malicious falsification/discriminatory grudge/invidious in nature,overcoming

Kari Fogelman. provided fraudulent information to Management, regarding Boeing premise access, that plaintiff tailgated to premise: BR 120[c]; Falsified regarding, token access BR61;May 14th Su 5.21 test failure, meeting with Hillary and Su 5.21 Schedule was demonstrated in a team meeting where she was also present, she falsified to Mauus, when investigator reported Plaintiff worked all the time BR 59-62(3738-41);BR80-82(CP4676-4678);BR104(CP4687);BR109(CP4689);BR853(CP477); PIC(CP890); BR854(CP4771);BR139(CP4900); BR1281(CP6355); BR1277(CP6352l);

the same actor inference, with fraudulent falsification for purported task delegation to others by Plaintiff. EEOC v Boeing, Orwick v City Of Seattle, is appropriately asserted. Plaintiff was desperately treated by Boeing, 3 elements MET]. See Appendix AAA.

D) REPLY TO: BOEING PRODUCED EVIDENCE PROVING A LEGITIMATE NON DISCREMINATORY REASON FOR TERMINATION & RAHMAN Failed TO PRODUCE EVIDENCE OF PRETEXT : Evidentiary support and testimony exists to prove that, Kari Fogelman and collaborator declarants and defendants, were in (i) willful negligence and falsification in CAMs, (ii) engaging others to collaborate in assisted discrimination to write untruthful CAMs and suspension memo(iii) Assigned task to Plaintiff which he did not sign, as agreement with, per WAC 192-150-210-6-e[PERC 116, Santore 28], and for which he was denied the "required" software (of manufacturing context) knowledge, in the from of training, when plaintiff requested training as flexibility to tasks but training was provided to Andrew Wright who reported to Ken Naethe (as stated earlier)(comparator, of different race, national origin and color than Plaintiff). (iii) Kari Fogelman falsified to HR, when email evidence show that Plaintiff directly called her during sick-time following SIP&T guideline that Tim Sayers untruthfully directed, for issuing CAM, to purport Plaintiff does not follow SIP&T attendance guideline. Also it surfaced that Kari Fogelman clearly acknowledged that Plaintiff indeed called in sick, to inform his back up Norris Harper & who had conveyed the out of office sick message to her per, Norris Harper's testimony [CP5354-5356 **&** <u>email reference of Kari Fogelman</u>]. Similarly she untruthfully reported to Kimberley Yeaton regarding Plaintiff's performance per Kimberly Yeaton(Testimony). (iv) same pattern of illegal workplace conduct <u>furthered & continued</u> in subsequent suspension notice, not produced till now, suspension memo,

__Judge's denial of Recusal after motion to recuse to chief judge & judge presidingCP3102-3104;3188-3190 BR153(CP5123-5126)];OT#1(CP5121-22);Kari Fogelman's Untruthful complaining to Maus Anthony (CP5118-5120); Hillary to Andrew Wright delegation by management BR11(5083); Requesting project management software need BR4359(CP4358-4359);Kari Fogelman untruthfully influenced in assisted discrimination of Cynthia Stevens in CAM[(CP 5082,5115-5116); (BR148), CP5117,5118,5119, 5120(BR15); Per Management funds were available for KBE CP4945-4946;

statements constitute, intentionally inaccurate and fraudulent statements – a clear departure from acceptable workplace managerial conduct that changed the "condition of the workplace" , in addition to changing "terms" of employment agreement[1] and job description, protected under 42 USC, and employment security WAC 192-150-210-6. (v) see CP , no evidence of Workplace returnable safe or trustful/truthful condition for Plaintiff's security, existed without being arrested or being escorted off. We hold that work safety had been deteriorated AFTER Plaintiff started working, at Boeing and after suspension before or after termination. Employer failed to comply with employment terms and condition, as a result of discrimination. Therefore Plaintiff's termination was a result of Employer "collaborative"/COLLECTIVE (TORT & Discrimination), when Employer was aware of Plaintiff's protected status, nation origin , race, religion, color , before and after his had exercised his statutory right to "retaliate ' verbally and in written, holding WA state's and federal laws against discrimination; class based factors , specific and substantial are presented with sufficient evidence, that defendants were motivated by malice, and defendants proffered explanation is unworthy of credence. EEOC v Boeing holds. Trial court's summary judgment violated substantial evidence standard. Summary judgement was unlawful & un constitutional. Plaintiff produces relevant pretext to overcome summary judgment. Genuine issue of material fact exists that Plaintiff was defrauded, [see definition of Fraud], suspended and terminated as a result of defendants' continued unlawful, malicious act. Defendants' stated reason is pretextual, both illegal and discriminatory – substantial factors(pretexts) EXISTS, that motivated the defendants' to wrongful act, existed, contrary to Domingo v Boeing Employee's Credit Union. [E].

REPLY:RAHMAN FAILED TO PROVIDE ANY FACTUAL BASIS/LEGAL SUPPORT

--Original Court Rule established Case Schedule CP1397.Plaintiff's civil record fraud by Defense counsels originating from counsel's office CP1622; Plaintiff's email in Boeing HR record for contact CP5326, CP2917. Deposition CP 5223-5322; 5329-5369; Written questionnaire & interrogatories dep CP5271-5342;Flu exposer after starting work at Boeing CP5227.Capability status reportsCP5588, 5598-5601; 5939-6018; 5441-5526; Per CP4969-5010 release Su5.21 without IPST(CP4968)

FOR ANY OTHER LEAGL "CLAIM" :Plaintiff establishes (i)a "retaliation claim" holding WA state law, and federal law , both verbal and written , holding he has "exercised " rights holding WA state law [see Div -1 opening brief]and 3 elements of case law Crownover v. State ex rel . Dept. of Transp. for review(ii) against workplace hostility that was motivated by malicious discrimination of listed elements of Glasgow v Georgia Pacific Corp. See [C][D] above, cited with evidentiary support and required pretext .(iii) violation of WA Family case act [see WA state claims asserted in Div -1 opening brief; AAA]. These claims were raised in the assignment of errors[Amended &Div-1 Claims] OVERLOOKED BY TRAIL COURT, as stated earlier, plaintiff is the moving party by Mandate, contrary to Cowiche Canyon Conservancy v. Bosley. F). REPLY TO: THIS CT. SHOULD REJECT RAHMAN's EFFORT TO ASSERT NEW CLAIMS: Contrary to defense's statement, "Fraud" & perjury existed (submitted by defense ,in concealing or in evasion, production of documents , plaintiff's civil record by defendants' holding perjury),discrimination, violation of "Human rights" [Div-1 claims, review, therefore is appropriate] had been pleaded along. See Motion to compel & supporting motion [CP4906]. Trial court's ruling violated 14, 7th amendment. See, Sox, breach of contract, involuntary servitude in summary judgement's pleadings holding 13th amendment, within the same limitations period. Defamation claim constituting disparaging emails to VPs, spreading fear, or of being frightened, fraud, bully (abusive) & invidious discrimination by defendants& attorney(s), are asserted in summary judgment pleadings, including racially(national origin) discriminating, to vilify Plaintiff , as an Iranian descendant, belligerent enemy combatant, 3 US listed terrorist countries, Contrary to, Roberson v Perez,Karlberg v Otten, for recovery. RAP2.5 [3] Appropriate for review. G) REPLY:CT SHOULD REFUSE ORDRs BY

__(1.)RICO does not require proof that predicate acts were to be motivated by economic purpose, Ntl org for woman v Joesph S Cheidler 510 U.S 249 114 S. Ct 798 ; (2.)Capability SU 5.21 involved matters and progresses CP5429-5433 [not Plaintiff's assigned takes in agreement [1] or that he had training in or Enovia Delmia (manufacturing) synch process related product training denied). Fraudulent (pretext) job description that was never agreed upon discovered in discovery JD 4786; CP5597; Fraudulent PIP 4782-4783;8.Sur-reply of summary judgment exhibits CP5428-6112. Capability Su 5.21 Schedule CP 5995

TRIAL COURT: Plaintiff followed proper court rule CR16, in recusal with stated reasons , under obvious and apparent /actual bias conduct, by Judge Downing holding 28 USC 455,154 . A court is discriminatory when the majority of the defendants and judge is of the same protected [color] status, contrary to plaintiff's standing, besides Judge Downing's court's and bailiff's obvious and apparent "overexposure" in communication to defense attorney, and referencing of federal judge ,Judge Lasnik, & Pechman's influence/tempered with victim, witness, DJA & Justice, in the summary judgment, which judge Downing admitted in his affiliation with ,in CR 16 meeting. Judge Downing continually refused to recuse and continually discriminated Plaintiff, in discovery, ruling of motions to allow deposition of witness from, court rule set case schedule, and failing to compel defendants to, discovery and production. These evidences are adequate premise, as factual basis of influence by defendants and counsels, for review under the de novo standards for judicial error, for abuse of discretion and power,- all in assigned of Judicial error in opening appeal brief – justifying reversal as a result of discrimination, by Judge Downing. See orders, short cutting discovery time line. Plaintiff refused to agree to March 6,2015 as summary judgment hearing date and did not concede in, to a discovery end before 3/31/2015. Trial court "evaded to rule on as if court does not understand what relief Plaintiff is seeking. An additional pendant motion was filed afterward no response was obtained. Plaintiff repeatedly stated his requirement to discover and deposition, in "supporting motion to compel discovery" [as a continuance of discovery before 3/31/15 in spite of disagreement of Plaintiff via email[exhibited], & with Defense counsel as judge maneuvered to order for a mutual(Shall) discovery, rather than Plaintiff's right to

discovery under 14th amendment, Defendants threatened to hold

plaintiff in contempt taking advantage of the discriminatory judge, maliciously depriving Plaintiff (14th amendment, Cary v Phiphus were violated). Plaintiff asserts Defense counsel & defendants were engaged in discriminatory conduct against plaintiff, in open court, and asserts influence using other presiding judges (see page 27 line 2,3 of answer, admitting engagement in conspiracy, influence, Obstruction of justice, affirmed, to move judgment towards him improperly, that is unlawful, evidencing that trial court case docket record was unlawfully removed and changed in assignment of clerk's paper, at DJA King county Sup court, evidenced earlier, of inappropriate attorney conduct. Defense attorney admitted to have been in "cahoots" [conspiracy/secret meeting]with Judges, that is unlawful, "nefarious " or "egregious" simultaneously prosecutable [Plaintiff asserts claim] under civil & criminal law holding article III standing, in presence of open court's written declaration, by defense counsel, that Plaintiff has been a victim of conspiracy and discrimination by defense counsel and defendants, by defense counsel's open court admission. Defense attorney of record in page 27 line 2 &has criminally, convicted himself in open court testimony, that has committed "actionable crime" under Article III, that he has been in cahoots with various judges, "confirming/admitting" influence & obstruction of justice claims; Orwick v. City of Seattle holds. Given clear and convincing evidence, for each & every claim, in (a)amend claims,(2) Ct of Appeals Div 1's,by 3 panel judge-reviewed claims, &holds on to FRE 302 , that, defendants violated all associated federal laws , including Ashcroft v. Iqbal & EEOC v Boeing, in fraud context, anti-trust, to dismiss, answering brief, asserts tort claims, actionable by RCW 49.60.030(2),4.92.110, 4.16.170, to initiate federal claims, holding 18 USC section2340A,for Human rights violation of UN charter(international law),in fraudulent deprival of ESD benefit reviewed meritorious by a

__Kat Fournier was delegate of Kari Fogelman in absence CP 4771. Discriminatory animus & wrongful act a pretext for purported ETS violation by Kari Fugleman and Kimberly Trulson " "very glad , animus) CP4770. Corporate investigation proven, contrary to Kari Fogelman, Ken Naethe and defendants complaints CP4670-4678; Investigation concluded no Security issue/concern , No substantial anomaly found CP4698. it was management issue CP4657; Plaintiff asserts invidious discriminatory animus.

3 panel judge in Div -1 Appeal court for relief of damages to Plaintiff) , denied by Judge Downing (an employee of WA state, Gordon v US holds, in 42 USC violation, at the nucleus of title VII by Boeing defendants of tort claims[in opening brief], as a result of discrimination, originating from independent causes of tortious act),prior to RICO Claims. Plaintiff holds on to Towbly v. Bell Atlantic, against Def. fraud & discrimination, for claims arising from the same nucleons, of title VII [including 42 USC], holding on to article III standing - as a victim of employment discrimination, that breached the protected statuses of plaintiff; of EEOC identified-complaint. VI. CONCLUSION: Tort Claim – The" claim" is appropriate for the following reasons: Boeing provided fraudulent information to ESD to deny benefit of Plaintiff (2). WA ESD obtained and provided information to convey to Plaintiff; (3)Plaintiff shows truthful information for his suspension and that ESD denial was unlawful and the "causes " was unjust(4). Plaintiff within limitations period of discrimination claim, filed law suit in WA superior court ,including claim of ESD denial as a result of employment discrimination, & appealed the ruling of superior court, in Div -1, for human right violation (5). A 3 panel judge reversed the decision of the claims including ESD denial by State,. by Boeing for trial (6).Trial court , by Judge Downing, dismissed with prejudice, claims of the ESD denial, that purported work related misconduct was a cause of the denial. Judge Downing is a WA State employee protected under title VII & 42 USC for which ,under Gordon v US , the WA state can be held liable for injustice to Plaintiff(7).Plaintiff appeals ,at Supreme Court, with the same ESD denial claim that "originated in the initial causes" of action against Boeing –a state actor, who denied benefit on unlawful causes, which Div-1 reversed via mandate. Judge to evaluate each claim of stated

__ Judges order: CP3103 (4,line4, shall occur);CP3104(5,shall take);CP3104(6, cut off in dispute);flatulent order, extension of deadline, CP3241(3), CP6117 in dispute; Kari Fogelman's deposition uncertainty in evasion of 14th amend CP3241;SnS, Management divided ICA project into 2 parts ,IT and business much later after Plaintiff lead the entire project himself, CP4034-35;4028;4046;4150-4155; Per added items in PE (CP3881); Plaintiff helped others in PE,CP 3799-3812;3867-3881; KF1043(CP4727); BR1131(CP5088); BR1132(CP5089); BR1147(CP4240); BR1181(CP5083);Falsified log (CP4779-4780);

ground.(8). A tort claim under human right claim which was stated in div 1 claims is filed properly at WA Risk Management Office, after the trail court made erroneous decision following procedure under tort claim statue(9). So the claim is appropriately stated and subject to review by supreme court (10). Given clear and convincing evidence, for each and every claim, in (a)amend claims,(2) Ct of Appeals Div 1's , a 3 panel judge-reviewed claims, and holding on to FRE 302 , that, Boeing defendants violated associated federal laws , including Ashcroft v Iqbal & EEOC v Boeing, (fraud context, anti-trust), And the "Cause of action" or tort claim is "against Boeing" since Boeing Willfully ,falsified to ESD or WA State to deny Plaintiff benefit[the original cause, is actionable to the informant who defrauds, via allegation under criminal & civil both laws]. And Judge Downing unfairly discriminated in denial of ESD claims at trial court (Tort). Defense counsels in written testimony ,page 27 line 2-3, (in "open court") via answer, that he has been engaged in conspiracy (in cahoots) with various judges, and convicted himself of crime under article III; Boeing for ESD denial. As a result "claim" for tort as a result of state employee (judges" discrimination) is appropriately " stated with procedure and limitations of tolling statue. Influence of defendants is affirmed in abuse of power, actionable under article III (Plaintiff possess article III standing), for all claims inclusive of ESD denial , De Beers Consol. Mines v .US 325 US 212 217(1945),applies; All claims (state, federal and constitutional) therefore, justifies merits and recovery to reverse & reinstate claims against defendants for recovery of damages. Plaintiff holds that defense attorney "admitted to cahoots(with various judges)/conspire[Definition of CONSPIRACY (a)(b)(c)(d), of APPENIDX AAA & B], to obstruct justice, under [DEFINITION OF]18 USC chapter 1961(nucleus) [B]section 1503 along with obstructing, by section 1511 of influencing judicial law

___Kari Fogelman untruthfully influenced to assist in discrimination by involving Cynthia Stevens, HR, in CAM[(CP 5082,5115-5116(BR148), CP5117,5118,5119,5120(BR15); JD (CP4622-4625); WA ESD denial CP 4627-4629; PIP (CP 4641-42);Plaintiff provided domain Plan as deliverable CP4036; and went back to office for printing CP4418;

enforcement(courts/DJA) thru obstruction, section 1510,1512 in tempering, with victim(as plaintiff), and in attempt to temper with witness-transcript of George prater inclusion, who testified, existence(during time in question) of Boeing Blues system, for employee contact information and testified regarding Plaintiff's demeanors as not a fearful person (which defendants/counsel falsely alleges). Defendants involuntarily, subjected Plaintiff to sign fraudulent(fraud) memos in a pattern of reoccurring conduct, against section 1581-1592 relating to peonage, slavery (involuntary servitude claim against defendants' in PLA summary judgement response). These appropriately establish, grounds for " causes of action" under 18 USC chapter 1962(nucleus),(b)(c)(d) holding **defendants** ["engaged in/control / interest/conduct /participate/directly or indirectly, clauses"] **under** RICO Act, 18 USC chapter(nucleus)1581-1592; 1961-1968(1994 ed. Supp IV), which creates a civil cause of action for "[a]ny person injured[PLA victimized by "Article II&III offences with casual links"] in his business or property by reason of a violation of section 1962" 18 USC chapter 1964(nucleus), (c) (1994 ed. Supp IV) . Subsection (d) of chapter 1962. Plaintiff "asserts facts" (evidenced by defense attorney-testimony ,page 27 line 2-3), with language of law to establish a "premise" for action, proven true to be Fact, holding, Sunnyside Valley Irrigation Dist V Dickie,149 Wn 2d. 873,879,73 P.3d, on the established significance of the "context factor", holding Employer /defendants/attorney(s) as co-conspirators, on vicarious liability. We holds that "cahoots with various judges" statement is "conspiracy to prevent" "trust" & violated 18 USC chapter 372, in United States Justice system in obstruction to place confidence, to injure, in lawful discharge of duties while engaged in lawful discharge thereof", to interrupt, hinder, or impede in the discharge of official duties.

De Beers Consol. Mines v .US, Whether such act to "comprises", of "open court

testimony" in written, by attorney of record , "affirms" actionable crime under section 3, Article III & II; to United Stated or its Justice System/Department, actionable, holding 18 USC chapter 373 nucleus(a-c). We hold that unambiguous meaning exists within U.S.C's, statuary framework, that "to be convicted of conspiracy, to violate RICO nucleus or , under chapter 1962(d)" the conspirator need not himself have committed(defendants committed along) or agreed to commit the two or more predicate acts defined in [DEFINITION OF]18 USC chapter 1961(nucleus), ". which forbids "any person to conspire to violate chapter 1962(c) " , "with any enterprise." "or activities which affect"[-ed] "to conspire" extending federal crimes under chapter 371." Since it contains no requirement of an overt specific act to effect the conspiracy's object" , presuming congress intended "to conspire" phrase to have its ordinary meaning , under the criminal law (Morrissett v United States, 342 U.S .246), well established under principles, satisfying all the elements, of substantive criminal offense. Plaintiff asserts original causes of action which are themselves "wrongful acts" had been established "independently"(pre requisite, met) for recovery, before "tort claim was asserted", holding appendix TORTIOUS ACT(ii) under RICO's enactment in 1970. See Ballentine's Law Dictionary 252 (3d ed. 1969) ("It is the civil wrong resulting in damage, and not the conspiracy which constitutes the cause of action"); Black's Law Dictionary 383 (4th ed. 1968) ("[W]here, in carrying out the design of the conspirators, overt acts are done causing *legal* damage, the person injured has a *right of action"* (emphasis added)). We presume, therefore, that when *Congress established in RICO a civil cause of action for a person "injured ... by reason of " a "conspir[acy]," it meant to adopt these well-established common-law civil conspiracy principles.* -that is "most consistent" with these principles to give rise to "Cause of Action" above. In consistency, with the

__ When Plaintiff directly called in sick to Kari Fogelman , Tim Sayers discriminates Plaintiff that he has taken unexcused absence , CP 5080-5081; SU 5.21 schedule was prepared with Nick Zandyeh as a deliverable to Andrew after project started in 2006 without any Microscope deliverable project SnS Domain schedule , CP 5021. Plaintiff's "Sick Time" Call record was not produced, till now, in motion to compel & supporting motion, CP4906. Per Management funds were available for KBE CP 4945-4946; 32

common law, which requires that a RICO conspiracy plaintiff allege injury from an act that is analogous to an "ac[t] of a tortious character," see 4 Restatement (Second) of Torts §876, Comment *b,* meaning an act that is independently wrongful under RICO - Therefore "conspiracy" obstructed due course of justice" in WA state, with intent to deny <u>any citizen</u> (to deprive, victim)the equal protection of the law" that bears invidious discriminatory animus of plaintiff 's protected status asserted earlier. SAME ACTOR INFERENCE REPLY: (1)After hiring & before termination, the same actor harbored invidious discriminatory animus, preferential treatment toward "comparator(s)": Hillary Okrent Grilley, Andrew Wright & treated plaintiff unfairly/differently. The invidious discriminatory animus, DISCRIMINATION, fraud, changed the "terms and condition" of the employment of Plaintiff, before termination.(2) Plaint-iff's was Retaliated against (adversely acted, in a reoccurring pattern of illegal conduct, by same actor, "a but for cause" (a Casual link. STRONG Statutory PRETEXT, is established) as a result of the same actor's invidious/discriminatory animus, hostility, untruthful illegal act, in collaboration with other Conspirators/ Collaborators, at work, after hire, continued on, in furtherance of RICO; Beck v. Prupis. Applies appropriately. s/Shaw Rahman, Pro Se Plaintiff, Respectfully put forth for review.

<u>See Proud v Stone</u> (3).Therefore "short time period is not an essential element" in determination of same actor inference, - _Strong Evidentiary Support Exists. Williams v Vitro Service Corp. (11th Cir) "it is the province of the jury rather the Court , however to determine whether the "inference" generated by same actor evidence is strong enough to overweigh a plaintiff's evidence of pretext. Therefore "mandatory" inference of same actor, is insufficient to warrant summary judgment for the defendants. Wexler v White Fine Furniture, Inc 317 F. 3d 564,573 (6th Cir, 2003). (4). Genuine Issue Of Material Fact Exist. (Citing Buhrmaster, 61 F.3d at 464). Defendants failed to comply with motion to compel and supporting motion, violating burden shifting principles of MacDonald Douglas v Green 411. (5). The same actor replaced Plaintiff with a comparator with different race, national origin, colors, and religion and Kari Fogelman falsely testified in her written testimony concealing that the protected characteristics of Hillary Okrent Grilley,- a replacement, who had different protected characteristics. Considering "same people" , "same company official ". The same actor (Kari Fogelman) inference therefore should not be afforded a presumptive value violating Amirmokri , 60 F. 3d 1126; Birkbeck v Marvel Lighting Corp., 30 F. 3d 507.523 (4th Circuit 1994);(6) Strong evidentiary support exists that, "intentional discrimination motivated" the employer in reoccurring illegal conduct in falsification, untruthful reporting to senior management and collaborating to conspire.(7). Defendants proffered explanation, fails to satisfy, ultimate issue of discrimination, to a factfinder/ jury, must decide the strength of permissible inference that can be drawn for Plaintiff's prima facis case of discrimination (disparate treatment, hostility, race/national origin, religion, retaliation) along with evidence that discredits the employers' proffered explanation. EEOC v Boeing. Per Definition of cahoots/conspiracy["agreement" of some form] & from open court/written testimony of defense counsel between him as conspirator, co –conspirator(s)[EXISTS] (per his testimony" various judges") & defendants, that obstructed justice under 18 USC chapter 1961 section 1503;1511,chapter 372;1962(d); Plaintiff asserts he has been a victim of Intersectional, class based, on protected statuses, invidious discrimination/animus.Appendix C,D,E;Ref: TheYaleLaw Jrnl Discr..By Comparison,Pg728-811

AFFIDAVIT

WA Supreme Court

Shaw Rahman v. Boeing

Case No 91503-2

I Shaw Rahman state that the statements of reply brief and , exhibits are true and correct, the scribble and handwriting are plaintiff's own.

Respectfully put forth,

Pro Se plaintiff,

s/Shaw Rahman

1. (Glossary, Case laws from opening brief, summary judgement reply, surreply, statues & law applies simultaneously, to each statement, reasserted in the same context.)

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From: shaw rahman <mailtoshawrahmanstate@gmail.com>
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To: OFFICE RECEPTIONIST, CLERK; Matautia, Jazmine; Bomotti, Gena M.; Shapero, Laurence; shaw rahman; CP@ohchr.org; canada.un@international.gc.ca
Subject: WA Supreme court Case: Shaw Rahman v. Boeinfg case 91503-2 - Appellant's Reply Brief filed
Attachments: appellant_s_replybrief.pdf; RICO-Prosecution-reference- DJ-US-GOVT.pdf

served via Email.

Respectfully submitted.

Pro Se, Plaintiff.

s/Shaw Rahman.

Washington State Supreme Court
NOV 24 2015
Ronald R. Carpenter
Clerk

WA State Supreme Court

Shaw Rahman v. Boeing

Case 91503-2

Appendices 1 of
REPLY BRIEF

Md. Mushfer Rahman

RULE OF LAW, BLACK LETTER LAW, STATUES, CASE LAW, WA STATE LAW

1. Amirmokri, 60 F. 3d 1126;
2. Arman, 85 F 3d at 1083
3. Aramburu v Boeing Co. , 112 F.3d 1398 (10th Cir 1997)
4. Birkbeck v Marvel Lighting Corp., 30 F. 3d 507.523 (4th Circuit 1994)
5. Black's Law Dictionary 383 (4th ed. 1968)
6. Cary v Phiphus
7. Citing Buhrmaster, 61 F.3d at 464
8. City of Seattle v. PERC (PERC,116)
9. De Beers Consol. Mines v .US 325 US 212 217(1945)
10. EEOC v Boeing.
11. Hearst Commc's Inc.
12. Morrissett v United States, 342 U.S .246
13. National Organization for Woman Inc v. Jospeh S Cheidler, 510 U.S 249 114 S.Ct 798
14. Orwick v. City of Seattle
15. Pejic v Hughes Halicopters Inc . –Desperate treatment Model(840 F.2d 667 46 Fair Empl.Prac.Cas. 318,45 Empl. Prac. Dec. P 37,824, 56 USLW 2555)
16. Robert A. Beck, Ii, Petitioner V. Ronald M. Prupis
17. The Racketeer Influenced and Corrupt Organizations Act RICO
18. 18 USC chapter 1961: section 1503 section 1511 section 1512 section 1581-1592 1
19. 8 USC chapter 1962:
20. 18 USC chapter 1961-1968(1994 ed. Supp IV), 18 USC chapter 1964:
21. 18 USC chapter 372
22. 18 USC chapter 373
23. Williams v Vitro Service Corp. (11th Cir)
24. Wexler v White Fine Furniture, Inc 317 F. 3d 564,573 (6th Cir, 2003)
25. Raytheon Co. Hernandez , 540 U.S 44, 52-53 (2003)
26. RCW 49.60.030(2),
27. RCW 4.92.110 ,
28. RCW 4.16.170
29. Santore ,28
30. Sunnyside Valley Irrigation Dist V Dickie,149 Wn 2d. 873,879,73 P.3d
31. WAC 192-150-210-6
32. 13th Amendment
33. 14 th Amendment
34. Hadley v. Baxendale :In Hadley v. Baxendale (1854) 9 Exch. 345,
35. See TORT & RICO CASE LAWS BELOW.

1. (Glossary, Case laws from opening brief, summary judgement reply, surreply, statues & law applies simultaneously, to each statement, reasserted in the same context.)

TORT & RICO CASE LAWS APPLY

TORTIOUS ACT (FROM REPLY BRIEF, PAGE 4 FOOTNOTE, REFERENCE MADE)

A. Ballentine's Law Dictionary 252 (3d ed. 1969) ("It is the civil wrong resulting in damage, and not the conspiracy which constitutes the cause of action"); Black's Law Dictionary 383 (4th ed. 1968) ("[W]here, in carrying out the design of the conspirators, overt acts are done causing legal damage, the person injured has a right of action" (emphasis added)). We presume, therefore, that when Congress established in RICO a civil cause of action for a person "injured ... by reason of" a "conspir[acy]," it meant to adopt these well-established common-law civil conspiracy principles.

B. Cohen v. Bowdoin, 288 A. 2d 106, 110 (Me. 1972) (" '[C]onspiracy' fails as the basis for the imposition of civil liability absent the actual commission of some independently recognized tort; and when such separate tort has been committed, it is that tort, and not the fact of combination, which is the foundation of the civil liability");

C. Consistency with the common law requires that a RICO conspiracy plaintiff allege injury from an act that is analogous to an "ac[t] of a tortious character," see 4 Restatement (Second) of Torts §876, Comment b, meaning an act that is independently wrongful under RICO. The specific type of act that is analogous to an act of a tortious character may depend on the underlying substantive violation the defendant is alleged to have committed. However, respondents' alleged overt act in furtherance of their conspiracy is not independently wrongful under any substantive provision of the statute. Injury caused by such an act is not, therefore, sufficient to give rise to a cause of action under §1964(c).

D. Earp v. Detroit, 16 Mich. App. 271, 275, 167 N. W. 2d 841, 845 (1969) ("Recovery may be had from parties on the theory of concerted action as long as the elements of the separate and actionable tort are properly proved");

E. Halberstam v. Welch, 705 F.2d 472, 479 (CADC 1983) ("Since liability for civil conspiracy depends on performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort").

F. J. & C. Ornamental Iron Co. v. Watkins, 114 Ga. App. 688, 691, 152 S. E. 2d 613, 615 (1966) ("[The plaintiff] must allege all the elements of a cause of action for the tort the same as would be required if there were no allegation of a conspiracy");

G. Lesperance v. North American Aviation, Inc., 217 Cal. App. 2d 336, 345 31 Cal. Rptr. 873, 878 (1963) ("[C]onspiracy cannot be made the subject of a civil action unless something is done which without the conspiracy would give a right of action" (internal quotation marks omitted));

H. Middlesex Concrete Products & Excavating Corp. v. Carteret Indus. Assn., 37 N. J. 507, 516, 181 A. 2d 774, 779 (1962) ("[A] conspiracy cannot be made the subject of a civil action unless something has been done which, absent the conspiracy, would give a right of action");

I. Mills v. Hansell, 378 F.2d 53, (CA5 1967) (per curiam) (affirming dismissal of conspiracy to defraud claim because no defendant committed an actionable tort);

J. Royster v. Baker, 365 S. W. 2d 496, 499, 500 (Mo. 1963) ("[A]n alleged conspiracy by or agreement between the defendants is not of itself actionable. Some wrongful act to the plaintiff 's damage must have been done by one or more of the defendants, and the fact of a conspiracy merely bears on the liability of the various defendants as joint tort-feasors").

K. W. Prosser, Law of Torts §46, p. 293 (4th ed. 1971) ("It is only where means are employed, or purposes are accomplished, which are themselves tortious, that the conspirators who have not acted but have promoted the act will be held liable" (footnotes omitted));

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APPENDIX AAA

Shaw Rahman v. Boeing

Case 91503-2

WA State Supreme Court

STANDARDS:

RCW 49.12.265

SICK LEAVE, TIME OFF — CARE OF FAMILY MEMBERS — DEFINITIONS.

The definitions in this section apply throughout RCW **49.12.270** through **49.12.295** unless the context clearly requires otherwise.

(5) "Sick leave or other paid time off" means time allowed under the terms of an appropriate state law, collective bargaining agreement, or employer policy, as applicable, to an employee for illness, vacation, and personal holiday. If paid time is not allowed to an employee for illness, "sick leave or other paid time off" also means time allowed under the terms of an appropriate state law, collective bargaining agreement, or employer policy, as applicable, to an employee for disability under a plan, fund, program, or practice that is: (a) Not covered by the employee retirement income security act of 1974, 29 U.S.C. Sec. 1001 et seq.; and (b) not established or maintained through the purchase of insurance.

CR56

(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show

affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading,

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but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

RETALIATION CLAIM:
The issue is whether the trial court erred in summarily dismissing the employees' retaliation claims by failing to recognize remaining genuine issues of material fact.

RCW 49.60.210(1) forbids employers to discharge or otherwise discriminate against an employee in retaliation for opposing practices forbidden by the Washington Law Against Discrimination. To avoid summary judgment, the employee must first show a prima facie case of retaliation: (1) The employee engaged in a statutorily protected activity, (2) the employer took adverse employment action against her/him, and (3) there is a causal link between the protected activity and the adverse action. *Milligan v. Thompson*, 110 Wash.App. 628, 638, 42 P.3d 418 (2002). Once a prima facie case is established, the burden then shifts to the employer to show a legitimate purpose for the adverse employment action. *Id.* If the employer shows a legitimate purpose, the burden shifts back to the employee to show that this legitimate reason was pretextual. *Id.*

DESPERATE TREATMENT:

To establish a prima facie disparate treatment case, an employee must show that (1) he or she belongs to a protected class, (2) he or she was treated less favorably in the terms or conditions of employment, (3) a similarly situated employee outside of the protected class received the benefit, and (4) the employees were doing substantially the same work. *Johnson v. Dep't of Soc. & Health Servs.*, 80 Wash.App. 212, 227, 907 P.2d 1223 (1996).

PEJIC v. HUGHES HALICOPTERS INC. – DISPERATE TREATMENT MODEL –NATIONAL ORIGIN/PROTECTED STATUS:

http://openjurist.org/840/f2d/667/pejic-v-hughes-helicopters-inc

HOSTILE WORK ENVIRONMENT:

[Regarded as Iranian, suffice to change terms and condition of employment]

To establish a hostile work environment claim, a plaintiff must prove the harassment (1) was unwelcome, (2) was because he or she is a member of a protected class, (3) affected the terms and conditions of his or her employment, and (4) was imputable to his or her employer. *Domingo v. Boeing Employees' Credit Union*, 124 Wash. App. 71, 84, 98 P.3d 1222 (2004). To satisfy the third element, the harassment must be sufficiently pervasive so as to alter his or her working conditions. *Washington v. Boeing Co.*, 105 Wash.App. 1, 10, 19 P.3d 1041 (2000). It is not sufficient that the conduct is merely offensive. *Adams v. Able Bldg. Supply, Inc.*, 114 Wash.App. 291, 296, 57 P.3d 280 (2002).

HARASSMENT:

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The harassment is imputed to the employer. Where an owner, manager, partner or corporate officer personally participates in the harassment, this element is met by such proof.

To hold an employer responsible for the discriminatory work environment created by a plaintiff's supervisor(s) or co-worker(s), the employee must show that the employer
(a) Authorized, knew, or should have known of the harassment and

(b) Failed to take reasonably prompt and adequate corrective action. This may be shown by proving

(c)That complaints were made to the employer through higher managerial or supervisory personnel or by proving such a pervasiveness of [sexual] harassment at the workplace as to create an inference of the employer's knowledge or constructive knowledge of it and

(d)that the employer's remedial action was not of such nature as to have been reasonably calculated to end the harassment.

To establish a work environment [sexual/sex BIAS] harassment case, the better reasoned rule is that an employee must prove the existence of the following elements.[2]

1. The harassment was unwelcome. In order to constitute harassment, the complained of conduct must be unwelcome in the sense that the plaintiff-employee did not solicit or incite it, and in the further sense that the employee regarded the conduct as undesirable or offensive.

2. The harassment was because of [sex]. The question to be answered here is: would the employee have been singled out and caused to suffer the harassment if the employee had been of a different [sex]? This statutory criterion [requires that the gender of the plaintiff-employee] be the motivating factor for the unlawful discrimination.

3. (i)The harassment affected the terms or conditions of employment. [Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms or conditions of employment to a **sufficiently significant degree to violate the law**.

(ii)The harassment must be sufficiently pervasive so as to *alter the conditions of employment and create an abusive working environment. Whether the harassment at the workplace is sufficiently severe and persistent to seriously affect the emotional or psychological well being of an employee is a question to be determined with regard to *407 the totality of the circumstances.*

4. The harassment is imputed to the employer. Where an owner, manager, partner or corporate officer personally participates in the harassment, this element is met by such proof. To hold an employer responsible for the discriminatory work environment created by a plaintiff's supervisor(s) or co-worker(s), the employee must show that the employer

(a) Authorized, knew, or should have known of the harassment and

(b) failed to take reasonably prompt and adequate corrective action. This may be shown by proving (a) that complaints were made to the employer through higher managerial or supervisory personnel or by proving such a pervasiveness of [sexual] harassment at the workplace as to create an inference of the employer's knowledge or constructive knowledge of it and (b) that the employer's remedial action was not of such nature as to have been reasonably calculated to end the harassment.

Plaintiffs have proved the requisite elements necessary to establish their claim of [sexual] discrimination.

Accordingly, the plaintiffs were entitled to recover damages for [physical], emotional and mental suffering

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As the fourth element of the cause of action makes clear, an employer may ordinarily avoid liability by taking prompt and adequate corrective action when it learns that an employee is being sexually harassed.

TORT CLAIM:

Having decided the liability issue on the basis stated, it is unnecessary to deal with the alternative basis of recovery stated by the trial court, namely that the tort of outrage was committed, other than to point out that even in the presence of reprehensible behavior the strict limiting parameters of that tort remain.[5]

[3] Contrary to plaintiff-employees' claim on cross appeal, we agree with the trial court that existence of unlawful discrimination alone is insufficient to support a finding of constructive discharge from employment.[6] Moreover, the evidence in this case was not sufficient to convince the trial court, as the trier of fact, that either of the employees' resignations constituted a constructive discharge such as to justify additional damages on account thereof. On the record before us we cannot conclude this was error.

Consumer Protection Act, RCW 19.86

CONSPIRACY

(1)An agreement between two or more people to commit an illegal act, along with an intent to achieve the agreement's goal. Most U.S. jurisdictions also require an overt act toward furthering the agreement. An overt act is a statutory requirement, not a constitutional one. See *Whitfield v. United States*, 453 U.S. 209 (2005). The illegal act is the conspiracy's "target offense."

(2)Conspiracy generally carries a penalty on its own. In addition, conspiracies allow for derivative liability where conspirators can also be punished for the illegal acts carried out by other members, even if they were not directly involved. Thus, where one or more members of the conspiracy committed illegal acts to further the conspiracy's goals, all members of the conspiracy may be held accountable for those acts.

(3)Where no one has actually committed a criminal act, the punishment varies. Some conspiracy statutes assign the same punishment for conspiracy as for the target offense. Others impose lesser penalties.

(4)Conspiracy applies to **both civil and criminal offenses.** For example, you may conspire to commit murder, or conspire to commit fraud

VICARIOUS LIABILITY

https://www.law.cornell.edu/wex/vicarious_liability

(5)Liability that a supervisory party (**such as an employer**) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties. See respondent superior

(6)**Under common law, a member of a conspiracy can be held vicariously liable for the crimes of his co-conspirators if the crimes committed by the co-conspirators were foreseeable and if they were committed with the intent of furthering the objective of the conspiracy**. See conspiracy

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STANDARDS OF TORT LIABILITY- **TORT DAMAGES**

(7)The law governing defamation actions involving communications purporting to convey opinion has been explored in a quartet of recent Court of Appeals decisions (*Gross v New York Times Co.*, supra; *600 West 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, cert denied __ US __, 113 S Ct 241; *Immuno AG. v Moor-Jankowski*, supra; *Steinhilber v Alphonse*, 68 NY2d 283). The essence of the tort of libel is the publication of a statement about an individual that is both false and defamatory. Since falsity is a sine qua non of a libel claim and since only assertions of fact are capable of being proven false, we have consistently held that a libel action cannot be maintained unless it is premised on **published assertions of fact** (*Gross v New York Times Co.*, supra, at 152-153; *Immuno AG. V Moor-Jankowski*, supra; see also, *Milkovich v*

(8)Distinguishing between **assertions of fact** and **non- actionable expressions of opinion** has often proved a difficult task. The factors to be considered are: **"(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to 'signal' * * * readers or listeners that what is being read or heard is likely to be opinion, not fact'" (*Gross v New York Times Co.*, supra, at 153, quoting *Steinhilber v Alphonse*, supra, at 292; accord, *Immuno AG. v Moor-Jankowski*, supra). It is the last of these factors that lends both depth and difficulty to the analysis.**

(9)The significance of **the context factor was explicated** in *Immuno AG. v Moor-Jankowski* (supra). In that case, we rejected an analysis that **would first search a publication for specific factual assertions and then hold those assertions** actionable unless they were couched in figurative or hyperbolic language (id., at 254). Instead, we held that, in **distinguishing between actionable factual assertions and non-actionable opinion, the courts must consider the content of the communication as a whole, as well as its tone and apparent purpose. Rather than sifting through a communication for the purpose of isolating and identifying assertions of fact**, the court **should look to the overall context *in which the assertions were made and determine on that basis "whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff*"** (id., at 254, citing *Steinhilber v Alphonse*, supra, at 293).

(10)In addition to considering the immediate context in which the disputed words appear, the **courts are required** to take into consideration **the larger context** in **which the statements were published, including the nature of the particular forum. In Immuno, for instance, the challenged communication was a letter to the editor of a professional journal -- a medium that is typically regarded by the public as a vehicle for the expression of individual opinion rather than "'the rigorous and comprehensive presentation of factual matter'" (77 NY2d, at 253, quoting 145 AD2d 114, 129).** Similarly, in *600 W. 115th St. Corp. v Von Gutfeld* (supra, at 143-144), **the alleged defamatory remarks were made at a public hearing, where the listeners presumably expect to hear vigorous expressions of personal opinion**. In the **same vein**, the disputed statements in *Steinhilber v Alphonse* (supra, at 294) were made by the defendant union official as part of a recorded telephone message that was calculated to punish a "scab" in the aftermath of an acrimonious labor conflict. In that context, where the "'audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole,'" we opined that statements which might otherwise be viewed as assertions of fact may take on an entirely different character (id., quoting *Information Control Corp. v Genesis One Computer Corp.*, 611 F2d 781, 784).

(11)By way of contrast, in *Gross v New York Times* (supra, at 155-156), where the defendants' statements were held to be actionable assertions of fact, we stressed that the accusations had been made "in the course of a lengthy, copiously documented newspaper series that was written * * * after what purported to be a thorough investigation." Further, we noted that the articles appeared in the news section of the newspaper where, unlike the editorial section, the reader expects to find factual accounts (id., at 156). Finally, **the identity, role and reputation** of the author may **be factors to the extent** that they **provide the reader with clues as to the article's** import.

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(12)We emphasize that an article's appearance in the sections of a newspaper that are usually dedicated to opinion does not automatically insulate the author from liability for defamation. Despite our firm commitment to encouraging the robust exchange of ideas through these and similar media, we have never suggested that an editorial page or a newspaper column confers a license to make false factual accusations and thereby unjustly destroy individuals' reputations (see, e.g., *Immuno AG. v Moor-Jankowski*, supra, at 254). To the contrary, we have repeatedly emphasized that the forum in which a statement has been made, as well as the other surrounding circumstances comprising the "broader social setting," **are only useful gauges for determining whether a reasonable reader or listener would understand the complained-of assertions as opinion or *statements* of fact.**

18 U.S. CODE § 373 - SOLICITATION TO COMMIT A CRIME OF VIOLENCE

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

- US Code

(a)
Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that **intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct**, shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both; or if the **crime solicited** is punishable by life imprisonment or death, shall be imprisoned for not more than twenty years. (b)
It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete **renunciation of his criminal intent, the defendant prevented the commission of the crime solicited**. A ***renunciation is not "voluntary and complete" if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective***. If the defendant raises the affirmative defense at trial, the ***defendant has the burden of proving the defense by a preponderance of the evidence.***
(c)
It is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because he lacked the state of mind required for its commission, because he was incompetent or irresponsible, or because he is immune from prosecution or is not subject to prosecution.
(Added Pub. L. 98–473, title II, § 1003(a), Oct. 12, 1984, 98 Stat. 2138; amended Pub. L. 99–646, § 26, Nov. 10, 1986, 100 Stat. 3597; Pub. L. 103–322, title XXXIII, § 330016(2)(A), Sept. 13, 1994, 108 Stat. 2148.)

18 U.S. Code § 372 - Conspiracy to impede or injure officer

If two or more persons in any State, Territory, Possession, or District conspire to prevent, by force, intimidation, or threat, any person from accepting or **holding any office,** trust, or place of confidence under the United States, or from discharging any duties thereof, or to induce by like means any officer of the United States to leave the place, where his duties as an officer are required to be performed, **or to injure him in his person or property on account of his lawful discharge of the duties of his office**, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him **in the discharge of his official duties,** each of such persons **shall be fined under this title** or imprisoned not more than six years**, or both.**

(June 25, 1948, ch. 645, 62 Stat. 701; Pub. L. 107–273, div. B, title IV, § 4002(d)(1)(D), Nov. 2, 2002, 116 Stat. 1809.)

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18 U.S. CODE § 1961 - DEFINITIONS

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

As used in this chapter—
(1)
"racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1351 (relating to fraud in foreign labor contracting), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461–1465 (relating to obscene matter), **section 1503 (relating to obstruction of justice),** section 1510 (relating to obstruction of criminal investigations), **section 1511 (relating to the obstruction of State or local law enforcement),** section 1512 (relating to tampering with a witness, victim, or an informant), section **1513 (relating to retaliating against a witness, *victim*, or an informant),** section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), **sections 1581–1592** (relating to peonage, **slavery,** and trafficking in persons).,[1] section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic), sections 175–178 (relating to biological weapons), sections 229–229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) **any offense involving fraud connected with a case under title 11** (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting

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certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or **(G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);**

(2)

"State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3)

"person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4)

"enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5)

"pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6)

"unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, **where the usurious rate is at least twice the enforceable rate;**

(7)

"racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8)

"racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining **whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;**

(9)

"documentary material" includes any book, paper, document, record, recording, or other material; and

(10)

"Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. **Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.**

(Added Pub. L. 91–452, title IX, § 901(a), Oct. 15, 1970, 84 Stat. 941; amended Pub. L. 95–575, § 3(c), Nov. 2, 1978, 92 Stat. 2465; Pub. L. 95–598, title III, § 314(g), Nov. 6, 1978, 92 Stat. 2677; Pub. L. 98–473, title II, §§ 901(g), 1020, Oct. 12, 1984, 98 Stat. 2136, 2143; Pub. L. 98–547, title II, § 205, Oct. 25, 1984, 98 Stat. 2770; Pub. L. 99–570, title I, § 1365(b), Oct. 27, 1986, 100 Stat. 3207–35; Pub. L. 99–646, § 50(a), Nov. 10, 1986, 100 Stat. 3605; Pub. L. 100–690, title VII, §§ 7013, 7020(c), 7032, 7054, 7514, Nov. 18, 1988, 102 Stat. 4395, 4396, 4398, 4402, 4489; Pub. L. 101–73, title IX, § 968, Aug. 9, 1989, 103 Stat. 506; Pub. L. 101–647, title XXXV, § 3560, Nov. 29, 1990, 104 Stat. 4927; Pub. L. 103–322, title IX, § 90104, title XVI, § 160001(f), title XXXIII, § 330021(1), Sept. 13, 1994, 108 Stat. 1987, 2037, 2150; Pub. L. 103–394, title III, § 312(b), Oct. 22, 1994, 108 Stat. 4140; Pub. L. 104–132, title IV, § 433, Apr. 24, 1996, 110 Stat. 1274; Pub. L. 104–153, § 3, July 2, 1996, 110 Stat. 1386; Pub. L. 104–208, div. C, title II, § 202, Sept. 30, 1996, 110 Stat. 3009–565; Pub. L. 104–294, title VI, §§ 601(b)(3), (i)(3), 604(b)(6), Oct. 11, 1996, 110 Stat. 3499,

1. (Glossary, Case laws from opening brief, summary judgement reply, surreply, statues & law applies simultaneously, to each statement, reasserted in the same context.)

3501, 3506; Pub. L. 107–56, title VIII, § 813, Oct. 26, 2001, 115 Stat. 382; Pub. L. 107–273, div. B, title IV, § 4005(f)(1), Nov. 2, 2002, 116 Stat. 1813; Pub. L. 108–193, § 5(b), Dec. 19, 2003, 117 Stat. 2879; Pub. L. 108–458, title VI, § 6802(e), Dec. 17, 2004, 118 Stat. 3767; Pub. L. 109–164, title I, § 103(c), Jan. 10, 2006, 119 Stat. 3563; Pub. L. 109–177, title IV, § 403(a), Mar. 9, 2006, 120 Stat. 243; Pub. L. 113–4, title XII, § 1211(a), Mar. 7, 2013, 127 Stat. 142.)

18 U.S. CODE § 1964 - CIVIL REMEDIES

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

- US Code

(a)
The district courts of the United States shall have jurisdiction to **prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities** or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise**, making due provision for the rights of innocent persons**. (b)
The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of **satisfactory performance bonds,** as it shall deem proper.
(c)
Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.
(d)
A final judgment or decree rendered in favor of the **United States in any criminal proceeding brought by the United** States under this chapter **shall estop** the **defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States**.
(Added Pub. L. 91–452, title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943; amended Pub. L. 98–620, title IV, § 402(24)(A), Nov. 8, 1984, 98 Stat. 3359; Pub. L. 104–67, title I, § 107, Dec. 22, 1995, 109 Stat. 758.)

18 U.S. CODE § 1962 - PROHIBITED ACTIVITIES

Current through Pub. L. 114-38. (See Public Laws for the current Congress.)

(a)
It shall be unlawful for any person who has received any income derived, **directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal** within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating **in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser,**

1. (Glossary, Case laws from opening brief, summary judgement reply, surreply, statues & law applies simultaneously, to each statement, reasserted in the same context.)

the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after **such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer**.

(b)

It shall be unlawful for any person through a pattern of racketeering activity or **through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.**

(c)

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, **to conduct or participate, directly or indirectly**, in the conduct of such **enterprise's affairs through a pattern of racketeering activity** or collection of unlawful debt.

(d)

It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

(Added Pub. L. 91–452, title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942; amended Pub. L. 100–690, title VII, § 7033, Nov. 18, 1988, 102 Stat. 4398.)

SALINAS v. UNITED STATES

SALINAS v. UNITED STATES (No. 96-738) 89
F. 3d 1185, affirmed.

SALINAS v. UNITED STATES

certiorari to the united states court of appeals for the fifth circuit

No. 96_738. Argued October 8, 1997__Decided December 2, 1997.

This federal prosecution arose from a scheme in which a Texas county sheriff accepted money, and his deputy, petitioner Salinas, accepted two watches and a truck, in exchange for permitting women to make socalled "contact visits" to one Beltran, a federal prisoner housed in the county jail pursuant to an agreement with the Federal Government. Salinas was charged with one count of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §1962(c), one count of conspiracy to violate RICO, §1962(d), and two counts of bribery, §666(a)(1)(B). **The jury convicted him on all but the substantive RICO count, and the Fifth Circuit affirmed.**

Held:

1. Section 666(a)(1)(B) does not require the Government **to prove the bribe in question had a demonstrated effect** upon federal funds. The enactment's plain language is expansive and unqualified, both as to the bribes forbidden and the entities covered, demonstrating by its reference to "any" business or transaction, §666(a)(1)(B), that it is not **confined to transactions affecting federal funds; by its application to all cases in which an "organization, government, or agency" receives a specified amount of federal benefits, §666(b), that it reaches the scheme involved here; and by its prohibition on accepting "anything of value," §666(a)(1)(B), that it encompasses the transfers of personal property to petitioner in exchange for his favorable treatment of Beltran**. Given the statute's plain and **unambiguous meaning, petitioner is not aided by the legislative history, see, *e.g.*, *United States* v. *Albertini* , 472 U. S. 675, or by the plain-statement rule set forth in *Gregory* v. *Ashcroft* , 501 U. S. 452, and *McNally* v. *United States* ,**

1. (Glossary, Case laws from opening brief, summary judgement reply, surreply, statues & law applies simultaneously, to each statement, reasserted in the same context.)

483 U. S. 350, see, *e.g., Seminole Tribe of Florida* v. *Florida* , 517 U. S. 44, n. 9. Moreover, the construction he seeks cannot stand when viewed in light of the pre-§666 statutory framework—which **limited federal bribery prohibitions to "public official[s],"** defined as **"officer[s] or employee[s] or person[s] acting for or on behalf of the United States, or any branch thereof,"** and which was interpreted by some lower courts not to include state and local officials—and the expansion prescribed by §666(a)(1)(B), **which was designed to extend coverage to bribes offered to state and local officials employed by agencies receiving federal funds. Under this Court's construction, §666(a)(1)(B) is constitutional as applied in this case. Its application to petitioner did not extend federal power beyond its proper bounds, since the preferential treatment accorded Beltran was a threat to the integrity and proper operation of the federal program under which the jail was managed**. See *Westfall* v. *United States* , 274 U. S. 256. Pp. 3–9.

2. **To be convicted of conspiracy to violate RICO under §1962(d), the conspirator need not himself have committed or agreed to commit the two or more predicate acts**, such as bribery, **requisite for a substantive RICO offense under §1962(c). Section 1962(d)—which forbids "any person to conspire to violate"** §1962(c)—**is even more comprehensive than the general conspiracy provision applicable to federal crimes, §371, since it contains no requirement of an overt or specific act to effect the conspiracy's object. Presuming Congress intended the "to conspire" phrase to have its ordinary meaning under the criminal law, see *Morissette* v. *United States* , 342 U. S. 246, well-established principles and contemporary understanding demonstrate that, although a conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense,** it suffices that he adopt the goal of furthering or facilitating the criminal endeavor, and he need not agree to undertake all of the acts necessary for the crime's completion. Salinas' contrary interpretation of §1962(c) violates the foregoing principles and is refuted by *Bannon* v. *United States* , 156 U. S. 464, 469. Its acceptance, moreover, is not required by the rule of lenity, see *United States* v. *Shabani* , 513 U. S. 10. Even if Salinas did not accept or agree to accept two bribes, there was **ample evidence** that the sheriff committed **at least two predicate acts** when he accepted numerous bribes and that Salinas knew about and **agreed to facilitate the scheme, and this is sufficient** to support Salinas' conviction under §1962(d). Pp. 9–14.

89 F. 3d 1185, affirmed.

Kennedy, J., delivered the opinion for a unanimous Court. https://www.law.cornell.edu/supct/html/98-1480.ZO.html

(i)This case turns on the combined effect of two provisions of RICO that, read in conjunction, provide a civil cause of action for conspiracy. Section 1964(c) states that a cause of action is available to anyone "injured … by reason of a violation of section 1962." Section 1962(d) makes it unlawful for a person "to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." To determine what it means to be "injured … by reason of" a "conspir[acy]," we turn to the well-established common law of civil conspiracy. As we have said, when Congress uses language with a settled meaning at common law, Congress "presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952).

See *Molzof* v. *United States,* 502 U.S. 301, 307 (1992) (quoting *Morissette, supra,* at 263); *NLRB* v. *Amax Coal Co.,* 453 U.S. 322, 329 (1981).6

TORTIOUS ACT:

TORTIOUS ACT (FROM REPLY BRIEF, PAGE 4 FOOTNOTE, REFERENCE MADE)

1. (Glossary, Case laws from opening brief, summary judgement reply, surreply, statues & law applies simultaneously, to each statement, reasserted in the same context.)

(ii) By the time of RICO's enactment in 1970, it was widely accepted that a plaintiff could bring suit for civil conspiracy only if he had been injured by an act that was itself tortious. See, *e.g.*, 4 Restatement (Second) of Torts §876, Comment *b* (1977) ("The mere common plan, design or even express agreement is not enough for liability in itself, and there must be acts of a tortious character in carrying it into execution"); W. Prosser, Law of Torts §46, p. 293 (4th ed. 1971) ("It is **only** where **means** are employed, or **purposes** are accomplished, **which are themselves tortious, that the conspirators who have not acted but have promoted the act will be held liable**" (footnotes omitted)); *Satin* v. *Satin*, 69 App. Div. 2d 761, 762, 414 N. Y. S. 2d 570, (1979) (Memorandum Decision) ("There is no tort of civil conspiracy in and of itself. **There must first be pleaded specific wrongful acts which might constitute an independent tort**"); *Cohen* v. *Bowdoin*, 288 A. 2d 106, 110 (Me. 1972) (" '[C]onspiracy' fails as the basis for the imposition of civil **liability absent the *actual commission* of some *independently recognized tort*;** and **when such separate tort has been committed, *it is that tort*,** and ***not the fact of combination*, which is the foundation of the civil liability**"); *Earp* v. *Detroit*, 16 Mich. App. 271, 275, 167 N. W. 2d 841, 845 (1969) ("Recovery may be had from parties on the theory of concerted action as long as the **elements of the separate** and **actionable tort are properly proved**"); *Mills* v. *Hansell*, 378 F.2d 53, (CA5 1967) *(per curiam)* (affirming dismissal of conspiracy to defraud claim because no defendant committed an actionable tort); *J. & C. Ornamental Iron Co.* v. *Watkins*, 114 Ga. App. 688, 691, 152 S. E. 2d 613, 615 (1966) ("[The plaintiff] must allege all the **elements of a cause of action for the tort the same as would be required if there were no allegation of a conspiracy**"); *Lesperance* v. *North American Aviation, Inc.*, 217 Cal. App. 2d 336, 345 31 Cal. Rptr. 873, 878 (1963) ("[C]onspiracy **cannot be made the subject of a civil action unless something is done which without the conspiracy would give a right of action**" (internal quotation marks omitted)); *Middlesex Concrete Products & Excavating Corp.* v. *Carteret Indus. Assn.*, 37 N. J. 507, 516, 181 A. 2d 774, 779 (1962) **("[A] conspiracy cannot be made the subject of a civil action unless something has been done which, absent the conspiracy, would give a right of action");** *Chapman* v. *Pollock*, 148 F. Supp. 769, 772 (WD Mo. 1957) (holding that a plaintiff who charged the defendants with "**conspiring to perpetrate an unlawful purpose**" could not recover because the defendants committed no unlawful act); *Olmsted, Inc.*, v. *Maryland Casualty Co.*, 218 Iowa 997, 998, 253 N. W. 804 (1934) ("[A] **conspiracy cannot be the subject of a civil action unless something is done pursuant to it which, without the conspiracy, would give a right of action**"); *Adler* v. *Fenton*, 24 How. 407, 410 (1861) ("[T]he act must be tortious, and there must be consequent damage").

Consistent with this principle, it was sometimes said that a conspiracy claim was not an independent cause of action, but was only the mechanism for subjecting co-conspirators to liability when one of their member committed a tortious act. *Royster* v. *Baker*, 365 S. W. 2d 496, 499, 500 (Mo. 1963) ("[A]n alleged conspiracy by or agreement **between the defendants** is not of itself actionable. Some **wrongful act to the plaintiff 's damage must have been done by one or more of the defendants, and the fact of a conspiracy merely bears on the liability of the various defendants as joint tort-feasors**"). See *Halberstam* v. *Welch*, 705 F.2d 472, 479 (CADC 1983) ("Since liability for civil conspiracy depends **on performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort**").7

The principle that a civil conspiracy plaintiff must claim injury from an act of a tortious character was so widely accepted at the time of RICO's adoption as to be incorporated **in the common understanding of "civil conspiracy**." See Ballentine's Law Dictionary 252 (3d ed. 1969) ("**It is the civil wrong resulting in damage, and not the conspiracy which constitutes the cause of action**"); **Black's Law Dictionary 383** (4th ed. 1968) ("[W]here**, in carrying out the design of the conspirators, overt acts are done causing *legal* damage, the person injured has a *right of action*" (emphasis added)).** We presume, therefore, that when ***Congress established in RICO a civil cause of action for a person "injured ... by reason of " a "conspir[acy]," it meant to adopt these well-established common-law civil conspiracy principles.***

Justice Stevens does not **challenge our view that Congress meant to incorporate common-law principles when it adopted RICO.** Nor does he attempt to make an affirmative case from the common law for his reading of the statute by pointing to a case in which there was ***(a) an illegal agreement; (b) injury***

1. (Glossary, Case laws from opening brief, summary judgement reply, surreply, statues & law applies simultaneously, to each statement, reasserted in the same context.)

proximately caused to the plaintiff by a nontortious overt act in furtherance of the agreement; and (c) recovery by the plaintiff. See *post*, at 2. Instead, he argues only that courts, authoritative commentators, and even dictionaries repeatedly articulated a rule with no meaning or application.**8 We find this argument to be implausible and, accordingly, understand RICO to adopt the common-law principles we have cited. Interpreting the statute in a way that is most consistent with these principles, we conclude that injury caused by an overt act that is not** an *act of racketeering* or **otherwise wrongful under RICO,** see n. 7, *supra*, is not sufficient to give rise to a cause of action under §1964(c) for a violation of §1962(d). As at common law, a civil conspiracy plaintiff cannot bring suit under RICO based on injury caused by ***any* act in furtherance of a** conspiracy **that might have caused the plaintiff injury**. Rather, **consistency with the common law requires that a RICO conspiracy plaintiff allege injury from an act that is analogous to an "ac[t] of a tortious character,"** see 4 Restatement (Second) of Torts §876, **Comment *b*, meaning an act that is independently wrongful under RICO.** The ***specific type of act that is analogous to an act of a tortious character may depend on the underlying substantive violation the defendant is alleged to have committed.***9 However, *respondents' alleged overt act in furtherance of their conspiracy is not independently wrongful under any substantive provision of the statute. Injury caused by such an act is not, therefore, sufficient to give rise to a cause of action under §1964(c).10*

Petitioner challenges this view of the statute under the **longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision *of that statute* meaningless or superfluous. He asserts that under our view of the statute, any person *who had a claim for a violation of §1962(d) would necessarily have a claim for a violation of §1962(a), (b), or (c)*. However, contrary to petitioner's assertions, our interpretation of §1962(d) does not render it mere surplusage.** *Under our interpretation, a plaintiff could, through a §1964(c) suit for a violation of §1962(d),* **sue co-conspirators who might not themselves have violated one of the substantive provisions of §1962.**

III

We conclude, therefore, **that a person may not bring suit** under §1964(c) predicated on a violation of §1962(d) for **injuries caused by an overt act that is not an act of racketeering** or otherwise **unlawful under the statute**.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

FRANK KUSH, ET AL., PETITIONERS V. KEVIN RUTLEDGE.

460 U.S. 719 (103 S.Ct. 1483, 75 L.Ed.2d 413) Frank KUSH, et al., Petitioners v. Kevin RUTLEDGE.

No. 81-1675. Argued: Jan. 12, 1983. Decided: April 4, 1983. **opinion**, STEVENS [HTML] Syllabus

In his action in Federal District Court, and in state administrative and judicial proceedings, respondent, a white male, asserted a variety of common-law and statutory claims against Arizona State University and certain of its officials (including petitioners) arising out of incidents occurring while he was a member of the University's football squad. One of the claims was that **three of the petitioners had engaged in a conspiracy to intimidate and threaten various potential material witnesses in order to prevent them from testifying "freely, fully and truthfully" in the action, in violation of the first part of 42 U.S.C. 1985(2) (1976 ed., Supp. V).** The District Court dismissed the entire complaint. The Court of Appeals, while affirming the dismissal of certain of **respondent's claims and remanding as to others, reversed with respect to the claim at issue. The court concluded that respondent's claims of witness intimidation, insofar as they related to obstruction of justice at the state level, were not actionable under the second part of § 1985(2)—which prohibits a conspiracy to obstruct the due course of justice in a State "with intent to**

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deny any citizen the equal protection of the laws"—because **there was no sufficient allegation of racial or class-based invidiously discriminatory animus**. The court concluded, however, that such an allegation—**which was held to be necessary in Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338, to avoid creating a general federal tort law with regard to a portion of § 1985(3)—was not applicable to *alleged intimidation of witnesses* in the federal courts in violation of the first part of § 1985(2).**

Held: No allegations of racial o**r class-based invidiously discriminatory animus are required to establish a cause of action under the first part of § 1985(2). The statutory provisions now codified at § 1985** were originally enacted as § 2 of the Civil Rights Act of 1871, and the substantive meaning of the 1871 Act has not been changed. The **provisions relating to institutions and processes of the Federal Government (including the first part of § 1985(2))—unlike those encompassing activity that is usually of primary state concern (including the second part of § 1985(2)** and the part of § 1985(3) involved in Griffin, supra)—contain no language requiring that the conspirators act with intent to deprive their victims of the equal protection of the laws. Thus, the reasoning of Griffin is not applicable here, and given the structure of § 2 of the 1871 Act, it is clear that Congress did not intend to impose a requirement of class-based animus on persons seeking **to prove a violation of their rights** under the first part of § 1985(2). **The legislative history supports this conclusion. Pp. 724-727**. 660 F.2d 1345, affirmed. Michael L. Gallagher, Phoenix, Ariz., for petitioners. Robert Ong Hing, Phoenix, Ariz., for respondent.

HADLEY V. BAXENDALE:

In Hadley v. Baxendale (1854) 9 Exch. 345, ever since considered a leading case on both sides of the Atlantic, and approved and followed by this court in Telegraph Co. v. Hall, above cited, and in Howard v. Manufacturing Co., 139 U.S. 199, 206 , 207 S., 11 Sup. Ct. 500; Baron Alderson laid down... the principles by which the jury ought to be guided in estimating the damages arising out of any breach of contract[.][3] .The Hadley holding was later incorporated into Section 351 of the Restatement (Second) of Contracts. A 1994 law review article noted that as of that year, Hadley had been cited with approval by the state supreme courts of 43 U.S. states; three state supreme courts had adopted the Hadley holding without citing Hadley itself; and intermediate appellate courts in the four other states had also favorably cited Hadley.[4] In Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The Pegase) [1981] 1 Lloyd's Rep 175, Robert Goff J stated, "Although the principle stated in Hadley v Baxendale remains the fons et origo of the modern law, the principle itself has been analysed and developed, and its application broadened, in the 20th century... The general result of the two cases is that the principle in Hadley v Baxendale is now no longer stated in terms of two rules, but rather in terms of a single principle—though it is recognised that the application of the principle may depend on the degree of relevant knowledge held by the defendant at the time of the contract in the particular case. This

ROBERT A. BECK, II, PETITIONER v. RONALD M. PRUPIS et al.
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR

THE ELEVENTH CIRCUIT

April 26, 2000 - Justice Stevens, with whom Justice Souter joins, dissenting.

For the purpose of decision, I assume--as I think the Court does--that petitioner has alleged an injury proximately caused by an overt act in furtherance of a conspiracy that violated 18 U.S.C. § 1962(d). In my judgment, the plain language of the Racketeer Influenced and Corrupt Organizations Act (RICO) makes it clear that petitioner therefore has a cause of action under §1964(c), whether or not the overt act is a racketeering activity listed in §1961(1). The common-law civil conspiracy cases relied upon by the Court prove nothing to the contrary.

1. (Glossary, Case laws from opening brief, summary judgement reply, surreply, statues & law applies simultaneously, to each statement, reasserted in the same context.)

A "conspiracy" is an illegal agreement. There is, of course, a difference between the question whether an agreement is illegal and the question whether an admittedly illegal agreement gives rise to a cause of action for damages. Section 1962(d), which makes RICO conspiracies unlawful, addresses the former question;1 §1964(c), which imposes civil liability, concerns the latter. Section 1964(c) requires a person to be "injured in his business or property" by a violation before bringing an action for damages. And because that kind of injury only results from some form of overt act in furtherance of the conspiracy, liability under §1964(c) naturally requires injury via an overt act.2 But there is nothing in either §1962(d) or §1964(c) requiring the overt act to be a racketeering activity as defined in §1961(1).3

The Court's central premise is that common-law civil conspiracy cases support the notion that liability cannot be imposed unless the overt act that furthered the conspiracy and harmed the plaintiff was a *particular kind* of overt act, namely, an act of a tortious character. But the cases cited by the Court do not support that point. First, no case cited by the majority actually parallels the Court's premise. That is, no case involved a situation in which (a) there was an illegal agreement, (b) there was an injury to the plaintiff proximately caused by an overt act in furtherance of that agreement, but (c) there was a refusal to impose civil liability because the overt act was not itself tortious.

RESOURCE:

https://books.google.ca/books?id=4RvVBQAAQBAJ&pg=PA171&lpg=PA171&dq=conspiracy+actionable&source=bl&ots=Li4yGB_Rgl&sig=JFDQiDx0xOzdPaXjZBhPy2obItY&hl=en&sa=X&ved=0CEAQ6AEwBmoVChMIsbm_iZPxyAIVlEqICh37ggDr#v=onepage&q&f=false

1. (Glossary, Case laws from opening brief, summary judgement reply, surreply, statues & law applies simultaneously, to each statement, reasserted in the same context.)

APPENDIX B

Shaw Rahman v. Boeing, Case 91503-2 , WA State Supreme Ct.

http://www.oxforddictionaries.com/definition/english/torture

(i)**DEFINITION - CAHOOTS**

http://www.oxforddictionaries.com/definition/english/cahoots cahoots
See definition in Oxford Advanced Learner's Dictionary
Line breaks: ca|hoots
Pronunciation: /kə'hu:ts/ Definition of
cahoots in English: plural noun
(in phrase in cahoots) informal
Colluding or conspiring together secretly:the area is dominated by guerrillas in cahoots with drug traffickers
[seee CONSPIRACY]

(ii)DEFINITION: **FRAUD**: Element of fraud in opening brief.

CONSPIRACY
kən'spirəsē/Submit noun -a **secret plan** by a group to do something
unlawful or harmful.
"a conspiracy to destroy the government" synonyms: plot, scheme, plan, machination, ploy, trick, ruse, subterfuge; informalracket "a conspiracy to manipulate the results"
the action of plotting or conspiring. "they were cleared of conspiracy to pervert the course of justice"
synonyms: plotting, collusion, intrigue, connivance, machination, collaboration; treason "conspiracy to commit murder.

(iii) **FURTHERANCE**

Synonyms of *furtherance* in English: noun
he was acting in the furtherance of his business interests
promotion, furthering, advancement, forwarding, improvement, development, betterment, stimulation; facilitating, aiding, assisting, helping, abetting;
expediting, hastening, speeding up, acceleration, pushing, boosting, encouragement, cultivation, nurturing, succouring, backing, fostering, championing, endorsement, patronage
[ANTONYMS] hindrance
Definition of further

(iii) **INVIDIOUS**
See definition in Oxford Advanced Learner's Dictionary
Line breaks: in|vidi|ous Pronunciation:
/ɪn'vɪdɪəs/
Definition of *invidious* in English:
adjective
1(Of an action or situation) likely to arouse or incur resentment or anger in others:*she'd put herself in an invidious position*
MORE EXAMPLE SENTENCESSYNONYMS
1.1(Of a comparison or distinction) unfairly discriminating; unjust:*it seems invidious to make special mention of one aspect of his work*

1. (Glossary, Case laws from opening brief, summary judgement reply, surreply, statues & law applies simultaneously, to each statement, reasserted in the same context.)

(iv) **TAMPER WITH**

LAT. AM. SP.
(document/figures
) **alterar** SP.

LAT. AM. SP.
2(influence)
(jury/witness)
sobornar

(v) **TORT - tort**

TORTIOUS ACT (FROM REPLY BRIEF, PAGE 4 FOOTNOTE, REFERENCE MADE)

See definition in Oxford Advanced Learner's Dictionary

Line breaks: tort Pronunciation:
/tɔːt/
Definition of *tort* in English:
noun *Law*
A wrongful act or an infringement of a right (other than under contract) **leading to legal liability**: ***public nuisance is a crime as well as a tort***[MASS NOUN]: *the law of tort*

(vi) **TORTURE -torture**

See definition in Oxford Advanced Learner's Dictionary

Line breaks: tor|ture Pronunciation:
/ˈtɔːtʃə/
Definition of *torture* in English:
noun
[MASS NOUN]
1**The action or practice of inflicting severe pain on someone as a punishment** or ***in order to force them to do*** or say something: *the torture of political prisoners confessions extracted under torture*[AS MODIFIER]: *a torture chamber*
MORE EXAMPLE SENTENCESSYNONYMS
1.1Great physical or mental suffering: *the torture I've gone through because of loving you so*
MORE EXAMPLE SENTENCESSYNONYMS
1.2A ***cause*** of great *physical or mental suffering*: *dances were absolute torture because I was so small* **verb**
[WITH OBJECT]*Back to top*
1Inflict severe pain on: *most of the victims had been brutally tortured*
MORE EXAMPLE SENTENCESSYNONYMS
1.**1Cause great mental suffering to:*he was tortured by grief***

(vii) **OUTRAGE**
See definition in Oxford Advanced Learner's Dictionary
Line breaks: out|rage Pronunciation: /ˈaʊtreɪdʒ/ Definition of *outrage* in English:
noun
[MASS NOUN]
1An extremely strong reaction of anger, shock, or **indignation:***her voice trembled with outrage*

1. (Glossary, Case laws from opening brief, summary judgement reply, surreply, statues & law applies simultaneously, to each statement, reasserted in the same context.)

MORE EXAMPLE SENTENCESSYNONYMS
1.1[COUNT NOUN] An action or event causing outrage:*some of the worst terrorist outrages*
MORE EXAMPLE SENTENCESSYNONYMS verb
[WITH OBJECT]*Back to top*
1Arouse fierce anger, shock, or indignation in (someone):*the public were outraged at the brutality involved*
MORE EXAMPLE SENTENCESSYNONYMS
1.1**Flagrantly violate or infringe** (a principle, law, etc.):*their behaviour outraged all civilized standards*

PEONAGE

http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100315949

QUICK REFERENCE

Peonage is a form of **involuntary servitude** based on indebtedness. By 1915 at least six southern states passed laws allowing the forced labor of those encumbered with debt, despite the ...

From: Peonage in Encyclopedia of African American History 1896 to the Present »

INTERSECTIONALITY (or **intersectional** theory) is the study of overlapping or intersecting social identities and related systems of oppression, domination or discrimination.

1. (Glossary, Case laws from opening brief, summary judgement reply, surreply, statues & law applies simultaneously, to each statement, reasserted in the same context.)

APPENDIX C

KING COUNTY, DJA RECORD / EMAIL EVIDENTIARY SUPPORT/LAW JOURNAL

shaw rahman <mailtoshawrahmanstate@gmail.com>
Notice of E-Service 11-2-35677-9
4 messages
EService.NoReply@kingcounty.gov <EService.NoReply@kingcounty.gov> Wed, Feb 25, 2015 at
9:36 AM
To: mailtoshawrahmanstate@gmail.com
The document(s) listed below are being electronically served according to your agreement. Case: 11-2-35677-9,
Title: RAHMAN VS BOEING CO ET AL.
You may view the documents within 15 calendar days after the date of this email, by clicking on the links
below. After that time, the e-filed document(s) can be viewed in person at the clerk Es office or may be
available for a fee via "ECR Online." We recommend that you download and save a copy of each document
during your first viewing.
E-Filed Document(s):
Attachment:
https://dja-
efsp.kingcounty.gov/EFiling/EService/ViewDocument.aspx?g0Mgzn5Zg6o=
Attachment:
https://dja-
efsp.kingcounty.gov/EFiling/EService/ViewDocument.aspx?8Z6d18+PH9A=
Attachment:
https://dja-
efsp.kingcounty.gov/EFiling/EService/ViewDocument.aspx?QC+/FYZnjHc=
Attachment:
https://dja-
efsp.kingcounty.gov/EFiling/EService/ViewDocument.aspx?VBr1q6fhqag=
Attachment:
https://dja-
efsp.kingcounty.gov/EFiling/EService/ViewDocument.aspx?FaFjbbCnGkc=
Attachment:
https://dja-
efsp.kingcounty.gov/EFiling/EService/ViewDocument.aspx?C2N/tJxSXyw=
Attachment:
https://dja-
efsp.kingcounty.gov/EFiling/EService/ViewDocument.aspx?XLIfzbJ37yE=
Description: RESPONSE OF BY PLAINTIFF RE TO DEF MTN OF SUM JUDGEMNT CROSS MT
Lead Document:
https://dja-
efsp.kingcounty.gov/EFiling/EService/ViewDocument.aspx?dScrUK9hwwE=

Attachment:
https://dja-
efsp.kingcounty.gov/EFiling/EService/ViewDocument.aspx?LmdD+Vk+dBQ=
If you are unable to connect directly to the E-served document by selecting the hyperlink above, please copy
and paste the entire URL into your web browser's address bar. Thank you, King County Superior Court
Clerk's Office ***Do not reply to this email. Please contact the Clerk's Office at 206-477-3000 or by email at
Eservices@kingcounty.gov if you have questions. ***
EService.NoReply@kingcounty.gov <EService.NoReply@kingcounty.gov> Wed, Feb 25, 2015 at
2:48 PM
To: mailtoshawrahmanstate@gmail.com
The document(s) listed below are being electronically served according to your agreement. Case: 11-2-35677-9,
Title: RAHMAN VS BOEING CO ET AL.
You may view the documents within 15 calendar days after the date of this email, by clicking on the links
below. After that time, the e-filed document(s) can be viewed in person at the clerkÆs office or may be
available for a fee via "ECR Online." We recommend that you download and save a copy of each document

during your first viewing.
E-Filed Document(s):
Description: OTHER (DO NOT FILE UNSIGNED ORDERS) RE ESERVICE OF MTN TO SEAL COVER
LCR7
Lead Document:
https://dja-
efsp.kingcounty.gov/EFiling/EService/ViewDocument.aspx?TdPWu9k1mUY=
[Quoted text hidden]
EService.NoReply@kingcounty.gov <EService.NoReply@kingcounty.gov> Wed, Feb 25, 2015 at
2:50 PM
To: mailtoshawrahmanstate@gmail.com
The document(s) listed below are being electronically served according to your agreement. Case: 11-2-35677-9,
Title: RAHMAN VS BOEING CO ET AL.
You may view the documents within 15 calendar days after the date of this email, by clicking on the links
below. After that time, the e-filed document(s) can be viewed in person at the clerkÆs office or may be

available for a fee via "ECR Online." We recommend that you download and save a copy of each document
during your first viewing.
E-Filed Document(s):
Description: AFFIDAVIT/DECLARATION OF SERVICE
Lead Document:
https://dja-
efsp.kingcounty.gov/EFiling/EService/ViewDocument.aspx?n35yKmShSu4=
[Quoted text hidden]
shaw rahman <mailtoshawrahmanstate@gmail.com> Mon, Aug 10, 2015 at 11:51 AM
To: "Crisostomo, Elias" <Elias.Crisostomo@kingcounty.gov>
as you can see on efileing at 2/25/2015 summary judgement references from Plaintiff accompanied the
"attachment" - appendix 0-5, Appendix Dep, and declaration of Shaw Rahman which are not present in Clerk's
paper please include the appendix after CP6117. They were all under the same sub number.
[Quoted text hidden]

affidavit 374 Are desingtion with date 9/4/2015
6 messages

haw rahman <mailtoshawrahmanstate@gmail.com> Tue, Sep 15, 2015 at 1:05 PM

To: "Crisostomo, Elias" <Elias.Crisostomo@kingcounty.gov>, "OFFICE RECEPTIONIST, CLERK" <supreme@courts.wa.gov>, "Shapero, Laurence" <lshapero@riddellwilliams.com>, "Bomotti, Gena M." <gbomotti@ riddellwilliams.com>, "Matautia, Jazmine" <jmatautia@ riddellwilliams.com>, shaw rahman <mailtoshawrahmanstate@ gmail.com>

From the phone call received from tel 2062960654 , (from Elais see email address in list,) of king county superior court , clerk's paper designation staff, regarding the rejection information of previously denegation clerk's paper for sub no 374 A, (9/8/2015), ["Crisostomo, Elias" <Elias.Crisostomo@ kingcounty.gov>]
to changed the designation filing date , to 9/4/2015 Plaintiff now is compelled to file
toay to redesignate the sub no 374 A ,with a changed date of 9/4/2015, per Elias's[king county superior court's] request.

shaw rahman <mailtoshawrahmanstate @gmail.com> Tue, Sep 15, 2015 at 1:06 PM

To: CP@ohchr.org, canada.un@ international.gc.ca

see affidavit to cahged the desnation date
[Quoted text hidden]

shaw rahman <mailtoshawrahmanstate@gmail.com>

Tue, Sep 15, 2015 at 1:12PM

To: CP@ohchr.org, canada.un@international.gc.ca, "OFFICE RECEPTIONIST, CLERK" <supreme@courts.wa.gov>, "Matautia, Jazmine" <jmatautia@riddellwilliams.com>, "Bomotti, Gena M." <gbomotti@riddellwilliams.com>, shaw raliman <mailtoshawrahmanstate@gmail.com>, "Crisostomo, Elias" <Elias.Crisostomo@kingcounty.gov>

new docket shows , presently ,

374	1	09/01/2015 INDEX CLKS PPRS PGS 6468-6469
374A	82	09/04/2015 ATTACHMENT/EXHIBITS
375		09/08/2015 AFFIDAVIT/DCLR/CERT OF SERVICE
376		09/08/2015 AFFIDAVIT/DCLR/CERT OF SERVICE
377		

1
09/08/2015
AFFIDAVIT/DCLR/CERT OF SERVICE

altered toout of 47 pages

[Quoted text hidden]

Crisostomo, Elias <Elias.Crisostomo@kingcounty.gov> To: shaw rahman <mailtoshawrahmanstate@gmail.com>

Tue, Sep 15, 2015 at 1:16PM

Shaw,

Nothing was altered. The dates listed below are the dates that the document is filed. You physically came into our office and filed 374A on 9/4/2015. *So,* this is the date that is associated with your document and this is the date that we used when entering your documents into SCOMIS.

Elias

From: shaw rahman
[mailto:mailtoshawrahmanstate@gmail.com] Sent:
Tuesday, September 15, 2015 1:13PM
To: CP@ohchr.org; canada.un@international.gc.ca; OFFICE
RECEPTIONIST, CLERK; Matautia, Jazmine; Bomotti, Gena M.; shaw
rahman; Crisostomo, Elias
Subject: Re: affidavit- 374 Are desingtion with date 9/4/2015

new docket shows , presently , altered to

374	1	09/01/2015	INDEX CLKS PPRS PGS 6468-6469
374A	82	09/04/2015	ATTACHMENT /EXHIBITS
375	1	09/08/2015	AFFIDAVIT/DCLR/CERT OF SERVICE
376	1	09/08/2015	AFFIDAVIT/DCLR/CERT OF SERVICE
377	1	09/08/2015	AFFIDAVIT/DCLR/CERT OF SERVICE

45 out of 47 pages

On Tue, Sep 15, 2015 at 1:06 PM, shaw rahman
<mailtoshawrahmanstate@gmail.com> wrote:

see affidavit to cahged the desnation date

--------- Forwarded message ---------
From: shaw rahman
<mailtoshawrahmanstate@gmail.com> Date: Tue, Sep
15, 2015 at 1:05 PM
Subject: affidavit - 374 A re desingtion with date 9/4/2015
To: "Crisostomo, Elias" <Elias.Crisostomo@kingcounty.gov>, "OFFICE
RECEPTIONIST, CLERK" <supreme@courts.wa.gov>, "Shapero,
Laurence"
<lshapero@ riddellwilliams.com>, "Bomotti, Gena M."

<gbomotti@ riddellwilliams.com>, "Matautia, Jazmine" <jmatautia@ riddellwilliams.com>, shaw rahman <mailtoshawrahmanstate@gmail.com>

From the phone call received from tel 2062960654 , (from Elais see email address in list,),of king county superior court, clerk's paper designation staff, regarding the rejection information of previously denegation clerk's paper for sub no 374 A, (9/8/2015), ["Crisostomo, Elias" <Elias.Crisostomo@kingcounty.gov>]

to changed the designation filing date , to 9/4/2015 Plaintiff now is compelled to file toay to redesignate the sub no 374 A ,with a changed date of 9/4/2015, per Elias's[king county superior court's] request.

OFFICE RECEPTIONIST, CLERK <SUPREME@ courts.wa.gov> Tue, Sep 15, 2015 at 3:00PM

To: shaw rahman <mailtoshawrahmanstate @gmail.com>, "CP@ohchr.org" <CP @ohchr.org>, "canada.un@ international.gc.ca" <canada.un@international.gc.ca>, "Matautia, Jazmine" <jmatautia@ riddellwilliams.com>, "Bomotti, Gena M." <gbomotti@ riddellwilliams.com>, "Crisostomo, Elias" <Elias.Crisostomo@ kingcounty.gov>

Received on 09-15-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the
original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: shaw rahman
[mailto:mailtoshawrahmanstate@gmail.com]
Sent: Tuesday, September 15, 2015 1:13 PM

To: CP@ ohchr.org; canada.un@international.gc.ca; OFFICE RECEPTIONIST,CLERK <SUPREME@COURTS.WA.GOV>; Matautia, Jazmine <jmatautia@ riddellwilliams.com>; Bomotti,Gena M. <gbomotti@riddellwilliams.com>; shaw rahman <mailtoshawrahmanstate@gmail.com>; Crisostomo, Elias <Elias.Crisostomo@kingcounty.gov>
Subject: Re: affidavit- 374 Are desingtion with date 9/4/2015

new docket shows , presently, altered to

374	1	09/01/2015	INDEX CLKS PPRS PGS 6468-6469
374A	82	09/04/2015	ATTACHMENT /EXHIBITS
375	1	09/08/2015	AFFIDAVIT/DCLR/CERT OF SERVICE
376	1	09/08/2015	AFFIDAVIT/DCLR/CERT OF SERVICE
377	1	09/08/2015	AFFIDAVIT/DCLRICERT OF SERVICE

45 out of 47 pages

On Tue, Sep 15, 2015 at 1:06 PM, shaw rahman <mailtoshawrahmanstate@gmail.com> wrote:

see affidavit to cahged the desnation date

--------- Forwarded message ---------
From: shaw rahman <mailtoshawrahmanstate@gmail.com> Date: Tue, Sep 15, 2015 at 1:05 PM
Subject: affidavit- 374 Are desingtion with date 9/4/2015
To: "Crisostomo, Elias" <Elias.Crisostomo@kingcounty.gov>, "OFFICE RECEPTIONIST, CLERK" <supreme@courts.wa.gov>, "Shapero, Laurence" <lshapero@riddellwilliams.com>, "Bomotti, Gena M." <gbomotti@riddellwilliams.com>, "Matautia, Jazmine" <jmatautia@ riddellwilliams.com>, shaw rahman <mailtoshawrahmanstate@gmail.com>

From the phone call received from tel 2062960654 , (from Elais see email address in list,),of king county superior court , clerk's paper designation staff, regarding the rejection information of previously denegation clerk's paper for sub no 374 A, (9/8/2015), ["Crisostomo, Elias" <Elias.Crisostomo@ kingcounty.gov>]

to changed the designation filing date, to 9/4/2015 Plaintiff now is compelled to file toay to redesignate the sub no 374 A ,with a changed date of 9/4/2015, per

Elias's[king county superior court's] request.

shaw rahman <mailtoshawrahmanstate@gmail.com> Sat, Sep 26, 2015 at 11:31 AM

Draft To: "Crisostomo, Elias" <Elias.Crisostomo@kingcounty.gov>, "Shapero, Laurence" <lshapero@riddellwilliams.com>, "Bomotti, Gena M." <gbomotti@riddellwilliams.com>, "Matautia, Jazmine" <jmatautia@riddellwilliams.com>, "mailtoshawrahman@gmail.com" <mailtoshawrahman@gmail.com>

please see docket date 9 previously captured and field with the WA Supreme court which is now " different and changed.

ious

74A8209/08/2015 B 797809/06/2015 1
[Quoted text hidden]

shaw rahman <mailtoshawrahmanstate@ gmail.com> Fri, Sep 25, 2015 at 9:44 PM

To: "Matautia, Jazmine" <jmatautia@riddellwilliams.com>, "Bomotti, Gena M." <gbomotti@ riddellwilliams.com>, "Shapero, Laurence" <lshapero@ riddellwilliams.com>, shaw rahman <mailtoshawrahmanstate@gmail.com>, "OFFICE RECEPTIONIST, CLERK" <supreme@courts.wa.gov>

Affidavit

case 91503-2

Shaw Rahman v. Boeing

WA State Supreme Court

Plaintiff states, as correction, that the page 4 of opening brief containing excluded part of brief, with label "RESONING" is intend to state " REASONING" and therefore be regarded as a corrected, label ,which is considered word, in, the exclusion criteria of brief per rule.

Respectfully,

ProSe

Plaintiff,

s/shaw

Rahman

shaw rahman <mailtoshawrahmanstate@gmail.com> Sat, Sep 26, 2015 at 10:59 AM

To: "Matautia, Jazmine" <jmatautia@riddellwilliams.com>, "Bomotti, Gena M." <gbomotti@riddellwilliams.com>, "Shapero, Laurence" <lshapero@riddellwilliams.com>, shaw rahman <mailtoshawrahmanstate@gmail.com>, "OFFICE RECEPTIONIST, CLERK" <supreme@courts.wa.gov>

in the order:

No further correction/supplemental " before the clerks paper is ready/released " stated after on Sept
21 st order, following , issue of releasing clerk's s paper was emailed.

shaw rahman <mailtoshawrahmanstate@gmail.com> Fri, Sep 25, 2015 at 12:40 PM

To: "OFFICE RECEPTIONIST, CLERK" <supreme@courts.wa.gov>, "Shapero, Laurence" <lshapero@riddellwilliams.com>, "Bomotti, Gena M." <gbomotti@riddellwilliams.com>, "Matautia, Jazmine" <jmatautia@riddellwilliams.com>, shaw rahman <mailtoshawrahmanstate@gmail.com>

OFFICE RECEPTIONIST, CLERK <SUPREME@courts.wa.gov> To: shaw rahman <mailtoshawrahmanstate@gmail.com> Fri, Sep 25, 2015 at 12:58 PM

Received 9-25-15

Supreme Court Clerk's Office

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original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original ofthe document.

From: shaw rahman [mailto:mailtoshawrahmanstate@gmail.com]
Sent: Friday, September 25, 2015 12:40 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; Shapero, Laurence <lshapero@riddellwilliams.com>; Bomotti, Gena M. <gbomotti@riddellwilliams.com>; Matautia, Jazmine <jmatautia@riddellwilliams.com>; shaw rahman <mailtoshawrahmanstate@gmail.com>

Subject: case 91503-2 - Note To Court - I have not received Clerk's paper to supplement the brief

shaw rahman <mailtoshawrahmanstate@gmail.com> Fri, Sep 25, 2015 at 3:52 PM

To: "OFFICE RECEPTIONIST, CLERK" <SUPREME@courts.wa.gov>, "Shapero, Laurence" <lshapero@riddellwilliams.com>, "Bomotti, Gena M." <gbomotti@riddellwilliams.com>, "Matautia, Jazmine" <jmatautia@riddellwilliams.com>, shaw rahman <mailtoshawrahmanstate@gmail.com>

This Reasoning"/Resoning [SIC]" word was in "exclusion criteria of the brief's word count" , that does not apply/affect the accepted brief [of fact/causes], per exclusion of word count, in a brief .
Petition was made to follow a procedure ,whether the exclusion criteria supplement, is the same procedure ,, as it does not encompass within word count of brief.

respectfull
y, shaw
Rahman

---------- Forwarded message ----------
From: **OFFICE RECEPTIONIST, CLERK** <SUPREME@courts.wa.gov>
Date: Tue, Sep 22, 2015 at 4:54 PM
Subject: RE: STIPULATED MOTION to file supplemental to page of brief, for page 48
To: shaw rahman <mailtoshawrahmanstate@gmail.com>, "Shapero, Laurence" <lshapero@riddellwilliams.com>, "Matautia, Jazmine" <jmatautia@riddellwilliams.com>

Mr. Rahman: Please wait until the clerk's papers are released before making any motion to correct references to them.

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: shaw rahman [mailto:mailtoshawrahmanstate@gmail.com]
Sent: Tuesday, September 22, 2015 4:48 PM
To: shaw rahman <mailtoshawrahmanstate@gmail.com>; Shapero, Laurence <lshapero@riddellwilliams.com>; Matautia, Jazmine <jmatautia@riddellwilliams.com>; OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: STIPULATED MOTION to file supplemental to page of brief, for page 48

As the clerk 's paper was supposed to be released today(for 78 pages) and it is past court hours , plaintiff petitions to file " a stipulated motion to supplement page 48 of the brief " with new

ranges of clerk's paper previously ended at CP6628 . as the paper hasn't been released, and the end CP number, may change to a CP 6630 or 6629, at this point unknown.

respectfully,

Pro Se Plaintiff

shaw rahman <mailtoshawrahmanstate@gmail.com> Sat, Sep 19, 2015 at 2:18 PM

To: "OFFICE RECEPTIONIST, CLERK" <supreme@courts.wa.gov>, "Matautia, Jazmine" <jmatautia@riddellwilliams.com>, "Bomotti, Gena M." <gbomotti@riddellwilliams.com>, "Shapero, Laurence" <lshapero@riddellwilliams.com>, CP@ohchr.org, canada.un@international.gc.ca, shaw rahman <mailtoshawrahmanstate@gmail.com>

I asserted the tort claim against ESD (a department of WA State) as a party/ [defendant, WA ESD is one of the collaborative party agency , when they obtained information from Boeing and denied benefit] , When the ESD denial was acted by ESD, This constituted torturous act by defendants , (under the definition of torture that I had provide earlier ,holding 18 U.S. Code § 2340A - Torture, and per WA state law), as well under definition "purpose"/intent to torture, [under legal definition(international law), see attachment for more clarification], resulting from discrimination , in ESD denial by defendants , WA ESD / "State" department ,is liable as a result of wrongful denial of benefit (discrimination). (Gordon v US/RCW provided earlier) .

ESD, the WA state Department, is actionable, under article III standing of Plaintiff to initiate an action of federal claim(18 USC section 2340A) as injured party, (to claim federal claims under definition of torture in USC, see previous email) along with violation of WA state law .

Serving one party for the tort claims , is sufficient under RCW for tort claim, and it is not a separate claim, because , tort claim , per definition in human rights , - it encompasses civil rights, along, - (attachment, public domain) (administered by Human right commission or UN, not under within WA states own civil rights' jurisdiction)

Because tort claim is "originating from the same actionable nucleus (cause, RCW 49.60, similar 49.60.270)" or denial of benefit without summary judgement tried ,by a jury. It is appropriate, and it had been asserted , in Div - I reviewed claims , all along.

respectfully

s/Shaw Rahman

Shaw Rahman V. Boeing , WA Supreme Court : Case 91503-2

Session Laws of the State of Washington 1957 (Olympia, Washington (State): Statute Law Committee, 1957). -See more at: http://www.blackpast.org/primarywest/washington-state-omnibus-civil-rights-act-1957#sthash.phOxTzbm.dpuf

DEFINITION:

https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture#What

The prohibition against torture under international law applies to many measures—e.g. beating on the soles of the feet; electric shock applied to genitals and nipples; rape; near drowning through submersion in water; near suffocation by plastic bags tied around the head; burning; whipping; needles inserted under fingernails; mutilation; hanging by feet or hands for prolonged periods.

International law also prohibits mistreatment that does not meet the definition of torture, either because less severe physical or mental pain is inflicted, or because the necessary purpose of the ill-treatment is not present. It affirms the right of every person not to be subjected to cruel, inhuman or degrading treatment. Examples of such prohibited mistreatment include being forced to stand spread eagled against the wall; being subjected to bright lights or blindfolding; being subjected to continuous loud noise; being deprived of sleep, food or drink; being subjected to forced constant standing or crouching; or violent shaking. In essence, any form of physical treatment used to intimidate, coerce or "break" a person during an interrogation constitutes prohibited ill-treatment. If these practices are intense enough, prolonged in duration, or combined with other measures that result in severe pain or suffering, they can qualify as torture.

The prohibition against torture as well as cruel, inhuman or degrading treatment is not limited to acts causing physical pain or injury. It includes acts that cause mental suffering—e.g. through threats against family or loved ones. As the U.S. Supreme Court has recognized, "coercion can be mental as well as physical... the blood of the accused is not the only hallmark of an unconstitutional inquisition" *Miranda v. Arizona*, 384 U.S. 436, 448, (1966) citing *Blackburn v. State of Alabama*, 361 U.S. 199 (1960). As discussed below, the use of mind-altering drugs to compel a person to provide information would at least amount to inhuman or degrading treatment under the Convention against Torture.

18 U.S. Code § 2340 - Definitions

(1)

"torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control; [ESD denial /unlawful sanction by Defendants/ESD/ unlawfully and fraudulently]

(2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—

(A)

the intentional infliction or threatened infliction of severe physical pain or suffering;

(B)

the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C)

the threat of imminent death; or

(D)

the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and

(3)

"United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

(Added Pub. L. 103–236, title V, § 506(a), Apr. 30, 1994, 108 Stat. 463; amended Pub. L. 103–415, § 1(k), Oct. 25, 1994, 108 Stat. 4301; Pub. L. 103–429, § 2(2), Oct. 31, 1994, 108 Stat. 4377; Pub. L. 108–375, div. A, title X, § 1089, Oct. 28, 2004, 118 Stat. 2067.)

18 U.S. Code § 2340A - Torture

https://www.law.cornell.edu/uscode/text/18/part-I/chapter-113C

(a)Offense.—

Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b)Jurisdiction.—There is jurisdiction over the activity prohibited in subsection (a) if—

(1)

the alleged offender is a national of the United States; or

(2)

the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c)Conspiracy.—

A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

(Added Pub. L. 103–236, title V, § 506(a), Apr. 30, 1994, 108 Stat. 463; amended Pub. L. 103–322, title VI, § 60020, Sept. 13, 1994, 108 Stat. 1979; Pub. L. 107–56, title VIII, § 811(g), Oct. 26, 2001, 115 Stat. 381.)

Washington (State) Omnibus Civil Rights Act of 1957

CHAPTER 37. H. B. 25. 7 CIVIL RIGHTS LAW AGAINST DISCRIMINATION.

AN ACT relating to civil rights, amending section 1, chapter 183, Laws of 1949 and ROW 49.60.010; amending section 12, chapter 183, Laws of 1949 and RCW 49.60.020; amending section 2, chapter 183, Laws of 1949 and ROW 49.60.030; amending section 3, chapter 183, Laws of 1949 and RCW 49.60.040; amending section 2, chapter 270, Laws of 1955 and ROW 49.60.050; amending section 6, chapter 270, Laws of 1955 and RCW 49.60.090; amending section 8, chapter 270, Laws of 1955 and RCW 49.60.120; amending section 7, chapter 183, Laws of 1949 and RCW 49.60.180 through 49.60.220; amending section 15, chapter 270, Laws of 1955 and RCW 49.60.230; amending section 16, chapter 270, Laws of 1955 and RCW

49.60.240; amending section 17, chapter 270, Laws of 1955 and RCW 49.60.250; section 9, chapter 183, Laws of 1949 and RCW 49.60.260 through 49.60.300; amending section 10, chapter 183, Laws of 1949 and ROW 49.60.310; and adding three new sections to chapter 183, Laws. of 1849 and chapter 49.60 RCW.

Be it enacted by the Legislature of the State o f Washington:

SECTION 1. Section 1, chapter 183, Laws of 1949 RCW 49.60.010 and RCW 49.60.010 are each amended to read as follows:

This chapter shall be known as the "Law Against Short Discrimination." It is an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, or national origin are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in places of public resort, accommodation or amusement, and in publicly assisted housing because of race, creed, color, or national origin; and the board established hereunder is hereby given general jurisdiction and power for such purposes.

SEC. 2. Section 12, chapter 183, Laws of 1949 and RCW 49.60.020 are each amended to read as fellows:

The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing, contained in this chapter shall be deemed to repeal any of the provisions of any other law of this state relating to discrimination because of race, color, creed, or national origin. Nor shall anything herein contained be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his civil rights. However, the election of a person to pursue such a remedy shall preclude him from pursuing those administrative remedies created by this act.

SEC. 3. Section 2, chapter 183, Laws of 1949 and RCW 49.60.030 are each amended to read as follows:

The right to be free from discrimination because of race, creed, color, or national origin is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(1) The right to obtain and hold employment without discrimination;

(2) The right to the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage or amusement;

(3) The right to secure publicly assisted housing without discrimination.

SEC. 4. Section 3, chapter 183, Laws of 1949 and RCW 49.60.040 are each amended to read as follows:

As used in this chapter:
"Person" includes one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers or any group of persons; it includes any owner, lessee, proprietor, manager, agent or employee, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof;

"Employer" includes any person acting in the interest of an employer, directly, or indirectly, who has eight or more persons in his employ, and does not include any religious or sectarian organization, not organized for private profit;

"Employee" does not include any individual employed by his parents, spouse or child, or, in the domestic service, of any person;

"Labor organization" includes any organization which exists for the purpose, in whole or in part, of dealing with employers concerning grievances or terms or conditions of employment, or for other mutual aid or protection in connection with employment; ,

"Employment agency" includes any person undertaking with or without compensation to recruit, procure, refer, or place employees for an employer;

"National origin" includes "ancestry";

"Full enjoyment of" includes the right to purchase any service, commodity or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage or amusement, without acts directly or indirectly causing persons of any particular, race, creed or color, to be treated as not welcome, accepted, desired or solicited;

"Any place of public resort, accommodation, assemblage or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire or reward, or where charges are made for admission, service, occupancy or use of any property or facilities, whether conducted for the entertainment, housing or lodging of transient guests, or for the benefit, use or accommodation of those seeking health, recreation or rest, or for the sale of goods, merchandise, services or personal , property, or for the rendering of personal services, or for the public conveyance or transportation on land, water or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports or recreation of any kind is offered with or without charge, or where medical service or care is made available, or

where the public gathers, congregates, or assembles for amusement, recreation or public purposes, or public halls, public elevators and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps: Provided, That nothing herein contained shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private; including fraternal organizations, though where public use is permitted that use shall be covered by this act; nor shall anything herein contained apply to any educational facility, operated or maintained by a bona fide religious or sectarian institution;

"Publicly assisted housing" includes any building, structure or portion thereof which is used or occupied or is intended to be used or occupied as the home, residence or sleeping place of one or more persons, and the acquisition, construction, rehabilitation, repair or maintenance of which is financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions, or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and such guarantee or insurance, or if a commitment, issued by a government agency, is outstanding that the acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions, or any agency thereof;

"Owner" includes the owner, lessee, sublessee, assignee, agent, creditor, lender or other person having the right to ownership or possession of housing, or to have housing pledged as security for a debt.

SEC. 5. Section 2, chapter 270, Laws of 1955 and RCW 49.60.050 are each amended to read as follows:

There is created the "Washington state board against discrimination," which shall be composed of five members to be appointed by the governor, one of whom shall be designated as chairman by the governor.

SEC. 6. Section 6, chapter 270, Laws of 1955 and RCW 49.60.090 are each amended to read as follows:

The principal office of the board shall be in the city of Olympia, but it may meet and exercise any or all of its powers at any other place in the state and may establish such district offices as it deems necessary.

SEC. 7. Section 8, chapter 270, Laws of 1955 and RCW 49.60.120 are each amended to read as follows:

The board shall have the functions, powers arid duties:

(1) To appoint an executive secretary, and chief examiner, and such investigators, examiners, clerks, and other employees and agents as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

(2) To obtain upon request and utilize the services of all governmental departments and agencies.

(3) To adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the provisions of this chapter, and the policies and practices of the board in connection therewith.

(4) To receive, investigate and pass upon complaints alleging unfair practices as defined in this act because of race, creed, color, or national origin.

(5) To issue such publications and such results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination because of race, creed, color, or national origin.

(6) To make such technical studies as are appropriate to effectuate the purposes and policies of this chapter and to publish and distribute the reports of such studies.

SEC. 8. Section 7, chapter 183, Laws of 1949 (heretofore divided and codified as RCW 49.60.180through 49.60.220) is amended to read as set forth in sections 9 through 13 of this amendatory act.

SEC. 9. (RCW 49.60.180) It is an unfair practice for any employer:

(1) To refuse to hire any person because of such person's race, creed, color, or national origin, unless based upon a bona fide occupational qualification.

(2) To discharge or bar any person from employment because of such person's race, creed, color, or national origin.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of such person's race, creed, color, or national origin.

(4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, or national origin, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification: Provided, Nothing contained herein shall prohibit advertising in a foreign language.

SEC. 10. (RCW 49.60.190) It is an unfair practice for any labor union or labor organization:

(1) To deny membership arid full membership rights and privileges to any person because of such person's race, creed, color, or national origin.

(2) To expel from membership any person because of such person's race, creed, color, or national origin.

(3) To discriminate against any member, employer, or employee because of such person's creed, color, or national origin.

SEC. 11. (RCW 49.60.200) It is an unfair practice for any employment agency to fail or refuse to classify properly or refer for employment, or otherwise to discriminate against, any individual because of his race, creed, color, or national origin, or to print or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection, with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, or national origin, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification: Provided, Nothing contained herein shall prohibit advertising in a foreign language.

SEC. 12. (RCW 49.60.210) It is an unfair practice for any employer, employment agency, or labor union to discharge, expel, or otherwise discriminate against any person because he has opposed any practices forbidden by this chapter, or because he has filed a charge, testified, or assisted in any proceeding under this chapter.

SEC. 13. (RCW 49.60.220) It is an unfair practice for any person to aid, abet, encourage, or incite the commission of any unfair practice, or to attempt to obstruct or prevent any other, person from complying with the provisions of this chapter or any order issued thereunder.

SEC. 14. There is added to chapter 183, Laws of 1949 and chapter 49.60 RCW, a new section to read as follows:

It shall be an unfair practice for any person or his agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination or the requiring of any person to pay a larger sum than the uniform rates charged other persons, or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, or national origin.

SEC. 15. There is added to chapter 183, Laws of 1949 and chapter 49.60 RCW, a new section to read as follows:

It shall be an unfair practice:

(1) For the owner of publicly assisted housing to refuse to sell, rent, or lease to any person or persons such housing because of the race, creed, color, or national origin of such person or persons;

(2) For the owner of any publicly assisted housing to segregate, separate or discriminate against any , person or persons because of the race, creed, color, or national origin of such person or persons, in the terms, conditions, or privileges of any such housing or in the furnishing of facilities or services in connection therewith;

(3) For any person to make or cause to be made any written or oral inquiry concerning the race, creed, color, or national origin of a person or group of persons seeking to purchase, rent, or lease publicly assisted housing accommodations;

(4) For any person to print or publish or cause to be printed or published any notice or advertisement relating to the sale, rental, or leasing of any publicly assisted housing accommodation which indicates any preference, limitation, specification, or discrimination based on race, creed, color, or national origin;

(5) For any person, bank, mortgage company or other financial institution to whom application is made for financial assistance for the acquisition, construction, rehabilitation, repair or maintenance of any publicly assisted housing to make or cause to be made any written or oral inquiry for the purpose of discrimination concerning the race, creed, color, or national original of a person or group of persons seeking such financial assistance, or concerning the race, creed, color, or national origin of prospective occupants or tenants of such housing, or to discriminate against, any person or persons because of the race, creed, color, or national origin of such person or persons, or prospective occupants or tenants, in the terms, conditions or privileges relating to the obtaining or use of any such financial assistance.

Nothing herein shall be deemed to prevent a bona fide religious, sectarian institution, or fraternal organization from selecting as tenants or occupants of any housing operated by such organization, as part of its religious, sectarian or fraternal activities, adherents or members of such religion, sect, or fraternal organization exclusively, or from giving preference in such selection to such adherents or members.

SEC. 16. Section 15, chapter 270, Laws of 1955 and RCW 49.60.230 are each amended to read as follows:

Who may file a complaint:

(1) Any person claiming to be aggrieved by an alleged unfair practice may, by himself or his attorney make, sign, and file with the board a complaint in writing under oath. The complaint shall state the name and address of the person alleged to have committed the unfair practice and, the particulars thereof, and contain such other information as may be required by the board.

(2) Whenever it has reason to believe that any person has been engaged or is engaging in. an unfair practice, the board may issue a complaint.

(3) Any employer or principal whose employees, or agents, or any of them, refuse or threaten to refuse to comply with the provisions of this chapter may file with the board a written complaint under oath asking for assistance by conciliation or other remedial action. Any complaint filed

pursuant to this section must be so filed within six months after the alleged act of discrimination.

SEC. 17. Section 16, chapter 270, Laws of 1955 and RCW 49.60.240 are each amended to read as follows:

After the filing of any complaint, the chairman of the board shall refer it to the appropriate section of the board's staff for prompt investigation and ascertainment of the facts. The results of the investigation shall be reduced to written findings of fact, and finding shall be made that there is or that there, is, not reasonable cause for believing that an unfair practice has been or is being committed. A copy of said findings shall be furnished to the, complainant and to the person named in such complaint, hereinafter referred to as the respondent.

If the finding is made that there is reasonable cause for believing that an unfair practice has been or is being committed, the board's staff shall immediately endeavor to eliminate the unfair practice by conference, conciliation and persuasion.

If an agreement is reached for the elimination of such unfair practice as a result of such conference, conciliation and persuasion, the agreement shall be reduced to writing and signed by the respondent, and an order shall be entered by the board setting forth the terms of said agreement. No order shall be entered by the board at this stage of the proceedings except upon such written agreement.

If no such agreement can be reached, a finding to that effect shall be made and reduced to writing, with a copy thereof furnished to the complainant and the respondent.

SEC. 18. Section 17, chapter 270, Law's of 1955 and RCW 49.60.250 are each amended to read as follows:

In case of failure to reach an agreement for the elimination of such unfair practice; and upon the entry of findings to that effect, the entire file, including the complaint and any and all findings made, shall be certified to the chairman of the board. The chairman of the board shall thereupon appoint a hearing tribunal of three persons, who shall be members of the board or a panel of hearing examiners, acting in the name of the board, to hear the complaint and shall cause to be issued and served in the name of the board a written notice, together with a copy of the complaint, as the same may have been amended, requiring the respondent to answer the charges of the complaint at a hearing before such tribunal, at a time and place to be specified in such notice.

The place of any such hearing may be the office of the board or another place designated by it. The case in support of the complaint shall be presented at the hearing by counsel for the board: Provided, That the complainant may retain independent counsel and submit testimony and be fully heard. No member or employee of the board who previously made the investigation or caused the notice to be issued shall participate in the hearing except as a witness, nor shall he participate in the deliberations of the tribunal in such case. Any endeavors or negotiations for conciliation shall not be received in evidence.

The respondent may file a written answer to the complaint and appear at the hearing in person or otherwise, with or without counsel, and submit testimony and be fully heard.

The tribunal conducting any hearing may permit reasonable amendment to any complaint or answer. Testimony taken at the hearing shall be under oath and recorded.

If, upon all the evidence, the tribunal finds that the respondent has engaged in any unfair practice it shall state its findings of fact and shall issue and file with the board and cause to be served on such respondent an order requiring such respondent to cease and desist from such unfair practice and to take such affirmative action, including, (but not limited to) hiring, reinstatement or upgrading of employees, with or without back, pay, an admission or restoration to full membership rights in any respondent organization, or to take such other action as, in the judgment of the tribunal, will effectuate the purposes of this chapter, and including a requirement for report of the matter on compliance.

If, upon all the evidence, the tribunal finds that the respondent has not engaged in any alleged unfair practice, it shall state its findings of fact and shall similarly issue and file an order dismissing the complaint.

The board shall establish rules of practice to govern, expedite and effectuate the foregoing procedure.

SEC. 19. There is added to chapter 183, Laws of 1949 and chapter 49.60 RCW, a new section to read as follows:

If the complainant is dissatisfied with the agreement reached as provided in section 17 hereof, or if the finding is made as provided for in this chapter, that there is no reasonable cause for believing that an unfair practice has been or is being committed, the complainant may within thirty days of approval by the board of such agreement or from receipt of a copy of said finding file a petition for reconsideration by the board and, he shall have the right to appear before the board at its next regular meeting in person or by counsel and present such facts, evidence and affidavits of witnesses as may support the complaint.

The board shall establish rules of practice to govern, expedite, and effectuate the foregoing procedure.

SEC. 20. Section 9, chapter 183, Laws of 1949 (heretofore divided and codified as RCW 49.60.260 through 49.60.300) is divided and amended as set forth in sections 21 through 25.

SEC. 21. (RCW 49.60.260) (1) The board shall petition the court within the county wherein any unfair practice occurred or wherein any person charged with an unfair practice resides or transacts business, for the enforcement, of any order which is not complied with and is issued by a tribunal under the provisions of this chapter and for appropriate temporary relief or a restraining order, and shall certify and file in court a transcript of the entice record of the proceedings, including the pleadings and testimony upon which such order was made and the finding and orders of the hearing tribunal. Within five days after filing such petition in court the

board shall cause a notice of the petition to be sent by registered mail to all parties or their representatives.

The court shall have jurisdiction of the proceedings and of the questions determined thereon, and shall have the power to issue such orders and grant such relief by injunction or otherwise, including temporary relief, as it deems just and suitable and to make and enter, upon the pleadings, testimony and proceedings set forth in such transcript, a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part any order of the board or hearing tribunal

(2) The findings of the hearing tribunal as to the facts, if supported by substantial and competent evidence shall be conclusive. The court, upon its own motion or upon motion of either of the parties to the proceeding, may permit each party to introduce such additional evidence as the court may believe necessary to a proper decision of the cause.

(3) The jurisdiction of the court shall be exclusive and its judgment, and decree shall be final, except that the same shall be subject to a review by the, supreme court, on appeal, by either party, irrespective of the nature of the decree or judgment. Such appeal shall be taken and prosecuted in the same manner and form and with the same effect as is provided in other cases of appeal to the supreme court, and the record so certified shall contain all that was before the lower court.

SEC. 22. (RCW 49.60.270) Any respondent or complainant aggrieved by a final order of a hearing tribunal may obtain a review of such order in the superior court for the county where the unfair practice is alleged to have occurred or in the county, wherein such person resides or transacts business by filing with the clerk of the court, within two weeks from the date of receipt of such order, a written petition in duplicate praying that such order be modified or set aside. The clerk shall thereupon mail the duplicate copy to the board. The board shall then cause to be filed in the court a certified transcript of the entire record in the proceedings, including the pleadings, testimony and order. Upon such filing the court shall proceed in the same manner as in the case of a petition by the board and shall have the same exclusive jurisdiction to grant to any party such temporary relief or restraining order as it deems just and suitable, and in like manner to make and enter a decree enforcing or modifying and enforcing as so modified or setting aside, in whole or in part, the order sought to be reviewed.

Unless otherwise directed by the court, commencement of review proceedings under this section shall operate as a stay of any order.

SEC. 23. (RCW 49.60.280) Petitions filed under RCW 49.60.260 and 49.60.270 shall be heard expeditiously and determined upon the transcript filed, without requirement of printing. Hearings in the court under this chapter shall take precedence over all other matters, except matters of the same character.

SEC. 24. (RCW 49.60.290) No court of this state shall have jurisdiction to issue any restraining order or temporary or permanent injunction preventing the board from performing any function vested in it by this chapter.

SEC. 25. (RCW 49.60.300) RCW 49.60.260 to 49.60.290, inclusive, shall not be applicable to orders issued against any political or civil subdivision of the state, or any agency, office, or employee thereof.

SEC. 26. Section 10, chapter 183, Laws of 1949 and RCW 49.60.310 are each amended to read as follows:

Any person that willfully resists, prevents, impedes, or interferes with the board or any of its members or representatives in the performance of duty under this chapter, or that willfully violates an order of the board, is guilty of a misdemeanor; but procedure for the review of the order shall not be deemed to be such willful conduct.

SEC. 27. If any provision of this act or the application of such provision to any person or circumstance shall be held invalid, the remainder of such act or the application of such provision to persons or circumstances other than those to which it is held invalid shall not be affected thereby.

Passed the House February 25, 1957
Passed the Senate February 23, 1957
Approved by the Governor March 2, 1957

Sources:

Session Laws of the State of Washington 1957 (Olympia, Washington (State): Statute Law Committee, 1957). - See more at: http://www.blackpast.org/primarywest/washington-state-omnibus-civil-rights-act-1957#sthash.phQxTzbm.dpuf

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Human Rights *are the basic rights and freedoms to which all human beings are entitled, like civil and political rights, the right to life and liberty, freedom of thought and speech/expression, equality before the law, social, cultural and economic rights, the right to food, the right to work, and the right to education. In short, human rights are freedoms established by custom or international agreement that protect the interests of humans and the conduct of governments in every nation.*

Human rights are distinct from civil liberties, which are freedoms established by the law of a particular state and applied by that state in its own jurisdiction.

Human rights laws have been defined by international conventions, by treaties, and by organizations, particularly the United Nations. These laws prohibit practices such as torture, slavery, summary execution without trial, and arbitrary detention or exile. Many human rights are secured by agreements between the governments and those they govern, such as the U.S. Constitution. Others are protected by international laws and pressure.

For more information on Human Rights laws, please refer to the materials below. Additionally, should you need the assistance of a human rights attorney, you may find lists of legal professionals on our Law Firms page.

shaw rahman <mailtoshawrahmanstate@gmail.com> Mon, Sep 28, 2015 at 1:18 PM

To: "Shapero, Laurence" <lshapero@riddellwilliams.com>, "Bomotti, Gena M." <gbomotti@riddellwilliams.com>, "Matautia, Jazmine" <jmatautia@riddellwilliams.com>, shaw rahman <mailtoshawrahmanstate@gmail.com>, "OFFICE RECEPTIONIST, CLERK" <supreme@courts.wa.gov>

Affidavit

Case 91503- 2

Shaw Rahman v. Boeing

Plaintiff states that, "if he had ever stated "waived title VII claim" in federal pleadings , he meant applied praecipe "to correct case filing erasing USC in superior court filing ", after it was removed to federal court, even though he filed EEOC complaint after 300 days, which cannot be the only determining criteria of remand. [to clear out terminology discrepancy/doubt]

Note: Plaintiff believes this has been well conveyed in Div-1 appeal briefs, if there is any doubt to this matter

Respectfully

Pro Se Plaintiff,

s/shaw Rahman

OFFICE RECEPTIONIST, CLERK <SUPREME@courts.wa.gov> Mon, Sep 28, 2015 at 1:46 PM

To: shaw rahman <mailtoshawrahmanstate@gmail.com>, "Shapero, Laurence" <lshapero@riddellwilliams.com>, "Bomotti, Gena M." <gbomotti@riddellwilliams.com>, "Matautia, Jazmine" <jmatautia@riddellwilliams.com>

Rec'd 9/28/2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: shaw rahman [mailto:mailtoshawrahmanstate@gmail.com]
Sent: Monday, September 28, 2015 1:19 PM
To: Shapero, Laurence <lshapero@riddellwilliams.com>; Bomotti, Gena M. <gbomotti@riddellwilliams.com>; Matautia, Jazmine <jmatautia@riddellwilliams.com>; shaw rahman <mailtoshawrahmanstate@gmail.com>; OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Affidavit Case 91503- 2 Shaw Rahman v. Boeing

[Quoted text hidden]

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shaw rahman <mailtoshawrahmanstate@gmail.com> Mon, Sep 28, 2015 at 2:19 PM

To: "Shapero, Laurence" <lshapero@riddellwilliams.com>, "Bomotti, Gena M." <gbomotti@riddellwilliams.com>, "Matautia, Jazmine" <jmatautia@riddellwilliams.com>, shaw rahman <mailtoshawrahmanstate@gmail.com>, "OFFICE RECEPTIONIST, CLERK" <supreme@courts.wa.gov>

Affidavit

case 91503-2

shaw rahman v Boeing

Plaintiff stated claims on "public good" [improper IPST testing/release retaliations] and hostility , on his remand pleadings in federal court, as claims valid under title VII of 1964 when he pleaded in federal court .Even though he applied praecipe

respectfully,
s/Shaw Rahman

On Mon, Sep 28, 2015 at 1:18 PM, shaw rahman <mailtoshawrahmanstate@gmail.com> wrote:

Affidavit

Case 91503- 2

Shaw Rahman v. Boeing

Plaintiff states that, "if he had ever stated "waived title VII claim" in federal pleadings , he meant applied praecipe "to correct case filing erasing USC in superior court filing ", after it was removed to federal court, even though he filed EEOC complaint after 300 days, which cannot be the only determining criteria of remand. [to clear out terminology discrepancy/doubt]

Note: Plaintiff believes this has been well conveyed in Div-1 appeal briefs, if there is any doubt to this matter

Respectfully

Pro Se Plaintiff,

s/shaw Rahman

OFFICE RECEPTIONIST, CLERK <SUPREME@courts.wa.gov> Mon, Sep 28, 2015 at 2:38 PM

To: shaw rahman <mailtoshawrahmanstate@gmail.com>, "Shapero, Laurence"

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: shaw rahman [mailto:mailtoshawrahmanstate@gmail.com]
Sent: Monday, September 28, 2015 2:19 PM
To: Shapero, Laurence <lshapero@riddellwilliams.com>; Bomotti, Gena M. <gbomotti@riddellwilliams.com>; Matautia, Jazmine <jmatautia@riddellwilliams.com>; shaw rahman <mailtoshawrahmanstate@gmail.com>; OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Affidavit Case 91503- 2 Shaw Rahman v. Boeing

[Quoted text hidden]

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shaw rahman <mailtoshawrahmanstate@gmail.com> Mon, Sep 28, 2015 at 5:12 PM

To: "Shapero, Laurence" <lshapero@riddellwilliams.com>, "Bomotti, Gena M." <gbomotti@riddellwilliams.com>, "Matautia, Jazmine" <jmatautia@riddellwilliams.com>, shaw rahman <mailtoshawrahmanstate@gmail.com>, "OFFICE RECEPTIONIST, CLERK" <supreme@courts.wa.gov>

Affidavit

case 91503-2

shaw rahman v Boeing

"public good " here is "public interest." as previously referenced, in title VII of 1964

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WA State Supreme Court

Shaw Rahman v. Boeing

Case 91503-2

Appendices 2 of
REPLY BRIEF

Pal. Rahman Rahman

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SUZANNE B. GOLDBERG

Discrimination by Comparison

ABSTRACT. Contemporary discrimination law is in crisis, both methodologically and conceptually. The crisis arises in large part from the judiciary's dependence on comparators—those who are like a discrimination claimant but for the protected characteristic—as a favored heuristic for observing discrimination. The profound mismatch of the comparator methodology with current understandings of identity discrimination and the realities of the modern workplace has nearly depleted discrimination jurisprudence and theory. Even in run-of-the-mill cases, comparators often cannot be found, particularly in today's mobile, knowledge-based economy. This difficulty is amplified for complex claims, which rest on thicker understandings of discrimination developed in second-generation intersectionality, identity performance, and structural discrimination theories. By treating comparators as an essential element of discrimination, instead of as a heuristic device to help discern whether discrimination has occurred, courts have largely foreclosed these other theories from consideration. At the same time, courts have further shrunk the very idea of discrimination by disregarding a central lesson from harassment and stereotyping jurisprudence: discrimination can occur without a comparator present. The comparator methodology retains its appeal, despite these deficiencies, because its empirical patina permits courts to evaluate discrimination claims without appearing to engage in a subjective analysis of workplace dynamics. Given the complex nature of both identity and discrimination, however, the comparisons produce a false certainty at best. By contrast, alternate methodologies, including the contextual consideration favored in harassment and stereotyping jurisprudence as well as the hypothetical comparator embraced in European law, offer a meaningful framework for matching discrimination law and norms to workplace facts, while preserving judicial legitimacy. With comparators dislodged from their methodological pedestal, we may yet recover space for the renewed development of discrimination jurisprudence and theory.

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INTRODUCTION

Contemporary discrimination law is in the midst of a crisis of methodological and conceptual dimensions. The underlying problem is that evaluating allegations of discrimination requires courts and others to see something that is not observable directly: whether an accused discriminator has acted because of a protected characteristic. While this challenge has long been with us, as putative discriminators rarely admit discriminatory intent,[1] the crisis arises because the most traditional and widely used heuristic—comparators, who are similar to the complainant in all respects but for the protected characteristic—is barely functional in today's economy and is largely unresponsive to updated understandings of discrimination.

Some decades ago, when identity-based differentiation was relatively open and notorious and when many workplaces were of a Tayloresque scale with easily comparable jobs,[2] individuals claiming discrimination could often point to counterparts who were treated better. Courts could then deduce, with some confidence, that the protected trait was the reason for the adverse treatment at issue.[3] But in a mobile, knowledge-based economy, actual comparators are

1. *See, e.g.*, Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177, 1207 (2003) (recognizing that as soon as Title VII became law, "no sensible employer would admit that it based a decision on one of the prohibited classifications").

2. *See* FREDERICK WINSLOW TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (1911). For further discussion, see *infra* notes 73-76 and accompanying text.

3. In this sense, the comparator is used to show causation—that the challenged acts occurred because of the protected trait and would not have occurred absent impermissible reliance on that trait. The causation determination is necessary because one of the central inquiries in a discrimination case is whether the challenged acts were "because of" a protected characteristic. Title VII of the Civil Rights Act of 1964 provides, for example, that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin*." 42 U.S.C. § 2000e-2(a)(1) (2006) (emphasis added); *see also* 29 U.S.C. § 623a-1 (2006) (forbidding, through the Age Discrimination in Employment Act, adverse employment actions "*because of such individual's age*" (emphasis added)).

   To decide a disparate treatment claim under these and similar laws, a court must determine "whether the employer is treating 'some people less favorably than others because of'" any of these characteristics. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)). While comparators are not statutorily required to make this determination, courts have come to treat them, in many cases, as essential to showing the requisite discriminatory intent. *See* Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60

hard to come by, even for run-of-the-mill discrimination claims.[4] For the complex forms of discrimination made legible by second-generation theories, the difficulties in locating a comparator amplify exponentially.[5]

This methodological problem has spilled over, conceptually, to constrict the very idea of discrimination. Consider Justice Thomas's statement that a finding of discrimination *cannot* be made without "a comparison of otherwise similarly situated persons who are in different groups by reason of certain characteristics provided by statute."[6] Justice Kennedy has observed similarly that "one who alleges discrimination must show that she 'received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic.'"[7] On this view, however abusively an employer treats its employees, the bad acts do not present a discrimination problem so long as

ALA. L. REV. 191, 204-06 (2009) (observing that a similarly situated comparator is not required by statute but that "the absence of a comparator is often fatal to a claim"). Further, although the ultimate question whether a defendant employer acted because of a protected characteristic is reserved for trial, courts regularly evaluate the link between the facts presented and the protected characteristic in the course of deciding dispositive pretrial motions. Disparate impact cases do not require a similar showing of discriminatory intent. *See infra* Section III.C. In constitutional discrimination claims, by contrast, a showing of discriminatory intent is always required. *See* Washington v. Davis, 426 U.S. 229 (1976) (finding no legally cognizable claim of discrimination where a policy had a racially disproportionate impact but there was no evidence of discriminatory intent).

The application of these doctrines and the related determinants of discrimination law's scope is also shaped, more generally, by views of discrimination law's social, political, and economic function. As Robert Post has observed, discrimination law is not actually concerned with eradicating all trait-based acts but rather only a subset of acts that has been socially disapproved. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1 (2000).

4. The case of Wendy Norville is illustrative. Norville was a black nurse who alleged that the hospital where she worked had discriminated against her by "refus[ing] to accommodate her disability despite having made job accommodations for two disabled white nurses." Norville v. Staten Island Univ. Hosp., 196 F.3d 89, 95 (2d Cir. 1999) (Sotomayor, J.). Although Norville produced evidence about the better treatment of her white coworkers, she lost her claim because she did not persuade the court that other nurses were "subject to the same standards governing performance evaluation and discipline, and . . . engaged in conduct similar to [hers]." *Id.* at 96 (quoting Mazzella v. RCA Global Commc'ns Inc., 642 F. Supp. 1531, 1547 (S.D.N.Y. 1986), *aff'd*, 814 F.2d 653 (2d Cir. 1987)); *see also* Opsatnik v. Norfolk S. Corp., 335 F. App'x 220, 222 (3d Cir. 2009) (noting the district court's rejection of twenty-four proposed comparators).

5. *See infra* Section II.B.

6. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 617 (1999) (Thomas, J., dissenting).

7. *Id.* at 611 (Kennedy, J., concurring) (quoting *id.* at 616 (Thomas, J., dissenting)).

they are committed in an evenhanded fashion.[8] Their position, in essence, is that discrimination laws and norms do not impose obligations with meaningful abstract value.

Yet this position foreshortens traditional understandings of discrimination even within the Supreme Court's own jurisprudence. As the case law that addresses harassment and stereotyping makes clear, objectionable trait-based acts and statements occur in the absence of a comparator.[9] Indeed, in a well-known stereotyping case, the Court acknowledged the lower court's finding that no comparators existed, yet still found that the plaintiff, Ann Hopkins, was discriminatorily denied partnership at her accounting firm.[10] Likewise, in a much-discussed harassment case, the Court unanimously recognized that discrimination, in the form of sexual harassment, could occur in a work environment where only men were present.[11] At the same time, the Court has acknowledged that the presence of a better-treated comparator does not transform permissible acts into unlawful ones. "Treating seemingly similarly situated individuals differently in the employment context is par for the course," Chief Justice Roberts recently wrote.[12]

8. This view is echoed by courts that have concluded that "equal opportunity" harassers, those who harass both men and women, do not violate sex discrimination prohibitions. *See, e.g.*, Lack v. Wal-Mart Stores, Inc., 240 F.3d 255, 262 (4th Cir. 2001) (rejecting a sex discrimination claim because "[i]n its totality, the evidence compels the conclusion that [the supervisor] was just . . . indiscriminately vulgar and offensive, . . . obnoxious to men and women alike"); *cf.* Kathryn Abrams, *Complex Claimants and Reductive Moral Judgments: New Patterns in the Search for Equality*, 57 U. PITT. L. REV. 337, 345 n.47 (1996) (describing "the dominant 'equality theory' understandings that animate antidiscrimination law" as comparative).

9. *See infra* Part IV. In conversation, Charles Sullivan has suggested that harassing acts and stereotyping statements amount to an admission of discriminatory intent. As will be elaborated below, I disagree with that contention, in part because employers ordinarily defend these kinds of acts and statements as nondiscriminatory and the courts often disagree with an employee's contention that the specified speech or conduct reflects discriminatory intent.

10. Price Waterhouse v. Hopkins, 490 U.S. 228, 236 (1989).

11. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998). For discussion of other circumstances in which an antidiscrimination norm may be violated absent an actual comparator, including the possible role of a hypothetical comparator, see *infra* Section VI.B.

12. Engquist v. Or. Dep't of Agric., 553 U.S. 591, 604 (2008).

Still, the scope of discrimination law continues to shrink.[13] The judicial demand for comparators continues largely unabated outside the harassment and stereotyping contexts,[14] sharply narrowing both the possibility of success for individual litigants[15] and, more generally, the very meaning of discrimination.

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13. I develop this claim primarily through identity-discrimination cases brought under federal employment discrimination laws rather than through cases that rest on constitutional equal protection challenges, state law claims, or discrimination claims outside the employment context. Yet, as will be elaborated, the analysis here is not limited to statutory prohibitions against discrimination or to the employment context. Discrimination based on factors other than identity, however, such as forms of economic discrimination addressed in antitrust law, is beyond this Article's scope. Still, some of the discussion below may be useful for the conceptualization of discrimination in those areas as well.

14. *See infra* Part I.

15. On the dismal fate of most discrimination claimants, see Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 444, 449-52 (2004). *See also* Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 176-77 (2010) (concluding that employment discrimination plaintiffs "receive cursory attention in legal process and a limited remedy" and that discrimination law "seldom offers an authoritative resolution of whether discrimination occurred"). Employment discrimination plaintiffs who prevail at trial lose on appeal forty-two percent of the time; judgments for employer-defendants are reversed in fewer than eight percent of cases. Clermont & Schwab, *supra*, at 450; *see also* Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 958 (describing employment discrimination plaintiffs as "one of the least successful classes of plaintiffs at the trial court level" as well as on appeal).

Individuals who present claims involving more than one aspect of their identity—such as race and sex—fare even worse. Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439 (2009) (discussing disproportionately high loss rates for individuals who bring complex discrimination claims). A new empirical study reinforces that even when individuals do not bring claims based on "overlapping axes of disadvantage," their "demographic diversity" further reduces their likelihood of success in discrimination litigation. Rachel Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. (forthcoming 2011) (manuscript at 5) (on file with author).

Some scholars maintain that courts' hostility toward discrimination claims is ideologically based. *See, e.g.*, Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 22-26 (2006) (asserting that courts resist a structural approach to discrimination claims, in part, because many judges are ideologically opposed to second-guessing decisions by employers); Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555, 561-69 (2001) (arguing that "courts approach cases from a particular perspective that reflects a bias against the claims" and that this ideological bias colors how courts adjudicate discrimination claims). On this view, the choice of the comparator heuristic, which narrows the set of discrimination claims

In this Article, I argue that we are seeing the transformation of a heuristic device[16] for observing discrimination into a defining element of discrimination and that this collapse presents two serious problems. First, methodologically, comparators' deficiencies have come to outweigh their strengths as devices for discerning discrimination. Specifically, the demand for similarly situated, better-treated others underinclusively misses important forms of discrimination and forecloses many individuals from having even an opportunity to be heard because sufficiently close comparators so rarely exist.[17]

The second problem is conceptual. Since the early 1990s, much of the theoretical work on discrimination has attempted to make legible the many ways in which discrimination occurs beyond the forms of easily recognizable, deliberate exclusion that are based on relatively thin conceptions of protected traits.[18] Yet when comparators are treated as definitional, these theories cannot gain jurisprudential traction because the problems they identify cannot, in effect, be seen by courts.

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likely to succeed, as explained below, could be seen as both deliberate and in service of ideologically motivated, outcome-oriented aims. Whether or not this is actually the reason for courts' embrace of the comparator heuristic, the lack of transparency and accountability associated with the assumptions and judgments embedded in the heuristic's selection triggers the inquiries I pursue here.

16. For an extended discussion of heuristics, see SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES 52-72 (2007). Page explains that heuristics are, in essence, thinking rules that generate solutions to problems. *Id.* at 55. In discrimination cases, the critical factor—discriminatory intent—is hidden from view, and the comparator heuristic works by reducing the set of likely explanations for the adverse treatment that triggered the claim.

    The term "heuristics" came to prominence in cognitive psychology during the 1970s through the work of Daniel Kahneman and Amos Tversky, who "posited that because decisionmaking often involves an abundance of information, time pressures, and an array of possible alternatives, people intuitively and unconsciously use cognitive shortcuts or 'heuristics' to make decisions about probabilities." Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 CARDOZO L. REV. 391, 395-96 (2006); *see also* Cass R. Sunstein, Lecture, *Moral Heuristics and Moral Framing*, 88 MINN. L. REV. 1556, 1558 (2004) (analyzing the "pervasive role" that heuristics play in legal judgments). *See generally* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

17. *See infra* Parts II & III.

18. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001). As will become apparent, first- and second-generation claims are best understood as falling along a spectrum, rather than as sharply distinct. *See infra* Part II.

This Article considers three of the leading theories.[19] The first is intersectionality theory, which recognizes that although the law designates trait-based protections sequentially, employers and others often target individuals because of their identity as a whole, rather than because of individual traits in isolation from one another.[20] In these situations, an employee, such as a black woman or a disabled older man, claims to have experienced discrimination based on a combination of legally protected traits. He or she struggles under a comparator regime in part because it can be difficult to decide who is the proper comparator—is it someone who shares neither of the individual's traits or shares one but not the other? In addition, because intersectional plaintiffs are often few in number relative to all others in a workplace, decisionmakers tend to be skeptical of the comparison's probative value and are typically unwilling to conclude that comparatively worse treatment is attributable to discriminatory intent rather than to the plaintiff's idiosyncratic quirks.

The second theory is identity performance, which conceives of identity traits in a thick way, recognizing that individuals sometimes experience discrimination because of stereotypes about behaviors or personal styles associated with their identity group rather than because of their phenotype. When operationalized, the theory produces cases in which employees and others seek to show that they have suffered trait-based discrimination because they have, for example, a Spanish-inflected accent or a traditionally African

19. Later in the Article I also briefly address additional second-generation theories related to implicit bias and other cognitive psychological research regarding discrimination. *See infra* Section V.C.

20. Intersectionality theory emerged in legal scholarship in the early 1990s. *See, e.g.*, Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243-44 (1991) ("[T]he experiences of women of color are frequently the product of intersecting patterns of racism and sexism, and . . . tend not to be represented within the discourses of either feminism or antiracism.") (footnote omitted); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (characterizing and criticizing "gender essentialism—the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience"). More recent theory makes the point that the relationship among multiple identity traits is better characterized as multidimensional or cosynthetic, with traits interacting in both dominant and subordinating ways depending on the surrounding context. As Darren Hutchinson has written, "Multidimensionality theorists have attempted to move beyond intersectionality's antiessentialist roots by examining questions of 'intersecting' privilege and subordination—rather than simply focusing on the lives of individuals, such as women of color, who are excluded from 'single-issue' frameworks." Darren Lenard Hutchinson, *New Complexity Theories: From Theoretical Innovation to Doctrinal Reform*, 71 UMKC L. REV. 431, 435-36 (2002). For further discussion, see *infra* Section II.B.

hairstyle.[21] Yet a comparator-based approach misses identity-performance theory's point in all but the most limited circumstances. For example, we might imagine an employer refusing to promote one Latino but promoting several others and arguing that it was not ethnicity but personal style (that is, too much Spanish-speaking or too thick an accent) that led to the promotion denial. Unless there is a non-Latino comparator who speaks the same amount of Spanish or has the same accent, the claim will not be legible in an analytic regime that recognizes discrimination only in the presence of a better-treated counterpart.[22]

The third is structural discrimination theory, which focuses on the ways in which the structures and dynamics of workplaces and other environments can effectuate—and obscure—discriminatory intent. Central to this theory are the "patterns of interaction among groups within the workplace that, over time, exclude nondominant groups" based on protected traits but are "difficult to trace directly to intentional, discrete actions of particular actors."[23] Comparators, even if they exist, are unlikely to shed light on the identity traits

21. *See* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1297-98, 1307-08 (2000). For further discussion, see *infra* Section II.B.

22. *See, e.g.*, Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993) (rejecting the claim that termination for speaking Spanish constituted national origin discrimination under Title VII); Fragante v. City & Cnty. of Honolulu, 888 F.2d 591, 596, 599 (9th Cir. 1989) (finding that "[a]ccent and national origin are obviously inextricably intertwined in many cases" but rejecting the plaintiff's employment discrimination claim because of the "*effect* of his Filipino accent on his ability to communicate"); Korpai v. A.W. Zengeler's Grande Cleaners, Inc., No. 85 C 9130, 1987 WL 20428, at *2 (N.D. Ill. Nov. 24, 1987) ("Discrimination based on foreign immigration and speech with an accent is not discrimination based upon Hungarian ancestry or Hungarian characteristics, for purposes of Section 1981."). *But see* Carino v. Univ. of Okla. Bd. of Regents, 750 F.2d 815 (10th Cir. 1984) (upholding a determination that the plaintiff suffered discrimination because of his national origin and related accent). *See generally* Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 10 LA RAZA L.J. 261 (1998) (discussing the relationship of accent discrimination to race- and ethnicity-based discrimination); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) (analyzing accent discrimination and the related application of antidiscrimination law). For further discussion of identity performance theory, see *infra* notes 124-139.

23. Sturm, *supra* note 18, at 460; *see also* Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 665 (2005) [hereinafter Green, *Work Culture*] ("[D]iscriminatory work cultures are too complex and too intertwined with valuable social relations to be easily regulated through judicial pronouncements and direct regulation of relational behavior."). *See generally* Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007) (describing and defending structural discrimination theory).

that motivated the exclusionary interaction patterns in all but the most blatant situations. The judicial insistence on comparators thus renders imperceptible the link between the protected trait and the reduction in opportunities or increase in adverse treatment.

Stepping back, we see that the comparator methodology has left these theories virtually noncognizable in the adjudication context and, by doing so, has depleted antidiscrimination norms of much of their content. Put another way, the synergistic relationship between the law's production of observational tools and those tools' production of law has put comparators in a position to shape and limit what courts can see as discriminatory.

Several payoffs follow from this clarified picture of the comparator methodology's consequences. For one, by putting into stark relief how little work discrimination law is doing in court, we can flesh out more of the story behind the numerous empirical studies showing that discrimination plaintiffs lose their cases at disproportionately high rates.[24] That is, the mismatch between the comparator heuristic and today's work world helps make sense of why so many discrimination plaintiffs lose their cases.

In addition, a more robust understanding of the comparator methodology's conceptual limitations prompts us to revisit Lon Fuller's observations regarding the forms and limits of adjudication,[25] this time in the context of discrimination law. Here we find a longstanding debate about whether discrimination law already overreaches and, even if it does not, whether the newer theories press it to do so.[26] Some argue that because we are largely past

24. *See supra* note 15.

25. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). Fuller defined adjudication as involving the "authoritative determination of questions raised by claims of right and accusations of guilt" through the consideration of "proofs and reasoned arguments," *id.* at 368-69, and then focused on addressing adjudication's limitations, particularly in circumstances that required, for proper resolution, a managerial-style analysis of polycentric and dynamic conflicts. To the extent that claims require these types of analyses and judgments, which do not rest on proofs and reasoned argument, Fuller argued that they demand more than reasonably can be asked of an adjudicator. *Id.* at 370-71.

26. *See, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 59-78 (1992) (objecting to discrimination laws because they interfere with the efficiencies gained in a homogeneous work environment); John J. Donohue III, Essay, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986) (maintaining that Title VII's ban on discrimination may maximize social welfare); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 157 (2009) (discussing disagreements regarding whether discrimination law prohibits the types of employer conduct captured by structural discrimination theories); *cf.* Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053,

the primordial phase of identity discrimination, with its overt or obvious trait-based differentiations, a modified or new paradigm may be needed to redress ongoing issues in the workplace.[27] Others take the position that, whatever one's normative preferences, courts are simply not capable of entertaining the complex, multifaceted forms of discrimination that the newer theories elaborate.[28] Still others maintain that discrimination law has much it can do to address those whose identity-based injuries were missed by first-generation analyses.

Rather than join this debate directly, my interest here is in using the clarified picture of comparator-centric analysis to gauge the possibilities and limits for both adjudication and theory in this area, however thinly or thickly identity-based protections are conceived. By shedding light on why the methodology has had such sticking power notwithstanding its striking

1059 (2009) ("The unconscious bias discourse is as likely to subvert as to further the goal of substantive racial justice.").

27. *See infra* Section II.B.

28. *See, e.g.*, Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2481 (1994) (describing the difficulty courts have in giving an account of complex cases "that would help integrate such claims into the mainstream of Title VII doctrine"); Jonah Gelbach, Jonathan Klick & Lesley Wexler, *Passive Discrimination: When Does It Make Sense To Pay Too Little?*, 76 U. CHI. L. REV. 797, 800 (2010) (arguing that discrimination law does not reach employers who design compensation packages to "avoid[] hiring individuals from [a] disfavored group"); Susan Sturm, *Equality and the Forms of Justice*, 58 U. MIAMI L. REV. 51, 54 (2003) ("[A]ny theory of discrimination that is sufficiently clear to provide guidance . . . cannot deal adequately with the varied, complex, and shifting dynamics and normative meaning of group-based discrimination."); *cf.* Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1900 (2009) (maintaining, with respect to unconscious discrimination, that "[a]ggressive legal strategies" may "have a negative effect on people's internalization of nondiscrimination norms" and exacerbate rather than "reduc[e] undesirable behaviors").

In addition, some second-generation theory has challenged the primacy of litigation as a means for redressing discrimination while also recognizing the value of courts working collaboratively with employers to restructure workplaces. *See* Sturm, *supra* note 18, at 522-23 (recognizing the potential for achieving results through litigation where employers and courts engage collaboratively in problem solving); *see also* Susan Sturm, *Law's Role in Addressing Complex Discrimination*, *in* HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 35 (Laura Beth Nielsen & Robert L. Nelson, eds., 2005) (analyzing the role of courts in elaborating norms and working with nonlegal actors to shape responses to complex discrimination). Others, however, have moved in directions more attenuated from law, focusing primarily on redressing social norms around identity and discrimination by restructuring extralegal conversations. *See, e.g.*, KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006).

deficiencies, we can begin to develop a picture of the features necessary to create viable supplements or alternatives.

This Article proposes that the comparator methodology has retained its popularity in large part because it serves entrenched judicial-legitimacy preferences that favor clearly defined and identifiable categories and, relatedly, disfavor sociologically oriented inquiries. With the advantage of an empirical patina, comparators suggest that the slippery interactions between law and lived experience in this area are susceptible to data-driven analysis based on workplace facts and that the resolution of claims does not rest on a judge's subjective perceptions of complex workplace dynamics.[29] This fits with the general inclination of courts to analyze issues involving complex social judgments in ways that appear to turn on "facts" rather than normative judgments.[30]

Along these lines, comparators can also be described as having the virtues of rules because they function to delineate sharply between situations where discrimination might occur and where it might not. As a result, they appear to constrain courts charged with discerning discrimination and, by the same token, offer predictability to employers interested in avoiding discrimination suits.[31]

On the other hand, however, comparators' empirical cast masks the inevitable and contestable judgments about the qualities that make for an acceptable comparison,[32] as well as the underlying normative judgments about the nature of discrimination and the capacity of existing law to remedy

29. *See infra* Part V. Within the employment arena, comparators are likely also appealing because their limited reach enhances the preservation of employer autonomy in workplace decisionmaking, which has proven to be an enduring value in this area. *See infra* notes 215-217 and accompanying text.

30. *See* Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955 (2006) [hereinafter Goldberg, *Constitutional Tipping Points*]; Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629 (2002) [hereinafter Goldberg, *Anti-Essentialist and Social Constructionist Arguments*].

31. On these and other virtues of rules, see generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992). Yet, as will be shown below and has been addressed more generally in the context of the rules/standards debate, rule-like measures and frameworks are typically embedded with unarticulated standard-like assumptions, reinforcing the point that a binary distinction between rules and standards often masks the mutually constitutive nature of those categories. *See, e.g.*, Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (showing the malleability of rule and standard characterizations).

32. *Cf.* Devon W. Carbado, *The Ties that Bind*, 19 CHICANO-LATINO L. REV. 283, 294 (1998) ("[O]ur identities are, on some level, unmanageable—fluid, contingent, and contestable.").

discriminatory harms.[33] In the terms of the rules/standards debate, we could thus say that the rule-like function of the comparator depends fundamentally on normative, and standard-like, judgments about comparators' probative value.

33. For example, a comparator framework focuses on capturing formal equality violations but misses the antisubordination theorists' concern with workplace conditions that are formally equal but nonetheless exacerbate trait-related differences among employees. It will miss, for example, the particular consequences for women when an employer refuses to allow breaks or private space for breastfeeding because there are no male comparators. Likewise, an employer who regularly makes sexualized or race-related comments to all employees would not face a comparator-based claim because all employees would be subjected to the same epithets. Yet the lack of breastfeeding accommodations as well as the making of sexual or racist remarks can surely have a trait-differentiated effect on the ability of women and members of racial minorities to perform in the workplace. *See* Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1144 (1986) ("[P]arceling out goods such as workplace benefits according to egalitarian distributive principles may not result in people's positions actually coming out equal in the end."); *see also* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 128 (1989) (arguing that "neutral" norms perpetuate bias); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (advocating an antisubordination approach); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 63 MINN. L. REV. 1049, 1059-61 (1978) (suggesting that the individualization of discrimination claims has undermined efforts to use discrimination law to promote distributive justice in the face of the historical practice of discriminating against a particular group); Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245 (1983) (arguing for approaches to ending discrimination that emphasize substantive rather than formal or procedural equality). Specifically with respect to women in the workplace, see Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 247, which observes that a framework concerned with formal equality will be unable to address job structures that clash with parenting responsibilities typically taken up by women; and Martha Chamallas, *Mothers and Disparate Treatment: The Ghost of* Martin Marietta, 44 VILL. L. REV. 337, 338 (1999), which argues that "the ban on disparate treatment will not solve the work/family conflict for women who experience actual, rather than perceived, conflicts because they find that there are just not enough hours in the day."

Still, as Owen Fiss has observed, although "the ideal of equality . . . is capable of a wide range of meanings," formal equality, which he describes as the "antidiscrimination principle," has become a "mediating principle" that underlies the concept of equality in both Title VII and the Equal Protection Clause. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976); *see also* Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6 (1976) (defining the "antidiscrimination principle" as disfavoring racial classifications and arguing that other inequalities may need to be addressed by different theories and principles, including principles of economic justice). The Americans with Disabilities Act, with its requirement that employers provide reasonable accommodation to employees with qualifying disabilities, is understood as an exception to this general rule.

In this light, we can conclude that for all of the judgment avoidance and other instrumental values that comparators may bring to discrimination analysis, courts put too much faith in them. The judicial default to comparators crowds out not only other heuristics, but also other more textured conceptions of discrimination, all of which is to the detriment of discrimination jurisprudence and theory.[34] By lowering the comparator heuristic's pedestal, I aim to clear a remaining barrier in the path of first-generation cases and to illuminate and begin to redress the challenge that the comparator heuristic's dominance poses to second-generation theories' translation to jurisprudence.

While the constraining effect of judicial-legitimacy concerns must be taken into account, I argue that these concerns need not limit courts' observation of discrimination to instances where comparators can be found. Indeed, an additional payoff from broadening the frame and considering other approaches to seeing discrimination is that the rigidity and blinder-like effects of the insistence on comparators come more clearly into focus. Concomitantly, the virtues of the contextual analysis, currently applied mainly to harassment and stereotyping claims, become clearer, as does that methodology's applicability to other discrimination cases.

Part I of this Article sets the foundation for the discussion here by outlining the ways in which courts rely on comparators as both a default heuristic and an element of discrimination law. Part II then shows that, notwithstanding the occasional value of comparators for revealing discrimination, courts' treatment of comparators as central to discrimination analysis functions primarily to filter out, rather than to facilitate recognition of, numerous types of discrimination. This Part shows, too, the ways in which the insistence on comparators is especially devastating for second-generation claims that rest on intersectionality, identity performance, and structural theories of discrimination. Building on this descriptive presentation, Part III looks critically at the comparisons that we do accept, exposes the assumptions embedded in them, and suggests that comparators do not warrant the degree of reliance we now give them as illuminators of discrimination. Part IV considers contextual analysis as a methodological alternative to comparators

34. This effort to reduce dependence on a flawed method for observing discrimination dovetails, in a sense, with James Greiner's recent effort to challenge the dominance of multiple regression analysis as the chief statistical technique for observing discrimination. *See* D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 HARV. L. REV. 533 (2008). For another approach to enhancing the value of statistical analysis in enabling comparison, see Edward K. Cheng, *A Practical Solution to the Reference Class Problem*, 109 COLUM. L. REV. 2081 (2009).

and shows how this approach governs discrimination cases involving harassment and stereotyping.

Part V asks why comparators have had such sticking power, given their serious limitations and the existence of alternate means of observing discrimination. My aim here is both to shed light on the judicial-legitimacy considerations that reinforce reliance on comparators and to identify factors that may affect the potential for new methodologies to gain traction. I argue that the sociologically complex nature of identity discrimination, combined with entrenched concerns about unduly invading employer autonomy, lead courts to prefer empirically styled observational approaches. These approaches, in turn, can avoid the appearance of judicial subjectivity in evaluating workplace dynamics. With these factors in mind, Part VI proposes and evaluates several alternate methodologies intended to destabilize the dominance of comparators in discrimination analysis. It considers, as well, whether these alternatives can help recover the space for judicial consideration of antidiscrimination norms that the comparator heuristic's narrow window has largely shut out from consideration.

I. THE EMERGENCE AND INSTANTIATION OF COMPARATORS IN DISCRIMINATION LAW

Observations about the relationship between comparators and discrimination have ancient roots, dating back, at least, to Aristotle's observation that unequal treatment occurs when likes are not treated alike.[35] Incorporating this view, contemporary discrimination law designates a set of protected characteristics (or, in Aristotle's terms, establishes a group of "likes") and imposes penalties on employers who use these characteristics as a basis for treating employees differently and adversely (treating the "likes" as "not alike"). Title VII of the 1964 Civil Rights Act, for example, specifies that it is unlawful for an employer to "discriminate . . . because of" race, sex, and the other characteristics protected in the law.[36]

35. ARISTOTLE, NICHOMACHEAN ETHICS 1131a-b (Martin Ostwald trans., The Bobbs-Merrill Co. 1962) (c. 384 B.C.E.). Aristotle also acknowledged that difficulty inhered in determining whether comparators were sufficiently like each other. There is some irony in linking Aristotle to today's antidiscrimination regime in that he was arguably more concerned with the problem of treating unlikes equally than in insuring broad-based equality. *Id.* ("[T]his is the source of quarrels and recriminations, when equals have and are awarded unequal shares *or unequals equal shares.*") (emphasis added).

36. 42 U.S.C. § 2000e-2 (2006).

While the statute itself, like other antidiscrimination measures, does not define discrimination in a comparative sense,[37] comparators have clear appeal as an aid for gauging whether discrimination has occurred. Initially, they make visible the occurrence of comparatively adverse treatment by showing that not all employees have been fired, disciplined, or otherwise unfavorably treated. Then, comparison of the better- and worse-treated employees helps isolate whether the protected trait is the reason for the adverse action. If an employer has two employees who are similar but for *X* characteristic, and the employer treats Employee *X* worse than Employee Not-*X*, we are generally comfortable inferring that *X* is the basis, or cause, for the different treatment.[38] As the Second Circuit explained, "In the run of the mill discrimination cases . . . a plaintiff can make a showing of disparate treatment simply by pointing to the adverse employment action and the many employees who suffered no such fate."[39]

Of course, an inference is a logical determination from known facts,[40] not a guarantee of what actually occurred. But that is all that the law can reasonably require if courts are to find discrimination where the employer denies having discriminated.[41] Consequently, because of their utility in producing inferences

37. It does elaborate the areas in which unlawful adverse treatment might occur, including hiring and firing but also "compensation, terms, conditions, or privileges of employment." *Id.* § 2000e-2(a).

38. *Cf.* Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 14 (1987) (observing that "what initially may seem to be an objective stance may appear partial from another point of view").

39. Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 467 (2d Cir. 2001); *see also* Billingsley v. Jefferson Cnty., 953 F.2d 1351 (11th Cir. 1992) (finding sufficient evidence of race discrimination where black employees were fired for excessive absences while a white employee was only suspended for three days); Bradley v. Americold Servs., No. Civ. A. 97-2161-KHV, 1997 WL 613335 (D. Kan. Sept. 8, 1997) (denying summary judgment where an employer terminated the black plaintiff for allegedly threatening harm to a coworker but only suspended a white supervisor for threatening to kill two employees). *But see, e.g.*, Flores v. Preferred Technical Grp., 182 F.3d 512 (7th Cir. 1999) (rejecting a national origin discrimination claim where the plaintiff was terminated for breaking a work rule violated by twenty-seven other employees, and where she and her sister (who was fired for a different reason) were the only two recognizably Hispanic employees and the only two fired).

40. *See* BLACK'S LAW DICTIONARY 847 (9th ed. 2009) (defining inference as "[a] conclusion reached by considering other facts and deducing a logical consequence from them"); *cf.* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 323 (2007) ("defining 'inference' as[, inter alia,] 'a conclusion [drawn] from known or assumed facts or statements'") (citing 16 OXFORD ENGLISH DICTIONARY 949 (2d ed. 1989) (second alteration in original)).

41. *Cf.* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (noting that "[t]he law often obliges finders of fact to inquire into a person's state of mind" and that

of discrimination, comparators have emerged as the predominant methodological device for evaluating discrimination claims. Yet courts rely on them far beyond their evaluative function, to the point that comparators are treated not only as a useful heuristic for evaluating claims but also as an essential element of a discrimination claim.

A. Comparators as the Default Methodology for Observing Discrimination

It is not surprising that courts have long looked to comparators as a tool to aid in discerning whether impermissible discrimination has occurred. As the Supreme Court explained early in its employment discrimination jurisprudence, evidence that an employer treated comparable white workers better than a black employee would be "[e]specially relevant" to showing discrimination.[42]

Indeed, in the case just quoted, *McDonnell Douglas Corp. v. Green*, the Court first set out the burden-shifting framework that is now widely used in evaluating employment discrimination claims where a plaintiff lacks direct evidence of discrimination and is thus a focal point for the comparator demand.[43] This framework, when applied in the context of a hiring

"'[i]t is true that it is very difficult to prove what the state of a man's mind at a particular time is'" (quoting Edgington v. Fitzmaurice, [1885] Ch.D. 459 at 483 (Eng.))).

42. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973). The Court recognized that other forms of evidence "*may* be relevant to any showing of pretext," including "facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment." *Id.* at 804-05 (emphasis added). The Court added that "statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks." *Id.* at 805. But the Court also "caution[ed] that such general determinations [about discrimination patterns from statistical analysis], while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire." *Id.* at 805 n.19. In effect, the Court suggested, absent an admission of racial motivation from the employer, a comparator would likely be the most effective means for showing whether impermissible discrimination had occurred because it could most reliably establish that race discrimination was a proximate cause for the employer's actions. For discussion of discrimination cases in which courts have observed that actual comparators are not necessary to a discrimination claim, see *infra* Part IV.

43. Because employers typically refrain from directly linking their adverse actions to an employee's protected trait, relatively few discrimination plaintiffs can present direct evidence of discriminatory intent, meaning evidence that "'if believed, proves [the] existence of [a] fact in issue without inference or presumption.'" Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999) (alterations in original) (quoting Burrell v. Bd. of Trs. of Ga. Military

discrimination claim (the basis for Green's claim against McDonnell Douglas), requires an applicant to show that he or she (1) belongs to a protected class; (2) applied to and was qualified for a position for which the employer was seeking applicants; (3) was rejected for the position; and (4) that the position remained open after that rejection and/or the position was offered to someone else.[44] Once the prima facie case is established, the burden shifts to the employer, who must offer a nondiscriminatory reason for its decision not to hire.[45] After that, the burden returns to the plaintiff to prove that the employer's proffered reason was pretextual and that discrimination actually motivated the adverse action.[46]

Within this framework, courts have split over precisely when the comparator becomes relevant.[47] For some, an employee must produce a comparator at the outset, as part of the prima facie case; only after that will the

Coll., 125 F.3d 1390, 1393 (11th Cir. 1997)); *see also id.* (describing direct evidence as "'the most blatant remarks, whose intent could be nothing other than to discriminate' on the basis of some impermissible factor" (quoting Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989))).

44. *McDonnell Douglas*, 411 U.S. at 802. The precise elements of the prima facie case will vary depending on the factual context of the discrimination claim. Clark v. Coats & Clark, Inc., 990 F.2d 1217, 1223 n.1 (11th Cir. 1993). For a discrimination claim in the context of ongoing employment, for example, courts typically require that the plaintiff establish a prima facie case by showing that "'(1) she is a member of a protected class; (2) she was subjected to adverse employment action; (3) her employer treated similarly situated male employees more favorably; and (4) she was qualified to do the job.'" EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1286 (11th Cir. 2000) (quoting Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999)). The Supreme Court has observed, in the context of an employment discrimination case involving *McDonnell Douglas* burden-shifting, that the prima facie showing was "'never intended to be rigid, mechanized, or ritualistic.'" Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (quoting Furnco. Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

45. *McDonnell Douglas*, 411 U.S. at 802.

46. *Id.* at 807; *see also* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 134 (2000) (explaining that discrimination can be deemed the "most likely" explanation for the employer's conduct if the employer's proffered justification is rejected). *But see* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (holding that a plaintiff does not necessarily establish pretext by disproving the employer's proffered justification for its action).

47. *See* Sullivan, *supra* note 3, at 194, 208 ("[S]ometimes the presence or absence of a comparator is assessed by the court in determining whether plaintiff has made out her prima facie case," but "more commonly, . . . the court tends to find comparators critical for pretext proof."); *cf.* Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 U. COLO. L. REV. 1243, 1290-91 (2008) (observing that plaintiffs can introduce evidence of discrimination at both the prima facie and pretext stages). Of course, not each step of the sequence (prima facie case, nondiscriminatory reason, showing of pretext) is reached in every case.

court shift the burden and require an employer to proffer a nondiscriminatory reason for its adverse action.[48] Other courts require, or strongly encourage, the production of comparators only at the third, pretext phase of the sequence, at which point the employee must show that the employer's *real* reason for acting adversely was the protected characteristic, notwithstanding any nondiscriminatory reasons that the employer advanced in response to the prima facie case.[49] Although the difference between these approaches can have great significance for an individual case,[50] I leave the debate about their relative virtues for another day, as my concerns with overreliance on the comparator heuristic exist at all stages of the adjudication process.[51]

48. *See, e.g.*, Adebisi v. Univ. of Tenn., 341 F. App'x 111, 112 (6th Cir. 2009) (ruling that a plaintiff "failed to make a *prima facie* showing of . . . discrimination, because he failed to show that a similarly-situated, non-protected person was treated more favorably"); Drake-Sims v. Burlington Coat Factory Warehouse, 330 F. App'x 795, 801 (11th Cir. 2009) (same); Nagle v. Vill. of Calumet Park, 554 F.3d 1106, 1119 (7th Cir. 2009) (same); *see also* Lee v. Kansas City S. Ry., 574 F.3d 253, 259 (5th Cir. 2009) (describing as a prong of the prima facie case that the plaintiff must show that "he was treated less favorably because of his membership in that protected class than were other similarly situated employees who were not members of the protected class, under nearly identical circumstances"); Fields v. Shelter Mut. Ins. Co., 520 F.3d 859, 864 (8th Cir. 2008) (same); Flores v. Preferred Technical Grp., 182 F.3d 512 (7th Cir. 1999) ("The linchpin of the plaintiff's *prima facie* case is evidence of disparate treatment between members of the plaintiff's protected class and nonmembers.").

49. *See, e.g.*, King v. Hardesty, 517 F.3d 1049, 1063 (8th Cir. 2008) (describing and applying the comparator requirement in the context of the pretext evaluation); Wright v. Murray Guard, Inc., 455 F.3d 702 (6th Cir. 2006) (finding that the plaintiff had established a prima face case of race discrimination but lacked an adequate comparator to demonstrate pretext); Harvey v. Anheuser-Busch, Inc., 38 F.3d 968, 972 (8th Cir. 1994) (same as *King*).

    In rejecting the position that a discrimination plaintiff must produce an actual comparator as part of the prima facie case, the Second Circuit criticized "the grotesque scenario where an employer can effectively immunize itself from suit if it is so thorough in its discrimination that all similarly situated employees are victimized." Abdu-Brisson v. Delta Airlines Inc., 239 F.3d 456, 467 (2d Cir. 2001). *See also supra* note 8.

50. In a race discrimination case, the Eighth Circuit identified differing demands for comparators within its own circuit, which ranged from a strict comparator demand at the prima facie stage of the burden-shifting analysis to a "low threshold" demand at that stage, accompanied by more rigorous review at the pretext stage. Rodgers v. U.S. Bank, N.A., 417 F.3d 845, 851 (8th Cir. 2005). Opting for the low threshold requirement, the court explained that "[u]sing a more rigorous standard at the prima facie stage would 'conflate the prima facie case with the ultimate issue of discrimination,' thereby effectively eliminating the burden-shifting framework the Supreme Court has directed us to use." *Id.* at 852 (quoting Williams v. Ford Motor Co., 14 F.3d 1305, 1308 (8th Cir. 1994)).

51. For further discussion of the insistence on comparators at the prima facie stage, see, for example, Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 839 (2002), which argues that requiring

Notably, while the *McDonnell Douglas* burden-shifting framework facilitates examination of the challenged employment decision, it provides no guidance as to the techniques that a court should use to sift through the competing accounts of an employer's action.[52] The same is true of the "mixed-motive" burden-shifting framework, in which the employee shows at the outset that the protected trait was among the reasons for the employer's actions and the employer, in response, attempts to show that it would have taken the same adverse act even without considering the protected trait.[53]

Comparators become relevant to the analysis, then, because they help expose—whether in the single- or mixed-motive analysis—that "likes" have been treated in an "unlike" fashion and give rise to the inference that discrimination is the reason for that differentiation. The Supreme Court has regularly affirmed comparators' value for this purpose,[54] as have lower courts,

comparative evidence at the prima facie stage "violates the statutory language and also has a number of other problems"; and Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2292 (1995), which maintains that "[s]erious problems inhere in requiring the plaintiff to produce comparative data at the prima facie stage of the case."

52. *See* Malamud, *supra* note 51, at 2291 (pointing out that the *McDonnell Douglass* framework does not "by its terms" require comparative evidence).

53. In contrast to the *McDonnell Douglas* analysis, where the individual plaintiff bears the burden of persuasion throughout the adjudication process, in a mixed-motive case, once the individual has established the employer's reliance on a protected trait, liability attaches and the employee will recover damages *unless* the employer can show persuasively that it would have "taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. § 2000e-5(g)(2)(B) (2006). In that case, the employee can still obtain certain kinds of declaratory or injunctive relief as well as attorney's fees and costs. *Id.* § 2000e-5(g)(2)(B)(i).

54. *See, e.g.*, Ash v. Tyson Foods, Inc., 546 U.S. 454, 457 (2006) ("[Comparative evidence] may suffice, at least in some circumstances, to show pretext."); O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996) (assuming that a comparator would be useful to show that the employer had acted "*because of*" the plaintiff's age); Patterson v. McLean Credit Union, 491 U.S. 164, 187-88 (1989) ("[A litigant] might seek to demonstrate that [the employer's] claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position.").

The comparator heuristic is used to observe discrimination in other contexts as well. With respect to the use of peremptory strikes of jurors during voir dire, for example, the Court has struggled to determine how best to see whether discriminatory intent, rather than permissible instinct, motivated the strike. In its most recent decision in this area, the Court reinforced the value of comparison in illuminating whether race discrimination had occurred in the use of a state's peremptory strikes in a capital murder case. The Court first considered statistics showing the disproportionately high use of peremptory strikes against black potential jurors and then observed that

which also typically treat them as their preferred lens for evaluating discrimination claims.[55] Commentators have observed as well that "the first step in most discrimination cases is for the plaintiff to identify an individual of another race (or the opposite sex, etc.) who was treated more favorably than she—a comparator."[56]

> [m]ore powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination.

Miller-El v. Dretke, 545 U.S. 231, 241 (2005).

55. Gossett v. Okla. *ex rel* Bd. of Regents for Langston Univ., 245 F.3d 1172, 1177 (10th Cir. 2001) (explaining, in a sex discrimination suit brought by a man who had been involuntarily withdrawn from a state university nursing program, that "evidence that the defendant treated the plaintiff differently from others who were similarly situated . . . is especially relevant to a showing of pretext"); Kendrick v. Penske Transp. Servs., 220 F.3d 1220, 1230 (10th Cir. 2000) (noting that a plaintiff seeking to show discriminatory conduct by the defendant "often does so by providing evidence that he was treated differently from other similarly-situated employees who violated work rules of comparable seriousness"). As the Massachusetts Supreme Judicial Court put the point, similarly situated comparators are "'usually the most probative means of proving that an adverse action was taken for discriminatory reasons,'" even if they are "'not absolutely necessary.'" Trs. of Health & Hosps. v. Mass. Comm'n Against Discrimination, 871 N.E.2d 444, 451 (Mass. 2007) (quoting Trs. of Health & Hosps. v. Mass. Comm'n Against Discrimination, 839 N.E.2d 861, 866 (Mass. App. Ct. 2005)).

56. Sullivan, *supra* note 3, at 202. Sullivan adds:

> The reality on the ground is that discrimination cases today increasingly turn not on whether the plaintiff has proven her prima facie case or established that the "legitimate nondiscriminatory reason" is a pretext for discrimination (although the courts continue to invoke the *McDonnell Douglas* mantra), but rather on whether the plaintiff has identified a suitable "comparator" who was treated more favorably than she.

Id. at 193; *see also* Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 181 n.270 (2007) ("The most common form of evidence offered in [cases based on unconscious discrimination or bias] is comparative evidence . . . ."); Lidge, *supra* note 51, at 831-32 (describing the use of a comparator as "[a] common way of proving" discrimination on account of a protected characteristic). Treatises take this position as well. *See, e.g.*, 1 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 8D.04 n.3 (2d ed. 2009) ("The most common way of demonstrating that an employer's explanation for an adverse employment action is pretextual is to show that similarly situated persons of a different race or sex received more favorable treatment."); *id.* § 8.02[6] (explaining that where the plaintiff alleges failure to hire based on discrimination, the most common method of making a prima facie case "is to show that the employer subsequently hired someone for the position, and that the hired person had equal or lesser qualifications compared to those of the plaintiff").

B. *Comparators as a Defining Element of Discrimination Law*

In much of discrimination law, however, comparators have taken on an importance beyond their service as a potentially useful heuristic for seeing discrimination. They constitute, to many courts, a threshold requirement of a discrimination claim and, in that sense, part of discrimination's very definition.[57] On this view, discrimination occurs only when an actor has differentiated between two groups of people because of a protected trait, which means that the absence of a comparator signals the absence of discrimination.

Lower courts and commentators regularly take this position, insisting that litigants identify comparators before their cases can proceed and treating the absence of a comparator as fatal to a claim.[58] An observation by the Eleventh Circuit in a discrimination case brought by a black doctor who had been removed from his position at a federal correctional institution is illustrative: "[T]he plaintiff *must* show that his employer treated similarly situated employees outside his classification more favorably than [himself]."[59]

57. Justices Thomas and Kennedy have expressed such a view. *See supra* notes 6-7 and accompanying text.

58. *See, e.g.*, Knight v. Baptist Hosp. of Miami, Inc., 330 F.3d 1313, 1316 (11th Cir. 2003) (finding that the plaintiff could not sustain her discrimination claims because she "[could not] show that similarly situated employees of other races were treated better"); Paluck v. Gooding Rubber Co., 221 F.3d 1003, 1012 (7th Cir. 2000) (holding that to establish a prima facie case for discriminatory discharge, the plaintiff must show that "she was discharged while other, similarly-situated employees who were not members of the protected class were treated more favorably"); Norville v. Staten Island Univ. Hosp., 196 F.3d 89, 95 (2d Cir. 1999) (ruling that the plaintiff "did not produce evidence sufficient to support a reasonable inference that her termination was the result of race discrimination" because she failed to identify satisfactory comparators); 3 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 47.05 (2d ed. 2009) (stating that, in the context of pregnancy discrimination, "if the employee cannot show that she was in fact treated differently from similarly situated non-pregnant employees, her claim will fail"); 3 LEX K. LARSON, LABOR AND EMPLOYMENT LAW § 54.02[6] (2010) (observing that where a plaintiff alleges discrimination in hiring, "failure of the plaintiff to present evidence of comparative qualifications of persons subsequently hired was sometimes viewed as fatal to a plaintiff's prima facie case"). *But see* 3 LEX K. LARSON, EMPLOYMENT DISCRIMINATION, § 47D.05 (2d ed. 2009) (analyzing EEOC v. Nw. Mem'l Hosp., 858 F. Supp. 759 (N.D. Ill. 1994), where a "plaintiff's failure to provide comparative evidence was not fatal to her case").

59. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997) (emphasis added). *But see, e.g.*, Bryant v. Aiken Reg'l Med. Ctrs. Inc., 333 F.3d 536, 545-46 (4th Cir. 2003) (maintaining that although comparative evidence may be "helpful," a plaintiff "is not required as a matter of law to point to a similarly situated white comparator in order to succeed on a race discrimination claim").

One analytic point is crucial here. If comparators are fundamental either to discrimination statutes or to our theoretical conceptualization of discrimination, then we can hardly object to their pervasive use. On the other hand, if comparators are merely one choice among several for how courts might go about the task of perceiving discrimination, as I contend here, then we have reason to be more concerned. These questions are addressed in Parts III and IV. For now, it is simply important to have a clear sense of comparators' dominance in shaping discrimination jurisprudence.

II. THE COMPARATOR DEMAND AS A BARRIER TO DISCRIMINATION CLAIMS

The judicial demand for comparators functions largely as a barrier to discrimination claims, accounting in part for the low success rates of these claims in ways that have gone underappreciated by courts and commentators. This Part catalogues the sets of circumstances in which courts' insistence on the production of comparators inhibits or precludes discrimination claims.[60] As the discussion shows, the comparator demand poses a serious obstacle both practically and conceptually. As a practical matter, comparators are hard to find even in workplaces with a diverse group of employees. And conceptually, the existence of a comparator is simply not relevant, under some discrimination theories, to the question whether discrimination has occurred.

To assess the consequences of the comparator demand, I look separately at first- and second-generation discrimination claims. Although the two types of claims exist along a spectrum rather than as mutually exclusive groupings, the distinction is useful for illuminating the separate ways in which the demand operates for more traditional and more cutting-edge discrimination claims. As noted at the outset, the first-generation cases rest on generally accepted theories about both the kinds of discriminatory acts that are or should be prohibited by governing statutes and the scope of the traits protected under those statutes.[61] These are, in other words, claims of sex, race, or other types of discrimination that would be easily recognizable to the person on the street even if they are not easily proven in court. The second-generation cases, by contrast, offer a thicker conceptualization of discrimination that has not achieved the same popular traction even though these cases are thought, in much of the scholarly literature, to be one of the most important next steps for

60. I leave to the following Parts consideration of the impact of the comparator approach on the meaning of discrimination.

61. *See supra* notes 18, 26 and accompanying text.

bringing discrimination law closer to lived experience. As will become apparent, a comparator-obsessed legal regime erects a serious barrier to many first-generation claims and renders second-generation claims even less likely to succeed.

Before turning to the comparator demand's distinct effects on first- and second-generation claims, one aspect of the comparator jurisprudence warrants initial attention for its effect on the evaluation of evidence in nearly all discrimination cases. When courts apply a comparator-based analysis, they frequently disregard or discount evidence that is not associated directly with the comparator. This means that adverse incidents directed at the plaintiff, such as hostile remarks or treatment by noncomparator coworkers or supervisors, are often marginalized as "stray" remarks and acts not worthy of serious consideration.[62] As the Eleventh Circuit observed in a housing disability discrimination case that challenged a city's use of zoning ordinances to close down a drug-rehabilitation halfway house, for example, "Evidence that neighbors and city officials are biased against recovering substance abusers is irrelevant absent some indication that the recoverers were treated differently than non-recoverers."[63] This deliberately acontextual approach, with its "willingness to continue to compartmentalize various aspects of plaintiff's proof to find that none is sufficient,"[64] is, I contend, a side effect of the comparator analysis's dominance and the skepticism toward discrimination claims that emerges from that dominance.[65]

62. In *Price Waterhouse v. Hopkins*, Justice O'Connor wrote that "stray remarks in the workplace, . . . statements by nondecisiomakers, and statements by decisionmakers unrelated to the decisional process itself" should not be treated as proving the connection between an employer's acts and the protected trait. 490 U.S. 228, 277 (1989) (O'Connor, J., concurring); *see also id.* at 251 (majority opinion) ("Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision.").

63. Schwarz v. City of Treasure Island, 544 F.3d 1201, 1216 (11th Cir. 2008). In the case, which was brought under the Fair Housing Act, neighbors and city commissioners had made statements about not wanting recovering drug users in their town, but the court deemed the statements irrelevant because of the absence of a comparator. *Id.*

64. Sullivan, *supra* note 3, at 216 n.93.

65. This compartmentalization effect is even more notable because it runs contrary to the Court's suggestion that all evidence must be taken together in evaluating a discrimination claim. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148-49 (2000) (identifying as relevant, inter alia, the "strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case").

For a critique of the stray-remarks doctrine, see, for example, Catherine Albiston et al., *Ten Lessons for Practitioners About Family Responsibilities Discrimination and Stereotyping*

A. *The Comparator Default and First-Generation Cases*

The comparator demand's inhibiting effect on first-generation discrimination claims can be seen in five primary ways. In many cases, potentially comparable coworkers are not seen as sufficiently comparable because of job responsibilities or workplace performance issues. In others, potential comparators are seen as insufficiently probative because of concerns about small sample size. In still others, the comparators are not seen as probative because the individual bringing the claim has a unique position in the workplace, works in an environment that is homogeneous with respect to the relevant trait, or has a trait-related aspect of identity, such as pregnancy, that is treated as inherently not comparable to others outside the trait-bearing group.

1. *No Sufficiently Comparable Coworkers*

Most commonly, the comparator default blocks discrimination claims because courts find that there is no individual sufficiently comparable to the employee-plaintiff to show that the protected characteristic, rather than some other factor, was the reason for the challenged adverse treatment.[66] Often, this

Evidence, 59 HASTINGS L.J. 1285, 1293-96 (2008). These authors argue that "[s]ocial science research has shown the value of 'stray remarks' as providing a window into the hidden biases in the workplace," *id.* at 1293, and that "[a]s social science research mounts and more courts acknowledge that '[c]ontext matters'—indeed it matters a lot—in these cases, the 'stray remarks' doctrine may be cast aside," *id.* at 1296 (citing Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 69 (2006)).

66. For example, in *Holifield v. Reno*, the court stated:

> Holifield has failed to produce sufficient affirmative evidence to establish that the non-minority employees with whom he compares his treatment were similarly situated in all aspects, or that their conduct was of comparable seriousness to the conduct for which he was discharged. Having failed to meet his burden of proving he was similarly situated to a more favorably treated employee, Holifield has not established a prima facie case.

115 F.3d 1555, 1563 (11th Cir. 1997); *see also* LaFary v. Rogers Grp., Inc., 591 F.3d 903, 909 (7th Cir. 2010) (finding that a coworker who took leave that was comparable to the leave taken by the pregnancy discrimination plaintiff was not similarly situated based on the employer's needs at the time when the coworker was rehired but the plaintiff was not); Senske v. Sybase, Inc., 588 F.3d 501, 510 (7th Cir. 2009) (rejecting an age discrimination claim for lack of an adequate comparator while observing that "[a]lthough the 'similarly situated' concept is a flexible one, the comparators must be similar enough that differences in their treatment cannot be explained by other variables, such as distinctions in their roles or performance histories" (citing Henry v. Jones, 507 F.3d 558, 564 (7th Cir. 2007))); White v. Fla. Dep't of Highway Safety & Motor Vehicles, 343 F. App'x 532, 535 (11th Cir. 2009)

is because the plaintiff's best evidence comes from a comparison to an employee with a different supervisor[67] or with insufficiently similar job responsibilities[68] or, in the case of a challenge to disparate enforcement of a disciplinary rule, to an employee not subject to the same disciplinary standards.[69] Although the circuits vary somewhat in how they characterize the match between comparators and the plaintiff, with some requiring that comparators be "similarly situated in [all] material respects"[70] and others

("[W]hile [the plaintiff] may have shown that some non-minority individuals had isolated issues in their backgrounds, he failed to identify any such individual that had the same number of problems in [as] many areas as he had." (third alteration in original) (internal citation omitted)); Lewis v. Metro. Atlanta Rapid Transit Auth., 343 F. App'x 450, 454 (11th Cir. 2009) (rejecting a comparator in a race discrimination case and stating that "[w]e 'require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges'") (quoting Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006)).

67. *See, e.g.*, Aramburu v. Boeing Co., 112 F.3d 1398 (10th Cir. 1997). *Aramburu* held that "'[s]imilarly situated employees,'" for the purpose of showing disparate treatment in employee discipline, "'are those who deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline.'" *Id.* at 1404 (quoting Wilson v. Utica Park Clinic, Inc., 76 F.3d 394, No. 95-5060, 1996 WL 50462, at *1 (10th Cir. Feb. 7, 1996)). The Sixth Circuit has stated:

> [T]o be deemed "similarly-situated", the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Hollins v. Atl. Co., 188 F.3d 652, 659 (6th Cir. 1999) (quoting Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992)). However, in its recent decision in *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379 (2008), the Court declined to embrace a categorical rule regarding whether evidence of discrimination had to come from comparators with the same supervisor.

68. For example, in addressing a sex discrimination claim by a female secretary, the Second Circuit wrote, "Given their quite different positions, no rational inference of disparate treatment on the basis of gender could be drawn from evidence that [two male employees] were not given the secretarial-type tasks assigned to" the female plaintiff. Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp., 136 F.3d 276, 291 (2d Cir. 1998).

69. *See, e.g.*, Wright v. Murray Guard, Inc., 455 F.3d 702, 710 (6th Cir. 2006) (holding that, in the disciplinary context, comparators must "'have been subject to the same standards and [must] have engaged in the same conduct without . . . differentiating or mitigating circumstances'" (quoting Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 352 (6th Cir. 1998))).

70. *See* Perkins v. Brigham & Women's Hosp., 78 F.3d 747, 751 (1st Cir. 1996). *See generally* Tricia M. Beckles, Comment, *Class of One: Are Employment Discrimination Plaintiffs at an*

insisting on "nearly identical" comparators,[71] all agree that the fit must be tight.[72]

As this set of cases reveals, the comparator heuristic might work well for observing discrimination in large, Tayloresque workplaces, where multiple workers engage in tasks that are susceptible to relatively straightforward comparison.[73] Indeed, the very point of Taylor's *Shop Management* was to remove "[a]ll possible brain work . . . from the shop and center[]" the work with managers.[74] By reducing jobs to specific tasks and standardizing supervision, Taylor prompted a shift in the workplace so that workers who had once been skilled in a variety of aspects of production and supervision were

Insurmountable Disadvantage if They Have No "Similarly Situated" Comparators?, 10 U. PA. J. BUS. & EMP. L. 459, 470-72 (2008) (reviewing the standards set out in several circuits).

71. As the Sixth Circuit wrote in the context of a disparate discipline complaint:

> [T]he "comparables" [must be] similarly-situated *in all respects*. . . . [They] must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992); *see also* Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1185 (11th Cir. 1984) ("[A] plaintiff fired for misconduct makes out a prima facie case of discriminatory discharge if he shows that he is a member of a protected class, that he was qualified for the job from which he was fired, and 'that the misconduct for which [he] was discharged was *nearly identical* to that engaged in by [an employee outside the protected class] whom [the employer] retained.'" (alteration in original) (emphasis added) (quoting Davin v. Delta Air Lines, Inc., 678 F.2d 567, 570 (5th Cir. Unit B 1982))).

72. In the separate but related context of whether comparative proof is sufficiently probative to show that discrimination accounted for the selection of someone other than the plaintiff, the Supreme Court rejected a lower court demand that the difference between comparators must be "'so apparent as virtually to jump off the page and slap you in the face.'" Ash v. Tyson Foods, Inc., 546 U.S. 454, 456-57 (2006) (quoting Ash v. Tyson Foods, Inc., 129 F. App'x 529, 533 (11th Cir. 2005)). At the same time, the Court endorsed other demanding characterizations of the comparator requirement. *See id.* at 457-58 (citing Cooper v. Southern Co., 390 F.3d 695, 732 (11th Cir. 2004) (holding that "disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question"); Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1194 (9th Cir. 2003) (holding that qualifications evidence alone could establish pretext where the plaintiff's qualifications are "clearly superior" to those of the candidate selected); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc) (concluding that pretext can be inferred if "a reasonable employer would have found the plaintiff to be significantly better qualified for the job"). For characterizations of the comparator requirement after *Ash*, see also *supra* note 66.

73. *See* FREDERICK WINSLOW TAYLOR, SHOP MANAGEMENT 50 (1911).

74. *Id.* at 34.

now performing a narrower set of routine—and easily comparable—tasks. Within this system, whose very design aimed to create comparable jobs and workers, the turn to comparators as a means of demonstrating discrimination might have been imperfect but was surely viable in many instances.

Today, however, the workplace barely resembles its Taylor-inspired predecessor. As Katherine Stone has observed, jobs are now "defined in terms of competencies" and employees are valued, not for their fungible skill sets, but for "their varied skills and flexibility."[75] In addition, "[t]he decentralization of authority and the flattening of hierarchy" obscures what were previously clear lines of authority, making it increasingly difficult to "locat[e] the responsible party in the face of decentralized and dispersed decision-making."[76] Given the flexible and dynamic nature of many contemporary jobs, the insistence on comparators seems starkly mismatched with the work world as it currently operates.

2. *Small Sample Size*

In other instances, the difficulty is that courts, while insisting on comparators, are skeptical of the selected comparators' probative value because of concerns about sample size.[77] As a federal district court observed in a race and sex discrimination case brought by a black woman who worked as a civilian for the Army, "The generally small sample size and lack of historical data further undermined the evidentiary value of the statistics" showing that black women were underrepresented in senior-grade Army positions.[78] In

75. *See* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 165 (2004); *see also* Jim Pope, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 N.Y.L. SCH. L. REV. 515, 516 (2005-2006) (describing "[f]lexibility and mobility" as "hav[ing] replaced predictability and stability as core values in business organization").

76. STONE, *supra* note 75, at 165-66.

77. For discussion of the particular challenges that sample size concerns present for individuals who bring discrimination claims based on more than one protected characteristic, see *infra* notes 118-123 and accompanying text. Even in less complex, first-generation cases, sample-size issues can be impediments for individuals bringing discrimination claims.

78. Judge v. Marsh, 649 F. Supp. 770, 780 (D.D.C. 1986). In a Seventh Circuit case, Judge Posner elaborated on an aspect of this sample size issue in a case brought by black female students who argued that they were punished more harshly for hazing sorority pledges than were comparable white students, where he rejected the proffered comparators as inadequate. He observed:

> In a large number of dissimilar cases, if there were reason to think the dissimilarities were randomly distributed and therefore canceled out, an inference

systemic disparate treatment challenges, the Court has similarly observed that small sample sizes produce statistical analyses with little probative value.[79] In other words, when an employee relies on comparative evidence but is either alone or one of few with his or her protected trait, courts have been skeptical that the protected identity trait, rather than a quirk of the employee, is the reason for the adverse action.

Current iterations of intersectionality theory suggest that this sort of skepticism about the revelatory effects of comparison would be well founded for all comparisons rather than just in cases where individuals present intersectional discrimination claims. Because all individuals have multidimensional aspects of their identities, very close comparisons are almost always hard to come by.[80] In this sense, the comparator analysis can be seen as mismatched not only with today's workplaces, as suggested above, but also with contemporary understandings of identity.

3. *Uniquely Situated Employees*

In addition to the difficulties that arise where potential comparators may actually exist in a workplace, there are several types of first-generation cases in which there are simply no comparators from which to choose. In some cases, an employee's position is unique, particularly with regard to high-level employees who cannot credibly claim that their responsibilities are closely

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> of discrimination might be drawn. And likewise in a small sample if the cases were identical except for a racial difference. But in a very small sample of dissimilar cases, the presence of a racial difference does not permit an inference of discrimination; there are too many other differences, and in so small a sample no basis for thinking they cancel out.

Williams v. Wendler, 530 F.3d 584, 588-89 (7th Cir. 2008). Courts are often skeptical of data drawn from small samples. *See* Sengupta v. Morrison-Knudsen Co., 804 F.2d 1072, 1076 (9th Cir. 1986) ("The problem with [a small sample size] is that slight changes in the data can drastically alter appearances."); Contreras v. City of L.A., 656 F.2d 1267, 1273 n.4 (9th Cir. 1981) ("Statistics are not trustworthy when minor numerical variations produce significant percentage fluctuations."); Morita v. S. Cal. Permanente Med. Grp., 541 F.2d 217, 220 (9th Cir. 1976) ("'[S]tatistical evidence derived from an extremely small universe . . . has little predictive value and must be disregarded.'" (quoting Harper v. Trans World Airlines, Inc., 525 F.2d 409, 412 (8th Cir. 1975))).

79. *See* N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 584-87 (1979); *see also* Mayor of Phila. v. Educ. Equal. League, 415 U.S. 605, 620-21 (1974) (criticizing "the simplistic percentage comparisons" used by the court of appeals as "lack[ing] real meaning in the context of [the] case" and affirming "the District Court's concern for the smallness of the sample").

80. For additional discussion of intersectionality theory, see *infra* notes 112-123 and accompanying text.

comparable to those of anyone else in the firm.[81] One comment cites the "class of one" of Carleton Fiorina, who lost her position as president and chief executive officer of Hewlett-Packard and, had she wanted to bring a sex discrimination claim, would have been precluded if required to show a comparator.[82] This difficulty also arises in other settings, such as academia, where an employee is often the only specialist in his or her field and is thus uniquely situated in terms of both work product and related responsibilities.[83]

More generally, in a knowledge-based economy, the blurring of lines between higher- and lower-level jobs increasingly precludes employees from finding comparators. As a result, even employees who are less senior will often hold a unique position and will similarly find themselves without a comparator.[84] In addition, for contractual or other reasons, "cases occasionally arise where a plaintiff cannot show disparate treatment only because there are no employees similarly situated to the plaintiff."[85] In one of those cases, Pan Am pilots who had joined Delta Air Lines were not positioned similarly to any

81. *See, e.g.*, Holifield v. Reno, 115 F.3d 1555, 1563 (11th Cir. 1997) ("[There] are only a limited number of potential 'similarly situated employees' when higher level supervisory positions for medical doctors are involved.").

82. Beckles, *supra* note 70, at 472.

83. *See, e.g.*, Martha S. West, *Gender Bias in Academic Robes: The Law's Failure To Protect Women Faculty*, 67 TEMP. L. REV. 67 (1994) (analyzing the ways in which federal discrimination laws have failed to protect women faculty members from discrimination in higher education institutions).

84. *See, e.g.*, Sylva-Kalonji v. Bd. of Sch. Comm'rs, No. 08-0207-KD, 2009 WL 1418808, at *6 (S.D. Ala. May 20, 2009) (finding a proposed comparator inadequate where the plaintiff, a data clerk, and the proposed comparator each performed "unique duties"). *But see* Jackson v. FedEx Corporate Servs., Inc., 518 F.3d 388, 396-97 (6th Cir. 2008) (finding the failure to identify an identically situated comparator not fatal to Title VII claim where the plaintiff worked in a "unique position").

85. Abdu-Brisson v. Delta Air Lines, 239 F.3d 456, 467 (2d Cir. 2001). In that case, the court found that former Pan Am pilots who joined Delta Airlines had made out a prima facie case of age discrimination, even though they had no comparator pilots, but ultimately found that the Pan Am pilots failed to rebut the nondiscriminatory reasons offered by the airline for their action. On the comparator point, the court wrote:

> While Delta is a long way from the days when it had only a single employee, the 488 Plaintiffs in this case find themselves in a similar conundrum: they are in a class all by themselves. Because all the Pan Am pilots hired by Delta were subjected to the same three employment terms challenged in this action, and because the Pan Am pilots differed materially from the pre-APA Delta pilots in terms of their airline of origin and career expectations, there are no Delta employees similarly situated to Plaintiffs who did not suffer the adverse employment actions.

Id. at 467-68.

others for purposes of their age discrimination claim because of the nature of the agreements accompanying their hire. Thus, again, we see the lack of fit between the comparator demand and the structure of many, if not most, contemporary jobs.

In addition, the plaintiff's particular situation with respect to workplace conduct or performance might be distinctive enough to make it hard to come by another comparable employee, even if the workplace has potential comparators in it. In one pregnancy discrimination case, for example, an employee was fired for excessive tardiness the day before her maternity leave was set to begin and lost her case because she presented no evidence that comparable employees were treated differently.[86] The Seventh Circuit, per Judge Posner, indicated that Ms. Troupe might have prevailed had she presented a comparator such as a "Mr. Troupe, who [was] as tardy as Ms. Troupe was, also because of health problems, and who [was] about to take a protracted sick leave growing out of those problems" at the employer's expense.[87] The court went on to express "doubt that finding a comparison group would be that difficult."[88] Perhaps that particular employer had fired many regularly tardy workers on the verge of taking extended sick leaves, but in most, if not all, workplaces, the comparator would be far more difficult to identify than Judge Posner suggests. Indeed, the Third Circuit acknowledged this difficulty when denying the pregnancy discrimination claim of a woman who was fired while absent on maternity leave. Finding that the plaintiff had not identified an adequate comparator, the court added that "[o]f course, it was difficult for her to make such a showing because Carnegie never has had an employee on disability leave for a protracted period for a reason other than pregnancy."[89]

4. *Homogeneous Workplaces*

In other cases, the lack of comparators arises because the relevant part of the workplace is homogeneous, in the sense that all potentially comparable workers share the same trait that is the basis for the discrimination claim. In those settings, a comparator regime will not recognize most forms of

86. Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994) (noting that the plaintiff had not presented a comparator to substantiate her discrimination claim).

87. *Id.*

88. *Id.* at 739.

89. *In re* Carnegie Ctr. Assocs., 129 F.3d 290, 297 (3d Cir. 1997).

discrimination.[90] Yet this type of segregation in the workplace remains widespread, which means that the comparator demand leaves large swaths of employment outside the reach of discrimination protections. Sex-segregated jobs, for example, are particularly common.[91] In one illustrative case, all of the relevant secretaries were female, which led the Second Circuit to reject a secretary's sex discrimination case because no comparator existed. "[A]lthough she complains that she was treated less favorably than two employees who held positions comparable to her secretarial position," the court wrote, "both of those employees were women."[92] From this, the court concluded that "[t]here was no evidence that [the plaintiff] was treated differently because of her gender."[93] Likewise, in a sex discrimination case brought by a mother with young children whose request to be scheduled in a different time slot was denied after she submitted a transfer request, the court held that "to establish a prima facie case based on a 'sex plus' theory of employment discrimination, the plaintiff must show that similarly situated men were treated differently than women."[94] Her claim failed because she could not provide a comparator in the form of a man with young children; there were no such men in her workplace.

90. As noted earlier and discussed in depth below, *see infra* Section IV.A, comparators are typically not required for sexual harassment claims, so it is possible that a claim of that sort would be recognized even in a homogeneous environment.

91. For a global analysis of sex-based occupational segregation, see MARIA CHARLES & DAVID B. GRUSKY, OCCUPATIONAL GHETTOS: THE WORLDWIDE SEGREGATION OF WOMEN AND MEN (2004).

92. Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp., 136 F.3d 276, 291 (2d Cir. 1998). As Vicki Schultz has explained in exploring the way that "lack of interest" arguments have been used to justify sex-based differences in employment, a homogeneous workplace does not necessarily indicate the absence of troubling gender bias. *See* Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

93. *Galdieri-Ambrosini*, 136 F.3d at 291.

94. Hess-Watson v. Potter, No. Civ.A. 703CV00389, 2004 WL 34833, at *2 (W.D. Va. Jan. 4, 2004); *see also* Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1086 (3d Cir. 1996) (stating that there would be insufficient evidence of gender discrimination against a male employee who was denied a promotion that was subsequently awarded to a female employee where "there is evidence that the decisionmaker was a man and that the great majority of the employees in the job category at issue were men"). *But see* Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1040 (8th Cir. 2010) (denying summary judgment in a sex discrimination case where sex-stereotyping remarks had been made but the plaintiff-employee lacked a male comparator).

The comparator demand has similarly been a barrier to discrimination claims in racially homogeneous workplaces. Typical is this observation in a discrimination case brought by an employee of Nigerian origin that was affirmed by the Second Circuit: "[T]he other unit . . . caseworkers were all African, so while Adeniji was the only person . . . assigned homemaking work while the others were assigned protective diagnostic work and homemaking work . . . he cannot claim that employees outside the Title VII protected class were treated differently than those within the protected class."[95]

5. *Pregnancy, Breastfeeding, and the Nonexistent Comparator*

Finally there are the pregnancy- and breastfeeding-related cases in which there can be no precise comparator by reason of the different reproductive capacities of men and women, and in which other comparators are generally not entertained by courts.[96] Most notorious, perhaps, is the Supreme Court's distinction between pregnant and nonpregnant people that led the Court to conclude that pregnancy discrimination did not amount to sex discrimination in *Geduldig v. Aiello*.[97] When this distinction first appeared, the question was whether California's exclusion of pregnancy from the state disability program's coverage violated the Equal Protection Clause. The Court saw the problem in this way:

> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.[98]

95. Adeniji v. Admin. for Children Servs., 43 F. Supp. 2d 407, 426 n.7 (S.D.N.Y. 1999) (citation omitted); *see also* Nieto v. L&H Packing Co., 108 F.3d 621, 623-24 (5th Cir. 1997) (treating the fact that eighty-eight percent of the defendant's workforce were minorities as evidence against the plaintiff's race discrimination claim). *But see* Legrand v. Trs. of Univ. of Ark., 821 F.2d 478, 480 (8th Cir. 1987) (reversing as legal error a district court ruling that plaintiffs had failed to establish a prima facie case because "the overwhelming majority of employees in the Physical Plant is black").

96. These cases, which present some of the most interesting questions related to the role of the comparator heuristic, are also discussed below. *See infra* notes 223-225 and accompanying text.

97. 417 U.S. 484 (1974).

98. *Id.* at 496 n.20. And again: "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Id.* at 496-97.

The Court took the same approach to a claim that pregnancy discrimination amounted to sex discrimination under Title VII, reinforcing that the relevant comparison was between "pregnant women and nonpregnant persons."[99] Consequently, "[a]s a matter of law, at that time, 'an exclusion of pregnancy from a disability-benefits plan providing general coverage [was] not a gender-based discrimination at all.'"[100] While Congress overrode the Court's conclusion in *Gilbert* with the Pregnancy Discrimination Act,[101] which amended Title VII's definition of sex to include pregnancy-based distinctions, the point for our purposes is that the comparator heuristic missed the possibility, recognized by both the dissent[102] and Congress, that the lack of a comparator did not necessarily mean the absence of discrimination.

Sex discrimination challenges that have been brought related to breastfeeding rules have fared about as well as those in *Geduldig* and *Gilbert*, with courts finding that the absence of a comparator for breastfeeding women rendered it unreasonable to see the rules as discriminatory based on sex. In a decision derided by commentators,[103] but representative of other decisions in this area, the Sixth Circuit sustained Wal-Mart's ban on breastfeeding in

99. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 135 (1976) (quoting *Geduldig*, 417 U.S. at 496 n.20).

100. AT&T Corp. v. Hulteen, 129 S. Ct. 1962, 1970 (2009) (quoting *Gen. Elec. Co.*, 429 U.S. at 136).

101. Congress passed the Pregnancy Discrimination Act in 1978, expanding the definition of "sex" in Title VII of the Civil Rights Act of 1964 to include unequal treatment "because of or on the basis of pregnancy, childbirth, or related medical conditions." Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

102. *Gen. Elec. Co.*, 429 U.S. at 149 (Brennan, J., dissenting) ("[I]n reaching its conclusion that a showing of purposeful discrimination has not been made . . . the Court simply disregards a history of General Electric practices that have served to undercut the employment opportunities of women who become pregnant while employed.").

103. *See, e.g.*, Katherine A. Macfarlane, Derungs v. Wal-Mart Stores*: Another Door Shut—A Federal Interpretation Excluding Breastfeeding from the Scope of a State's Sex Discrimination Protection*, 38 LOY. L.A. L. REV. 2319, 2322 (2005) ("[T]he Sixth Circuit's analysis . . . stymies the natural expansion of sex discrimination protection."); Elizabeth Hildebrand Matherne, *The Lactating Angel or Activist? Public Breastfeeding as Symbolic Speech*, 15 MICH. J. GENDER & L. 121, 133-34 (2008) (arguing that the Sixth Circuit's decision "leaves breastfeeding mothers vulnerable in their everyday lives and pushes them back into the home by making the world so uncomfortable and full of potential confrontations"); Brianne Whelan, *For Crying Out Loud: Ohio's Legal Battle with Public Breastfeeding and Hope for the Future*, 13 AM. U. J. GENDER SOC. POL'Y & L. 669, 673-74, 678 n.44 (2005) (analyzing an Ohio bill, H.B. 554, 125th Gen. Assem., Reg. Sess. (Ohio 2004), proposed in response to *Derungs*, that would allow a "mother . . . to breast-feed her baby in any location of a place of public accommodation wherein the mother otherwise is permitted").

public areas of the store against a state law sex discrimination claim.[104] The court insisted that a comparator analysis be followed, holding that "for there to be impermissible sex discrimination, there must be one gender that is treated differently than another."[105] Continuing, the court explained that no sex discrimination had occurred because the only prohibition Wal-Mart imposed was on a type of feeding that only women could do, and there was, therefore, no class for comparison.[106] The court also pointed out that the same insistence on a comparator had doomed several other challenges to breastfeeding-related restrictions, including one where a federal district court had found that "the lack of a similarly-situated class of men was fatal to the plaintiff's [Title VII] claim: 'if there is no comparable subclass of members of the opposite gender, the *requisite* comparison to the opposite gender is impossible.'"[107] Of the numerous district and appellate court cases it reviewed related to breastfeeding restrictions, none "found that breast-feeding fell within the scope of gender discrimination *because of the absence of a comparable class*."[108]

Thus, a conceptualization that recognizes discrimination only in the presence of a comparator will simply not observe discrimination even in cases, like many of those just discussed, that fall well within widely accepted, first-generation theories of discrimination. Indeed, in some of these settings, the comparator requirement's very design forecloses recognition of the possibility that discrimination might have occurred, including in homogeneous work environments and situations where women and men are seen as being categorically different from one another.[109] That is, by demanding that plaintiffs produce a comparator to have a viable case, courts have transformed the comparator methodology into the substantive law of discrimination. Because that method, as applied, allows for only a narrow set of circumstances

104. Derungs v. Wal-Mart Stores, Inc., 374 F.3d 428 (6th Cir. 2004).

105. *Id.* at 437.

106. *Id.*

107. *Id.* at 439 (emphasis added) (quoting Martinez v. N.B.C., Inc., 49 F. Supp. 2d 305, 310 (S.D.N.Y. 1999)).

108. *Id.* (emphasis added).

109. While these cases involving discrimination claims because of a particular aspect of the lives of many women, such as reproduction or childcare, could fit within the discussion of second-generation claims as well, I include them here because they were framed as relatively straightforward discrimination cases yet were barred, nonetheless, by the comparator demand. *Cf.* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995) (questioning whether the recognition of differences between men and women related to reproductive capacity as categorical overstates the difference between socially constructed and biologically rooted gendered distinctions).

to be considered discriminatory, the law of discrimination has, in effect, been narrowed as well.

B. The Comparator Heuristic's Flaws as Amplified in Second-Generation Cases

Not surprisingly, if finding an adequate comparator is difficult in a "simple" discrimination case, where an individual alleges that he or she was treated differently because of his or her protected trait, then the task becomes even more daunting when a claim rests on a more complex understanding of identity or the surrounding workplace structures. Many of the problems posed by the comparator demand in these cases echo those just discussed. Still, the ways in which they manifest render nearly all second-generation cases nonviable, reinforcing the starkness of the disconnect between these newer theories of discrimination and the existing comparator-focused jurisprudence.[110] Hence their separate treatment here.[111]

1. Intersectionality

Among the various cases that track intersectionality theory's insights, the simplest are known as trait-plus cases, in which an employer imposes a rule on members of one group in a workplace based on a combination of their protected trait and some other unprotected attribute, such as having young children or being married to a fellow employee. An early case in this area, *Phillips v. Martin Marietta Corp.*, signaled the possibility of success for an individual who could show, via an explicit policy such as a bar on employment applications from women with small children, that an employer had treated a subset of employees adversely because of a protected trait.[112] Absent an explicitly discriminatory policy, however, an individual is typically required to produce a comparator to show that the adverse treatment is trait-based. This means that the individual must identify a coworker who not only has comparable job responsibilities and lacks the same protected trait but also has the same unprotected attribute, such as parental or marital status.

110. The last Part of this Article returns to this disconnect to discuss alternate methodologies that have the potential to be inclusive of the thicker, second-generation conceptualizations of discrimination.

111. Even for those who would not characterize the circumstances described below as involving discrimination, it is useful to see the similarities in the ways in which the comparator demand affects consideration of both these and first-generation types of claims.

112. 400 U.S. 542 (1971). In *Martin Marietta*, there was a clear comparator group of men with small children whose applications were not barred by the challenged rule. *Id.* at 544.

Given the difficulties associated with finding an adequate comparator in the simplest of circumstances, as described earlier, there are likely to be even fewer, if any, close comparators in these kinds of cases.[113] Consider, for example, the Tenth Circuit's rejection of a sex discrimination claim by an airport custodian shift supervisor who alleged that she was treated worse than the male shift supervisors when she was fired because her husband, whom she supervised, was reported to have left his workplace during his shift.[114] The court cited a litany of cases for the proposition that "gender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender."[115] Adding that "[s]uch plaintiffs cannot make the requisite showing that they were treated differently from similarly situated members of the opposite gender,"[116] the court found that Ms. Coleman's claim failed because she could not show that the employer treated her "differently from men who also were married to subordinate employees."[117]

More complicated still are the situations in which an individual claims discrimination based on more than one protected category. These intersectional or multidimensional claims arise when an individual seeks to show that the employer discriminated because of the individual's particular combination of traits, rather than simply trying to show that the employer discriminated on two distinct grounds.[118] As one court explained in connection

113. The challenge here is thus somewhat similar to the challenge for the "unique" Mrs. Troupe in the pregnancy-leave discrimination case described above. *See supra* text accompanying notes 87–89.

114. Coleman v. B-G Maint. Mgmt., Inc., 108 F.3d 1199 (10th Cir. 1997).

115. *Id.* at 1204. As the court also explained, in a "plus"-type case, "although the protected class need not include *all* women, the plaintiff must still prove that the subclass of women was unfavorably treated as compared to the corresponding subclass of men." *Id.* at 1203.

116. *Id.* at 1204.

117. *Id.* at 1205.

118. *See, e.g.*, Vasquez v. Cnty. of L.A., 349 F.3d 634, 653–55 (9th Cir. 2003) (Ferguson, J., dissenting) (stating that a comment about the plaintiff having a "typical Hispanic macho attitude" and others like it showed "particularly offensive stereotypes about Hispanics as lazy, and about Hispanic males as aggressive and domineering" and finding that the remarks and other conduct stated a claim "as to whether [the plaintiff] was subjected to an abusive workplace because of his race and his sex"); Anthony v. Cnty. of Sacramento, 898 F. Supp. 1435, 1445 (E.D. Cal. 1995) (denying defendants' summary judgment motion and stating that "the epithet 'black bitch' cannot be designated exclusively as either racist or sexist"); *see also* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981) (finding that African-American women did not constitute a discrete class for the purposes of a Title VII suit); DeGraffenreid v. Gen. Motors Assembly Div., 413 F. Supp. 142, 143 (E.D. Mo. 1976) ("[T]his lawsuit must be examined to see if it states a cause of action for race discrimination,

with a suit brought by an Asian woman, for example, "Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women" so the absence of evidence of discrimination against Asian men or white women would not disprove the plaintiff's claim.[119]

Most courts exclude as possible comparators anyone who shares any of the protected characteristics that form the basis of the plaintiff's claim,[120] so that finding a comparator for an intersectional claimant is even more difficult than it is for individuals who base their claim on one protected characteristic. As one court explained, "[T]he more specific the composite class in which the plaintiff claims membership, the more onerous th[e] ultimate burden" of proving discrimination becomes.[121] Thus, even if anecdotal and social science evidence reveals the real experience of intersectional discrimination,[122] it will usually be impossible, as a practical matter, for an individual to find his or her negative mirror image to show that discrimination has occurred. As a result, as one commentator has observed, "courts have basically given up on the complex subject."[123]

2. *Identity Performance*

A second type of complex case for which the comparator demand inhibits the observation of discrimination is the identity performance case. In developing the idea that "[w]orkplace discrimination is driven by more than

sex discrimination, or alternatively either, but not a combination of both."), *aff'd in part, rev'd in part*, 558 F.2d 480 (8th Cir. 1977).

119. Lam v. Univ. of Haw., 40 F.3d 1551, 1562 (9th Cir. 1994); *see also id.* ("[T]he attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences."); Jefferies v. Harris Cnty. Cmty. Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980) ("The essence of Jefferies' argument is that an employer should not escape from liability for discrimination against black females by a showing that it does not discriminate against blacks and that it does not discriminate against females."); Kotkin, *supra* note 15, at 1475 (describing *Lam* as "one of very few 'plus' claims to have met success").

120. *See* Kotkin, *supra* note 15, at 1491-92; *cf.* Philipsen v. Univ. of Mich. Bd. of Regents, No. 06-CV-11977-DT, 2007 WL 907822, at *6 (E.D. Mich. Mar. 22, 2007) ("Courts are split . . . over whether the proper comparator may only include a person outside of the protected class who has the same 'plus characteristic' as the plaintiff (in this case, a male with young children) or whether the comparator may include any *person* (male or female) who lacks the 'plus' characteristic (in this case, a female without young children).").

121. Jeffers v. Thompson, 264 F. Supp. 2d 314, 327 (D. Md. 2003).

122. *See* Kotkin, *supra* note 15, at 1446 & n.22 (discussing sources).

123. *Id.* at 1462.

the physiological markers of outsider difference,"[124] Devon Carbado and Mitu Gulati observed that outsiders who want to succeed in a workplace "often find themselves having to do extra work to make themselves palatable and their insider employers comfortable."[125] Addressing clothing and hairstyle choices, language use, and styles of socializing, Carbado and Gulati identify "strategic passing," "comforting," "using prejudice," and other strategies as existing along this continuum of identity work.[126] Those who do not engage in these "comfort strategies" may find themselves out of work or outside the partnership track.

In considering what a discrimination claim on these grounds might look like, Carbado and Gulati offer the example of the "fifth black woman" who presents herself, through her choices about clothing and socializing, in ways more associated with African-Americans than do four other black female colleagues.[127] Ultimately, the four others get promoted but the fifth black woman does not, although all have produced comparable work. The question for purposes here becomes whether a court could recognize race discrimination in that set of facts, which indicate that the fifth employee's nonpromotion was because of the way she performed her race. Even if the fifth black woman could produce a comparator from outside of her demographic group, such as a white

124. Carbado & Gulati, *supra* note 21, at 1307; *see also* Green, *Work Culture*, *supra* note 23, at 628 ("[S]etting behavioral expectations along a white, male norm imposes extra performance costs on outsiders and forces reconstruction of identity."); Gowri Ramachandran, *Intersectionality as "Catch 22": Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299, 300 (2005) ("[N]egotiating multiple identity performance demands simultaneously often places intersectionals in a uniquely restricted situation, one that has been referred to in other contexts as a 'catch 22' or 'double bind.'"); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1199-1230, 1269 (2004) (arguing that interpretations of Title VII that "fail to account for the role that volitional behavior or race/ethnicity performance plays in defining individual identity" leave courts unable to reach "equitable resolution" of discrimination claims); Laura Morgan Roberts & Darryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 DUKE J. GENDER L. & POL'Y 369, 378-86 (2007) (discussing "[i]dentity [p]erformance as a [s]trategic [r]esponse to [w]orkplace [c]ultural [p]rofiling"); Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 369 (2006) ("This paper seeks to begin the process of defining the ways in which employers use trait discrimination so as to begin a more useful normative discussion about when, if ever, antidiscrimination law should prohibit such discrimination.").

125. Carbado & Gulati, *supra* note 21, at 1307.

126. *Id.* at 1299-1307.

127. *See* Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 714-19 (2001).

man, the promotion of four "comparable" peers who are similar with respect to their race and sex (that is, the protected traits on which a claim might be filed) would likely be treated as undermining any inference of discrimination a factfinder might otherwise draw from the comparison.[128] There may well be other strategies for illuminating the possibility that the employer acted with discriminatory intent, as will be discussed shortly, but comparison will be unavailing.

Perhaps the most classic illustration of identity-performance discrimination from case law is *Rogers v. American Airlines*, in which a federal district court rejected a claim that the airline's prohibition of cornrows amounted to race discrimination.[129] "[E]ven if socioculturally associated with a particular race or nationality," the court wrote, the hairstyle "is not an impermissible basis for distinctions in the application of employment practices by an employer."[130] The *Rogers* analysis has since been repeated by numerous courts, which have rejected employees' claims that employer restrictions on or comments about personal appearance choices amount to trait-based discrimination.[131] In a case

128. *See, e.g.*, Smith v. Planas, 975 F. Supp. 303, 308 (S.D.N.Y. 1997) ("Five of the seven individuals identified by Plaintiff as having received higher-paying assignments were black—members of Plaintiff's protected class. As such, Plaintiff has failed to make out a prima facie case of race discrimination because he cannot show that the adverse employment action taken against him occurred in circumstances giving rise to an inference of race discrimination."); Samuels v. N.Y. State Dep't of Corr. Servs., No. 94-CV-8645, 1997 WL 253209, at *5 (S.D.N.Y. May 14, 1997) (finding that an African-American woman failed to articulate a prima facie case for race discrimination because, as two of her alleged comparators were African-American men, she "[could not] show that the adverse employment action taken against her . . . occurred in circumstances giving rise to an inference of race discrimination"). *But see, e.g.*, Graham v. Long Island R.R., 230 F.3d 34, 43 (2d Cir. 2000) ("[Because] Title VII's principal focus is on protecting individuals, rather than a protected class as a whole, an employer may not escape liability . . . simply because it can prove it treated other members of the employee's group favorably.").

129. 527 F. Supp. 229 (S.D.N.Y. 1981). Rogers argued that the grooming policy "discriminate[d] against her as a woman, and more specifically as a black woman." *Id.* at 231; *see also id.* at 231-32 (quoting Rogers's contention that the cornrow style "'has been, historically, a fashion and style adopted by Black American women'"). Scores of articles have analyzed the *Rogers* decision and the racial nature of the airline's selective hairstyle restriction. *See, e.g.*, Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079 (2010).

130. *Rogers*, 527 F. Supp. at 232.

131. *See, e.g.*, Tavora v. N.Y. Mercantile Exch., 101 F.3d 907, 908-09 (2d Cir. 1996) (citing numerous cases to support the conclusion that sex-based hair length rules do not violate sex discrimination prohibitions); Pitts v. Wild Adventures, No. 7:06-CV-62-HL, 2008 WL 1899306, at *6 (M.D. Ga. Apr. 25, 2008) (finding that a theme park employer's ban on dreadlocks and cornrows did not amount to race discrimination in part because "the policy

against the United Parcel Service, for example, a driver alleged racial discrimination and harassment in connection with comments about his dreadlocks, which he associated with his African identity as well as his religious beliefs.[132] Among other comments, UPS managers told him he looked like Stevie Wonder, equated his hair with drug use, and more.[133] Yet the court concluded that race was not implicated. "These comments and abuse," the court wrote, "while hurtful, sophomoric and insulting, are not racist in nature and do not support a reasonable inference of racial discrimination."[134] Likewise, another district court found that an employer's conduct was harassing but not racially motivated when he criticized an African American employee's hairstyles, "commented 'it's a black thing' one day when Miller was discussing her hair and fingernails with a white female co-worker," and asked her, among other similar questions, whether she was going to the zoo or to the jungles of Nigeria when she wore an animal-print top.[135]

In these cases, the comparator demand plays what might be described as a supporting role in limiting the discrimination theory's reach. Although courts are generally dismissive of grooming code discrimination claims as restrictions on "personal preference" rather than identity,[136] they also take the absence of comparators to reinforce the absence of discriminatory intent. For example, in *Eatman*, the court observed that the driver "ha[d] not identified any specific similarly situated non-black employee who was not disciplined for violating the hair appearance guideline."[137] It added, in response to the driver's showing that seventeen of the eighteen affected employees were black, that this

applies to all races and there is no evidence that the policy was enforced only against African-Americans"); Austin v. Wal-Mart Stores, Inc., 20 F. Supp. 2d 1254, 1257 n.4 (N.D. Ind. 1998) (citing *Rogers* to sustain store's sex-based hair length rules); *see also* Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc) (sustaining sex-based grooming code restrictions against a sex discrimination claim); *Austin*, 20 F. Supp. 2d at 1256 (holding, with respect to a grooming code, that "discrimination based on factors of personal preference" does "not necessarily restrict employment opportunities and thus" is "not forbidden").

132. Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 259 (S.D.N.Y. 2002). Thanks to Kimberly Yuracko for discussion of *Eatman* and some of the other contemporary identity performance cases noted here.

133. *Id.* at 261, 264.

134. *Id.* at 265.

135. Miller v. CCC Info. Sys., Inc., No. 95 C 6612, 1996 WL 480370, at *1 (N.D. Ill. Aug. 22, 1996). Miller had argued that the hairstyle and clothing comments "were 'racial' because white people do not wear their hair in the same style." *Id.* at *3.

136. *See, e.g.*, *Austin*, 20 F. Supp. 2d at 1256.

137. *Eatman*, 194 F. Supp. 2d at 264.

circumstantial evidence "would not, on its own, reasonably support a finding of discriminatory intent against African Americans."[138] Likewise, in *Rogers*, even while the court stressed that "[a]n all-braided hair style is an 'easily changed characteristic,'" it bolstered its argument by observing that the cornrows ban "applies equally to members of all races."[139]

3. *Structural Discrimination*

In a third situation—where workplace norms, structures, and interactions tend to obscure discriminatory intent (the "structural" cases)—the treatment of comparators as prerequisite to a claim may also exacerbate the difficulties that individuals already face in illuminating discrimination. The claim of structural analysis, as noted earlier, suggests that standard enforcement of discrimination laws misses many of the ways in which members of nondominant groups are excluded or marginalized not only by their supervisors but also by coworkers and others, with a detrimental effect on the terms and conditions of their employment.[140] This analysis, which reflects both the changed workplace and our increasingly refined understanding of the dynamics producing inequality, requires adjudicators to recognize complexly constituted, nonexplicit bias in interactions that often take place over time.[141]

The difficulty is that this view of the dynamics that produce inequality does not match the behavioral assumptions behind the comparator approach, which rely most heavily on striking differences in an employer's treatment of comparable coworkers as the signal of discriminatory intent.[142] A woman may be given less weighty assignments or excluded from certain meetings or outings that ultimately limit her opportunities to advance within a firm, yet unless a precisely comparable male colleague has not been excluded, the different treatment will not be legible for a court focused on actual comparators. Consider the law firm environment, for example. Because associates work on an array of cases, often with a variety of supervisors, a

138. *Id.*; *see also id.* at 265 ("Locked hair . . . is not so closely associated with black people that a racially neutral comment denigrating it can reasonably be understood as a reflection of discriminatory animus . . . . ").

139. Rogers v. Am. Airlines, 527 F. Supp. 229, 232 (S.D.N.Y. 1981).

140. *See supra* note 23 and accompanying text.

141. *See* Sturm, *supra* note 18, at 469 (explaining that the complexity of these claims "lies in the multiple conceptions and causes of the harm, the interactive and contextual character of the injury, the blurriness of the boundaries between legitimate and wrongful conduct, and the structural and interactive requirements of an effective remedy").

142. *See supra* note 72.

female associate is unlikely to be able to identify a sufficient number of closely comparable colleagues with sufficiently similar credentials and assignments to make a persuasive case of sex-based disparate treatment based on differences in assignment quality.[143]

Notably, some recent class actions have succeeded in persuading courts, at least for class certification purposes, that a particular type of hiring or promotion process (usually one in which supervisors have relatively unfettered discretion) is likely to facilitate discrimination based on a protected characteristic.[144] Ordinarily, though, the constricted view of comparators that operates in most cases means that few plaintiffs are able to provide an adequate comparator class that has not been disadvantaged by the employer's practices.

In short, although comparison is the dominant method used for observing discrimination, an actual and sufficient comparator turns out to be unattainable for most individuals who claim discrimination. Further, because of the numerous situations in which a comparator does not exist by virtue of the theory underlying the claim, the insistence on comparators renders whole

143. *Cf.* Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509 (3d Cir. 1992) (rejecting a claim that a law firm's assignment system had disadvantaged the plaintiff because of sex rather than because of her academic credentials); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493, 585 (1996) (arguing that "[n]either disparate treatment nor disparate impact analysis is well suited to rooting out the kind of adverse employment practices" related to assignments, training, and mentoring that are critical to advancement within law firms); S. Elizabeth Foster, Comment, *The Glass Ceiling in the Legal Profession: Why Do Law Firms Have So Few Female Partners?*, 42 UCLA L. REV. 1631, 1642-43 (1995) (discussing the "exclusionary and discriminatory behavior" in law firms that results in women's diminished opportunities for advancement).

144. *See, e.g.*, Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010) (en banc) (certifying a sex discrimination class action based in part on a determination that the employer's promotion practices could have facilitated sex-based decisionmaking) *cert. granted*, 79 U.S.L.W. 3128 (U.S. Dec. 6, 2010) (No. 10-277); Butler v. Home Depot, Inc., Nos. C-94-4335 SI & C-95-2182 SI, 1997 WL 605754, at *7 (N.D. Cal. Aug. 29, 1997) (sustaining certification of a sex discrimination class action challenging hiring and promotion practices and quoting expert testimony explaining that "[i]n the context of a male-dominated culture, relying on highly arbitrary assessments of subjective hiring criteria allows stereotypes to influence hiring decisions"). *But see, e.g.*, EEOC v. Chi. Miniature Lamp Works, 947 F.2d 292, 305 (7th Cir. 1991) (rejecting a race discrimination in hiring claim and holding that "[w]ithout probative evidence of discriminatory intent, however, Miniature is not liable when it passively relies on the natural flow of applicants for its entry-level positions"); EEOC v. Wal-Mart Stores, Inc., No. 6:01-CV-339, 2010 WL 583681, at *3 (E.D. Ky. Feb. 16, 2010) (excluding expert witness testimony regarding the link between an employer's practices and sex discrimination on the grounds that the expert had not shown discriminatory intent when concluding that the "overwhelmingly male-dominated workforce" was likely to influence hiring decisions).

categories of potentially discriminatory conduct beyond the reach of discrimination law.

III. ON THE CONCEPTUAL LIMITATIONS OF COMPARATORS

As we have seen, courts place comparators on something of a doctrinal pedestal by treating them as the default heuristic and as a threshold requirement for illuminating whether discrimination could have occurred. Yet the vast number of cases in which comparisons simply cannot be made begs the question whether comparators deserve this status and whether we ought to accept, as many courts and individual judges have, that if no comparison can be drawn, discrimination could not have occurred.

This Part argues that courts' unequivocal embrace of comparators overstates comparators' revelatory powers related to discrimination in two ways. First, the heuristic is overinclusive; it does not prove as much as it is often treated as proving, at least not without important additional assumptions from the factfinder. And second, the heuristic is underinclusive; a comparator's absence does not necessarily show that discrimination has not occurred. To be clear, I am not suggesting that, as a result of these vulnerabilities, we abandon comparators entirely as a means of recognizing discrimination. Indeed, given the challenges associated with any means of observing discrimination, coupled with the entrenched judicial preferences for comparators and the heuristic's occasional utility, that position would be both unwise and unrealistic.

My point, instead, is that comparators, like other methodological devices, work by virtue of unstated assumptions about the nature of discrimination and about how best to identify it. When we take account of these assumptions, we will be better positioned to see that the comparatively different treatment revealed by the heuristic is a byproduct of discrimination rather than discrimination itself. With that awareness, we will also be better positioned to avoid erroneously insisting upon the presence of a differently treated comparator as a necessary (and, in some cases, sufficient) element of discrimination.

A. *Comparators as Overinclusive*

At the most basic level, comparators are surely useful in reducing the set of variables that might explain an employer's adverse treatment of one employee

relative to another.[145] Yet the move from the reduced set of explanations to the conclusion that an employer more likely than not acted because of the employee's protected trait is not as defensible as courts sometimes suggest.

Indeed, the confidence that many courts express in the power of comparison to reveal discrimination contrasts sharply with other significant strands of American discrimination jurisprudence that recognize the complex and idiosyncratic nature of most employment decisions. As the Court has observed, "[T]reating seemingly similarly situated individuals differently in the employment context is par for the course."[146] Again: "To treat employees differently is . . . . simply to exercise the broad discretion that typically characterizes the employer-employee relationship."[147] Although the Court was writing in the context of a public employee's equal protection argument that her layoff was impermissibly arbitrary, its understanding that employers "'often must take into account the individual personalities and interpersonal relationships of employees in the workplace'"[148] could hardly be limited to those circumstances.

Yet if the baseline expectation is that employers will regularly treat similarly situated employees differently,[149] different treatment of comparable coworkers is likely to reflect merely benign variation in the workplace.[150] On this view, the comparator heuristic would be flawed if the fact of different treatment triggered our suspicion that discrimination had occurred.

145. If two employees have the same educational and experiential qualifications and similar job responsibilities, the set of possible explanations for the employer's negative treatment of one of them is significantly reduced. As compared to a situation in which the employees have different qualifications and responsibilities, then, discrimination is proportionately more likely to be the reason for the employer's adverse action.

146. Engquist v. Or. Dep't of Agric., 553 U.S. 591, 604 (2008).

147. *Id.* at 605; *see also Ezold*, 983 F.2d at 542 (observing that Title VII "does not require employers to treat all employees fairly").

148. *Engquist*, 553 U.S. at 604 (quoting Brief for Petitioner at 48, *Engquist*, 553 U.S. 591 (No. 91-1780)).

149. This view that employers regularly act arbitrarily but without discriminatory intent reinforces, and is reinforced by, the strong commitment to at-will employment and the related reluctance of courts to "second-guess difficult and expertise-laden personnel judgments." David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High-Level" Jobs*, 33 HARV. C.R.-C.L. L. REV. 57, 100 (1998). For further discussion of the comparator heuristic's synergies with judicial deference to employers, see *infra* notes 215-217 and accompanying text.

150. *But see* Selmi, *supra* note 15, at 561-62 (arguing that courts underestimate the probability that discriminatory intent infects this sort of seemingly idiosyncratic treatment).

Even if employers ordinarily treat similarly situated employees in the same way, different treatment can signal discrimination only if we make several additional, arguably fragile assumptions. For one, reliance on comparators as expositors of discrimination assumes that employers act rationally, so that when they deviate from their typical equal treatment model, they do so deliberately in a way that reliably signals discrimination.[151] If we assume, instead, that employers are not fully rational, we can find discrimination only by making the additional assumption that discriminatory intent, rather than arbitrariness or idiosyncrasy, is more likely to explain deviations from equal treatment.[152]

Of course, any exercise in comparison also requires the analyst to treat the inevitable differences between individuals as nonsalient. Because all individuals have multidimensional aspects of their identities, as current iterations of intersectionality theory show, very close comparators are hard to come by even for a relatively simple discrimination claim. In almost any setting, there are innumerable differences between individual employees, both by virtue of personal background and job assignments, that conceivably could explain an employer's adverse action against one but not another. In "high-skill or knowledge intensive jobs,"[153] this is true almost by definition, as no positions are exactly alike or often even very similar—at least in a workplace striving for an efficient, nonduplicative management structure. This not only makes monitoring difficult[154] but also renders the comparator heuristic virtually unusable, as the essence of hiring and promotion in these positions depends on the unique set of skills and contacts that an experienced professional brings to a position. In this light, different treatment can nearly always be attributed to nondiscriminatory motivations. Yet the typical judicial reliance on the comparator heuristic does not ordinarily engage in depth, or at all, with those consequential determinations.

Even in the context of lower-level positions, a comparison between two individuals who perform the same function but differ by the nature of their protected trait shows us intentional discrimination occurred only if we make assumptions that allow the comparison to do so. In this context, I think back to my days working at an ice cream shop. My manager, Chip, never liked me

151. Relatedly, if we were to treat job descriptions as reliable indicators of which jobs might be comparable across positions in a firm, we would assume a stability that runs contrary to the dynamic realities of actual jobs in any given workplace.

152. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 527 (1993).

153. Charny & Gulati, *supra* note 149, at 60.

154. *Id.* at 60-61.

much and made clear from time to time that he wanted to fire me. Had he done so while leaving in place my male coworkers and replacing me with a young man, I could have demonstrated a prima facie case of sex discrimination. Or, if he fired only me after learning that every scooper, including me, gave away ice cream to friends, the comparison could also suggest sex discrimination—disparate punishment of similarly situated employees for the same offense—if we let it. Given what we know about Chip's sentiments toward me, however, comparison is not necessarily revealing of Chip's reasons for the adverse action. Still, at the prima facie stage, this might not trouble us—the work that comparison does here, at most, is to make an opening suggestion that Chip fired me for an impermissible reason; it need not be treated as conclusive proof.

But, as we move through the burden-shifting process, we ought to consider what additional work, if any, we allow the comparison to do. Or, put another way, the question is whether (and why) we treat the comparison as probative at all. Taking the case to the next stage, imagine that Chip offered a nondiscriminatory reason for firing me—he disliked my sense of humor or my commitment to my schoolwork. And suppose I offered evidence in response that he laughed heartily at my jokes and repeated them to others and had given me the same congratulatory ice cream cake for doing well at school that he had given to my male ice cream scooping peers. Then what? I have arguably shown not only that his reasons for the firing were not credible, but also that they were pretexts for discrimination.

At this point, we might say that the set of possible reasons for Chip's actions has been narrowed even further, to the point that we will treat sex discrimination as the likely reason for his firing me.[155] But, again, comparison is the "closer" on my discrimination claim only if we are willing to impute discriminatory intent to Chip's comparatively worse treatment of me relative to my male coworkers. The governing law says that we can; although the doctrine would not mandate a determination that Chip discriminated,[156] my evidence would allow a factfinder to hold that Chip had discriminated against me.

155. *Cf.* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) ("[O]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.").

156. *St. Mary's Honor Ctr.*, 509 U.S. at 511 (holding that a court's "rejection of the [employer]'s proffered reasons" for its actions does not entitle a plaintiff to judgment as a matter of law).

Yet if we could peer into Chip's mind, we might have learned that his dislike was rooted in my particular ambitions for college (which were different from those of my also-college-bound scooping peers) rather than in my being female.[157] Comparison, seen in this light, was helpful for showing that Chip saw me differently from how he saw my peers[158] but was misleading to the extent that we read more into it than that. In other words, while the comparison can reliably narrow the set of reasons for Chip's actions, we *choose* to infer that Chip acted "because of sex." The comparator analysis itself does not require that interpretation of the facts.

Two interrelated observations follow. The first is simply that, as suggested above, comparators are a valuable filtering device, in that we can be reasonably confident in their ability to shrink the set of possible explanations for an employer's action. The second is that comparators are imperfect filtering devices; they are not a clear, or necessarily reliable, window into discriminatory intent.

Although some might say that this imperfection of fit should lead us to abandon comparators altogether, that is not my suggestion. It is always the case that circumstantial evidence requires a factfinder to draw inferences about intent rather than guaranteeing certainty.[159] And it is always the case that, unless we limit discrimination claims to situations where employers admit that they acted because of an employee's protected characteristic, we must draw from circumstances. Consequently, to the extent that we recognize discrimination even when an employer denies having discriminated and require plaintiffs to prove an employer's discriminatory intent, comparators are among our best resources.[160]

The point, instead, is that comparators themselves neither provide definitive insight into employers' motives nor inevitably compel conclusions regarding whether an employer acted because of an employee's protected trait, as courts often suggest they do. Instead, the comparator's revelation of

157. As the Court explained in *Price Waterhouse v. Hopkins*, "In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." 490 U.S. 228, 250 (1989).

158. As a potential additional virtue, the comparator framework may encourage employers to be more explicit and comprehensive about the grounds for their actions and their agents' actions to protect against adverse inferences.

159. *See supra* note 40 and accompanying text.

160. Still, the imperfections of such an approach raise interesting questions about why the courts treat comparison as confidently as they do. I consider these questions below.

discriminatory intent rests on a set of assumptions about both the similarity of the complainant and the comparator and the baseline rationality of employers. For the comparator's probative work to be assessed properly, relative to other methodologies, those assumptions must be part of the conversation. The comparator's imperfections as a filtering device ought also to give us pause with respect to the transformation of comparators from heuristic to substantive law.

B. *Comparators as Underinclusive*

The comparator heuristic's underinclusiveness should give us additional cause to be dubious when courts treat comparators as the only or preeminent method for illuminating discriminatory intent. Recall that the triggering problem for discrimination law is the employer's decision to take action because of the trait. This means, again, that while the presence of a comparator may help illuminate an employer's reliance on a protected trait, the existence of a better-off comparator is a byproduct of the discrimination rather than the discrimination itself.

The Supreme Court made this point when considering the sex discrimination claims of female security guards who alleged that the county government running the jail where they worked intentionally paid them less because they were female.[161] In its defense, the county argued that discrimination could have occurred only if the women had engaged in "equal work" relative to the male guards.[162] The Court was clear that the county's comparative conceptualization of discrimination was unduly constrained. "In practical terms," the Court wrote, restricting recognition to instances where comparisons could be made would "mean[] that a woman who is discriminatorily underpaid could obtain no relief—no matter how egregious the discrimination might be—unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay."[163] The Court labeled this type of practice as "blatantly discriminatory," recognizing that the discrimination was rooted not in the comparison between men and women but in the employer's decision to underpay an employee because she is a woman.[164]

161. Cnty. of Wash. v. Gunther, 452 U.S. 161 (1981).

162. *Id.* at 177.

163. *Id.* at 178.

164. *Id.* at 179.

Likewise, the Second Circuit observed:

> If [an] employee were fired for a discriminatory reason, and no one was hired to replace him, he could never demonstrate disparate treatment because there is no point of comparison. . . . [I]t stands to reason that, in such a case, the plaintiff should be able to create an inference of discrimination . . . .[165]

Or imagine, returning to my ice cream scooping experience, that Chip fired me because of my sex but did not replace me with another scooper. The absence of a comparator would not change the fact that Chip treated me adversely "because of sex."

In other words, if we understand discrimination to mean adverse treatment because of a protected trait, we ought to be able to find discrimination even when comparison is not a meaningful possibility. It is no doubt true that, without a comparator, the fact that an employer acted because of the employee's trait rather than for some other reason becomes more difficult to see. But, to the extent we agree that the discrimination could have occurred, our limitations in seeing discriminatory intent should prompt us to explore other methodologies and perhaps rethink the way in which courts rely on comparators as our best, or even exclusive, methodology.

C. *Comparison and Disparate Impact*

Interestingly, disparate impact theory and jurisprudence reinforce how questionable the conceptual link is between comparators and proof of discriminatory intent. Comparison is critical to disparate impact cases in that the trait-based impact is ordinarily shown by comparing the effect of a rule or policy on individuals with and without the protected trait at issue. So, for example, in the Court's recent ruling in *Ricci v. DeStefano*, the disparate impact claim rested in part on a showing that the city's decision not to rely on test results had a comparatively adverse effect on white firefighters who would have been promoted had the test results been counted.[166]

165. Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 467 (2d Cir. 2001).

166. 129 S. Ct. 2658 (2009). For other cases in which comparators are critical to demonstrating disparate impact, see, for example, *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010), which found that the plaintiff had made out a cognizable prima facie disparate impact claim by showing that an employment practice affected African-Americans more negatively than others; and *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008), which held that a disparate impact claim requires plaintiffs to show that employment practices cause statistical disparities between groups.

Yet the point of comparative proof in *Ricci* and other disparate impact cases is not to show the employer's discriminatory intent but rather to highlight the effect of the challenged decision. Indeed, courts do not draw an inference of discriminatory intent from the comparatively adverse treatment. Instead, intent in disparate impact cases is irrelevant to the analysis and, more deeply, to the law's concern in this area, which is to eradicate employer actions that have the effect, if not the aim, of discriminating based on a protected trait.[167] Thus, while the primary focus here is on the overreliance on comparators in disparate treatment cases, the additional evidence of a disconnect between comparators and intent in the disparate impact context should cast further doubt on the faith that courts place in comparators' revelatory powers.

IV. CONTEXT: A METHODOLOGICAL ALTERNATIVE

Notwithstanding the dominance of comparators in much of the employment discrimination jurisprudence, harassment and stereotyping case law shows that the task of observing discrimination can be managed successfully with other techniques and that discrimination is not centrally defined by comparison. Indeed, although these cases are not often treated as different in kind analytically from other discrimination cases, when seen through a comparator lens it becomes clear that they are. While individual employees might offer a comparator as part of their proof, the discrimination claim is typically founded not on a comparison to coworkers but instead on the harassing and/or stereotype-based interactions between the employee and others in the workplace.

More specifically, in the harassment context, the employee will point to one or more statements or acts by coworkers or supervisors that negatively affected the employee's work environment and had either an explicit or implicit connection to the employee's protected characteristic(s). A sexual harassment plaintiff might indicate, for example, that a supervisor or coworker touched her inappropriately or targeted her with sexually demeaning comments.

In the stereotyping cases, an individual will seek to show that an employer treated him or her adversely because of stereotypes associated with the individual's protected characteristic(s). Here, the crux of the claim is typically that the employer acted adversely based on doubts about the individual's

167. *See* Raytheon Co. v. Hernandez, 540 U.S. 44, 52–53 (2003) (noting that while disparate treatment cases depend on an employer's motivation for the challenged acts, disparate impact cases do not).

ability to perform the job at issue not because of merit but because of stereotypes associated with the individual's identity characteristic.

For both types of cases,[168] courts discern discriminatory intent in the acts and statements at issue by looking to all of the surrounding circumstances for the ways in which the protected traits may have operated to affect employer decisionmaking. Comparators may be present, but they are not decisive. For this reason, these cases, and their application of a totality-of-the-circumstances analysis, reinforce the claim here that comparators are best understood as one among several observational tools rather than as a defining element without which discrimination cannot occur. This Part first will trace the development of the contextual methodology in discrimination cases involving stereotyping and harassment, and then will consider the relationship of this method to the work of comparators as a means for seeing discrimination.

A. *The Emergence of the Contextual Model in Stereotyping and Harassment Jurisprudence*

The recognition that discriminatory intent could be discerned from context, including an employer's acts and statements, rather than from comparison to other employees, initially took hold in the Supreme Court's sexual harassment jurisprudence. Indeed, in the Court's first case to find that harassing acts could themselves amount to discrimination, *Meritor Savings*

168. It bears noting that harassment and stereotyping claims are not mutually exclusive. Indeed, there are a number of cases in which employees have prevailed because the harassment they experienced took the form of stereotyping linked to a protected characteristic. In *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001), for example, a male waiter was repeatedly harassed because his coworkers thought he was too effeminate. As the court observed,

> At its essence, the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act. Sanchez was attacked for walking and carrying his tray "like a woman"—i.e., for having feminine mannerisms. Sanchez was derided for not having sexual intercourse with a waitress who was his friend. Sanchez's male coworkers and one of his supervisors repeatedly reminded Sanchez that he did not conform to their gender-based stereotypes, referring to him as "she" and "her." And, the most vulgar name-calling directed at Sanchez was cast in female terms. We conclude that this verbal abuse was closely linked to gender.

Id. at 874; *see also* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1067 (9th Cir. 2002) (en banc) (finding it "clear" that sexualized attacks on a gay man, "who was singled out from his male coworkers" for hostile treatment, stated a sex discrimination claim).

Bank v. Vinson, comparators were but one option on a long list of techniques for discerning discriminatory intent.[169]

In *Meritor*, the Court addressed whether a bank supervisor, who had acted in sexually aggressive ways toward the plaintiff, had acted "because of sex" rather than for some other reason by looking to the Equal Employment Opportunity Commission's guidelines. Those guidelines identified "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" as sexual harassment and, separately, defined sexual harassment as a form of sex discrimination.[170] Yet the Court also made clear that not all such advances and conduct would amount to discrimination; instead, only "sufficiently severe and pervasive" acts would warrant remediation under the statute.[171]

But neither of these points, by itself, shows that the sexualized conduct was "because of sex" rather than for some other reason. Indeed, the Court has since reiterated that sexualized harassment is not necessarily harassment "because of sex" within the meaning of Title VII.[172] As Justice Scalia observed for a

169. The central question was whether a sexually harassed litigant needed to show additional adverse action by the employer, such as demotion or termination, to state a discrimination claim. The Court held she did not. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."). Both in *Meritor* and subsequently, the Court recognized that racially harassing acts can likewise create a hostile and discriminatory environment. *See id.* at 66-67; *see also* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 116 n.10 (2002) ("Hostile work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment.").

170. *Meritor*, 477 U.S. at 65.

171. *See id.* at 67 ("[The] 'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' would not affect the conditions of employment to [a] sufficiently significant degree to violate Title VII." (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1972))). "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* (alteration in original) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)); *see also* Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006) ("[I]t is important to separate significant from trivial harms. Title VII, we have said, does not set forth 'a general civility code for the American workplace.'" (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998))); Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (stating that judicial standards for sexual harassment must "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing'" (quoting BARBARA LINDEMANN & DAVID KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 175 (1992))).

172. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998); *see also* David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1748-58 (2002) (observing that modern academics and courts have questioned the assumption that sexual harassment occurs "because of sex").

unanimous court in *Oncale v. Sundowner Offshore Services*, "We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations."[173] Still, even while characterizing "the critical issue" in a comparative manner—that "members of one sex [be] exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed"—comparators were last on the Court's list of methods of seeing the link between the adverse act and the protected characteristic.[174] The more prominent and "easy" methods, according to the Court, involved consideration of the harassing statements and actions themselves,[175] as well as the defendant's sexual orientation.[176]

The larger point, as the Court explained, is that observing discrimination in a workplace requires consideration of not only "the words used or the physical acts performed" but also "a constellation of surrounding circumstances, expectations, and relationships."[177] In short, what matters for seeing

173. *Oncale*, 523 U.S. at 80.

174. *Id.* (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)); *see also id.* at 80-81 ("A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.").

175. *Id.* at 80 ("A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.").

176. On the relevance of a defendant's sexual orientation, the Court stated:

> Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.

Id.

177. *Id.* at 82. *See also, e.g.*, Petrosino v. Bell Atl., 385 F.3d 210, 221 (2d Cir. 2004) ("The mere fact that men and women are both exposed to the same offensive circumstances on the job site . . . does not mean that, as a matter of law, their work conditions are necessarily equally harsh. The objective hostility of a work environment depends on the totality of the circumstances."); Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1063 (7th Cir. 2003) (rejecting a discrimination claim after "consider[ing], as in any sex harassment case, the 'social context in which the particular behavior occurs'" (quoting *Oncale*, 523 U.S. at 81)).

discrimination is context, with comparison being but one technique among several for making that contextual evaluation.[178]

The use of this type of contextual but noncomparative evaluation to observe identity-based discrimination can also be seen outside the employment context. In finding that Georgia's segregated confinement of mentally disabled patients amounted to discrimination "by reason of" disability,[179] for example, the Court in *Olmstead v. Zimring* rejected outright the need for a comparator. It declared instead that it could observe discrimination by analyzing the segregating act in context, similar to its approach in the harassment cases. Specifically, the Court rested its "[r]ecognition that unjustified institutional isolation of persons with disabilities is a form of discrimination" on two observations—one related to the expressive meaning of isolation and the other related to the harm caused to those isolated:

> First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.[180]

In short, the Court saw that the segregation of mentally disabled individuals was discrimination because of disability not by comparing the act to the treatment of others, but instead by looking more broadly at the segregating act's social meaning and its injurious effect.[181]

178. This could be characterized as a Bayesian approach to evidence. One might also argue that the Court in *Meritor* deployed a hypothetical comparator by imagining, in effect, a man who would not have been subject to the same conduct as the female plaintiff. If that is the case, there is no mention of that analytic move by the Court. Further, the "opposite-sex" hypothetical comparator provides little help in understanding the Court's analysis in the same-sex harassment context, where the Court, as in *Oncale*, did not give any indication that it was imagining that a female worker on the offshore oil platform where Joseph Oncale was harassed would not also have been subject to harassment.

179. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 598 (1999).

180. *Id.* at 600-01 (internal citations omitted); *see also* City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971))).

181. Notably, although Congress had specified this type of segregation as discriminatory, the Court did not simply rest on the statute's findings, which "identified unjustified

The importance of contextual evidence of discrimination, rather than comparator evidence, can be seen in stereotyping cases as well. In *Price Waterhouse v. Hopkins*, for example, the Court found that the accounting firm had discriminated impermissibly by relying on sex stereotypes to deny partnership to Ann Hopkins.[182] Although Hopkins had offered evidence of how male partnership candidates had been treated, the Court noted specifically the district court's finding that she did not have an adequate comparator. There were male candidates who lacked the interpersonal skills that Hopkins had also been accused of lacking, but they were not sufficiently comparable because they "possessed other, positive traits that Hopkins lacked."[183] Instead, the Court looked to the sex-stereotyped remarks made about Hopkins to find that the firm had acted "because of" sex. These included the observation by some partners at the firm that she was "macho," that she "overcompensated for being a woman," that she should "take a course at charm school," and that, "to improve her chances for partnership . . . [she] should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"[184]

In an approach endorsed by others on the Court,[185] the plurality treated its observation of stereotyping remarks as equivalent to observing discriminatory intent directly, writing simply that "stereotyped remarks can certainly be *evidence* that gender played a part" in an employer's decision.[186] Although

'segregation' of persons with disabilities as a 'for[m] of discrimination,'" but, as illustrated, explained and justified that determination. *Olmstead*, 527 U.S. at 600 (citing 42 U.S.C. §§ 12101(a)(2), (5) (2006)).

182. 490 U.S. 228 (1989).

183. *Id.* at 236.

184. *Id.* at 235.

185. *Id.* at 259 (White, J., concurring) ("I agree that the finding [of sex discrimination] was supported by the record."); *id.* at 261 (O'Connor, J., concurring) (agreeing with the plurality that "on the facts presented in this case," Hopkins had showed that the firm relied adversely on her sex in its partnership decision); *id.* at 265 ("Congress was certainly not blind to the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one's race or sex."). Even the dissenters agreed that "Hopkins plainly presented a strong case . . . of the presence of discrimination in Price Waterhouse's partnership process" and that "[e]vidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent." *Id.* at 294, 295 (Kennedy, J., dissenting).

186. *Id.* at 251; *see also id.* ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."). Further, the Court explained why stereotypes violate Title VII's sex discrimination prohibition: "An employer who objects to aggressiveness in women but whose positions require this trait places women in an

Hopkins had introduced expert testimony to show, through social psychological theory, that these and other comments should properly be seen as sex stereotyping, the plurality characterized that testimony as "merely icing on Hopkins' cake."[187] Making its observation of discrimination sound straightforward, the plurality observed that "[i]t takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.'"[188]

The Court was clear that stereotyped remarks themselves do not necessarily show that impermissible discrimination has occurred. Instead, the employee who has alleged discrimination "must show that the employer actually relied on her gender in making its decision."[189] But, most significant for our purposes, the remarks can help make that showing because they are treated as exposing the employer's intent to act because of the employee's protected characteristic.[190]

B. Acts, Statements, and Automaticity

In essence, the Court, through its "no special training" comments, suggested that drawing the link between acts, statements, and discriminatory intent is undemanding, if not automatic. Yet much like the overstated faith in the comparator heuristic, this characterization also implies that acts and statements themselves do more work than they actually do to establish that an employer has acted because of a protected trait.

Justice O'Connor's commentary in *Price Waterhouse* is illustrative of the way in which courts frequently gloss over the difficulties associated with discerning discriminatory intent from stereotyping statements. As she explained, not every statement regarding an employee's sex necessarily

intolerable and impermissible catch-22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind." *Id.*

187. *Id.* at 256.

188. *Id.*

189. *Id.* at 251.

190. *See also* Prowel v. Wise Bus. Forms, 579 F.3d 285, 291-92 (3d Cir. 2009) (putting comments made to the plaintiff-employee in context and finding those comments sufficient to state a sex stereotyping claim); Schroer v. Billington, 577 F. Supp. 3d 293, 303-05 (D.D.C. 2008) (finding, in context, that an employer's comments about the plaintiff themselves amounted to sex stereotyping).

Some would argue that courts are comfortable turning to context where stereotyping or harassing incidents have occurred because those incidents are more easily understood than other occurrences, as described in the cases in Part II, *supra*, to signal the presence of discriminatory intent. I address this point *infra* at text accompanying notes 264-265.

demonstrates sex stereotyping and, therefore, discriminatory intent. "[A] mere reference to 'a lady candidate' might show that gender 'played a role' in the decision," she wrote, "but by no means could support a rational factfinder's inference that the decision was made 'because of' sex."[191] For Justice O'Connor, this understanding followed from the point that "[r]ace and gender always 'play a role' in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion."[192]

Yet distinguishing the comments that reveal discriminatory intent from those that do not is neither as easy nor as obvious as the comments of Justice O'Connor and other members of the Court seem to suggest.[193] While Justice O'Connor did not find the "lady candidate" reference troublesome, others, including Hopkins's expert witness, could make a strong case that the reference showed that the firm's treatment of Hopkins was centrally shaped by her being a woman to the point that the very way in which they identified Hopkins focused on her being female. Likewise, although the majority in *Olmstead* deemed it "evident" that the act of segregating mentally disabled individuals amounted to discrimination,[194] the dissent found it equally evident that no discrimination had occurred.[195]

Indeed, a central claim of second-generation theories is that discriminatory intent is often missed in precisely the sort of "lady candidate" statement that Justice O'Connor dismissed as nonprobative. As discussed earlier, for example, many courts would not see race discrimination in the refusal to promote the "fifth black woman" even if the nonpromoted woman could identify negative comments about her African-style clothing or her black church choir

191. *Price Waterhouse*, 490 U.S. at 277.

192. *Id.*

193. Indeed, as suggested earlier, it is this difficulty that, outside of the stereotyping and harassment cases, drives courts to embrace comparator evidence so strongly.

194. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 600 (1999).

195. *Id.* at 623 (Thomas, J., dissenting) (describing the majority's analysis as "fly[ing] in the face" of the Court's precedent). We can see similar disagreement over the link between sex-based rules and stereotyping in *Nguyen v. INS*, where Justice O'Connor, in dissent, had no difficulty concluding that a rule favoring mothers over fathers for purposes of conferring U.S. citizenship on foreign-born children was rooted in impermissible sex stereotypes, while a majority of the Court found the sex-based distinction to be perfectly legitimate. *Compare* 533 U.S. 53, 74-97 (2001) (O'Connor, J., dissenting), *with* 533 U.S. at 56-73 (majority opinion). For further discussion of the ways in which the majority and dissenting opinions in *Nguyen* interpreted the same facts differently and, consequently, reached different conclusions about the constitutionality of the challenged rule, see Goldberg, *Constitutional Tipping Points*, *supra* note 30, at 1970-74.

membership, so long as her four African-American peers were promoted.[196] Yet as Carbado and Gulati suggest, when examined closely, those sorts of comments reflect the same sort of racial stereotyping that is seen more easily in other settings.[197]

In other words, a case like *Price Waterhouse* may be easy because the Court "gets" the link between sexism and statements about a partnership candidate being too macho. Likewise, the Court may have little difficulty finding that an employer's use of the word "boy" when talking to African-American employees suggests the presence of discriminatory intent.[198] But there is nothing inherent in harassing acts and stereotyping statements in general that makes their underlying discriminatory intent fundamentally easier to unmask than the discriminatory intent that might underlie other types of adverse treatment. Instead, it is agreement (or presumed agreement) on the social meaning of those acts and statements, when considered through a contextual lens, that renders the cases easy for courts to decide. Consequently the "easy" characterization should be understood as describing the Court's comfort level with finding discriminatory intent in particular acts or statements, and not as suggesting that observing discriminatory intent is any more automatic in the stereotyping and harassment contexts than it is through comparisons.

C. Reconsidering Comparators in Light of the Contextually Focused Stereotyping and Harassment Jurisprudence

Recall Justice Thomas's assertion that a conceptualization of discrimination that does not require a comparison is "nonsensical"[199] and "drains the term of

196. *Cf.* Jesperson v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc) (presenting differing views in majority and dissenting opinions as to whether a policy requiring female employees to wear makeup constituted sex stereotyping); Zalewska v. Cnty. of Sullivan, 316 F.3d 314, 323 (2d Cir. 2003) (declining to give credence to the "stereotype[]" that a woman wearing pants is dressed "more masculinely"); Weinstock v. Columbia Univ., 224 F.3d 33, 44-45 (2d Cir. 2000) (finding that labels such as "nice" and "nurturing" used to describe a female professor were insufficient as a matter of law to demonstrate sexually discriminatory intent).

197. *See* Carbado & Gulati, *supra* note 21, at 1279-93. Again, even readers who reject either the premise of identity performance theory or the view that discrimination law embodies the theory's premise may benefit from seeing that the easy identification of discrimination in some acts and statements but not others is not because those acts and statements are different in kind but rather because there is more general consensus about discriminatory intent underlying some acts and statements than there is about others.

198. *See* Ash v. Tyson Foods, Inc., 546 U.S. 454, 456 (2006).

199. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 618 (1999) (Thomas, J., dissenting).

any meaning other than as a proxy for decisions disapproved of by this Court."[200] Specifically, Justice Thomas suggested that "no principle" could "limit[] this new species of 'discrimination' claim . . . because it looks merely to an individual in isolation, without comparing him to otherwise similarly situated persons, and determines that discrimination occurs merely because that individual does not receive the treatment he wishes to receive."[201]

If it is correct that discrimination exists only where an individual can show a comparator in a better-off position, then we ought to be able to locate this type of comparison within the harassment and stereotyping jurisprudence. If not, we ought to ask whether Justice Thomas's concerns about the potential lack of a limiting principle for a noncomparative discrimination analysis undermine the validity of the contextual method for observing discrimination.

As a preliminary matter, it is worth reiterating that Justice Thomas's constrained conceptualization of discrimination did not capture majority support when he advanced it in *Olmstead* and that his approach conflicts with the Court's harassment and stereotyping decisions discussed above. Moreover, comparison is arguably counterproductive as a means for illuminating, let alone defining, discrimination where an employer singles out an employee for harassment or stereotyping because of a protected trait. In these kinds of cases, an employee can often show that others outside his or her protected group were not treated adversely, but the employer can likewise show that some within the protected group were not treated adversely either. At that point, the comparison no more allows for an inference of discriminatory intent based on a protected characteristic than for an inference that something else particular to the employee had provoked the employer's actions.

Yet, as discussed above, it is long settled that when an employer targets one employee for adverse treatment from among others who share the same protected trait, discrimination can be found. Despite Justice Scalia's having joined Justice Thomas's opinion in *Olmstead*, it was Scalia's own opinion in *Oncale* that made this point by allowing a man to bring a sexual harassment claim based on the activities of other men in a workplace where no women were present.[202] Even Justice Kennedy, who agreed with Justice Thomas's

200. *Id.* at 624.

201. *Id.*

202. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 77, 79-80 (1998). On the question whether ideas of comparison are embedded in conceptualizations of sexual harassment, Katherine Franke has observed that "sexual harassment is a kind of sex discrimination not because the conduct would not have been undertaken if the victim had been a different sex . . . but precisely because . . . . it perpetuates, enforces, and polices a set of gender norms

insistence on comparators, did not fully embrace the limited scope for discrimination law that Justice Thomas advanced. Instead, he specifically "put[] aside issues of animus or unfair stereotype" when expressing his support for a comparison-based methodology, suggesting, in effect, that the presence of either could render the comparison-driven analysis unnecessary.[203]

All of this reinforces that while comparators are one acceptable mode of exposing discrimination, they are certainly not, conceptually or doctrinally, a categorical requirement. Yet the question remains whether courts, by finding discrimination absent a comparative showing, are misusing discrimination law to mandate their own preferred code of conduct per Justice Thomas's view.

The very suggestion that comparator-based discrimination findings are objective while noncomparative analyses are subjective significantly overstates the differences between these methods for discerning discrimination, creating a false and unhelpfully dichotomous analysis. As discussed earlier, observing discrimination through comparators is no more automatic than through these other means. The determination that a comparator is adequate (or inadequate) for purposes of illuminating discriminatory intent arguably effectuates the subjective preferences of courts at least as much as the finding of discrimination through an examination of acts or statements. So while it is true that making a contextual determination about which acts or statements reveal impermissible discrimination requires judgment calls or assumptions by the court, so too does the application of the comparator analysis.

Indeed, the suggestion that discrimination can truly be seen only via comparators and that all other non-comparison-based discrimination findings amount to policy judgments is reminiscent of a decades-old debate about the underpinnings of equality guarantees. Prompting that debate was the argument, advanced by Peter Westen, that equality was both "empty" and "entirely '[c]ircular'" because similar treatment could be required only for those deemed to be sufficiently similar.[204] Others quickly responded with a

that seek to feminize women and masculinize men." Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 696 (1997).

203. *Olmstead*, 527 U.S. at 611 (Kennedy, J., concurring). Justice Kennedy observed that "[a]t the outset it should be noted there is no allegation that Georgia officials acted on the basis of animus or unfair stereotypes regarding the disabled," *id.*, and argued that "absent a showing of policies motivated by improper animus or stereotypes, it would be necessary to show that a comparable or similarly situated group received different treatment," *id.* at 613.

204. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547-51 (1982). Westen argues that:

> Equality is an empty vessel with no substantive moral content of its own. Without moral standards, equality remains meaningless, a formula that can have

range of theories to suggest that the equality guarantee did indeed have valuable content.[205] Yet, however forcefully advocated, each of these positions necessarily rested on the premise that substantive judgments and assumptions were required to give equality its content.[206]

Likewise, the process of observing discrimination necessarily requires judgments about whatever circumstantial forms of evidence we are considering—whether comparisons, harassing acts, or stereotyping statements—as well as decisions about which discrimination theories to embrace. As shown earlier, choices about which comparisons will be treated as exposing discrimination and which will not, just like the choices about which acts and statements are because of a protected trait and which are not, are just that—choices. None is more mechanical or automatic than the other.

Because these choices are thus essential to evaluating any circumstantial evidence, comparators provide false certainty to the extent that they are treated as elemental to, or objectively confirmatory of, discrimination. In turn, this false certainty enables courts to elide accountability (1) for their decisions to require comparators in the first place; and (2) for their dispositive judgments regarding the scope of acceptable comparators and the diminished value of other non-comparator-based evidence. The contextual evaluation, by contrast, gives greater exposure to the choices that courts make regarding their theory of discrimination and the relationship of workplace evidence to that theory. This is because the doctrine insists that a connection be established between the

> nothing to say about how we should act. With such standards, equality becomes superfluous, a formula that can do nothing but repeat what we already know.

Id. at 547 (footnote omitted).

205. *See, e.g.*, C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933 (1983) (urging that an "equality-of-respect" model reflects the best substantive understanding of the equal protection guarantee); Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167, 1184-85 (1983) (arguing that the principle of equality has been central to advancement of greater political rights and social opportunities); Karst, *supra* note 33, at 279-80 (maintaining that equality rhetoric has substantive effect on legal rights and political culture); Kenneth W. Simons, *Equality as a Comparative Right*, 65 B.U. L. REV. 387, 389 (1985) ("A right to equal treatment is a *comparative* claim to receive a particular treatment just because another person or class receives it.").

206. *See* Finley, *supra* note 33, at 1144. Discussing Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1711 (1976), Finley writes, "Kennedy's insight is that there is no determinate, coherent way to choose between . . . formal equality or substantive equality. Inevitably, the choice depends on our sets of values and visions of society." *Finley*, *supra* note 33, at 1144 n.113. Finley adds that "[t]here is no way, within the doctrinal framework itself, to tell us when we should adopt the approach of formal equality, and when a substantive equality approach is called for. Instead, we must appeal to deeply political conceptions of what values and type of society we wish to foster." *Id.*

protected characteristic and the acts or statements at issue.[207] Of course, as illustrated by *Price Waterhouse*, where courts find that connection to be easy or obvious, they may move quickly or automatically from the acts or statements to a finding of discrimination.[208] But even in those circumstances, the move is there for all to see, whereas the comparator framework provides cover for courts' similar judgments and the resulting jurisprudential inhibition of all but the most formalistic antidiscrimination norms and theories.

V. JUDICIAL LEGITIMACY AND THE STICKING POWER OF COMPARATORS

At this point we have seen that comparators are not the only means for seeing discrimination and that, by design (or at least in a typical application), there are serious limitations to the discrimination that comparators can reach. Yet comparators remain dominant to the point that discrimination lawsuits typically cannot be won without them.

This Part explores the reasons for comparators' sticking power, and aims both to explain why such an imperfect means for observing and defining discrimination has achieved dominance and to understand the possibilities for new methodologies going forward. My central claim is that comparators have gained their status because their empirical appearance enables courts to accommodate a primary legitimacy concern that plagues judicial intervention on issues related to identity and a subsidiary concern related to employer autonomy. That is, comparators offer a seemingly bright-line framework for identifying elusive facts and resolving complex social judgments even though a flexible framework would be more appropriate.

A. The Legitimacy Concerns at Play

The prospect of a free-form, or even relatively unstructured, inquiry into workplace behaviors related to individual identity taps directly into the legitimacy- and capacity-protecting inclination exhibited by many courts to avoid tasks that have the cast of a sociological inquiry.[209] This antisociological

207. In addition to its value in terms of judicial accountability, the contextual evaluation also adds substantive value by exposing, and possibly avoiding, the diminishment of antidiscrimination norms effected by the comparator heuristic. *See supra* note 33.

208. *See supra* text accompanying notes 182–188.

209. For extended development of this point, see Goldberg, *Constitutional Tipping Points*, *supra* note 30; and Goldberg, *Anti-Essentialist and Social Constructionist Arguments*, *supra* note 30.

bent can be seen, for example, in the Court's turn to visible markers such as ancestral lineage and surnames[210] when defining identity categories, rather than to the more complex and contested social norms that are widely understood, even by the Court, to contribute importantly to the content of these categories.[211] It can be seen as well in the way that the Court cites changed factual understandings about a social group rather than acknowledging changed social norms when invalidating restrictions on group-member rights previously accepted as legitimate.[212]

The basic idea is that while courts may be well equipped to sift among empirical facts, they are less institutionally suited, both in terms of training and resources, for deep investigation and analysis of social norms. Consequently, however attentive they may be to trends in social stances regarding an issue or

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We might point to similar reasons to explain courts' turn to discrimination as the legal framework for evaluating sexual harassment, rather than dignity, which is the more common approach within European law. As Gabrielle Friedman and James Whitman have observed, "For Americans . . . the concept of 'dignity' often remains unconquerably vague, unfillable with meaningful content. . . . It is 'discrimination' that seems the *hard* concept in America, the concept with real content." Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241, 268 (2003).

210. *See, e.g.*, Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 (1987) (relying on an early nineteenth-century definition of race "continued series of descendants from a parent who is called the *stock*") (internal citation omitted); Hernandez v. Texas, 347 U.S. 475, 480 n.12 (1954) ("[J]ust as persons of a different race are distinguished by color, these Spanish [sur]names provide ready identification of the members of this class."). These same themes can be traced through lower court decisions. *See, e.g.*, Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 540 (Cal. 1971) (identifying race and lineage as "immutable trait[s], a status into which the class members are locked by the accident of birth"); Hernandez v. Hous. Indep. Sch. Dist., 558 S.W.2d 121, 124 (Tex. Civ. App. 1977) (characterizing lineage and race as "classifications based upon unalterable traits"). *But see* Commonwealth v. Rico, 711 A.2d 990, 994 (Pa. 1998) ("The mere spelling of a person's surname is insufficient to show that he or she belongs to a particular ethnic group.").

Kenji Yoshino has written in the equal protection context about the way in which a trait's "visibility" enhances the likelihood for heightened judicial review of trait-based classifications. *See* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 496-98 (1998). He described this visibility as "the perceptibility of traits such as skin color that manifest themselves on the physical body in a relatively permanent and recognizable way." *Id.* at 497.

211. *See, e.g.*, *Saint Francis Coll.*, 481 U.S. at 610-11 (cataloguing dictionaries and encyclopedias that discuss the socially constructed nature of race); Williams v. Wendler, 530 F.3d 584, 587 (7th Cir. 2008) (describing "'race'" as "a fuzzy term").

212. *See* Goldberg, *Constitutional Tipping Points*, *supra* note 30, at 1998-99 (citing Roper v. Simmons, 543 U.S. 551, 610 (2005) (Scalia, J., dissenting)).

a particular social group,[213] courts are more likely to register that awareness through commentary about observable facts than through a sociologically framed analysis. While the latter might be more accurate and candid, it also would leave courts more vulnerable to charges that they are acting beyond their capacity and using their powers to institutionalize their own social views into legal mandates.[214]

In addition, courts tend to be especially wary of appearing to be hyper-regulators of the workplace given the background commitments, both ideological and doctrinal, that typically favor employer autonomy. Because discrimination law carves out an exception to the general tolerance for bad workplace behavior,[215] including "low-grade" discrimination,[216] courts have a strong interest in avoiding the appearance that they are deploying the law in ways that infringe on employers' well-established prerogatives to govern their workplaces as they like.[217]

213. *Cf.* Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269, 272 (1993) ("Mr. Dooley's dictum about the Supreme Court's tendency to follow the election returns seems no less apt today than when it was first printed almost a century ago."); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2606 (2003) ("[J]udicial decisions rest within a range of acceptability to a majority of the people.").

214. Goldberg, *Constitutional Tipping Points*, *supra* note 30, at 1999; *cf.* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1241 (2004) (identifying a similar concern as a reason for the Court's avoidance of explicit morals-based rationales for government action).

215. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (addressing the "risk" that Title VII might function as "a general civility code for the American workplace"); Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (explaining that Title VII "eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice" and describing the Court's task as drawing a "balance between employee rights and employer prerogatives").

216. By "low-grade" discrimination, I mean the discriminatory acts that the law has been construed not to prohibit. In the sexual harassment context, for example, the Court has reinforced that Title VII "forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment." *Oncale*, 523 U.S. at 81. *See also id.* ("'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.'" (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993))).

217. For a discussion of the historical development of the at-will employment doctrine in America, which arguably has influenced contemporary views about judicial deference to employer autonomy, see Clyde W. Summers, *Employment At Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 66 (2000) (identifying at-will employment as a "fundamental assumption [that] has shaped our labor law"). *Cf.* Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653 (2000) (arguing that the expansion of modern tort law is gradually eviscerating at-will employment in America); Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will*

B. The Comparator Heuristic's Legitimizing Work

The comparator heuristic, as it is used by most courts, accommodates both of these concerns because it gives the appearance that the facts of differential treatment, rather than the courts' own assumptions and judgments, are doing the work to show that trait-based discrimination has occurred and that, as required by the applicable discrimination law, the court must intervene. That is, if the comparison reveals that an employee with *X* characteristic was treated differently from the similarly situated employee without *X* characteristic, the resulting inference of discriminatory intent is treated as the comparison's logical, natural product.[218]

The comparison thus has an empirical cast to it—it documents, from facts, the different treatment and, by implication, the discriminatory intent. Given the pressures created by courts' general orientation to avoid the sociological role and the undue disruption of employer prerogatives, the comparator heuristic provides comfort by appearing to produce "hard" evidence of discrimination. Put another way, the inference of discriminatory intent becomes less superficially vulnerable, at least from the vantage point of the judicial-legitimacy concerns just described, to the extent that it is presented as resting on facts rather than on the court's subjective judgments about a workplace. Yet, as discussed above, comparators produce results regarding the presence of discriminatory intent that are surely false. Further, by failing to specify the results' underlying subjectivity, they obscure the absence of judicial accountability for the analytic choices and assumptions made.

The contextual methodology for gleaning discriminatory intent from stereotyping and harassing acts might seem to be in tension with these legitimacy concerns because it lacks the comparators' ability to produce "facts." As applied, however, courts find other ways to suggest that it is the workplace context, rather than their own judgment, that is shedding light on the presence or absence of discrimination. Recall that in the stereotyping and harassment contexts, courts have stressed that linking workplace conduct to a protected

World, 74 TEX. L. REV. 1655, 1655 (1996) ("The employer's presumptive right to fire employees at will—for good reason, for bad reason, or for no reason at all—has been drastically cut back in the last sixty years. . . . The at-will rule now coexists with numerous important exceptions—statutory and common law, state and federal—that prohibit . . . . discrimination based on race, sex, age, or other characteristics.").

218. Of course, as shown earlier, a court's choices as to how tight a fit to demand between the plaintiff and the comparator are contestable. But once those choices have been made, there can be no denying the difference in treatment, should one exist.

characteristic neither requires "special training" nor presents great difficulties. Put in legitimacy terms, then, the facts appear to be doing the work.

Of course, as discussed above, not all harassing acts or stereotyping statements can be linked to a protected trait and treated as discriminatory.[219] But, from a legitimacy standpoint, if the context reveals acts or statements that are widely assumed to reflect discriminatory intent, the Court need not expend reputational capital to find the presence of discrimination. We see this, for example, in cases where courts have little difficulty finding statements that mothers should not work outside the home while raising young children to be sex-related[220] or that calling an African-American man a "boy" can be racially derogatory.[221]

219. The debates among experts about whether Wal-Mart stereotyped and then discriminated against its female employees underscore this point. *Cf.* John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 VA. L. REV. 1715, 1742-43 (2008) (identifying the sex discrimination case of *Dukes v. Wal-Mart* as a landmark case for "the use of social science research on stereotyping to support claims for relief in employment discrimination [lawsuits]"). This is apart from the question whether the acts and statements are sufficiently harmful to exceed the tolerance for low-grade discrimination.

220. In applying *Price Waterhouse* to a family responsibilities discrimination suit, for example, the Second Circuit recently rejected an employer's argument that disparaging comments about a woman's commitment to work after having children could not be treated as sex-based "without comparative evidence of what was said about fathers." Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 121 (2d Cir. 2004). The statements included inquiries as to how the plaintiff was "planning on spacing [her] offspring," requests that the plaintiff "not get pregnant until [her supervisor] retire[d]," suggestions that the plaintiff "wait until [her son] was in kindergarten to have another child," and statements that it was "'not possible for [the plaintiff] to be a good mother and have this job.'" *Id.* at 115 (first and fourth alterations in original) (internal quotation marks omitted). The court found specifically that no such comparison was required to see discriminatory intent. Instead, "the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based." *Id.* at 121. Invoking *Price Waterhouse*, the court added that "stereotypical remarks about the incompatibility of motherhood and employment 'can certainly be *evidence* that gender played a part' in an employment decision," and that, therefore, "stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive." *Id.* at 122 (quoting Price Waterhouse v. Hopkins, 480 U.S. 228, 251 (1989)). The court identified other circuit courts in agreement that these types of comments support a finding of discriminatory intent. *See, e.g.*, Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 57 (1st Cir. 2000) (holding that a direct supervisor's "specifically question[ing] whether [the plaintiff] would be able to manage her work and family responsibilities" supported a finding of discriminatory animus, where the plaintiff's employment was terminated shortly thereafter); Sheehan v. Donlen Corp., 173 F.3d 1039, 1044-45 (7th Cir. 1999) (holding, in a Pregnancy Discrimination Act case, that a reasonable jury could have concluded that "a supervisor's statement to a woman known to be pregnant that she was being fired so that she could 'spend more time at home with her children' reflected unlawful motivations

Comparators become important, then, in situations where the challenged conduct is not easily or obviously recognized, per these social understandings, as embodying discriminatory intent or, more colloquially, as speaking for itself. In these cases, comparators' empirical overtones suggest that the inquiry involves more than just the subjective preferences of a particular court, which Justice Thomas derided in response to the noncomparative analysis in *Olmstead*.[222] Consider the Court's early pregnancy cases in this light. The comparison of pregnant and nonpregnant people did not produce facts showing that the challenged rules restricting pregnancy benefits were "based on sex."[223] Indeed, the Court in *Gilbert* wrote that it needed only the most "cursory" analysis to reach that conclusion.[224] Had the Court wanted to "see" discriminatory intent in that distinction, it would have needed a source other than the comparator to do so. At the time, however, the Court may have sensed there was not widespread agreement on the connection between pregnancy-related restrictions and sex discrimination. Consequently, without a comparator or easy connection between the employer's acts and discriminatory intent, the majority seemed to suggest that a finding of sex discrimination would have reflected its subjective sensibilities rather than its objective judgment, thereby undermining its legitimacy.[225]

because it invoked widely understood stereotypes the meaning of which is hard to mistake").

221. *See* Ash v. Tyson Foods, Inc., 546 U.S. 454, 456 (2006). On remand, the Eleventh Circuit affirmed its earlier determination that "the ['boy'] comments were ambiguous stray remarks . . . and are not sufficient circumstantial evidence of bias" to sustain the plaintiff's race discrimination claim. Ash v. Tyson Foods, Inc., No. 08-16135, 2010 WL 3244920, at *13 (11th Cir. Aug. 17, 2010) (alternation in original).

222. *See* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 624 (1999) (Thomas, J., dissenting). The Court showed its sensitivity to this type of critique while allowing a non-comparison-based sex discrimination challenge to the compensation of the female prison guards in *County of Washington v. Gunther*, emphasizing that the discrimination inquiry did not "require a court to make its own subjective assessment of the value of the male and female guard jobs." 452 U.S. 161, 181 (1981).

223. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 135 (1976).

224. *Id.*

225. The dissenters, by contrast, would have located sexually discriminatory intent in the pregnancy classification following the same model that the Court has used since for linking stereotyping and harassment to discriminatory intent. They stated that nothing more than "common sense" was necessary to see the link between the two. *Id.* at 149 (Brennan, J., dissenting) ("[I]t offends common sense to suggest that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related.'").

C. *The Call for Experts as a Response to Legitimacy Concerns*

This legitimacy-protective dynamic that leads courts to prefer quasi-empirical demonstrations of discriminatory intent via the comparator heuristic also helps explain why scholars have stepped up the call for expert testimony in employment discrimination claims. Experts, like comparative data, enable courts to avoid the appearance of engaging in the arguably sociological task of discerning identity discrimination.[226]

In part, experts may be useful within the comparator framework to expand courts' sense of which comparisons could be probative. Charles Sullivan, for example, argues that courts need help with the "real question" of "when the putative comparator is similar enough to justify the inference" of discrimination.[227] He suggests that experts can establish the "standard of care" against which an employer's conduct can be measured.[228] For Minna Kotkin, who documents courts' difficulty observing discrimination when a discrimination claim rests on multiple grounds, experts are likewise the key to expanding courts' understanding of how stereotypes operate and their conception of appropriate comparators.[229]

The centrality of experts to theories that advocate noncomparative methods for observing discrimination similarly can be understood as responding to, or at least reflecting sensitivity to, the judicial-legitimacy concerns just described. The implicit bias literature, for example, highlights the ways in which experts can document the presence of implicit identity-related biases and the effects of those biases on workplace decisions.[230] If carried out by experts, this approach

226. Still, courts must engage in a potentially sociological assessment when evaluating the admissibility of testimony by sociologists, cognitive psychologists, and other experts on discrimination under the standard set out in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). *Daubert* requires federal courts to screen expert testimony for "scientific validity" to ensure reliability and relevance. *Id.* at 594-95. Some have suggested that *Daubert* has presented a particular hurdle for expert testimony in discrimination cases. *See* Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 551-55 (2010) (discussing scholarship addressing the effect of *Daubert* on the admission of expert testimony in discrimination cases and observing that *Daubert*, together with summary judgment practices, may be part of a "lethal combination" that disadvantages plaintiffs in civil rights and employment discrimination cases).

227. Sullivan, *supra* note 3, at 223.

228. *Id.* at 237.

229. Kotkin, *supra* note 15, at 1449, 1495-97.

230. For recent discussion and review of implicit bias research in the social sciences, see, for example, Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Jerry Kang &

to identifying discriminatory intent that is otherwise not readily observable can have the appearance of objectivity and, relatedly, of being driven by factors other than the influence of the court's subjective preferences.

The legitimacy concerns also help explain why, even if a plurality of the Supreme Court dismissed the expert testimony regarding sex stereotyping at Price Waterhouse as "icing on the cake," those litigating the case had thought the testimony might be helpful. If the Court had not found the link between the statements made and the partnership denial to Ann Hopkins to be so noncontroversial, then there would have been little, other than the Court's own judgments, to confirm the link between the statements and the protected characteristic of sex. In this light, the expert testimony in the case can be seen as a quasi-empirical source to verify or even compel that judgment.

This move to locate determinations about discriminatory intent in experts can be characterized as simply shifting the legitimacy debate from the observation of discrimination to the treatment of expert testimony, where the debate is similarly fraught.[231] Moreover, the increased focus on experts (with their attendant high costs)[232] risks exacerbating existing resource imbalances between plaintiffs and defendants, making the move difficult in all but class actions and unusually high-value discrimination cases. Still, conceptually at least, the shift may be just enough to overcome the legitimacy concerns to which courts are so vulnerable. Justice Scalia has written, in the sexual harassment context, that "common sense" and "an appropriate sensitivity to social context" is all that is necessary to discern discriminatory intent.[233] But where there is no easy agreement about how best to understand the social context, courts again become vulnerable to charges of imposing their own preferences on a workplace if there is no extrajudicial source that can be said to have compelled their observation of discrimination.[234]

Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1071 (2006); and Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006). The Court has long recognized that these biases can result in cognizable discrimination. *See* Watson v. Fort Worth Bank, 487 U.S. 977, 990 (1988) (acknowledging "the problem of subconscious stereotypes and prejudices" in employment). My focus here is on how courts can come to see the operation of these stereotypes and prejudices.

231. *See supra* note 226.

232. *Cf.* Christopher Tarver Robertson, *Blind Expertise*, 85 N.Y.U. L. REV. 174, 177 (2010) (noting the significant cost of expert testimony).

233. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998).

234. This is not to suggest that expert evidence will always be accepted by courts as sufficient or decisive to establish the presence of discriminatory intent, but instead only that the expert testimony enables courts to invoke an external source when drawing the link between the

D. Legitimacy Concerns and the Viability of Second-Generation Discrimination Theories

These legitimacy concerns appear to present a particular hurdle for second-generation discrimination theories because, ordinarily, there are no comparators for intersectional, identity performance, or structural claims. If these theories are to translate into practice, their success will depend on eliding the comparator heuristic and finding a different means of exposing the discrimination at issue, such as the contextual approach of the stereotyping and harassment cases.

Although relatively few second-generation theories have succeeded in making this move to contextual analysis or in finding an alternate methodology, "family responsibilities discrimination" theory has had notable success in gaining doctrinal traction and may offer valuable lessons.[235] The theory, known as FRD, is concerned with the ways in which employees, particularly women, face barriers in the workplace associated with their parenting or other caregiving responsibilities.[236] Often employees who suffer adverse action related to their family responsibilities cannot show discrimination through a comparator either because there are no similarly situated coworkers or because the potential comparators in a workplace are all women or otherwise share the same protected trait.

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challenged conduct and the protected characteristic. *Cf.* Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) (stating that expert testimony about sex stereotyping at Price Waterhouse would not have been enough to give rise to inference of discriminatory intent).

235. *See* Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1357 (2008) (stating that FRD lawsuits have "cemented that plaintiffs in Title VII disparate treatment cases may show [family responsibilities] discrimination even when they lack a comparator"); *see also* Catherine Albiston et al., *Ten Lessons for Practitioners About Family Responsibilities Discrimination and Stereotyping Evidence*, 59 HASTINGS L.J. 1285 (2008).

236. Joan Williams and Stephanie Bornstein have defined family responsibilities discrimination as "discrimination against employees based on their responsibilities to care for family members," which includes "pregnancy discrimination, discrimination against mothers and fathers, and discrimination against workers with other family caregiving responsibilities." Williams & Bornstein, *supra* note 235, at 1313. They have observed that "[w]hile FRD most commonly occurs against pregnant women and mothers of young children, it can also affect fathers who wish to take on more than a nominal role in family caregiving and employees who care for aging parents or ill or disabled partners." *Id.* For additional discussion of FRD, see JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 101-10 (2000); and JOAN C. WILLIAMS & CYNTHIA THOMAS CALVERT, *Introduction* to WORKLIFE LAW'S GUIDE TO FAMILY RESPONSIBILITIES DISCRIMINATION (2006).

Rather than try to work from within the comparator heuristic, advocates for recognition of FRD worked around it and, centrally, engaged experts (as well as popular culture) to ease courts' way into seeing the link between employers' skepticism of workers with family responsibilities and the protected characteristic of sex. Social scientists have been particularly important to this effort, as they have documented "an underlying schema that assumes a lack of competence and commitment when women are viewed through the lens of motherhood and housework."[237] These data, supplemented by additional research, do the work of linking maternal stereotypes to discriminatory intent. Perhaps responding to *Geduldig* and *Gilbert*, where the Court was unable to bring itself to see the pregnancy-sex connection, FRD advocates effectively relocated the task of observing discriminatory intent from the courts to expert social scientists.

FRD recognition advocates have sought to establish the link between employers' adverse treatment of parents and sexism in the popular culture as well, so that the link between an employer's skepticism toward a new mother's work ethic and sex discrimination can be seen easily and without any special training.[238] Thus, when these advocates celebrate that courts have accepted non-comparator-based FRD claims, we can understand this success as deriving in part from judicial confidence in public acceptance of the caregiver-sex discrimination link because public acceptance minimizes the risk that courts will appear to be meddling unduly in employer freedom or imposing their subjective views of discrimination.[239]

237. Williams & Bornstein, *supra* note 235, at 1327.

238. *Id.* at 1314 (describing the issue of caregiver discrimination as one that "has 'arrived' in the public consciousness").

239. In a more limited way, discrimination claims related to gender identity and performance also have begun to gain traction. *Compare* Schroer v. Billington, 525 F. Supp. 2d 58 (D.D.C. 2007) (refusing to dismiss a sex discrimination claim against the Library of Congress, which withdrew a job offer it had made to a military specialist upon learning she was transgender), *with* Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) (rejecting a sex discrimination claim brought by an airline pilot who was fired after the airline learned she was transgender). Some of the reasons for the more recent claims' success relate to judicial perceptions about the fixed nature of sex in transgender individuals, consistent with the legitimacy concerns regarding identity described earlier. But others, more relevant to the inquiry here, derive from the sex stereotyping in these cases, which is as blatant and relatively easy to recognize as the stereotyping in *Price Waterhouse*.

By contrast, consider the poor track record of challenges to sex-based dress and grooming codes as discriminatory.[240] In these situations, the underlying theoretical claim is that an employer's insistence on having men and women groom and dress themselves differently is not materially different from first-generation-style sex-based classified advertisements or blanket refusals to hire women; in both, the employer impermissibly polices gender norms.[241] Yet courts regularly do not see the sex-based distinction as discriminatory, in part because of the way in which they apply a comparator analysis to these cases.[242]

The legitimacy concerns can help illuminate why comparators are so difficult to escape in this context. In the view of most courts to have addressed these challenges, the link between the sex-based rules and discriminatory intent is not nearly as "obvious" or easy as in the case of sexual harassment or sex stereotyping. Even relative to FRD, courts do not see evidence that the public imagination considers grooming codes to be obviously discriminatory. Nor is there a wealth of social science on which courts can rely, as there is for FRD, to do the work of establishing that these grooming codes embody sex-based stereotypes or otherwise to illuminate and verify that sex-based discriminatory intent is embedded in the codes.

240. *See, e.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (rejecting a sex discrimination challenge to a casino grooming code that imposed different requirements on men and women); *cf.* Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004) (affirming summary judgment for an employer where an employee alleged that a "no facial jewelry" policy constituted religious discrimination); Pitts v. Wild Adventures, Inc., No. 7:06-CV-62-HL, 2008 WL 1899306, at *5-6 (M.D. Ga. Apr. 25, 2008) (finding no merit to the plaintiff's allegation that a grooming policy that prohibited dreadlocks and cornrows constituted race discrimination against African-American employees). *But see* Tamimi v. Howard Johnson Co., 807 F.2d 1550 (11th Cir. 1987) (affirming a judgment in favor of an employee who alleged sex discrimination over a dress code that required female employees to wear makeup and lipstick).

241. For a discussion of grooming standards and gender norms, see Devon Carbado et al., *Foreword: Making Makeup Matter*, 14 DUKE J. GENDER L. & POL'Y 1 (2007). Carbado et al. state that "grooming standards *can* (but needn't always) function to regulate and give content to our identities." *Id.* at 2; *see also* United States v. Virginia, 518 U.S. 515 (1996) (sustaining a first-generation-type challenge to the exclusion of women from the Virginia Military Academy).

242. Apart from the comparator issue, some courts have treated dress and grooming codes, as opposed to other employer conduct, as falling more broadly within an employer's discretion and, therefore, as less susceptible to restriction via Title VII and other antidiscrimination measures. *See* Jennifer L. Levi, *Misapplying Equality Theories: Dress Codes at Work*, 19 YALE J.L. & FEMINISM 353, 353-55 (2008) ("[T]he typical dress code that simply distinguishes the appearance of men and women in the workplace has been found to be unobjectionable by courts."); *id.* at 355 n.4 (citing cases).

Because the link between sex-based grooming codes and impermissible stereotyping does not fall within *Price Waterhouse*'s "no special training" standard, some other methodology is needed to review the discrimination allegation, and courts most often funnel these cases through what amounts to a comparator analysis. As the Ninth Circuit found, for example, when sustaining a casino's extensive dress code that included different makeup, hair, and nail care requirements for men and women, "[t]he only evidence in the record to support the stereotyping claim is [the plaintiff's] own subjective reaction to the makeup requirement."[243] The court contrasted the employee's claim in that case with cases in which, it suggested, the link between a dress code and discrimination would be easier to find, such as where a dress code "tend[ed] to stereotype women as sex objects" or invite sexual harassment.[244] Given courts' interest in avoiding sociological judgments about identity discrimination that infringe on employer freedom, it is not surprising that where the court did not find "clear" stereotyping and where a comparison did not produce a striking difference in the treatment of men and women,[245] the court did not find discrimination because of sex.[246]

In short, courts' concerns about navigating between the Scylla of sociological tasks and the Charybdis of employer autonomy surely account for some, if not all, of the comparators' appeal. With their empirical, legalistic cast, comparators strongly suggest that courts' findings of impermissible discrimination are the product of neither an amateur judicial evaluation of social norms and workplace dynamics nor a court's arrogant disregard of employer autonomy. Instead, they are—or, more precisely, have the appearance of being—compelled simply and cleanly by both the facts and the governing law.

243. *Jespersen*, 444 F.3d at 1112.

244. *Id.*

245. The dissenters disagreed with this characterization of the policy, finding that the grooming code's makeup requirements for women imposed a distinct burden not imposed on men and that this difference in treatment was "'because of' sex" and was "clearly and unambiguously impermissible under Title VII." *Id.* at 1114 (Pregerson, J., dissenting) (describing Jespersen's evidence as "show[ing] that Harrah's fired her because she did not comply with a grooming policy that imposed a facial uniform (full makeup) on only female bartenders").

246. Again, the substantive consequence of this application of the comparator heuristic was to limit the reach of discrimination law and its underlying norms.

VI. PROSPECTS FOR CHANGE

Assuming that no social scientific advance will render obsolete the need for judicial inquiries into discriminatory motive and that courts will retain their sensitivity to the legitimacy concerns just described, this Part suggests several possibilities for expanding courts' methodological repertoire for observing discrimination in light of comparators' costly deficiencies. Although full development and evaluation of alternate approaches is beyond this Article's scope, the suggestions below aim to counter the comparator demand's flattening effect on discrimination law and norms in both first- and second-generation theories and cases while also taking account of both judicial-legitimacy and accountability concerns.[247]

Setting aside strategies for enlarging the set of acts and statements that are widely understood to expose discriminatory intent,[248] potential means for expanding the set of approaches used to observe discrimination range from tweaks to the current comparator regime to more expansive frameworks. The latter have the benefit of allowing more nuanced review, but they also bear the weakness, in some cases, of providing less guidance and less protection to courts concerned about their legitimacy. Ultimately, I argue that a move toward applying the contextual analysis that is already familiar from the stereotyping and harassment jurisprudence will best address both the legitimacy concerns to which comparators respond and the accountability flaws embedded in that methodological choice—with the additional benefit of restoring a less formalistic, more substantive treatment of discrimination law and norms.

247. Although the focus here is on developing options that might enable greater judicial recognition of diverse forms of discrimination, it is also possible that, again recalling Fuller, litigation and adjudication are simply not well-suited to resolving certain kinds of complex suits, including those that are the focus of second-generation theorizing. *See supra* notes 25-28 and accompanying text. Legislative and policy advocacy as well as collaborative efforts with employers, public accommodation operators, and others may ultimately be more effective in eliminating barriers related to protected (and other) traits. However, because the primary focus of this Article is on what courts can do, and because many of the extra-litigation efforts just described operate in the shadow of doctrine, the alternate analytic approaches here warrant consideration, even if all they do is enhance the possibilities for success of the nonlitigation strategies.

248. The movement to have FRD recognized provides a strategic model worthy of consideration for these kinds of efforts because of its combined focus on developing social science and establishing understanding of the link between family responsibilities and sex discrimination in the public's mind.

A. *Involving Experts in Setting Comparators' Contours*

A first option would be to accept the comparator methodology's dominance but expand the conception of an appropriate comparator. As noted earlier, the Court itself rejected a formulation demanding that a comparison produce a result that "virtually . . . jump[s] off the page and slap[s] you in the face" before a finding of discrimination can be made.[249] Beyond that, the suggestions of Kotkin and Sullivan that experts be used to establish reasonable comparators despite differences in jobs, supervisors, or even employers could prove helpful in enabling more employees to identify adequate comparators.[250] By recasting the selection of comparators as a determination involving facts subject to expert analysis and verification, rather than as a matter turning exclusively on the judgment of the court, it might be possible to broaden the conceptualization of comparators while attending to the legitimacy constraints in this area.

For first-generation theories, this expansion would almost certainly be helpful in mitigating the comparator heuristic's barrier-like effects. The broader the pool, the more likely an employee will be able to identify a colleague who is similarly situated but for the protected characteristic.

The benefit flowing from the sheer increase in numbers of potential comparators would be much more limited for second-generation intersectionality claims, however. Recall that the difficulty in these cases does not lie, primarily, in finding a comparator. Instead, when an individual appears anomalous amidst the comparator pool because of his or her particular combination of traits, courts tend to be skeptical—even with comparators—that discrimination, as opposed to a quirk particular to that individual, motivated the employer's adverse action.[251]

For identity-performance-based suits, broadening the pool of comparators would likewise be unavailing. For example, returning to Carbado and Gulati's example of the fifth black woman, a broader comparator pool would not, in itself, help that employee show that her race (rather than other factors related to her personal presentation) was the basis for the adverse treatment. Even with a broad pool, the employer could still produce the four other black women whom it promoted to strengthen its argument that it had legitimate,

249. Ash v. Tyson Foods, Inc., 546 U.S. 454, 456-57 (2006) (quoting Ash v. Tyson Foods, Inc., 129 F. App'x 529, 533 (11th Cir. 2005)).

250. *See supra*, notes 227-229 and accompanying text.

251. *See supra* notes 77-79 and accompanying text. A broader comparator pool might possibly enable a plaintiff to invoke systemic evidence of discrimination by identifying a greater number of similar coworkers who have suffered adverse action from the employer.

nondiscriminatory reasons for denying promotion to the fifth black woman. With the benefit of a broader comparator pool, the fifth black woman could potentially identify a non-black woman who had a similar style but received a promotion, but as a practical matter it is difficult to imagine this sort of comparison-based claim succeeding. Even if the employee could find a comparator, employers could be counted on to undermine the broader comparator pool as insufficiently attuned to salient differences in workplace cultures that are relevant to consideration of employees' personal style.

For second-generation claims based on structural discrimination, where workplace patterns make discrimination difficult to observe and trace, expanding the size of the comparator pool would seem to be of marginal assistance, at best. Having more employees in the mix could conceivably help illuminate the effects of the discrimination that is masked within employee interactions. But as much of the structurally focused literature makes clear, the structures and relationships within workplaces that facilitate and exacerbate diffuse and subtle discrimination will still escape observation within a comparator framework.

B. Considering Hypothetical Comparators

A related possibility would be to expand the current comparator-based approaches by allowing for hypothetical comparators as well as actual comparators.[252] This approach has been embraced in England, for example, where the Sex Discrimination Act of 1975 "permits a comparison to be drawn between the way in which a woman is treated and the way in which a 'hypothetical male' would have been treated."[253] The European Union has likewise embraced the value of the hypothetical comparator through its discrimination-related directives, which provide that discrimination can be found "where one person is treated less favourably than another is, has been or *would be* treated in a comparable situation on grounds of racial or ethnic

252. Even this proposal would move beyond the discrimination theory advanced by Justice Thomas in *Olmstead*, which restricts the recognition of discrimination to situations in which actual differences of treatment between actual employees can be documented.

253. *See* Sandra Fredman, *Reforming Equal Pay Laws*, 37 INDUS. L.J. 193, 200 (2008); *see also* Iain Steele, Note, *Beyond Equal Pay?*, 37 INDUS. L.J. 119 (2008) (recognizing the value of a hypothetical male comparator for a woman bringing a claim under the Sex Discrimination Act of 1975).

origin."[254] As one commentator has observed, "Clearly, the comparator need not 'exist'; establishment of the probability of 'his' or 'her' better treatment will be enough."[255]

This shift would enhance even further the benefits that flow from broadening the actual comparator pool, at least for first-generation cases, by providing more opportunities to produce a discrimination-exposing comparison. Second-generation cases, by contrast, would experience less gain from this change for the same reasons that gains from enlarging the set of actual comparators would be limited.

The potential problem is that the move to a hypothetical comparator may tread more closely on judicial-legitimacy concerns than an approach that expands the scope of "real" comparators because it overtly acknowledges the court's work in seeing discrimination rather than simply in "finding" discrimination in the facts presented. Yet there may be ways around this difficulty. As Sandra Fredman observed with respect to the United Kingdom's equal pay laws, "[T]here is a well-developed methodology for determining what a hypothetical male would have been paid, using either a proportionate value method or a proxy method."[256] Thus, this type of expert-driven, data-based portrait of the hypothetical comparator could conceivably fit neatly with the judicial-legitimacy concerns in this area.

However, while either legislative commitments or statistical analysis might work in the equal pay context, where job criteria and pay ranges are arguably susceptible to quantification and comparison,[257] hypothesizing a comparison to

254. Council Directive 2000/43/EC, art. 2, 2000 O.J. (L 180) 22, 24 (emphasis added); *see also* Council Directive 2006/54/EC, 2006 O.J. (L 204) 23; Council Directive 2000/78/EC, 2000 O.J. (L 303) 16.

255. Elisabeth Holzleithner, *Mainstreaming Equality: Dis/Entangling Grounds of Discrimination*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 927, 934 (2005). For additional discussion of the use and limitations of comparators in Australia, Canada, and Europe, see generally Aileen McColgan, *Cracking the Comparator Problem: Discrimination, "Equal" Treatment and the Role of Comparisons*, 6 EUR. HUM. RTS. L. REV. 650 (2006), which collects and analyzes cases from European supranational and domestic courts that address the use of comparators; Sophia Reibetanz Moreau, *Equality Rights and the Relevance of Comparator Groups*, 5 J.L. & EQUAL. 81 (2006), which analyzes the Canadian Supreme Court's use of comparators; and Belinda Smith, *From* Wardley *to* Purvis—*How Far Has Australian Anti-Discrimination Law Come in 30 Years?*, 21 AUSTL. J. LAB. L. 3 (2008), which critiques the High Court of Australia's constrained use of hypothetical comparators.

256. Fredman, *supra* note 253, at 201.

257. The failure of most comparable worth litigation in the United States suggests, however, that even this effort might be doomed by charges of unconstrainable subjectivity. *See, e.g.*, Birch v. Cuyahoga Cnty. Probate Court, 392 F.3d 151, 170 (6th Cir. 2004) (noting that courts have refused to apply *Gunther* analysis where a comparable worth case "involves a subjective

prove the discriminatory treatment of a corporate executive or a group of plant workers where there are no actual comparators will not have that factual, legitimacy-protecting cast. Imagine, for example, that a court faced with a discrimination claim by the only African American senior executive at a bank was asked to hypothesize a comparator to assess the adverse treatment that had been alleged. While a court might be willing to stretch and consider an expert's analysis of actually comparable positions and employees in the industry, the creation of a purely hypothetical comparator, even if by an expert, arguably leaves a court with little to show that it has observed trait-based discrimination rather than simply bad, but permissible, treatment.

Alternately, a hypothetical comparator might elide these concerns if legislative bodies were to provide an "elaboration . . . of criteria of assessment," as the European Court of Justice has suggested.[258] Courts could then point to these bodies, rather than their own views, as driving the comparison. Yet again, while this could conceivably work in the equal pay area (though the comparable worth movement's experience suggests that this would not be feasible in the United States),[259] a general statement of acceptable workplace behavior would be exceedingly difficult to conceptualize in a way that would capture discriminatory conduct but not workplace behavior that is offensive but permissible. Even if one could be created, it would face serious challenges from extant political and jurisprudential commitments to employer discretion in workplace governance.

C. *Moving Beyond Comparators*

The discrimination case law and literature also contain the seeds of methodologies that could displace or supplement comparators as the primary heuristic for locating and evaluating discrimination and, in doing so, alleviate the effects of comparators' limitations on both first- and second-generation cases. This section looks first to experts and then to contextual analysis as the methodological alternatives most likely to succeed because of their sensitivity to the legitimacy and accountability concerns set out above.

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assessment of different positions with different duties" (citing EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1333 (N.D. Ill. 1986))). *See generally* MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).

258. *See* Case 129/79, Macarthys Ltd. v. Smith, 1980 E.C.R. 1275, 1289.

259. *See supra* note 257.

The value of experts, not just to expand conceptions of comparators but to serve, themselves, as a lens for observing discriminatory intent emerges directly from the second-generation scholarship. Both the implicit bias and structural discrimination literature show that expert analysis can aid courts in seeing which particular structures may foster discrimination.[260]

The difficulty with experts, relative to the legitimacy concerns, comes in drawing the link from the insights of the implicit bias and structurally focused literatures to the dynamics of a specific workplace and the adverse treatment of a particular employee.[261] Although this can be done, methods for seeing discrimination are likely to be more attractive to courts to the extent that the experts, rather than the court, appear to be illuminating the discrimination within the workplace at issue.

Yet another possibility—and the one that I advocate most strongly here—would be simply to put comparison in its place as one technique among many for observing discrimination rather than to view it as *the* technique that must be used before discrimination can be seen.[262] This change would also move contextual evaluation from its confined role in stereotyping and harassment cases to a new status as a legitimate analytic option in all cases. Even in its simplicity, this type of frame-shift in the way in which we see discrimination cases could be transformative in diminishing some of the worst offenses of the comparator paradigm. It would do so by more closely matching the

260. *See supra* note 230; *see also* William T. Bielby, *Can I Get a Witness? Challenges of Using Expert Testimony on Cognitive Bias in Employment Discrimination Litigation*, 17 EMP. RTS. & EMP. POL'Y J. 377 (2003).

261. If the research showing the general pervasiveness of implicit bias were accepted as sufficient to show discrimination in a specific case, then anyone with a trait that is the subject of an implicit bias in a particular context would conceivably be able to prevail on a discrimination claim. The vast potential reach of this type of reliance on experts would inevitably produce its own powerful legitimacy-threatening concerns related to judicial overregulation of the workplace. These would be separate from questions about whether employers should be held accountable for acting on biases about which they are unaware. *See* Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 479 (2007) (responding to the critique of implicit bias evidence as scientifically invalid and noting that "the case for using the law to respond to the problem of implicit bias remains strong"); Michael Selmi, *Response to Professor Wax, Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233 (1999) (maintaining that it is well settled that discrimination law can and should respond to subtle forms of discrimination, including those exposed by implicit bias research); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1132-33 (1999) (arguing against employer liability for "unconscious disparate treatment" because "employers have little effective control over unconscious bias"); *cf.* Nagareda, *supra* note 26, at 156-61 (discussing critiques of implicit bias and structural discrimination theories in the context of evaluating discrimination class actions).

262. This would be outside the context of harassment and stereotyping cases, of course.

observational tools courts use with both the refinements to theory that have taken place in recent decades and our expanded knowledge of the dynamics of discrimination.

Indeed, if comparators are properly understood to be one among a set of imperfect methodological choices for seeing discrimination, courts' cordoning off "stray" remarks from consideration, rather than looking holistically at all incidents in the work environment as they do in harassment and stereotyping cases, no longer seems so sensible (if it ever did).[263] In short, a contextual approach would free courts from the artificial blinders imposed by the comparator jurisprudence that short-circuit the analysis of discrimination claims and produce constricted outcomes without explanation or justification.

This move would obviously be beneficial for first-generation cases because it would expand the means by which employees could seek to shed light on discriminatory intent. Discrimination claimants would no longer need to produce a comparable coworker to overcome the prima facie threshold; nor would comparators be seen as the gold standard for proving discriminatory intent. Instead, a picture of the entire work environment, including statements by supervisors and coworkers, the demographics of the firm and the surrounding workforce, and the dynamics of the relationship between the employee and other relevant employees would all be appropriately considered by courts deciding whether to allow an employee to proceed to trial.

For second-generation claims, an escape from the comparator demand similarly could prove invaluable by enabling exposure of the nuanced, contextually rooted, and complex forms of discrimination not reached by first-generation theories and foreclosed by a demand for comparators. As would be true for first-generation cases, the removal of the comparator demand as part of the prima facie case, or even as an essential part of the proof of pretext, would enable plaintiffs to turn to other sources to shed light on the discriminatory work environment. Again, comments and acts by other employees, firm demographics, and firm policies, among other aspects of workplace life and governance, could all be deemed worthy of consideration in deciding whether to allow a discrimination claim to proceed. Employers who single out some members of a protected class for adverse treatment could no longer immunize themselves solely on the ground that others with similar characteristics had not been similarly harmed. In other words, releasing the comparator's grip on discrimination analysis reopens the possibility that discrimination jurisprudence could develop in ways that recognize more than just the most formalistic and easily legible violations of discrimination laws.

263. *See supra* Part IV.

A skeptic might object that context-based methodology should be used sparingly, just as heightened scrutiny of identity-based classifications is limited. On this view, while we can be reasonably sure that impermissible bias is at work where there has been harassment or stereotyping, just as we are willing to suspect similar bias in the use of certain classifications,[264] other situations will not give us the same basis to doubt the employer's actions. The concern, from this perspective, would be that if we enable an employee to trigger a contextual inquiry outside the presence of harassment or stereotyping remarks (as in a challenge to a breastfeeding ban, for example), courts would lack the constraints necessary to prevent them from unduly infringing employer freedom.[265]

The analogy is misplaced, however, because a context-focused analysis of a discrimination claim is concerned with what types of evidence will be considered; it does not come with a heightened-scrutiny-style presumption that the employer has acted impermissibly. Indeed, as discussed earlier, even the presence of overtly sexualized or racialized comments or acts does not necessarily produce an inference of discriminatory intent related to an employee's protected characteristic.[266] There is no reason to think that a shift to a contextual analysis in cases without stereotyping or harassment claims will alleviate the doctrine's burden on the plaintiff to show that the conduct at issue is both serious and linked to the employee's protected characteristic(s). That is, in a case where an employee lacks a comparator but can point to an adverse

264. For extended discussion about the relationship between heightened scrutiny and rational basis review in the equal protection context, see, for example, Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004). For discussion of context-sensitive review in other constitutional contexts, see, for example, Cnty. of Allegheny v. ACLU, 492 U.S. 573, 629 (1989) (O'Connor, J., concurring in part and concurring in the judgment), which discusses context-sensitivity with respect to standards for reviewing Establishment Clause violations as well as "many [other] standards in constitutional law"; and Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1655 n.106 (2006), which describes the "context-sensitive, rough balancing of incommensurable values that is typical of doctrinal analysis in constitutional law."

265. Extending the analogy, the skeptic might also argue that a comparator's presence gives the court some reason, though not as much as in the case of harassment or stereotyping, to be suspicious of the workplace conduct at issue. Thus the presence of a comparator, on this view, could reasonably trigger something similar to a strong form of rational basis review. Without harassment, stereotyping, or a near-identical comparator, the skeptic would argue that courts should have no reason to be suspicious and, therefore, no reason to subject the employer's actions to the relatively more searching contextual assessment. Indeed, we could characterize the approach courts take in the no-comparator cases as analogous to the weakest form of rational basis review, which gives the employer's adverse action the strongest presumption of legitimacy.

266. *See supra* note 173 and accompanying text.

action—for example, some arguably trait-related remarks from coworkers—and perhaps other circumstances, such as a pattern of exclusion from important events, the discrimination claim will not gain a free pass under a contextual review. Instead, it will merely, but importantly, have a chance to be heard, where under a comparator framework, it would be foreclosed from the outset.

Of course, a move like this, which broadens the pool of potentially successful discrimination cases, has certain costs. With more cases surviving into later stages of litigation, employers are likely to pay employees more, and perhaps more quickly, to settle cases. Courts, too, will face greater burdens to the extent they are charged with overseeing a potential growth in longer-lasting litigation.[267] But, I would argue, these costs are more than matched by the benefit of having open jurisprudential discussion and debate about the proper reach of discrimination doctrine. This is not to say that courts (or employers) would easily embrace the kinds of complex, or even first-generation, discrimination cases that currently lose because the plaintiff lacks a comparator. But under the current comparator regime, these cases, and the theories on which they rely, do not even get to the point of having a meaningful hearing absent a comparator. A move to a contextual evaluation would open the possibility of conversation and perhaps lead to refinement of the jurisprudence.

Further, if we admit that the way in which we see discriminatory intent—in harassment and stereotyping cases as well as cases with comparators—rests on judicial judgment calls aided by whatever heuristics have been deployed, rather than being factually or legally compelled, then maintaining such different approaches begins to make less sense. A move toward contextualized assessment of all types of workplace rules starts to seem both more sensible and less troubling.

267. For plaintiffs, by contrast, the cost of a move to a context-focused regime would be virtually nil. If the production of a comparator were enough, on its own, to enable an employee to prevail, we might be concerned that employers would seek to invoke a contextual analysis to impede potentially successful comparator-based claims. But the comparator alone does not secure victory for the employee; instead, at most, the employee wins the right to survive summary judgment and bring his or her case to a jury. A context-focused analysis simply opens room for the employee to produce additional evidence of discrimination, which at most could supplement, but could not undermine, whatever observations about discrimination a court would make via a comparator.

The Same-Actor Inference: A Look at *Proud v. Stone* and Its Progeny

By C. Scott Schwefel

Since 1991, employers have been able to defend individual disparate treatment suits under Title VII of the Civil Rights Act of 1964[1] and the Age Discrimination in Employment Act[2] by invoking a doctrine known as the same-actor inference.[3] Simply put, the doctrine states that an inference or presumption of nondiscrimination is invoked when the individual terminating the employee is the same person who hired the employee, and the hiring and firing occur within a relatively short time span. The logic behind the doctrine is best summarized by the Fifth Circuit, which explained that "[c]laims that employer animus exists in termination but not in hiring seem irrational. From the standpoint of the putative discriminator, [i]t hardly makes sense to hire workers from a group one dislikes . . . only to fire them once they are on the job."[4]

The same-actor inference originated in *Proud v. Stone*, where the Fourth Circuit held that "in cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer."[5]

In *Proud*, an age discrimination case, a 68-year-old plaintiff had been fired six months after having been hired. Proud was hired on the basis of his written application, which included his date of birth. Proud was selected for the position of chief accountant over six younger applicants. Several months later, Proud was terminated and replaced by a 32-year-old employee who was promoted to his position. The same individual that hired Proud made the decision to terminate him, with the stated reason for termination being dissatisfaction with Proud's performance of the his duties.

At trial, the district court granted the defendant-employer's Rule 41(b) motion for dismissal at the close of plaintiff's evidence. The plaintiff's evidence at trial revealed no direct evidence of discrimination and established that the person who fired Proud was the same person who had hired him just a few months earlier. The Fourth Circuit affirmed the dismissal, reasoning that the inference generally makes discrimination cases "amenable to resolution at an early stage," as "employers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing."[6]

Although the same-actor inference emerged from an age discrimination case, the inference applies equally to discrimination claims arising under Title VII and the Americans with Disabilities Act.[7]

Generally, and as common sense would suggest, the shorter the time span between the employee's hiring and firing, the stronger is the inference. As put by the Second Circuit,

> Such an inference is strong where the time elapsed between the events of hiring and firing is brief . . . [a]nd, the enthusiasm with which the actor hired the employee years before may have waned with the passage of time because the relationship between an employer and an employee, characterized by reciprocal obligations and duties, is, like them, subject to time's "wrackful siege of battering days."[8]

As there is no bright-line rule as to what constitutes a "relatively short time span," the temporal separation between hiring and firing has varied widely in cases applying the inference, with cases ranging from between eight days and up to four years.[9] However, at least one circuit has left the door open to applying the inference even where there is a longer time span between the hiring and firing. In *Buhrmaster v. Overnite Transportation Co.*, the Sixth Circuit opined that a "short period of time is not an essential element of the same actor inference, at least in cases where the plaintiff's class does not change." The court further noted,

> [T]o say that time weakens the same actor inference is not to say that time destroys it. In discrimination cases where the employee's class does not change, it remains possible that an employer who has nothing against women per se when it hires a certain female will have nothing against women per se when it fires that female, regardless of the number of years that pass.[10]

Although the doctrine originally applied in situations where the same individual had done both the hiring and firing, it has since been extended to apply to multiple decision makers where the hirer and firer was not a single individual acting unilaterally on each occasion.[11] For example, in *Campbell v. Alliance National Inc.*, the plaintiff argued against the application of the doctrine because numerous individuals had participated in the decision to terminate her in addition to the person who had hired her. The court reasoned that "[t]he decision-makers in the hiring and firing need not mirror each other exactly as long as one management-level employee played a substantial role in both decisions."[12] Accordingly, the court held that the same-actor inference applied despite the participation of the nonhiring decision makers.

Similarly, in *DeJarnette v. Corning, Inc.*, a pregnancy discrimination case, the court applied the doctrine where one of the three people who participated in the decision to fire the plaintiff knew that the plaintiff was pregnant at the time she was hired, notwithstanding the fact that the individual did not participate in the hiring decision.[13]

Further extending the doctrine,

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numerous courts have applied the doctrine where the alleged discriminator engaged in some positive action or favorable treatment toward the employee prior to terminating the employee, even where the alleged discriminator did not participate in the hiring decision.[14] For example, in its 1996 decision in *Hartsel v. Keys*, the Sixth Circuit applied the same-actor inference where the decision maker had not initially hired the plaintiff but had promoted her prior to her termination.[15] In that case, a former city employee brought an age and gender discrimination suit against her municipal employer and its mayor when the mayor failed to promote her. Citing a previous promotion and raise, the court observed:

> This circuit has recently endorsed the "same actor inference," which allows an inference of a lack of discriminatory animus where the same person is responsible for both hiring and firing the individual. . . . This rationale seems applicable to Keys's decision to promote Hartsel temporarily but later finding her lacking for the permanent position.[16]

Both the Eleventh and Third circuits expressly reject the same-actor inference as a means of summary disposition.

More recently, in *Coghlan v. American Seafoods Co.*, the Ninth Circuit affirmed summary judgment for the employer in a national-origin discrimination case where the plaintiff was unable to overcome the same-actor inference applied by the district court. On appeal, at issue was whether the trial court, in applying the same-actor inference, had correctly deemed a previous transfer of the plaintiff as favorable treatment. The employee argued on appeal that the lower court's application of the same-actor inference was inappropriate because the transfer was, technically, a step down in rank. The court held that the decision maker, in spite of the demotion in rank of the plaintiff "intentionally chose to appoint [plaintiff] to a new, better-paid, more demanding position. . . . The favorable nature of the reassignment satisfies us that the same-actor inference should arise."[17]

There is a split of authority among the circuit courts as to the weight assigned to the inference, as well as whether the doctrine should be applied at the summary-judgment stage.

The Fourth Circuit, since *Proud*, still affords a strong inference of nondiscrimination, and its courts often apply the doctrine in dismissing claims on summary judgment.[18] Similarly, the Ninth Circuit characterized a plaintiff's burden in overcoming the doctrine as "especially steep" and has noted that it requires an "extraordinarily strong showing of discrimination necessary to defeat the same-actor inference."[19] The Eighth Circuit also affords the inference significant weight. In *Lowe v. J.B. Hunt Transport, Inc.*, the court described the same-actor inference as being "fatal" to the plaintiff's case.[20] In affirming the lower court's directed verdict, the court explained:

> The evidence that plaintiff claims is inconsistent with defendant's proffered justification is thin, but perhaps sufficient, all other things being equal, to defeat a motion for directed verdict. In the present case, however, all other things were not equal. The most important fact here is that plaintiff was a member of the protected age group both at the time of his hiring and at the time of his firing, and that the same people who hired him also fired him. . . . It is simply incredible, in light of the weakness of plaintiff's evidence otherwise, that the company officials who hired him at age fifty-one had suddenly developed an aversion to older people less than two years later.[21]

Similarly, the Second Circuit indicated that the same-actor inference "strongly suggest[s] that invidious discrimination was unlikely"[22] and that the doctrine is a "highly relevant factor" in deciding summary judgment.[23] Moreover, the Fifth and Tenth circuits also attach strong value to the same-actor inference.[24]

In contrast, the Sixth Circuit "reject[s] the idea that a *mandatory* inference must be applied in favor of a summary-judgment movant whenever the claimant has been hired and fired by the same individual."[25] The court further elaborated:

> [A]lthough the factfinder is permitted to draw this inference, it is by no means a mandatory one, and it may be weakened by other evidence. . . . We therefore specifically hold that where, as in this case, the factfinder decides to draw the same-actor inference, it is insufficient to warrant summary judgment for the defendant if the employee has otherwise raised a genuine issue of material fact.[26]

Both the Eleventh and Third circuits expressly reject the same-actor inference as a means of summary disposition. In *Williams v. Vitro Services Corp.*, the Eleventh Circuit held that it is improper to grant summary judgment on the basis that the hirer and firer are the same actor but that the jury can consider same-actor evidence in determining the issue of pretext.[27] The court noted that "it is the province of the jury rather than the court, however, to determine whether the inference generated by 'same-actor' evidence is strong enough to outweigh a plaintiff's evidence of pretext."[28] The court explained:

> [W]ithin the [employment discrimination] burden-shifting framework . . . this inference is a permissible—not a mandatory—inference that a jury may make in deciding whether intentional discrimination mo-

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tivated the employer's conduct. [A] prima facie case plus evidence permitting disbelief of the employer's proffered reasons equals the plaintiff's entitlement to have the factfinder decide the ultimate issue of discrimination. [T]he jury must measure the strength of the permissible inference of discrimination that can be drawn from the plaintiff's prima facie case along with the evidence that discredits the employer's proffered explanations for its decision.[29]

In *Waldron v. SL Industries, Inc.*, the Third Circuit similarly held that the same-actor inference "is simply evidence like any other and should not be afforded presumptive value".[30]

Last, courts are split as to whether a party seeking to invoke the doctrine at trial is entitled to a jury instruction on the same-actor inference. In *Buhrmaster*, the Sixth Circuit held that it was not error to give a same-actor instruction allowing the jury to infer a lack of discrimination from the fact that the same individual both hired and fired the employee.[31] Moreover, at least one court has reversed a lower court judgment for failure to instruct the jury as to the doctrine.[32] On the other hand, the Second Circuit held that a trial court need not necessarily provide such an instruction, explaining:

> Although we have recognized the validity of this "same actor" argument . . . we do not believe that defendants were prejudiced by the court's refusal to give an instruction on this issue, particularly inasmuch as over six years had passed between the time plaintiff was hired and the time he was fired. . . . Notably, although the court told defendants that they remained free to make the "same actor" argument to the jury, defendants failed to rely on this allegedly crucial aspect of their case in their closing argument.[33]

Endnotes

1. 42 U.S.C. §§2000e to 2000e-17 (2000).
2. 29 U.S.C. § 621 et seq. (1988).
3. Proud v. Stone, 945 F.2d 796 (4th Cir. 1991).
4. Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir.1996) (quoting *Proud*, 945 F.2d at 797 (internal quotation marks omitted)).
5. *Proud*, 945 F.2d. at 797.
6. *Id.* at 798.
7. Buhrmaster v. Overnite Transp. Co., 61 F.3d 461, 464 (6th Cir. 1995) ("This general principle applies regardless of whether the class is age, race, sex, or some other protected classification"); Tyndall v. Nat'l Educ. Ctrs., Inc., of Calif., 31 F.3d 209 (4th Cir. 1994) (ADA); DeJarnette v. Corning, Inc., 133 F.3d 293 (4th Cir. 1998) (Pregnancy Discrimination Act); Amirmokri v. Baltimore Gas and Elec. Co., 60 F.3d 1126 (4th Cir. 1995) (national origin); Raheim v. N.Y. City Bd. of Educ., 2006 WL 2385428 (E.D.N.Y.) (religion); Jiminez v. Mary Washington Coll., 57 F.3d 369 (4th Cir. 1995) (race); Antonio v. Sygma Network, Inc., 458 F.3d 1177 (10th Cir. 2006) (race).
8. Carlton v. Mystic Transp., Inc., 202 F.3d 129, 132 (2d Cir. 2000) (quoting William Shakespeare, Sonnet LXV, in *The Complete Works of William Shakespeare* (W.J. Craig ed., Oxford Univ. Press 1928)).
9. Grady v. Affiliated Cent., Inc., 130 F.3d 553, 561 (2d Cir. 1997) (8 days); Jacques v. Clean-Up Group, Inc., 96 F.3d 506, 509 (1st Cir. 1996) (3 months); *Proud*, 945 F.2d at 798 (6 months); Bradley v. Harcourt Brace & Co., 104 F.3d 267, 269 (9th Cir. 1996) (11 months); Roberts v. Separators, Inc., 172 F.3d 448, 452 (7th Cir. 1999) (1 year); LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 847 (1st Cir. 1993) (2 years); Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173, 174-75 (8th Cir. 1992) (2 years); *Brown*, 82 F.3d at 658 (4 years).
10. *Buhrmaster*, 61 F.3d at 464.
11. *Amirmokri*, 60 F.3d 1126; Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 513 (4th Cir. 1994) (suggesting that a direct relationship between the individual hirer and the plaintiff is not necessary to establish the inference so long as the firing official has hired others in the plaintiff's protected class); *Lowe*, 963 F.2d at 174 (considering evidence that "same people" or "same company officials" hired and fired plaintiff in less than two years "compelling . . . in light of the weakness of the plaintiff's evidence otherwise").
12. Campbell v. Alliance Nat'l Inc., 107 F. Supp. 2d 234, 250 (S.D.N.Y. 2000); *see also* Nieto v. L & H Packing Co., 108 F.3d 621, 623 (5th Cir. 1997) (implicitly rejecting employee's contention disputing the identity of the hirer and firer and accepting employer's argument that corporate decisions are often made by management groups).
13. *DeJarnette*, 133 F.3d 293; *see also Antonio*, 458 F.3d 1177 (applying the inference in a race and national-origin discrimination case, where the hiring and firing decisions were made by a group, even though the group comprised different individuals at the time of the employee's hiring and firing).
14. Hooks v. Lockheed Martin Skunk Works, 14 F. App'x. 769, 2001 WL 706919 (9th Cir. 2006) (unpublished) (in a case involving the denial of a promotion by an individual who had previously promoted the plaintiff, the court held that "[w]hen an individual makes a favorable employment decision and then, within a short period of time, the same actor makes an adverse employment decision, 'a strong inference arises that there was no discriminatory motive'") (internal citations omitted).
15. Hartsel v. Keys, 87 F.3d 795 (6th Cir. 1996).
16. *Id.* at 804 n.9.
17. Coghlan v. American Seafoods Co., 413 F.3d 1090, 1098 (9th Cir. 2005).
18. Montgomery v. Ruxton Health Care, IX, LLC, 2007 WL 1229708 (E.D. Va. Apr. 26, 2007) (unreported).
19. *Coghlan*, 413 F.3d at 1096-97.
20. *Lowe*, 963 F.2d 173 (8th Cir. 1992).
21. *Id.* at 174 (internal citations omitted).
22. *Grady*, 130 F.3d at 560.
23. *Schnabel v. Abramson*, 232 F.3d 83, 91 (2d Cir. 2000).
24. *Brown*, 82 F.3d at 651; *But see* Haun v. Ideal Indus., Inc., 81 F.3d 541, 546 (5th Cir. 1996) ("While evidence of [same actor] circumstances is relevant in determining whether discrimination occurred, we decline to establish a rule that no inference of discrimination could arise under such circumstances"); *Antonio*, 458 F.3d at 1183.
25. Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 573 (6th Cir. 2003) (emphasis added).

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26. *Id.* at 573–74 (Citing *Buhrmaster*, 61 F.3d at 464).

27. Williams v. Vitro Servs. Corp., 144 F.3d 1438 (11th Cir. 1998).

28. *Id.* at 1443.

29. *Id.*

30. 56 F.3d 491, 496 n.6 (3d Cir. 1995).

31. 61 F.3d at 463-64.

32. Brown Distrib. Co. of W. Palm Beach v. Marcell, 890 So.2d 1227, 1232 (Fla. 4th DCA 2005) ("Turning next to the proposed jury instruction on the same actor inference, we again find that it accurately states the law and is necessary for the jury to properly resolve the issues of the case").

33. Kim v. Dial Serv. Intern., Inc., 159 F.3d 1347, 1998 WL 514297, *4 (2d. Cir. 1998) (unpublished disposition) (citing *Grady*, 130 F.3d at 560).

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510 U.S. 249, 114 S.Ct. 798

Supreme Court of the United States

NATIONAL ORGANIZATION FOR WOMEN, INC., etc., et al., Petitioners,
v.
Joseph SCHEIDLER et al.

No. 92-780.

Argued Dec. 8, 1993.
Decided Jan. 24, 1994.
Rehearing Denied March 21, 1994.
See 510 U.S. 1215, 114 S.Ct. 1340.

Womens' rights organization and abortion clinics brought action against coalition of antiabortion groups alleging that defendants were members of nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity in violation of Racketeer Influenced and Corrupt Organizations Act (RICO). The United States District Court for the Northern District of Illinois, James F. Holderman, Jr., J., 765 F.Supp. 937, dismissed claims. Plaintiffs appealed. The Court of Appeals for the Seventh Circuit, Bauer, Chief Judge, 968 F.2d 612, affirmed. Certiorari was granted. The Supreme Court, Chief Justice Rehnquist, J., held that RICO does not require proof that either racketeering enterprise or predicate acts of racketeering be motivated by economic purpose.

Reversed.

Justice Souter filed a concurring opinion in which Justice Kennedy joined.

*252 Chief Justice REHNQUIST delivered the opinion of the Court.

We are required once again to interpret the provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO) chapter of the Organized Crime Control Act of 1970 (OCCA), Pub.L. 91-452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961-1968 (1988 ed. and Supp. IV). Section 1962(c) prohibits any person associated with an enterprise from conducting its affairs through a pattern of racketeering activity. We granted certiorari to determine whether RICO requires proof that either the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose. We hold that RICO requires no such economic motive.

I

Petitioner National Organization for Women, Inc. (NOW), is a national nonprofit organization that supports the legal availability of abortion; petitioners Delaware Women's Health Organization, Inc. (DWHO), and Summit Women's Health Organization, Inc. (SWHO), are health care centers that perform abortions and other medical procedures. Respondents are a coalition of antiabortion groups called the Pro-Life Action Network (PLAN), Joseph Scheidler and other individuals and organizations that oppose legal abortion, and a medical laboratory that formerly provided services to the two petitioner health care centers. [FN1]

FN1. The other respondents named in the complaint include the following: John Patrick Ryan, Randall A. Terry, Andrew Scholberg, Conrad Wojnar, Timothy Murphy, Monica Migliorino, Vital-Med Laboratories, Inc., Pro-Life Action League, Inc. (PLAL), Pro-Life Direct Action League, Inc. (PDAL), Operation Rescue, and Project Life.

Petitioners sued respondents in the United States District Court for the Northern District of Illinois, alleging violations of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1 *et seq.*, and RICO's §§ 1962(a), (c), and (d), as well as several pendent state-law claims stemming from the activities *253 of antiabortion protesters at the clinics. According to respondent Scheidler's congressional testimony, these protesters aim to shut down the clinics and persuade women not to have abortions. See, *e.g.*, Abortion Clinic Violence, Oversight Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 99th Cong., 1st and 2d Sess., 55 (1987) (statement of Joseph M. Scheidler, Executive Director, Pro-Life Action League). Petitioners sought injunctive relief, along with treble damages, costs, and attorney's fees. They later amended their complaint, and pursuant to local rules, filed a "RICO Case Statement" that further detailed the enterprise, the pattern of racketeering, the victims of the racketeering activity, and the participants involved.

The amended complaint alleged that respondents were members of a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity including extortion in violation of the Hobbs Act, 18 U.S.C. § 1951. [FN2] Section 1951(b)(2) defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." Petitioners alleged that respondents conspired to use threatened or actual force, violence, or fear to induce clinic employees, **802 doctors, and patients to give up their jobs, give up their

economic right to practice medicine, and give up their right to obtain medical services at the clinics. App. 66, Second Amended Complaint ¶ 97. Petitioners claimed that this conspiracy "has injured *254 the business and/or property interests of the [petitioners]." *Id.*, at 72, ¶ 104. According to the amended complaint, PLAN constitutes the alleged racketeering "enterprise" for purposes of § 1962(c). *Id.*, at 72-73, ¶¶ 107-109.

FN2. The Hobbs Act, 18 U.S.C. § 1951(a), provides: "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both." Respondents contend that petitioners are unable to show that their actions violated the Hobbs Act. We do not reach that issue and express no opinion upon it.

The District Court dismissed the case pursuant to Federal Rule of Civil Procedure 12(b)(6). Citing *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), it held that since the activities alleged "involve[d] political opponents, not commercial competitors, and political objectives, not marketplace goals," the Sherman Act did not apply. 765 F.Supp. 937, 941 (ND Ill.1991). It dismissed petitioners' RICO claims under § 1962(a) because the "income" alleged by petitioners consisted of voluntary donations from persons opposed to abortion which "in no way were derived from the pattern of racketeering alleged in the complaint." *Ibid.* The District Court then concluded that petitioners failed to state a claim under § 1962(c) since "an economic motive requirement exists to the extent that some profit-generating purpose must be alleged in order to state a RICO claim." *Id.*, at 943. Finally, it dismissed petitioners' RICO conspiracy claim under § 1962(d) since petitioners' other RICO claims could not stand.

The Court of Appeals affirmed. 968 F.2d 612 (CA7 1992). As to the RICO counts, it agreed with the District Court that the voluntary contributions received by respondents did not constitute income derived from racketeering activities for purposes of § 1962(a). *Id.*, at 625. It adopted the analysis of the Court of Appeals for the Second Circuit in *United States v. Ivic*, 700 F.2d 51 (1983), which found an "economic motive" requirement implicit in the "enterprise" element of the offense. The Court of Appeals determined that "non-economic crimes committed in furtherance of non-economic motives are not within the ambit of RICO." 968 F.2d, at 629. Consequently, petitioners failed to state a claim under § 1962(c). The Court of Appeals also affirmed dismissal of the RICO conspiracy claim under § 1962(d).

*255 We granted certiorari, 508 U.S. 971, 113 S.Ct. 2958, 125 L.Ed.2d 659 (1993), to resolve a conflict among the Courts of Appeals on the putative economic motive requirement of 18 U.S.C. §§ 1962(c) and (d). Compare *United States v. Ivic, supra.* and *United States v. Flynn*, 852 F.2d 1045, 1052 (CA8), ("For purposes of RICO, an enterprise must be directed toward an economic goal"), cert. denied, 488 U.S. 974, 109 S.Ct. 511, 102 L.Ed.2d 546 (1988), with *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (CA3) (because the predicate offense does not require economic motive, RICO requires no additional economic motive), cert. denied, 493 U.S. 901, 110 S.Ct. 261, 107 L.Ed.2d 210 (1989).

II

[1][2] We first address the threshold question raised by respondents whether petitioners have standing to bring their claim. Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546-547, 106 S.Ct. 1326, 1333-1334, 89 L.Ed.2d 501 (1986). Respondents are correct that only DWHO and SWHO, and not NOW, have sued under RICO. [FN3] Despite the fact that the clinics attempted to bring the RICO claim as class actions, DWHO and SWHO must themselves have standing. *Simon v. Eastern Ky.* **803 *Welfare Rights Organization*, 426 U.S. 26, 40, n. 20, 96 S.Ct. 1917, 1925, n. 20, 48 L.Ed.2d 450 (1976), citing *Warth v. Seldin*, 422 U.S. 490, 502, 95 S.Ct. 2197, 2207, 45 L.Ed.2d 343 (1975). Respondents are wrong, however, in asserting that the complaint alleges no "injury" to DWHO and SWHO "fairly traceable to the defendant's allegedly unlawful conduct." *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

FN3. NOW sought class certification for itself, its women members who use or may use the targeted health centers, and other women who use or may use the services of such centers. The District Court did not certify the class, apparently deferring its ruling until resolution of the motions to dismiss. All pending motions were dismissed as moot when the court granted respondents' motion to dismiss. 765 F.Supp. 937, 945 (ND Ill.1991).

*256 We have held that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2137, 119 L.Ed.2d 351 (1992) (citations omitted). The District Court dismissed petitioners' claim at the pleading stage pursuant to Federal Rule of Civil Procedure 12(b)(6), so their complaint must be sustained if relief could be granted "under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984). DWHO and SWHO alleged in their complaint that respondents conspired to use force to induce clinic staff and patients to stop working and obtain medical services elsewhere. App. 66, Second Amended Complaint ¶ 97. Petitioners claimed that this conspiracy "has injured the business and/or property interests of the [petitioners]." *Id.*, at 72, ¶ 104. In addition, petitioners claimed that respondent Scheidler threatened DWHO's clinic administrator with reprisals if she refused to quit her job at the clinic. *Id.*, at 68, ¶ 98(g). Paragraphs 106 and 110 of petitioners' complaint incorporate these allegations into the § 1962(c) claim. *Id.*, at 72, 73. Nothing more is needed to confer standing on DWHO and SWHO at the pleading stage.

III

[3] We turn to the question whether the racketeering enterprise or the racketeering predicate acts must be accompanied by an underlying economic motive. Section 1962(c) makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Section 1961(1) defines "pattern of racketeering activity" to include conduct that is "chargeable" *257 or "indictable" under a host of state and federal laws. [FN4] RICO broadly defines "enterprise" in § 1961(4) to "includ[e] any individual, partnership, corporation, **804 association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Nowhere in either § 1962(c) or the RICO definitions in § 1961 is there any indication that an economic motive is required.

FN4. Section 1961(1) provides: " 'racketeering activity' means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering)... (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States...."

The phrase "any enterprise engaged in, or the activities of which affect, interstate or foreign commerce" comes the closest of any language in subsection (c) to suggesting a need for an economic motive. Arguably an enterprise engaged in *258 interstate or foreign commerce would have a profit-seeking motive, but the language in § 1962(c) does not stop there; it includes enterprises whose activities "affect" interstate or foreign commerce. Webster's Third New International Dictionary 35 (1969) defines "affect" as "to have a detrimental influence on--used especially in the phrase *affecting commerce*." An enterprise surely can have a detrimental influence on interstate or foreign commerce

without having its own profit-seeking motives.

The Court of Appeals thought that the use of the term "enterprise" in §§ 1962(a) and (b), where it is arguably more tied in with economic motivation, should be applied to restrict the breadth of use of that term in § 1962(c). 968 F.2d, at 629. Respondents agree and point to our comment in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489, 105 S.Ct. 3275, 3281, 87 L.Ed.2d 346 (1985), regarding the term "violation," that "[w]e should not lightly infer that Congress intended the term [violation] to have wholly different meanings in neighboring subsections."

We do not believe that the usage of the term "enterprise" in subsections (a) and (b) leads to the inference that an economic motive is required in subsection (c). The term "enterprise" in subsections (a) and (b) plays a different role in the structure of those subsections than it does in subsection (c). Section 1962(a) provides that it "shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity ... to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." Correspondingly, § 1962(b) states that it "shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." ***259** The "enterprise" referred to in subsections (a) and (b) is thus something acquired through the use of illegal activities or by money obtained from illegal activities. The enterprise in these subsections is the victim of unlawful activity and may very well be a "profit-seeking" entity that represents a property interest and may be acquired. But the statutory language in subsections (a) and (b) does not mandate that the enterprise be a "profit-seeking" entity; it simply requires that the enterprise be an entity that was acquired through illegal activity or the money generated from illegal activity.

By contrast, the "enterprise" in subsection (c) connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity. Subsection (c) makes it unlawful for "any person employed by or associated with any enterprise ... to conduct or participate ... in the conduct of such enterprise's affairs through a pattern of racketeering activity...." Consequently, since the enterprise in subsection (c) is not being acquired, it need nothave a property interest that can be acquired nor an economic motive for engaging in illegal activity; it need only be an association in fact that engages in a pattern of racketeering activity. [FN5] Nothing in ****805** subsections (a) and (b) directs us to a contrary conclusion.

FN5. One commentator uses the terms "prize," "instrument," "victim," and "perpetrator" to describe the four separate roles the enterprise may play in § 1962. See Blakey, The RICO Civil Fraud Action in Context: Reflections on *Bennett v. Berg*, 58 Notre Dame L.Rev. 237, 307-325 (1982).

The Court of Appeals also relied on the reasoning of *United States v. Bagaric*, 706 F.2d 42 (CA2), cert. denied, 464 U.S. 840, 104 S.Ct. 133, 134, 78 L.Ed.2d 128 (1983), to support its conclusion that subsection (c) requires an economic motive. In upholding the convictions, under RICO, of members of a political terrorist group, the *Bagaric* court relied in part on the congressional statement of findings which prefaces RICO and refers to the activities of groups that " 'drai[n] billions of dollars from America's economy ***260** by unlawful conduct and the illegal use of force, fraud, and corruption.' " 706 F.2d, at 57, n. 13 (quoting OCCA, 84 Stat. 922). The Court of Appeals for the Second Circuit decided that the sort of activity thus condemned required an economic motive.

We do not think this is so. Respondents and the two Courts of Appeals, we think, overlook the fact that predicate acts, such as the alleged extortion, may not benefit the protesters financially but still may drain money from the economy by harming businesses such as the clinics which are petitioners in this case.

We also think that the quoted statement of congressional findings is a rather thin reed upon which to base a requirement of economic motive neither expressed nor, we think, fairly implied in the operative sections of the Act. As we said in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 248, 109 S.Ct. 2893, 2905, 106 L.Ed.2d 195 (1989): "[T]he occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime."

In *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), we faced the analogous question whether "enterprise" as used in § 1961(4) should be confined to "legitimate" enterprises. Looking to the statutory language, we found that "[t]here is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact." *Id.*, at 580, 101 S.Ct., at 2527. Accordingly, we resolved that §

1961(4)'s definition of "enterprise" "appears to include both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises than it does legitimate ones." *Id.*, at 580-581, 101 S.Ct., at 2527. We noted that Congress could easily have narrowed the sweep of the term "enterprise" by inserting a single word, "legitimate." *Id.*, at 581, 101 S.Ct., at 2527. Instead, Congress did nothing to indicate that "enterprise" ***261** should exclude those entities whose sole purpose was criminal.

The parallel to the present case is apparent. Congress has not, either in the definitional section or in the operative language, required that an "enterprise" in § 1962(c) have an economic motive.

The Court of Appeals also found persuasive guidelines for RICO prosecutions issued by the Department of Justice in 1981. The guidelines provided that a RICO indictment should not charge an association as an enterprise, unless the association exists " 'for the purpose of maintaining operations directed toward an *economic* goal....' " *United States v. Ivic*, 700 F.2d, at 64, quoting U.S. Dept. of Justice, United States Attorneys' Manual § 9-110.360 (1984) (emphasis added). The Second Circuit believed these guidelines were entitled to deference under administrative law principles. See 700 F.2d, at 64. Whatever may be the appropriate deference afforded to such internal rules, see, *e.g.*, *Crandon v. United States*, 494 U.S. 152, 177, 110 S.Ct. 997, 1011, 108 L.Ed.2d 132 (1990) (SCALIA, J., concurring in judgment), for our purposes we need note only that the Department of Justice amended its guidelines in 1984. The amended guidelines provide that an association-in-fact enterprise must be "directed toward an economic *or other identifiable goal.*" U.S. Dept. of Justice, ****806** United States Attorney's Manual § 9-110.360 (Mar. 9, 1984) (emphasis added).

Both parties rely on legislative history to support their positions. We believe the statutory language is unambiguous and find in the parties' submissions respecting legislative history no such "clearly expressed legislative intent to the contrary" that would warrant a different construction. *Reves v. Ernst & Young*, 507 U.S. 170, 177, 113 S.Ct. 1163, 1169, 122 L.Ed.2d 525 (1993), citing *United States v. Turkette, supra*, 452 U.S., at 580, 101 S.Ct., at 2527, quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980).

[4] ***262** Respondents finally argue that the result here should be controlled by the rule of lenity in criminal cases. But the rule of lenity applies only when an ambiguity is present; " 'it is not used to beget one.... The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.' " *Turkette, supra*, 452 U.S., at 587-588, n. 10, 101 S.Ct., at 2531, n. 10, quoting *Callanan v. United States*, 364 U.S. 587, 596, 81 S.Ct. 321, 326, 5 L.Ed.2d 312 (1961) (footnote omitted). We simply do not think there is an ambiguity here which would suffice to invoke the rule of lenity. " '[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.' " *Sedima*, 473 U.S., at 499, 105 S.Ct., at 3286 (quoting *Haroco, Inc. v. American Nat. Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (CA7 1984)). [FN6]

FN6. Several of the respondents and several *amici* argue that application of RICO to antiabortion protesters could chill legitimate expression protected by the First Amendment. However, the question presented for review asked simply whether the Court should create an unwritten requirement limiting RICO to cases where either the enterprise or racketeering activity has an overriding economic motive. None of the respondents made a constitutional argument as to the proper construction of RICO in the Court of Appeals, and their constitutional argument here is directed almost entirely to the nature of their activities, rather than to the construction of RICO. We therefore decline to address the First Amendment question argued by respondents and the *amici*.

We therefore hold that petitioners may maintain this action if respondents conducted the enterprise through a pattern of racketeering activity. The questions whether respondents committed the requisite predicate acts, and whether the commission of these acts fell into a pattern, are not before us. We hold only that RICO contains no economic motive requirement.

The judgment of the Court of Appeals is accordingly

Reversed.

***263** Justice SOUTER, with whom Justice KENNEDY joins, concurring.

I join the Court's opinion and write separately to explain why the First Amendment does not require reading an economic-motive requirement into the Racketeer Influenced and Corrupt Organizations Act (RICO or statute), and to stress that the Court's opinion does not bar First Amendment challenges to RICO's application in particular cases.

Several respondents and *amici* argue that we should avoid the First Amendment issues that could arise from allowing RICO to be applied to protest organizations by construing the statute to require economic motivation, just as we have previously interpreted other generally applicable statutes so as to avoid First Amendment problems. See, *e.g.*, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138, 81 S.Ct. 523, 530, 5 L.Ed.2d 464 (1961) (holding that antitrust laws do not apply to businesses combining to lobby the government, even where such conduct has an anticompetitive purpose and an anticompetitive effect, because the alternative "would raise important constitutional questions" under the First Amendment); see also *Lucas v. Alexander*, 279 U.S. 573, 577, 49 S.Ct. 426, 428, 73 L.Ed. 851 (1929) (a law "must be construed with an eye to possible constitutional limitations so as to avoid doubts as to its validity"). The argument is meritless in this case, though, for this principle of statutory construction **807 applies only when the meaning of a statute is in doubt, see *Noerr, supra*, and here "the statutory language is unambiguous," *ante*, at 806.

Even if the meaning of RICO were open to debate, however, it would not follow that the statute ought to be read to include an economic-motive requirement, since such a requirement would correspond only poorly to free-speech concerns. Respondents and *amici* complain that, unless so limited, the statute permits an ideological organization's opponents to label its vigorous expression as RICO predicate acts, thereby availing themselves of powerful remedial provisions that could destroy the organization. But an *264 economic-motive requirement would protect too much with respect to First Amendment interests, since it would keep RICO from reaching ideological entities whose members commit acts of violence we need not fear chilling. An economic-motive requirement might also prove to be underprotective, in that entities engaging in vigorous but fully protected expression might fail the proposed economic-motive test (for even protest movements need money) and so be left exposed to harassing RICO suits.

An economic-motive requirement is, finally, unnecessary, because legitimate free-speech claims may be raised and addressed in individual RICO cases as they arise. Accordingly, it is important to stress that nothing in the Court's opinion precludes a RICO defendant from raising the First Amendment in its defense in a particular case. Conduct alleged to amount to Hobbs Act extortion, for example, or one of the other, somewhat elastic RICO predicate acts may turn out to be fully protected First Amendment activity, entitling the defendant to dismissal on that basis. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 917, 102 S.Ct. 3409, 3427, 73 L.Ed.2d 1215 (1982) (holding that a state common-law prohibition on malicious interference with business could not, under the circumstances, be constitutionally applied to a civil-rights boycott of white merchants). And even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) (invalidating under the First Amendment a court order compelling production of the NAACP's membership lists, issued to enforce Alabama's requirements for out-of-state corporations doing business in the State). See also *NAACP v. Claiborne Hardware Co., supra*, 458 U.S., at 930-932, 102 S.Ct., at 3434-35 (discussing First Amendment limits on the assessment of derivative liability against ideological organizations); *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531 (CA9 1991) (applying a heightened pleading standard *265 to a complaint based on presumptively protected First Amendment conduct).

This is not the place to catalog the speech issues that could arise in a RICO action against a protest group, and I express no view on the possibility of a First Amendment claim by the respondents in this case (since, as the Court observes, such claims are outside the question presented, see CG*ante, CG* at 806, n. 6). But I think it prudent to notice that RICO actions could deter protected advocacy and to caution courts applying RICO to bear in mind the First Amendment interests that could be at stake.

APPENDIX D
(Synopsis Derivatives of Case Laws)

A. ISSUES RAISED FOR THE FIRST TIME ON APPEAL

¶ 16 In general, issues not raised in the trial court may not be raised on appeal. 848*848See RAP 2.5(a) (an "appellate court may refuse to review any claim of error which was not raised in the trial court"). However, by using the term "may," RAP 2.5(a) is written in discretionary, rather than mandatory, terms. See State v. Ford, 137 Wash.2d 472, 477, 484-85, 973 P.2d 452 (1999).

¶ 17 In addition to its discretionary nature, RAP 2.5(a) contains several express exceptions from its general prohibition against raising new issues on appeal, including the "failure to establish facts upon which relief can be granted." This exception is fitting inasmuch as "[a]ppeal is the first time sufficiency of evidence may realistically be raised." State v. Hickman, 135 Wash.2d 97, 103, n.3, 954 P.2d 900 (1998). For purposes of RAP 2.5(a), the terms "failure to establish facts upon which relief can be granted" and "failure to state a claim" are largely interchangeable. See 1 Washington Court Rules Annotated RAP 2.5 cmt. (a) at 640 (2d ed. 2004) ("Exception (2) uses the phrase `failure to establish facts' rather than the traditional `failure to state a claim.' The former phrase more accurately expresses the meaning of the rule in modern practice.").

¶ 18 The Court of Appeals held that the County could argue the failure to establish facts upon which relief can be granted for the first time on appeal. We agree and have previously so held:

In our opinion, this particular statutory limitation on the class of persons entitled to a civil cause of action for age discrimination operates to define the specific facts upon which relief may be predicated. A party may raise failure to establish facts upon which relief can be granted for the first time in the appellate court. RAP 2.5(a)(2). Respondent is thus not precluded from raising appellant's failure to establish he is within the protected class. Gross v. City of Lynnwood, 90 Wash.2d 395, 400, 583 P.2d 1197 (1978). We have consistently stated that a new issue can be raised on appeal "`when the question raised affects the right to maintain the action.'" Bennett v. Hardy, 113 Wash.2d 912, 918, 784 P.2d 1258 (1990) (quoting Maynard Inv. Co. v. McCann, 77 Wash.2d 616, 621, 465 P.2d 657 (1970)); see also Jones v. Stebbins, 122 Wash.2d 471, 479, 860 P.2d 1009 (1993).

¶ 19 Given the discretionary nature of RAP 2.5(a) and its express exception for raising failure to establish facts upon which relief can be granted, we conclude that the Court of Appeals did not err in reaching the County's argument regarding the scope and availability of Petitioners' cause of action.

B. LAW OF THE CASE DOCTRINE

¶ 20 Law of the case is a doctrine that derives from both RAP 2.5(c)(2) and common law. This multifaceted doctrine means different things in different circumstances, Lutheran Day Care v. Snohomish County, 119 Wash.2d 91, 113, 829 P.2d 746 (1992), and is often confused with other closely related doctrines, including collateral estoppel,[6] res judicata,[7] and stare decisis.[8]

¶ 21 In its most common form, the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation. Id. (citing 15 Lewis H. Orland & Karl B. Tegland, Washington Practice: Judgments § 380, at 55-56 (4th ed.1986)). In addition, law of the case also refers to the principle that jury instructions 849*849 that are not objected to are treated as the properly applicable law for purposes of appeal.Hickman, 135 Wash.2d at 101-02, 954 P.2d 900. In all of its various formulations the doctrine seeks to promote finality and

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efficiency in the judicial process. See 5 Am. Jur.2d Appellate Review § 605 (1995). ¶ 22 In 1976, RAP 2.5(c)(2) codified certain restrictions on the law of the case doctrine:

(2) Prior Appellate Court Decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

86 Wash.2d 1152. By using the term "may," RAP 2.5(c)(2) **is written in discretionary, rather than mandatory,** terms. See Folsom v. County of Spokane, 111 Wash.2d 256, 264, 759 P.2d 1196 (1988). The plain language of the rule affords appellate courts discretion in its application. RAP 2.5(c)(2) codifies at least two historically recognized exceptions to the law of the case doctrine that operate independently.

¶ 23 First, application of the doctrine may be avoided where the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party. See, e.g., First Small Bus. Inv. Co. of Cal. v. Intercapital Corp. of Or., 108 Wash.2d 324, 333, 738 P.2d 263 (1987). This common sense formulation of the doctrine assures that an appellate court is not obliged to perpetuate its own error.

¶ 24 Second, application of the doctrine may also be avoided where there has been an intervening change in controlling precedent between trial and appeal. See RAP 2.5(c)(2) (authorizing appellate courts to review prior decisions on the basis of the law "at the time of the later review."). This exception to the law of the case doctrine also comports with federal law. 1B James Wm. Moore, Moore's Federal Practice ¶ 0.404[1], at II-6II-7 (2d ed. 1996) ("It is clear, for example, that a decision of the Supreme Court directly in point, irreconcilable with the decision on the first appeal, and *rendered in the interim, must be followed on the second appeal, despite the doctrine of the law of the case.") (footnote omitted); cf. Crane Co. v. American Standard, Inc., 603 F.2d 244, 249 (2d Cir.1979) (concluding that law of case did not preclude trial court reconsideration of whether plaintiff had a cause of action when reexamination is appropriate in light of an intervening United States Supreme Court decision). An appellate court's discretion to disregard the law of the case doctrine is at its apex when there has been a subsequent change in controlling precedent on appeal.*

¶ 25 Petitioners argue that both of the above formulations of law of the case doctrine should have prevented the County from relitigating on appeal the scope and availability of Petitioners' cause of action for negligent investigation. First, Petitioners argue that the Division One opinion could not be set aside absent a finding by the Court of Appeals that the previous decision was erroneous and that the erroneous decision would work a manifest injustice to one party. However, no such finding is required where reconsideration is prompted by intervening, controlling precedent from this court. The instant case squarely fits within this exception. Prior to the issuance of Division Three's opinion, we issued our controlling opinion in M.W., 149 Wash.2d 589, 70 P.3d 954. As explained further below, our decision in M.W.compelled the dismissal of Petitioners' claim for negligent investigation under chapter 26.44 RCW.

¶ 26 Petitioners also assert that jury instructions become law of the case and that the County is barred from rearguing the cause of action as defined in the instructions. However, if jury instructions were controlling as Petitioners assert, a reviewing court could never review a case based on the law as it exists at the time of appeal. Moreover, our case law reinforces the principle that even failure to object to jury instructions is of no consequence where the contention affects the right to maintain a cause of action.

*It is the approved rule in this state that the parties are bound by the law laid down by the court in its instructions where, as here, the charge is approved by counsel for 850*850 each party, no objections or exceptions thereto having been made at any stage....* This rule does not apply if the record or evidence conclusively shows that the party in whose favor the verdict is rendered is not entitled to recover. No man should be allowed to recover in any case unless there is evidence to support his contention.

Tonkovich v. Dep't of Labor & Indus., 31 Wash.2d 220, 225, 195 P.2d 638, 640-41 (1948) (emphasis added).

1. (Glossary, Case laws from opening brief, summary judgement reply, surreply, statues & law applies simultaneously, to each statement, reasserted in the same context.)

¶ 27 Rigid adherence to the law of the case doctrine where the issue on appeal involves the threshold determination of whether plaintiff possesses a cause of action may actually violate the very purpose for which the law of the case doctrine exists — promoting finality and efficiency in the judicial process. The determination that a plaintiff cannot maintain a cause of action conserves judicial resources for those whose grievances are properly before the courts. Such a ruling also prospectively precludes suits by potential litigants with similar claims.

¶ 28 We conclude that the Court of Appeals acted within its discretion when it declined to invoke the law of the case doctrine and reconsidered the prior Division One opinion in light of intervening, controlling precedent from this court. We now address whether Petitioners fall within the scope of cognizable claims under chapter 26.44 RCW.

C. SCOPE OF CAUSE OF ACTION FOR NEGLIGENT INVESTIGATION

¶ 29 We have previously recognized an implied cause of action against DSHS for negligent investigation of child abuse allegations under chapter 26.44 RCW.[9] SeeTyner v. Dep't of Soc. & Health Servs., 141 Wash.2d 68, 79-81, 1 P.3d 1148 (2000).[10] In Tyner, a father was accused of abusing his children and was separated from them for several months during the pendency of a CPS investigation and resulting dependency proceedings. Id. at 71-75, 1 P.3d 1148. After the dismissal of the dependency petition, the father sued for negligent investigation under RCW 26.44.050. Id. at 75-56, 1 P.3d 1148. The parties agreed that RCW 26.44.050 created a duty to a child victim when investigating child abuse but disputed whether that duty extended to the child's parents. Id. at 77, 1 P.3d 1148. We noted that the statute has two central purposes — to protect children and to preserve the integrity of the family.Id. at 80, 1 P.3d 1148. Accordingly, we concluded that the statute provides a cause of action for both parents and their children. Id.

¶ 30 In M.W., 149 Wash.2d 589, 70 P.3d 954, we subsequently clarified the scope of the cause of action established in Tyner.

¶ 31 Based on our decisions in Tyner and M.W., the County argued on appeal that the Simses do not have a cause of action for negligent investigation because (1) Ms. Sims was not investigated by the County for abusing her son Daniel, and (2) the Simses avoided any possible "harmful placement decision" by sending Daniel to live with a grandparent in Kansas. Although the parties dispute whether Ms. Sims was ever investigated by the County for abusing her own son, we need not determine whether this is necessary for the cause of action. Our interpretation of the statute inM.W. unequivocally requires that the negligent investigation to be actionable must lead to a "harmful placement decision." Id.

¶ 32 Here, the Simses voluntarily relinquished guardianship of Daniel to his grandmother and sent him to live with her in Kansas after learning that Ms. Sims was among those accused of abusing children. In their briefs, the Simses described this sequence of events as **a "preemptive move," tantamount to "constructive removal."** Br. of Pet'rs at 28. We reject the contention that this supports a cause of action under chapter 26.44 RCW.

¶ 33 Extending the cause of action for negligent investigation to include so-called "constructive placement" decisions would be problematic and is beyond the statute. First, any "harm" resulting from the investigation would be purely speculative in nature. It cannot be readily determined what placement action, if any, DSHS or law enforcement might have taken, after investigation.

¶ 34 Second, claimants asserting "constructive placement" could largely control the extent of their damages. Because damages reflect disruption to the family unit, the length of such a disruption is proportionate to the damage. Here, for example, the Simses determined the length of time that Daniel was absent from their home. Daniel's absence occurred approximately one month before Ms. Sims was arrested and his return was delayed until approximately four months after the acquittal of Ms. Sims. Notably, the jury awarded no damages to Daniel. In addition, disruption to the family unit could be minimized. Here, for example, Daniel

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could have continued to live at home with his father during Ms. Sims' incarceration. Mr. Sims was never accused of abusing Daniel or any other children.

¶ 35 Finally, extending the cause of action for negligent investigation to include constructive placement decisions could encourage individuals to frustrate investigations. Ms. Sims testified, for example, that part of her decision to send Daniel away was to prevent **further investigation.**

¶ 17 Leave to amend is to be "freely given when justice so requires." CR 15(a). We review a trial court's denial of a motion to amend for an abuse of discretion. The touchstone for the denial of a motion to amend is the prejudice such an amendment **would cause to the nonmoving party. Donald B. Murphy Contractors, Inc. v. King County, 112 Wash.App. 192, 199, 49 P.3d 912 (2002). In determining whether prejudice would result, a court can consider potential delay, unfair surprise, or the introduction of remote issues. Kirkham v. Smith, 106 Wash.App. 177, 181, 23 P.3d 10 (2001)**.

¶ 18 Where a new claim can be litigated with the same evidence that is already in the case, it may be proper for a trial court to allow an amendment even when the motion to amend is made shortly before trial. In Kirkham, for example, the defendant moved to add a counterclaim three weeks before trial for violation of a statute. Kirkham, 106 Wash.App. at 180, 23 P.3d 10. Concluding that the counterclaim required essentially the same proof as the allegations in an existing counterclaim for misrepresentation, the trial court determined there was no prejudice and allowed the amendment. We upheld the decision to allow the amendment as a proper exercise of the trial court's discretion. Kirkham, 106 Wash.App. at 181, 23 P.3d 10

¶ 23 **A failure to preserve a claim of error by presenting it first to the trial court generally means the issue is waived. SeeBellevue Sch. Dist. No. 405 v. Lee, 70 Wash.2d 947, 950, 425 P.2d 902 (1967); RAP 2.5(a). While an appellate court retains the discretion to consider an issue raised for the first time on appeal, such discretion is rarely exercised.** Smith v. Shannon, 100 Wash.2d 26, 38, 666 P.2d 351 (1983). Here, it would be unfair to Karlberg to reverse the first judgment and remand for a new trial to allow Otten to present a claim of adverse possession he did not squarely present the first time around.

26 As a preliminary matter, Karlberg contends that Otten waived the defense of res judicata. The defense of res judicata can be waived if the defendant is aware of a second suit for the same cause of action. Brice v. Starr, 93 Wash. 501, 504-05, 161 P. 347 (1916); Landry v. Luscher, 95 Wash.App. 779, 786, 976 P.2d 1274, review denied, 139 Wash.2d 1006, 989 P.2d 1140 (1999); RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(a) (1982). But here, Karlberg's second suit came after judgment was granted in the first case. Because Karlberg's two suits were not pending at the same time, this exception does not apply. Landry, 95 Wash.App. at 786-87, 976 P.2d 1274. ¶ Res judicata does not apply to issues reserved from adjudication. Cummings v. Guardianship Servs. of Seattle, 128 Wash.App. 742, 754, 110 P.3d 796 (2005),review denied, 157 Wash.2d 1006, 136 P.3d 759

(2006); RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(b). Karlberg contends the trial court "reserved" the issue concerning the rest of the property up to fence. The record does not support this argument. There was no discussion of any issue being reserved. The issue of ownership up to the fence was fully heard. We will proceed to reach the merits of Otten's res judicata defense

¶ 32 When reviewing an order for summary judgment, we engage **in the same inquiry as the trial court, and will affirm summary judgment if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law.Marthaller v. King County Hosp. Dist. No. 2, 94 Wash.App. 911, 915, 973 P.2d 1098 (1999)**. All facts and reasonable inferences must be considered in a light most favorable to the nonmoving party, and all questions of law are reviewed de novo. Marthaller, 94 Wash.App. at 915, 973 P.2d 1098.

1. (Glossary, Case laws from opening brief, summary judgement reply, surreply, statues & law applies simultaneously, to each statement, reasserted in the same context.)

¶ 33 **Res judicata is a judicially created doctrine designed to prevent relitigation and to curtail multiplicity of actions by parties, participants or privies who have had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction**. Corbin v. Madison, 12 Wash.App. 318, 323, 529 P.2d 1145 (1974),review denied, 85 Wash.2d 1005, 1975 WL 48230 (1975). Also referred to as claim preclusion or as the prevention of "claim splitting," res judicata prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action. Ensley v. Pitcher, 152 Wash.App. 891, 899, 222 P.3d 99 (2009), review denied, 168 Wash.2d 1028, 230 P.3d 1060 (2010); Pederson v. Potter, 103 Wash. App. 62, 67, 11 P.3d 833 (2000), review denied, 143 Wash.2d 1006, 25 P.3d 1020 (2001). The doctrine "puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings." Walsh v. Wolff, 32 Wash.2d 285, 287, 201 P.2d 215 (1949). Allowing a claimant to split a single cause of action or claim "would lead to duplicitous suits and force a defendant to incur the cost and effort and defending multiple suits." Landry, 95 Wash.App. at 782, 976 P.2d 1274. The general rule is that "if an action is brought for part of a claim, a judgment obtained in the action precludes the plaintiff from bringing a second action for the residue of the claim." Landry, 95 Wash.App. at 782, 976 P.2d 1274.

¶ 34 Application of res judicata requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) causes of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made. Res judicata also requires a final judgment on the merits. Pederson, 103 Wash.App. at 67, 11 P.3d 833.

1. (Glossary, Case laws from opening brief, summary judgement reply, surreply, statues & law applies simultaneously, to each statement, reasserted in the same context.)

APPENDIX - E

WA State Supreme Court

Case 91503-2

Shaw Rahman v. Boeing

"SEC. 4. The Equal Employment Opportunity Commission, after consultation with all affected departments and agencies, shall issue such rules, regulations, orders, and instructions and request such information from the affected departments and agencies as it deems necessary and appropriate to carry out this Order.

"SEC. 5. All departments and agencies shall cooperate with and assist the Equal Employment Opportunity Commission in the performance of its functions under this Order and shall furnish the Commission such reports and information as it may request. The head of each department or agency shall comply with rules, regulations, orders and instructions issued by the Equal Employment Opportunity Commission pursuant to Section 4 of this Order."

1-103. Executive Order No. 11022, as amended [set out as a note under section 3001 of this title], is further amended by revising Section 1(b) to read as follows:

"(b) The Council shall be composed of the Secretary of Health, Education, and Welfare [now Health and Human Services], who shall be Chairman, the Secretary of the Treasury, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Labor, the Secretary of Housing and Urban Development, the Secretary of Transportation, the Administrator of Veterans Affairs, the Director of the Office of Personnel Management, the Director of the Community Services Administration, and the Chairman of the Equal Employment Opportunity Commission."

1-104. Executive Order No. 11480 of September 9, 1969 [set out as a note under section 791 of Title 29, Labor], is amended by deleting "and the Chairman of the United States Civil Service Commission" in Section 4 and substituting therefor "Director of the Office of Personnel Management, and the Chairman of the Equal Employment Opportunity Commission".

1-105. Executive Order No. 11830 of January 9, 1975 [set out as a note under section 791 of Title 29, Labor], is amended by deleting Section 2 and revising Section 1 to read as follows:

"In accord with Section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and Section 4 of Reorganization Plan No. 1 of 1978 (43 FR 19808) the Interagency Committee on Handicapped Employees is enlarged and composed of the following, or their designees whose positions are Executive level IV or higher:

"(1) Secretary of Defense.

"(2) Secretary of Labor.

"(3) Secretary of Health, Education, and Welfare [now Health and Human Services], Co-Chairman.

"(4) Director of the Office of Personnel Management.

"(5) Administrator of Veterans Affairs.

"(6) Administrator of General Services.

"(7) Chairman of the Federal Communications Commission.

"(8) Chairman of the Equal Employment Opportunity Commission, Co-Chairman.

"(9) Such other members as the President may designate."

1-106. This Order shall be effective on January 1, 1979.

JIMMY CARTER.

EX. ORD. NO. 12144. TRANSFER OF CERTAIN EQUAL PAY AND AGE DISCRIMINATION IN EMPLOYMENT ENFORCEMENT FUNCTIONS

Ex. Ord. No. 12144, June 22, 1979, 44 F.R. 37193, provided:

By the authority vested in me as President of the United States of America by the Constitution and laws of the United States, including Section 9 of Reorganization Plan No. 1 of 1978 (43 FR 19807) [set out above], in order to effectuate the transfer of certain functions relating to the enforcement of equal pay and age discrimination in employment programs from the Department of Labor to the Equal Employment Opportunity Commission, it is hereby ordered as follows:

1-101. Sections 1 and 2 of Reorganization Plan No. 1 of 1978 (43 FR 19807) [set out as a note above] shall become effective on July 1, 1979, with the exception of the transfer of functions from the Civil Service Commission, already effective January 1, 1979 (Executive Order No. 12106 [set out above]).

1-102. The records, property, personnel and positions, and unexpended balances of appropriations or funds, available or to be made available, which relate to the functions transferred as provided in this Order are hereby transferred from the Department of Labor to the Equal Employment Opportunity Commission.

1-103. The Director of the Office of Management and Budget shall make such determinations, issue such Orders, and take all actions necessary or appropriate to effectuate the transfers provided in this Order, including the transfer of funds, records, property, and personnel.

1-104. This Order shall be effective July 1, 1979.

JIMMY CARTER.

§ 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation

that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

[1] So in original. Probably should be subsection "(b)".

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally en-

gaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e–3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e–2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e–2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

(Pub. L. 88–352, title VII, § 706, July 2, 1964, 78 Stat. 259; Pub. L. 92–261, § 4, Mar. 24, 1972, 86 Stat. 104; Pub. L. 102–166, title I, §§ 107(b), 112, 113(b), Nov. 21, 1991, 105 Stat. 1075, 1078, 1079; Pub. L. 111–2, § 3, Jan. 29, 2009, 123 Stat. 5.)

REFERENCES IN TEXT

This Act, referred to in subsec. (f)(2), means Pub. L. 88–352, July 2, 1964, 78 Stat. 241, known as the Civil Rights Act of 1964, which is classified principally to subchapters II to IX of this chapter (§ 2000a et seq.). For complete classification of this Act to the Code, see Short Title note set out under section 2000a of this title and Tables.

Rules 65 and 53 of the Federal Rules of Civil Procedure, referred to in subsec. (f)(2), (5), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

Chapter 6 (§ 101 et seq.) of title 29, referred to in subsec. (h), is a reference to act Mar. 23, 1932, ch. 90, 47 Stat. 70, popularly known as the Norris-LaGuardia Act. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

2009—Subsec. (e)(3). Pub. L. 111–2 added par. (3).

1991—Subsec. (e). Pub. L. 102–166, § 112, designated existing provisions as par. (1) and added par. (2).

Subsec. (g). Pub. L. 102–166, § 107(b), designated existing provisions as pars. (1) and (2)(A) and added par. (2)(B).

Subsec. (k). Pub. L. 102–166, § 113(b), inserted "(including expert fees)" after "attorney's fee".

1972—Subsec. (a). Pub. L. 92–261, § 4(a), added subsec. (a). Former subsec. (a) redesignated (b) and amended generally.

Subsec. (b). Pub. L. 92–261, § 4(a), redesignated former subsec. (a) as (b), modified the procedure for the filing and consideration of charges by the Commission, subjected to coverage unlawful employment practices of joint labor-management committees controlling apprenticeship or other training or retraining, including on-the-job training programs, required the Commission to accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law in its determination of reasonable cause, and inserted provision setting forth the time period, after charges have been filed, allowed to the Commission to determine reasonable cause. Former subsec. (b) redesignated (c).

Subsecs. (c), (d). Pub. L. 92–261, § 4(a), redesignated former subsecs. (b) and (c) as (c) and (d), respectively. Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 92–261, § 4(a), redesignated former subsec. (d) as (e), extended from ninety to one hundred and eighty days after the occurrence of the alleged unlawful employment practice the time for filing charges under this section and from two hundred and ten to three hundred days the time for filing such charges where the person aggrieved initially instituted proceedings with a State or local agency, and inserted requirement that notice of the charge be served on the respondent within ten days after filing. Former subsec. (e) redesignated (f)(1).

Subsec. (f). Pub. L. 92–261, § 4(a), redesignated former subsec. (e) as par. (1), substituted provisions setting forth the procedure for civil actions where the Commission was unable to secure from the respondents a conciliation agreement to prevent further unlawful employment practices for provisions setting forth the procedure for civil actions where the Commission was unable to obtain voluntary compliance with this subchapter and inserted provisions setting forth the procedure for civil action where the respondent is a govern-

ment, governmental agency, or political subdivision and the Commission could not secure a conciliation agreement, added par. (2), redesignated former subsec. (f) as par. (3), substituted "aggrieved person" for "plaintiff", and added pars. (4) and (5).

Subsec. (g). Pub. L. 92–261, § 4(a), inserted provisions which authorized the court to order affirmative action not limited solely to the enumerated affirmative acts and such other equitable relief as deemed appropriate, and provisions which set forth the accrual date for back pay.

Subsecs. (i), (j). Pub. L. 92–261, § 4(b)(1), (2), substituted "this section" for "subsection (e) of this section".

EFFECTIVE DATE OF 2009 AMENDMENT

Pub. L. 111–2, § 6, Jan. 29, 2009, 123 Stat. 7, provided that: "This Act [amending this section and section 2000e–16 of this title and sections 626, 633a, and 794a of Title 29, Labor, and enacting provisions set out as notes under this section and section 2000a of this title], and the amendments made by this Act, take effect as if enacted on May 28, 2007 and apply to all claims of discrimination in compensation under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), title I and section 503 of the Americans with Disabilities Act of 1990 [42 U.S.C. 12111 et seq., 12203], and sections 501 and 504 of the Rehabilitation Act of 1973 [29 U.S.C. 791, 794], that are pending on or after that date."

EFFECTIVE DATE OF 1991 AMENDMENT

Amendment by Pub. L. 102–166 effective Nov. 21, 1991, except as otherwise provided, see section 402 of Pub. L. 102–166, set out as a note under section 1981 of this title.

EFFECTIVE DATE OF 1972 AMENDMENT

Section 14 of Pub. L. 92–261 provided that: "The amendments made by this Act to section 706 of the Civil Rights Act of 1964 [this section] shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act [Mar. 24, 1972] and all charges filed thereafter."

FINDINGS

Pub. L. 111–2, § 2, Jan. 29, 2009, 123 Stat. 5, provided that: "Congress finds the following:

"(1) The Supreme Court in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The Ledbetter decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.

"(2) The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.

"(3) With regard to any charge of discrimination under any law, nothing in this Act [amending this section and section 2000e–16 of this title and sections 626, 633a, and 794a of Title 29, Labor, and enacting provisions set out as notes under this section and section 2000a of this title] is intended to preclude or limit an aggrieved person's right to introduce evidence of an unlawful employment practice that has occurred outside the time for filing a charge of discrimination.

"(4) Nothing in this Act is intended to change current law treatment of when pension distributions are considered paid."

APPLICATION TO OTHER LAWS

Pub. L. 111–2, § 5(a), (b), Jan. 29, 2009, 123 Stat. 6, provided that:

"(a) AMERICANS WITH DISABILITIES ACT OF 1990.—The amendments made by section 3 [amending this section] shall apply to claims of discrimination in compensation brought under title I and section 503 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq., 12203), pursuant to section 107(a) of such Act (42 U.S.C. 12117(a)), which adopts the powers, remedies, and procedures set forth in section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5).

"(b) REHABILITATION ACT OF 1973.—The amendments made by section 3 shall apply to claims of discrimination in compensation brought under sections 501 and 504 of the Rehabilitation Act of 1973 (29 U.S.C. 791, 794), pursuant to—

"(1) sections 501(g) and 504(d) of such Act (29 U.S.C. 791(g), 794(d)), respectively, which adopt the standards applied under title I of the Americans with Disabilities Act of 1990 [42 U.S.C. 12111 et seq.] for determining whether a violation has occurred in a complaint alleging employment discrimination; and

"(2) paragraphs (1) and (2) of section 505(a) of such Act (29 U.S.C. 794a(a)) (as amended by subsection (c))."

§ 2000e–6. Civil actions by the Attorney General

(a) Complaint

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) Jurisdiction; three-judge district court for cases of general public importance: hearing, determination, expedition of action, review by Supreme Court; single judge district court: hearing, determination, expedition of action

The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding

AFFIDAVIT

WA Supreme Court

Shaw Rahman v. Boeing

Case No 91503-2

I Shaw Rahman state that the statements of reply brief and , exhibits are true and correct, the scribble and handwriting are plaintiff's own.

Respectfully put forth,

Pro Se plaintiff,

s/Shaw Rahman

1. (Glossary, Case laws from opening brief, summary judgement reply, surreply, statues & law applies simultaneously, to each statement, reasserted in the same context.)

WA STATE SUPREME COURT

AFFIDAVIT

CASE 91503-2

SHAW RAHMAN v. BOEING

Plaintiff stated that the affidavits, field at WA Supreme Court and served via email to defendants, are inclusive of this, reply appeal as exhibits.

Respectfully,

s/Shaw Rahman

WA State Supreme Court

Shaw Rahman v. Boeing

Case 91503-2

Reference:

Appendices 3

U.S. Department of Justice
Criminal Division
Organized Crime and Racketeering Section

Civil RICO: A Manual for Federal Attorneys

October 2007

Civil RICO: 18 U.S.C. §§ 1961-1968

A Manual for Federal Attorneys

October 2007

Prepared by the Staff of the Organized Crime and Racketeering Section
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PREFACE

This manual is intended to assist federal attorneys in the preparation and litigation of cases involving the civil provisions of the Racketeer Influenced & Corrupt Organization Act, 18 U.S.C. §§ 1961-1968. Federal attorneys are encouraged to contact the Organized Crime and Racketeering Section of the United States Department of Justice ("OCRS") early in the preparation of their case for advice and assistance.

All Government civil RICO complaints, RICO Civil Investigative Demands and all proposed settlements of Government civil RICO suits must be submitted, with a supporting prosecution memorandum, to OCRS for review and approval before being issued or filed with the court. The submission should be approved by the Government attorney's office before being submitted to OCRS. Due to the volume of submissions received by OCRS, Government attorneys should submit the proposal three weeks prior to the date final approval is needed. Government attorneys should contact OCRS regarding the status of pending submissions and must refrain from finalizing any settlement agreement concerning a proposed civil RICO lawsuit before final approval has been obtained from OCRS.

The policies and procedures set forth in this manual and elsewhere relating to 18 U.S.C. §§ 1961-1968 are internal Department of Justice policies and guidance only. They are not intended to, do not, and may not be relied upon to, create any right, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

I

INTRODUCTION AND APPROVAL PROCESS

A. Introduction

1. Overview

RICO was enacted October 15, 1970, as Title IX of the Organized Crime Control Act of 1970[1] and is codified at 18 U.S.C. §§ 1961-1968. RICO provides for both criminal and civil remedies. RICO's civil remedies are set forth in 18 U.S.C. § 1964(a), (b) and (c), which provide as follows:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining order or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
>
> (c) Any person injured in his business or property by reason of a violation of Section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The

[1] Pub. L. No. 91-452, 84 Stat. 941 (1970).

> exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

Section 1964(a) vests the Attorney General of the United States with the exclusive authority to sue for equitable relief, whereas Section 1964(c) vests private litigants, but not the United States, with authority to sue for treble damages for injury to their business or property. See Section II (D) below. Because the United States may not sue for treble damages under Section 1964(c), this Manual does not address such suits for treble damages.[2]

To obtain civil equitable relief under 18 U.S.C. § 1964(a), the United States must prove by a preponderance of the evidence that: (1) a defendant committed or intended to commit a RICO violation by establishing the same elements as in a criminal RICO case, except that criminal intent is not required; and (2) that there is a reasonable likelihood that the defendant will commit a violation in the future. See Section III (A) below. However, this Manual does not address the elements of a criminal RICO violation or the substantial body of law interpreting criminal RICO because those matters are addressed in the Organized Crime and Racketeering Section ("OCRS") manual entitled: Racketeer Influenced and Corrupt Organizations: A Manual for Federal Prosecutors (4th Ed. July

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[2] To obtain relief under Section 1964(c), a plaintiff must establish that a defendant committed a violation of the RICO statute, and that such RICO violation was the proximate cause of injury to the plaintiff's business or property. See, e.g., Anza v. Ideal Steel Supply Corp., 547 U.S. ____, _____, 126 S.Ct. 1991, 1996 (2006); Beck v. Prupis, 529 U.S. 494, 496-503 (2000); Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992).

2000) ("Criminal RICO Manual").[3] Therefore, Government attorneys handling civil RICO lawsuits should consult OCRS' Criminal RICO Manual in addition to this Manual.

This Manual first discusses the origins and general nature of courts' equitable authority and then addresses the specific equitable relief Congress intended civil RICO to authorize. This Manual also includes an analysis of: (1) the elements of Government civil RICO lawsuits; (2) principles of liability and certain defenses; (3) various procedural and discovery issues that are likely to arise in Government civil RICO lawsuits; and (4) analysis of the law governing judgments, consent decrees, enforcement, injunctions, contempt and the authority of court-appointed officers. This Manual also includes detailed analyses of the Government's civil RICO lawsuits involving labor unions and issues likely to arise in such lawsuits as well as other matters.

2. Guidelines for Bringing Civil RICO Lawsuits

Civil RICO, 18 U.S.C. § 1964(a), authorizes potentially intrusive remedies, including injunctive relief, reasonable restrictions on defendants' future activities, disgorgement of unlawful proceeds, divestiture, dissolution, reorganization, removal from positions in an entity, and appointment of court officers to administer and supervise the affairs and operations of defendants' entities and to assist courts in monitoring compliance with courts' orders and in imposing sanctions for violations of courts' orders. See Sections II (C), VII (C), (D) and (E), and VIII (A), (B), and (C) below. Because such civil RICO remedies may be powerful and intrusive, the Government should bring a civil RICO lawsuit only when the totality of the circumstances clearly justify imposition of

[3] (Available at www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/rico.pdf).

such remedies, and not in a routine case where there has been a RICO violation.

Moreover, Government civil RICO lawsuits typically are brought against defendants that are collective entities such as corporations and labor unions, and hence such suits may affect innocent third parties such as union members and corporate shareholders. See Sections III(A)(2) and (B)(2) and (3) below. Therefore, the Government should consider the adverse effects, if any, of a civil RICO lawsuit upon innocent third parties. Generally, Government attorneys should apply the same factors in determining whether to bring a civil RICO lawsuit against a collective entity as they do with respect to individual defendants. Thus, Government attorneys must weigh the sufficiency of the evidence, the likelihood of success at trial and the consequences of a finding of liability.

In addition, Government attorneys should consider the following factors, among others, in determining whether to bring a civil RICO lawsuit against an individual and/or a collective entity:

(1) the nature and seriousness of the predicate racketeering offenses;

(2) whether the predicate racketeering offenses were committed over a substantial period of time, and/or pose a threat of continuing unlawful activity;

(3) whether an organized crime group participated in any of the predicate racketeering offenses or exercised corrupt influence over any proposed enterprise, defendant or related entity;

(4) whether there is a reasonable likelihood that the defendant will commit unlawful activity in the future;

(5) the pervasiveness of wrongdoing within a collective entity that is a proposed defendant, including the complicity in, or condonation of, the wrongdoing by the collective entity's officers and management;

(6) the defendant's history of similar unlawful conduct, including prior criminal, civil or regulatory enforcement actions against it;

(7) whether the defendant has derived unlawful proceeds from his RICO violation that are subject to disgorgement;

(8) the defendant's timely and voluntary disclosure of wrongdoing and his/her or its willingness to cooperate with the authorities to eliminate corruption involving the defendant or related entities;

(9) the existence and adequacy of a collective entity's compliance program and other remedial actions;

(10) collateral consequences, including harm, if any, to innocent third parties, including a collective entity's shareholders, employees, or union members;

(11) whether and to what extent the sought remedies are likely to be effective; and

(12) the availability and adequacy of other remedies.[4]

No single factor is dispositive. Rather, these factors must be considered under the totality of the circumstances. Moreover, the factors listed are intended to be illustrative of those that should be considered and not a complete or exhaustive list.

For example, it may be especially appropriate to bring a Government civil RICO lawsuit where injunctive relief and structural reform is necessary to eliminate extensive and prolonged corruption in an entity and to cure its ill effects, such as in the cases involving Government civil RICO lawsuits against labor unions. In these labor union-related civil RICO cases, La Cosa Nostra figures and corrupt union officials had exercised corrupt control and influence over the labor unions involved for many years, and

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[4] The factors listed are similar to the factors to be considered in determining whether to bring criminal charges against a corporation. See Department of Justice Memorandum from Paul J. McNulty, Deputy Attorney General on Principles of Federal Prosecution of Business Organizations (December 12, 2006).

successful criminal prosecution of many of those wrongdoers was not sufficient to eliminate such systemic corruption from those unions. In such circumstances, civil RICO's equitable remedies, especially injunctive relief, removal of corrupt union officers and members from the unions, and appointment of court officers to administer and oversee aspects of the unions' operations, achieved substantial success in eliminating and reducing such corruption within the unions involved and related businesses. See Section VIII below.

B. Prior Approval by the Organized Crime and Racketeering Section of All Government Civil RICO Lawsuits is Required

1. Approval Authority and Process

The Code of Federal Regulations, 28 C.F.R. § 0.55, provides, in relevant part, as follows:

> **§ 0.55 General Function**
>
> The following functions are assigned to and shall be conducted, handled or supervised by, the Assistant Attorney General, Criminal Division
>
> . . .
>
> (d) Civil or criminal forfeiture or civil penalty actions (including petitions for remission or mitigation of forfeiture and civil penalties, offers in compromise, and related proceedings under the . . . Organized Crime Control Act of 1970 . . . [i.e., RICO, 18 U.S.C. § 1961 et. seq.].
>
> . . .
>
> (g) Coordination of enforcement activities directed against organized crime and racketeering.

Pursuant to USAM § 9-110.010, such authority has been delegated to the Organized Crime and Racketeering Section of the Criminal Division. Accordingly, the following procedures must be followed in all civil RICO lawsuits brought by or against

the United States:

(1) No civil RICO complaint shall be filed, and no RICO investigative demand shall be issued, without the prior approval of OCRS.

(2) No civil RICO complaint shall be settled or dismissed, in whole or in part, without prior approval of OCRS.

(3) No remedy in any civil RICO lawsuit brought by the United States shall be sought without prior approval by OCRS.

(4) In any civil RICO lawsuit brought by, or against, the United States, any adverse decision on an issue involving an interpretation of the RICO statute from any District Court or any Circuit Court of Appeals shall be timely reported to OCRS, in addition to reporting to the Solicitor General's Office and the appropriate Appellate Section of the Civil or Criminal Divisions, to enable OCRS to submit a recommendation to the Solicitor General's Office whether to seek further review of the decision.

(5) In any civil RICO lawsuit brought by, or against, the United States, any brief submitted in any appeal to any Circuit Court of Appeals involving an issue of an interpretation of the RICO statute must be timely submitted to OCRS for review prior to filing the brief in the Court of Appeals.

These requirements are necessary to enable OCRS to carry out its supervisory authority over all Government uses of the RICO statute and to promote consistent, uniform interpretations of the RICO statute. See, e.g., USAM § 110.300 "RICO Guidelines Policy", which provides that "[i]t is the purpose of these guidelines to centralize the RICO review and policy implementation functions in the section of the

Criminal Division having supervisory responsibility for this statute," i.e., OCRS.

The review process for authorization of all Government civil and criminal suits pursuant to the RICO statute is set forth in the United States Attorneys Manual. See USAM §§ 9-110.010 -- 9-110.400, which provisions are attached as Appendix A. To commence the formal review process, submit a final draft of the proposed complaint, including the remedies sought, and a detailed prosecution memorandum to OCRS. The prosecution memorandum should be similar, in organization and types of information provided, to a RICO criminal prosecution memorandum, which is described in the Criminal Resource Manual at section 2071 et seq. The prosecution memorandum should also address the factors to be considered in determining whether to bring a civil RICO lawsuit set forth in Section I (A)(2) above. Before the formal review process begins, Government attorneys are encouraged to consult with OCRS in order to obtain preliminary guidance and suggestions.

The review process can be time-consuming, especially in light of the complexity of Government civil RICO lawsuits and the sensitive remedies involved; and also because of the likelihood that modifications will be made to the complaint, and the heavy workload of the reviewing attorneys. Therefore, unless extraordinary circumstances justify a shorter time frame, a period of at least 15 working days must be allowed for the review process.

2. Post-Complaint Duties

Once a civil RICO complaint has been approved and filed, it is the duty of the Government's attorney handling the matter to submit to OCRS a copy of the complaint,

including all attachments, bearing the seal of the clerk of the district court. In addition, the Government's attorney should send OCRS copies of the Government's filings for pre-trial motions and should keep OCRS informed of adverse decisions as noted above and legal problems that arise in the course of the case to enable OCRS to provide assistance and carry out its supervisory functions.

II

OVERVIEW OF EQUITABLE RELIEF, CIVIL RICO, AND ITS LEGISLATIVE HISTORY

A. Origins and General Nature of Courts' Equitable Authority

1. Origins of Courts' Equitable Authority

Article III, Section 2 of the United States Constitution provides, in relevant part, that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties Made, or which shall be made, under their Authority." "[E]quity is that portion of the law which was developed by the English and American courts of chancery to remedy defects in the common law." Howard L. Oleck, Historical Nature of Equity Jurisprudence, 20 FORDHAM L. REV. 23, 24 (1951) ("Equity Jurisprudence").

At the time the United States Constitution was adopted and continuing for a considerable period thereafter, various states had separate equity courts, and federal courts recognized separate causes of action for equity that were distinguished from suits at common law. See generally Parsons v. Bedford, 28 U.S. 433, 446 (1830); Equity Jurisprudence, 20 FORDHAM L. REV. at 23-26, 40-43; Leonard J. Emmerglick, J. Emmerglick, A Century of the New Equity, 23 Tex. L. Rev. 244 (1944-45) ("The New Equity"). However, commencing in 1845, states began to abandon their separate equity courts, and in 1938, federal courts adopted new Federal Rules of Civil Procedure for all civil matters, wherein a single form of civil action is provided for all civil suits. See Equity Jurisprudence, 20 FORDHAM L. REV. at 41-43; The New Equity, 23 Tex. L. Rev. at 244-250.

Classification of a cause of action as to whether it seeks a remedy "at law" or "in equity" remains important for several reasons of general significance: (1) "equitable remedies are generally enforceable by contempt while legal remedies are not"; (2) generally, litigants do not have a right to a jury trial to obtain equitable relief, whereas in many cases a right to a jury trial attaches to the suits "at law"; and (3) "equitable relief is discretionary." DAN B. DOBBS, DOBBS LAW OF REMEDIES, Vol. One at 11-12, 56-57 (West Publ'g Co. 2d ed. 1993) ("DOBBS").

However, determining whether a particular cause of action seeks remedies "at law" or "in equity" is not an easy task. As one commentator perceptively observed, "[t]he description of equity as that law which was administered by the old English Courts of Chancery, of course, is hardly a definition." Equity Jurisprudence, 20 FORDHAM L. REV. at 24. To determine "whether [a cause of] action is more similar to suits tried in courts of law," the Supreme Court examines "both the nature of the action and of the remedy sought." Tull v. United States, 412 U.S. 412, 417 (1987). First, the Court compares the action at issue "to 18th Century actions brought in the courts of England prior to the merger of the courts of equity," and second, the Court examines "the remedy sought and determine[s] whether it is legal or equitable in nature." Tull, 481 U.S. at 417-418. See also Section V (C) below, which addresses whether an action is equitable, and hence does not carry a right to a jury trial.

Under these principles, courts have ruled that a wide variety of causes of actions constitute actions for equitable relief, including injunctions,[5] disgorgement of

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[5] See, e.g., Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993); Tull, 481 U.S. at 423; (continued...)

wrongdoers' ill-gotten gains,[6] restitution of illegally obtained profits, [7] divestiture or dissolution,[8] appointment of a receiver and others to assist the court in executing its duties,[9] and constructive trusts.[10]

Moreover, "[g]enerally, an action for money damages" is a remedy "at law." Teamsters Local No. 391 v. Terry, 494 U.S. 558, 570 (1990). However, an award of monetary relief is not necessarily legal relief. Id. at 570. The Supreme Court has "characterized damages as equitable where they are restitutionary, such as in 'actions for

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[5](...continued)
Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 291-92 (1960); United Steelworkers of America v. United States, 361 U.S. 39, 40-41 (1959); Porter v. Warner Holding Co., 328 U.S. 395, 399 (1946); Barton v. Barbour, 104 U.S. 126, 133-34 (1881).

[6] See, e.g., Harris Trust & Savings Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 250 (2000); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 352 (1998); Teamsters Local No. 391 v. Terry, 494 U.S. 558, 570 (1990); Tull, 481 U.S. at 424; FTC v. Gem Merchandising Corp., 87 F.3d 464, 468-70 (11th Cir. 1996); SEC v. Rind, 991 F.2d 1486, 1493 (9th Cir. 1993); SEC v. Tome, 833 F.2d 1086, 1096 & n. 7 (2d Cir. 1987); SEC v. Commonwealth Chem. Securities, 574 F.2d 90, 94-96 (2d Cir. 1978); Bradford v. SEC, 278 F.2d 566, 567 (9th Cir. 1960); United States v. Philip Morris, 273 F. Supp. 2d 3, 8 (D.D.C. 2002); SEC v. Asset Mgmt. Corp., 456 F. Supp. 998, 999-1000 (S.D. Ind. 1978); SEC v. Petrofunds, Inc., 420 F. Supp. 958, 959 (S.D.N.Y. 1976); SEC v. Associated Minerals, Inc., 75 F.R.D. 724, 726 (E.D. Mich. 1977). Cf. SEC v. Blavin, 760 F.2d 706, 713 (6th Cir. 1985) ("the district court possesses the equitable power to grant disgorgement"); SEC v. Williams, 884 F. Supp. 28, 30-31 (D. Mass. 1995).

[7] See, e.g., Porter v. Warner Holding Co., 328 U.S. 399, 402 (1946).

[8] See, e.g., California v. American Stores Co., 495 U.S. 271, 281-95 (1990); United States v. E.I. DuPont de Nemours & Co., 366 U.S. 316, 326-27 (1961); Schine Chain Theatres v. United States, 334 U.S. 110, 128 (1948).

[9] See Gordon v. Washington, 295 U.S. 30, 37 (1935). See also cases cited in Sections VII (E) and VIII (B)(3) below.

[10] See DOBBS, Vol. One at 157.

disgorgement of improper profits.'" or when "a monetary award [is] 'incidental to or intertwined with injunctive relief.'" Id. at 570-71 (citations omitted). Generally speaking, "a claim could be deemed equitable if it sought a coercive remedy like injunction," or "if the plaintiff sought to enforce a right that was originally created in the equity courts, or a right that was traditionally decided according to equitable principles." DOBBS, Vol. One at 155.[11]

2. Courts Are Vested With Broad Equitable Powers To Remedy Unlawful Conduct, Including Ordering Intrusive, Structural Changes in Wrongdoers' Entities and Practices

The Supreme Court has repeatedly emphasized that courts are vested with extensive equitable powers to fashion appropriate remedies to redress unlawful conduct. For example, in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), the Supreme Court stated:

> Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.
>
> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." Hecht Co. v. Bowles, 321 U.S. 321, 329-330 (1944).

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[11] For a comprehensive discussion of equitable remedies, see DOBBS, Vol. One at 55-81, 148-275, 586-655.

Swann, 402 U.S. at 15. Accord California v. American Stores, Co., 495 U.S. 271, 284 (1990).

Moreover, the Supreme Court has pointedly ruled that where "the public interest is involved. . . those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." Porter v. Warner Holding, Co., 328 U.S. 395, 398 (1946). Accord Virginian Ry. Co. v. Sys. Fed'n. No. 40, 300 U.S. 515, 552 (1937) ("Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.") (collecting cases); Golden State Bottling Co. v. NLRB, 414 U.S. 168, 179-80 (1973) (same).[12]

In accordance with these principles, courts have imposed a wide variety of highly intrusive equitable remedies in institutional reform litigation to remedy constitutional violations and to foster paramount public interests, including various structural reforms.[13] Typically in such cases, the equitable relief afforded exceeds an injunction enjoining the

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[12] See also Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291-92 (1960) ("When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purpose. As this Court has long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to. . . give effect to the policy of legislature.' Clark v. Smith, 38 U.S. (13 Pet.) 195, 203, 10 L. Ed. 123.").

[13] See generally DOBBS, Vol. Two at 349-353 ("Some civil rights injunctions. . . [seek] to halt a group of wrongful practices by restructuring a social institution such as a mental hospital, school or prison. Structural injunctions are not limited to civil rights cases; one might restructure a private corporation in an effort [to] make its compliance with legal rules more likely.") (id. at 349). See also Special Project: The Remedial Process in Institutional Reform Litigation, 78 COLUM. L. REV. 784 (1978) (hereinafter "Special Project"); William Fletcher The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 YALE L.J. 635 (1982).

proscribed conduct, and also encompasses compelled changes in practices, structural changes and prolonged court-supervision over implementation of the equitable relief. See generally, DOBBS, Vol. Two at 348-353.

For example, in Brown v. Bd. of Educ., 349 U.S. 294, 300-01 (1955), the Supreme Court ruled that courts had very broad equitable powers to order structural changes in school systems to desegregate schools, including "ordering the immediate admission of plaintiffs to schools previously attended only by white children." Similarly, in Swann, 402 U.S. at 9-10, 18-32, the Supreme Court upheld a district court's equitable authority to order a school district to implement a comprehensive plan to desegregate a school system, including various structural changes such as re-zoning, busing of students, and re-assignment of teachers to different schools. Moreover, in Milliken v. Bradley, 433 U.S. 267, 279-91 (1977), the Supreme Court upheld the equitable powers of a district court, as part of a desegregation decree, to "order compensatory or remedial educational programs for schoolchildren who have been subjected to past acts of **de jure** segregation." Id. at 267.

Similarly, in Local 28 of the Sheet Metal Worker's Int'l Assoc. v. EEOC, 478 U.S. 421 (1986), the district court found that Union Local 28 discriminated against non-white workers in recruitment, selection, training and admission to the union. The Supreme Court upheld the district court's imposition of an affirmative action program requiring Local 28 to adopt various changes its practices and policies, including requiring Local 28 "to offer annual, nondiscriminatory journeyman and apprentice examinations, select members according to a white-non-white ratio to be negotiated by the parties,

conduct extensive recruitment and publicity campaigns aimed at minorities, secure the [court-appointed] administrator's consent before issuing temporary work permits, and maintain detailed membership records." Id. at 432-33.[14]

The Supreme Court has, likewise, recognized courts' expansive equitable authority to order structural changes and other intrusive remedies to redress unconstitutional prison conditions. See, e.g., Hutto v. Finney, 437 U.S. 678, 683 (1978) (describing district court's orders to change various prisons practices and policies to remedy constitutional violations).[15] Courts, likewise, have afforded similar equitable relief to compel changes in conditions and policies to remedy unconstitutional treatment of mental patients.[16]

B. Congressional Findings and Purposes Regarding Civil RICO

Congress found that organized crime, particularly La Cosa Nostra ("LCN"), had extensively infiltrated and exercised corrupt influence over numerous legitimate businesses and labor unions throughout the United States, and hence posed "a new threat

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[14] Courts have upheld similar intrusive equitable relief in other cases to remedy racial discrimination in schools and other institutions and entities. See, e.g., EEOC v. Local 638, 565 F.2d 31, 33-35 (2d Cir. 1977); Evans v. Buchanan, 555 F.2d 373, 378-82 (3d Cir. 1977); Morgan v. McDonough, 540 F.2d 527, 533-35 (1st Cir. 1976); EEOC v. Local 638, 532 F.2d 821, 829-31 (2d Cir. 1976); Hart v. Cmty. School Bd. of Ed., N.Y. Sch. Dist. #21, 512 F.2d 37, 52-55 (2d Cir. 1975).

[15] For similar expansive equitable relief in cases involving unconstitutional prison conditions, see Miller v. Carson, 563 F.2d 741, 748-52 (5th Cir. 1977); Rhem v. Malcom, 507 F.2d 333, 340-41 (2d Cir. 1974) (collecting cases); Gates v. Collier, 501 F.2d 1291, 1303-05, 1309-10 (5th Cir. 1974); Hamilton v. Landrieu, 351 F. Supp. 549 (E.D.La. 1972); Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Oh. 1971), aff'd, 456 F.2d 854 (6th Cir. 1972).

[16] See, e.g., Sharp v. Weston, 233 F.3d 1166, 1173-74 (9th Cir. 2000); New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 962-66 (2d Cir. 1983); Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1974).

to the American economic system." See S. REP. NO. 617, 91st Cong., 1st Sess. at 76-78 (1969) ("S. REP. NO. 91-617"); see also Organized Crime Control Act of 1970, Congressional Statement of Findings and Purpose, Section 904(a) of PUB. L. NO. 91-452, 84 Stat. 922, 947.

The Senate Report regarding RICO further found that existing remedies "are inadequate to remove criminal influences from legitimate endeavor organizations." S. REP. NO. 91-617 at 78. In that respect, the Senate Report stated:

> The arrest, conviction, and imprisonment of a Mafia lieutenant can curtail operations, but does not put the syndicate out of business. As long as the property of organized crime remains, new leaders will step forward to take the place of those we jail.

S. REP. NO. 91-617 at 78 (quoting H.R. Doc. No. 91-105, at 6; the President's message on "Organized Crime" (1969)).

Accordingly, the Senate Report concluded that:

> What is needed here. . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.
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> . . .
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> What is ultimately at stake is not only the security of individuals and their property, but also the viability of our free enterprise system itself. The committee feels, therefore, that much can be accomplished here by adopting the civil remedies developed in the antitrust field to the problem of organized crime.

S. REP. NO. 91-617 at 79, 80-81.

C. Congress Designed 18 U.S.C. § 1964 (a) To Authorize Courts To Impose the Full Panoply of Equitable Relief

In accordance with the above-referenced legislative history regarding civil RICO, 18 U.S.C. § 1964 vests district courts with authority to impose extensive equitable relief and provides, in relevant part, as follows:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, **including, but not limited to**: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, **including, but not limited to**, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining order or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper. (emphasis added).[17]

Thus, to remedy a civil RICO violation, the plain language of § 1964(a) explicitly authorizes district courts to impose intrusive, structural reforms including, but not limited to, divestiture, "dissolution or reorganization of any enterprise," "reasonable restrictions on the future activities or investments of **any person**" and "prohibiting **any person** from engaging in

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[17] See United States v. Cappetto, 502 F.2d 1351, 1357 (7th Cir. 1974) ("Section 1964 provides for a civil action in which only equitable relief can be granted. The relief authorized by the section is remedial not punitive and is of a type traditionally granted by courts of equity."); NSC Int'l Corp. v. Ryan, 531 F. Supp. 362, 363 (N. D. Ill. 1981) ("§ 1964 (a) . . . authorizes only equitable relief.").

the same type of endeavor as the enterprise engaged in."(emphasis added).[18]

Indeed, the Senate Committee Report regarding RICO emphasized the expansive and flexible nature of the equitable relief authorized under § 1964(a), stating:

> The use of such remedies as prohibitory injunctions and the issuing of orders of divestment or dissolution is explicitly authorized. Nevertheless, it must be emphasized that these remedies are not exclusive, and that [RICO] seeks essentially an economic, not a punitive goal. However remedies may be fashioned, it is necessary to free the channels of commerce from predatory activities, but there is no intent to visit punishment on any individual; the purpose is civil.
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> . . .
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> Although certain remedies are set out, the list is not exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provisions for the rights of innocent persons.

S. REP. NO. 91-617 at 81 and 160. Accord H.R. REP. No. 1549, 91st Cong., 2d Sess. at 57(1970). Moreover, the Senate Committee Report noted that to achieve RICO's remedial purposes, courts would need broad equitable powers:

> Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal law approach . . . or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from illicit

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[18] RICO, 18 U.S.C. § 1961(3), provides that "'person' includes any individual or entity capable of holding a legal or beneficial interest in property," which includes a corporation, union, partnership and a sole proprietorship. See, e.g., United States v. Goldin Indus., Inc., 219 F.3d 1268, 1270-71 (11th Cir. 2000) (en banc); 219 F.3d 1271, 1275-77 (11th Cir. 2000); Living Designs, Inc. v. E.I. DuPont De Nemours & Co., 431 F.3d 353, 362-62 (9th Cir. 2005); Nat'l Elec. Benefit Fund v. Heary Bros. Lightning Prot. Co. Inc., 931 F. Supp. 169, 186-87 (W.D.N.Y. 1965); C& W Constr. Co. v. Bhd. of Carpenters and Joiners of America, Local 745, 687 F. Supp. 1453, 1466 (D. Hawaii 1988).

Moreover, RICO's definition of "enterprise" (18 U.S.C. § 1961(4)) "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

activity.

S. REP. NO. 91-617 at 79.

The Senate Report regarding RICO also quoted approvingly the Department of Justice's view that "these equitable remedies would also seem to have a greater potential than that of the penal sanctions for actually removing the criminal figure from a particular organization and enjoining him from engaging in similar activity," and that "these remedies are flexible, allowing of several alternate courses of action for dealing with a particular type of predatory activity, and they may also be effectively monitored by the court to insure that its decrees are not violated." S. REP. NO. 91-617 at 82-83. The Senate Report further stated that civil RICO was patterned after the equitable relief available under the antitrust laws, and hence "brings to bear. . . the full panoply of civil remedies . . . now available in the antitrust arena." S. REP. NO. 91-617 at 81.[19]

Moreover, as noted above, Congress stated that the purpose of RICO's remedial provisions was to afford "enhanced sanctions and new remedies," and accordingly mandated that RICO "shall be liberally construed to effectuate its remedial purposes." Section 904(a) of PUB. L. NO. 91-452, 84 Stat. 922, 923, 947. The Supreme Court has similarly characterized Section 1964 as a "far-reaching civil enforcement scheme," Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 483 (1985), and has explained that "if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident." Id. at 491 n.10. See also Russello v. United States, 464 U.S. 16, 27 (1983); United States v. Turkette, 452 U.S.

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[19] In accordance with this legislative history, the Supreme Court has repeatedly stated that RICO's civil remedies provision, 18 U.S.C. § 1964, was patterned after the equitable relief provisions of the antitrust laws. See e.g., Klehr v. A.O. Smith Corp., 521 U.S. 179, 189 (1997); Holmes v. Sec. Investor Prot. Corp, 503 U.S. 258, 267-68 (1992); Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 150-52 (1987); Sedima, S.P.R.L. v. Imrex, 473 U.S. 479, 486-90 (1985).

576, 587 & n. 10 (1981).

Thus, Section 1964 's legislative history demonstrates that Congress intended Section 1964(a) to vest district courts with powerful new weapons to eliminate and prevent corruption in organizations, and accordingly authorized district courts to impose the full panoply of equitable relief, including, but not limited to, the intrusive remedies discussed below:

1. Injunctions - An injunction is the quintiessential equitable order designed "to prevent and restrain" violations of law under 18 U.S.C. § 1964(a). An injunction is a "coercive remedy" whereby the "defendant is enjoined by a prohibitory injunction to refrain from doing specific acts; or he is commanded by a mandatory injunction to carry out specified acts." DOBBS, Vol. One at 59; see also id. at 223-277. See Section VIII(B)(1) below, which discusses injunctions obtained in civil RICO cases involving labor unions.

2. Divestiture, Dissolution and Reorganization - Section 1964(a) explicitly includes the equitable remedies of divestiture, dissolution and "reorganization of any enterprise." "'[D]issolution' refers to a . . . judgment which dissolves or terminates an illegal combination or association - putting it out of business, so to speak. 'Divestiture' is used to refer to situations where the defendants are required to divest or dispossess themselves of specified property in physical facilities, securities, or other assets." California v. American Stores Co., 495 U.S. 271, 290 n.16 (1990). Divestiture "deprives a defendant of the gains from his wrongful conduct" and "is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project." Schine Chain Theaters v. United States, 334 U.S. 110, 128 (1948). Both dissolution and divestiture serve to put "an end to the [unlawful] combination or conspiracy" and to "deprive . . . defendants of the

benefits of their conspiracy." Id. at 129.[20]

The Government has obtained divestiture, dissolution and reorganization of an enterprise in various civil RICO cases involving labor unions. See Sections VIII (B) (2) and (5) below. See also United States v. Cappetto, 502 F.2d 1351, 1358-59 (7th Cir. 1974) (noting that divestiture under 18 U.S.C. § 1964 is an equitable remedy); United States v. Ianniello, 646 F. Supp. 1289, 1297-1300 (S.D.N.Y. 1986) (appointing a receiver for a restaurant that was subject to divestiture for a violation of civil RICO).

3. **Disgorgement** - Although "disgorgement" is not explicitly listed in the remedies set forth in 18 U.S.C. § 1964, it is well established that "disgorgement" is a traditional equitable remedy. See Sections II(A)(1) above and V(C) below. In particular, disgorgement requires a wrongdoer to yield the proceeds derived from his unlawful conduct, and "is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the . . . laws." SEC v. First City Financial Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989).[21]

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[20] "Divestiture has been called the most important of antitrust remedies." United States v. E.I. DuPont DeNemours & Co., 366 U.S. 316, 330-31 (1961).

[21] Accord SEC v. Bilzerian, 29 F.3d 689, 697 (D.C. Cir. 1994) ("The primary purpose of disgorgement is not to refund others for losses suffered but rather 'to deprive the wrongdoer of his ill-gotten gain.'" (citation omitted)); SEC v. Banner Fund Int'l, 211 F.3d 602, 617 (D.C. Cir. 2000); SEC v. First Pacific Bancorp, 142 F.3d 1186, 1191 (9th Cir. 1998); SEC v. Palmisano, 135 F.3d 860, 865-66 (2d Cir. 1998); SEC v. Hughes Capital Corp., 124 F.3d 449, 455 (3d Cir. 1997); SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996); FTC v. Gem Merch. Corp., 87 F.3d 466, 470 (11th Cir. 1996); SEC v. Tome, 833 F.2d 1086, 1096 (2d Cir. 1987); SEC v. Blavin, 760 F.2d 706, 713 (6th Cir. 1985); CFTC v. Hunt, 591 F.2d 1211, 1222 (7th Cir. 1979); SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978); SEC v. Manor Nursing Ctr., Inc., 458 F.2d 1082, 1104 (2d Cir. 1972); SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1308 (2d Cir. 1971).

Because disgorgement of unlawful proceeds merely requires the wrongdoer to "give up only his ill-gotten gains" to which he has no right, such disgorgement is entirely remedial and "is not punishment." Bilzerian, 29 F.3d at 696. Accord First City Financial Corp., 890 F.2d at 1230-31; SEC v. Tome, 833 F.2d 1086, 1096 (2d Cir. 1987); CFTC v. Hunt, 591 F.2d 1211, 1222 (7th Cir. 1979); see also Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 293 (1960)(equitable remedy of restitution of lost wages for violation of statute is not "punitive").[22]

As of this writing, there is a conflict among the circuits as to whether disgorgement is a remedy available under 18 U.S.C. § 1964. In United States v. Carson, 52 F.3d 1173, 1181 (2d Cir. 1995), the Second Circuit held that "disgorgement is among the equitable powers available

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[22] Moreover, because "[r]ules for calculating disgorgement must recognize that separating legal from illegal profits exactly may at times be a near-impossible task . . . disgorgement need only be a reasonable approximation of profits causally connected to the violation," and that once the plaintiff establishes such a "reasonable approximation," the burden shifts to the defendants "clearly to demonstrate that the disgorgement figure was not a reasonable approximation." First City Fin. Corp., 890 F.2d at 1231-32. Accord SEC v. Bilzerian, 29 F.3d 689, 697 (D.C. Cir. 1994) ("Calculations of [the causal nexus] are often imprecise – it is impossible to say with certainty what portion of [the defendant's] profits is attributable to his securities violations. [The Defendant], however, bears the burden of establishing" that the approximation of his unlawful profits was not reasonable.). See also SEC v. First Jersey Sec., 101 F.3d 1450, 1475 (2d Cir. 1996); United States Dep't of Housing & Urban Dev. v. Cost Control Mktg. & Sales Mgt. of Va., Inc., 64 F.3d 920, 927 (4th Cir. 1995); SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995); SEC v. Kenton Capital, Ltd., 69 F. Supp. 2d 1, 16 (D.D.C. 1998). Moreover, "the causal connection required is between the amount by which the defendant was unjustly enriched and the amount he can be required to disgorge," not merely the actual money that he wrongfully obtained. SEC v. Banner Fund Int'l, 211 F.3d 602, 617 (D.C. Cir. 2000). Furthermore, "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." First City Fin. Corp., 890 F.2d at 1232. Accord SEC v. Hughes Capital Corp., 124 F.3d 449, 455 (3d Cir. 1997); First Jersey Sec., 101 F.3d at 1475; SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996); Patel, 61 F.3d at 140. See also Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.").

to the district court by virtue of 18 U.S.C. § 1964." However, the Second Circuit also held that since § 1964(a) authorizes district courts "to prevent and restrain violations" of RICO, it creates remedies that are "forward looking, and calculated to prevent RICO violations in the future." Therefore, the Second Circuit concluded that disgorgement must be limited to the amount designed "solely to 'prevent and restrain' future RICO violations," and hence must be limited to unlawful proceeds that "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." Id. at 1182.[23]

In United States v. Philip Morris USA Inc., 396 F.3d 1190 (D.C. Cir. 2005), the panel majority ruled that RICO's grant of judicial authority under 18 U.S.C. § 1964 (a) to "prevent and restrain" statutory violations does not include the power to order equitable disgorgement. Philip Morris, 396 F.3d at 1197-1202. The majority opinion declared that "[t]his language indicates that the jurisdiction is limited to forward looking remedies that are aimed at future violations," whereas disgorgement, in the majority's view, "is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo." Id. at 1198.

The United States filed an interlocutory petition for a writ of certiorari, which was denied. See United States v. Philip Morris USA Inc., 126 S. Ct. 478 (2005).[24] Subsequently, the United

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[23] See Section VIII(B)(7) below, which discusses disgorgement in Government civil RICO cases involving labor unions.

[24] The Government's petition for a writ of certiorari is available at http://www.supremecourtus.gov/opinions/opinions.html In its petition for a writ of certiorari, the Government argued, among other matters, that the limitations imposed upon RICO disgorgement in Carson, supra, and the majority decision in Philip Morris, supra, were inconsistent with: (1) decisions of the Supreme Court and other courts of appeals holding that when a statute confers equitable jurisdiction upon district courts, as does 18 U.S.C. § 1964, it is presumed that all inherent equitable powers of the district courts are granted, unless otherwise provided by statute; (2) decisions of the Supreme Court and lower courts holding that disgorgement serves a crucial

(continued...)

States District Court for the District of Columbia found defendants liable for RICO violations after a nine-month bench trial. See United States v. Philip Morris USA Inc., 449 F. Supp. 2d 1, 851-52, 867-73, 901-07 (D.D.C. 2006). See also Section IX below. As of this writing, that decision is pending appeals to the District of Columbia Circuit. See United States v. Philip Morris USA Inc., Appeal Nos. 06-5267-5272.

4. Limitations on Future Activities and Removal From Positions In An Entity - 18 U.S.C. § 1964 (a) explicitly authorizes district courts to impose "reasonable restrictions on the future activities. . . of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in." Courts have held that this provision empowers courts to remove persons found liable for RICO violations or for violating courts' judgment orders in Government civil RICO cases from positions in an entity and to prohibit them from holding such positions in the future. See Sections VII (D) and VIII(B)(6) below.

Section 1964 (a)'s legislative history confirms that Congress intended Section 1964 (a) to authorize district courts to impose such relief. For example, the Senate Report regarding civil RICO states:

> Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal law approach of fine, imprisonment and forfeiture, or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity.
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[24](...continued)
deterrent, and hence forward-looking, function; and (3) the text of Section 1964 (a) and its legislative history establishing that Section 1964 (a) is not limited to the relief explicitly listed therein.

> Through this new approach, it should be possible to remove the leaders of organized crime from their sources of economic power.

S. REP. NO. 91-617 at 79-80. The Senate Report also quoted with approval the Department of Justice's statement that:

> The relief offered by these equitable remedies would also seem to have a greater potential than that of the penal sanctions for actually removing the criminal figure from a particular organization and enjoining him from engaging in similar activity.

S. REP. No. 91-617 at 82.

5. Appointment of Court Officers - Courts have long had the inherent authority to appoint non-judicial persons to assist them in the performance of their judicial duties. Accordingly, in Government civil RICO cases involving labor unions, courts have appointed "officers" to, among other matters, administer the affairs and operations of corrupted unions and related entities, and assist the courts in monitoring compliance with the courts' orders and in imposing sanctions for violations of the courts' orders. See Sections VII(E) and VIII(B), (3), (4), (5), and (6) below.

D. Civil RICO, 18 U.S.C. § 1964, is Patterned After Antitrust Laws, and Hence Vests the Attorney General of the United States with the Exclusive Authority to Obtain Equitable Relief, and Vests Private Litigants, But Not the United States, With the Authority to Sue For Treble Damages

RICO's civil remedies provision, 18 U.S.C. § 1964, authorizes two causes of action: a public enforcement action for equitable relief by the Attorney General and a treble damages action by private parties. The Attorney General's right to sue for equitable relief derives from Sections 1964(a) and (b), and those provisions, in combination, make the Attorney General's right exclusive.

Section 1964(a) grants district courts "jurisdiction to prevent and restrain violations" of RICO by issuing the full range of "appropriate orders" available to courts of equity, 18 U.S.C. § 1964(a). Section 1964(a) does not identify who can seek such relief, but Section 1964(b) does. That provision states that "[t]he Attorney General may institute proceedings under this section" and that, "[p]ending final determination thereof," the court may enter interim restraining orders or take such other actions as it shall deem proper. 18 U.S.C. § 1964(b).

By empowering the Attorney General to institute proceedings "under this section," Congress signaled its intent that the district court's equitable jurisdiction under Section § 1964(a) must be invoked by the Attorney General. Congress further manifested its intent that the Attorney General alone may seek equitable relief by providing in subsection (b) that temporary equitable relief may be awarded "[p]ending final determination" of a proceeding instituted by the Attorney General for permanent equitable relief. There is no corresponding provision that authorizes a private party to institute proceedings "under this section" or to seek temporary equitable relief pending final disposition of a claim. Under Sections 1964(a) and (b), therefore, the sole power to seek final and interim equitable relief against racketeering activities and enterprises is reposed in the Attorney General.

Rather than authorize private civil RICO plaintiffs to seek equitable remedies, Congress in Section 1964(c) granted private parties the right to bring suit to recover treble damages and attorney's fees. Section 1964(c) provides that "(a)ny person injured in his business or property by reason of a [RICO] violation . . . may sue . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c). That provision has been construed to authorize private parties, and not the Government, to seek

treble damages. See United States v. Bonnano, 879 F.2d 20, 22-24 (2d Cir. 1989) (reasoning that the United States is not a "person" under Section 1964(c), and therefore may not sue for treble damages); see also Sedima, S.P.R.L. v. Imrex Co. Inc., 473 U.S. 479, 487 (1985) (observing that Section 1964(c) creates "a private treble-damages action").

Section 1964's "inclusion of a single statutory reference to private plaintiffs, and the identification of a damages and fees remedy for such plaintiffs in [Section 1964(c)], logically carries the negative implication that *no other remedy* was intended to be conferred on private plaintiffs." Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1083 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987). Coupled with the fact that Congress in Section 1964(b) explicitly authorized the Attorney General to initiate proceedings to obtain equitable relief under Section 1964(a), but did not similarly grant private parties that right, the statute makes it clear that Congress did not authorize private parties to bring actions for equitable relief.

2. Section 1964 's legislative history confirms that it vests the Attorney General of the United States with the exclusive authority to bring suits for equitable relief, and authorizes private litigants to bring suits for treble damages. The Supreme Court has repeatedly observed that RICO's civil remedies provision, 18 U.S.C. § 1964, was patterned after virtually identical provisions of the antitrust laws.[25] In that regard, at a time when Congress had provided no express authority for private antitrust plaintiffs to seek equitable relief, the antitrust laws were construed to preclude such relief. The parallels between the antitrust laws at that time and the

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[25] See, e.g., Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 267-68 (1992); Klehr v. A.O. Smith Corp., 521 U.S. 179, 189 (1997); Agency Holding Corp. v. Malley-Duff & Assocs. Inc., 483 U.S. 143, 150-152 (1987); Sedima, S.P.R.L. v. Imrex, 473 U.S. 479, 486-90 (1985). See also S. REP. No. 91-617 at 81 (RICO's Section 1964 "brings to bear. . . the full panoply of civil remedies . . . now available in the antitrust area.").

language of RICO support the same conclusion for RICO — particularly since RICO lacks the explicit provision for private injunctive relief that Congress added to the antitrust laws.

As the Supreme Court has explained, "[a] treble-damages remedy for persons injured by antitrust violations was first provided in § 7 of the Sherman Act and was re-enacted in 1914 without substantial change as § 4 of the Clayton Act." Pfizer, Inc. v. India, 434 U.S. 308, 311 (1978); accord Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 267 n.13 (1992); Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 644 n.16 (1981).[26] Section 4 of the Sherman Act also authorized courts to issue equitable relief in actions brought by the United States. 26 Stat. 209-10.[27] The Supreme Court repeatedly recognized that those provisions of the Sherman Act did not authorize private parties to bring suit for injunctive relief.[28] Private parties

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[26] Section 7 of the Sherman Act provided that "(a)ny person who shall be injured in his business or property . . . by reason of anything forbidden or declared to be unlawful by this act may sue therefor . . . and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 26 Stat. 210.

[27] Section 4 of the Sherman Act provided:

> The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. . . . (P)ending [a] petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

26 Stat. 209-10.

[28] See General Inv. Co. v. Lake Shore & Mich. S. Ry. Co., 260 U.S. 261, 286 (1922); Geddes v. Anaconda Copper Mining Co., 254 U.S. 590, 593 (1921); Paine Lumber Co. v. Neal, 244 U.S. 459, 471 (1917); D.R. Wilder Mfg. Co. v. Corn Prods. Ref. Co., 236 U.S. 165, 174 (1915); Minnesota v. Northern Sec. Co., 194 U.S. 48, 70-71 (1904).

were not authorized to seek injunctive relief for violations of the antitrust laws until Congress passed Section 16 of the Clayton Act (15 U.S.C. § 26) *explicitly* authorizing such a right. California v. American Stores Co., 495 U.S. 271, 287 (1990) ("§ 4 of the Sherman Act, which authorizes equitable relief in actions brought by the United States, was reenacted as § 15 of the Clayton Act, while § 16 filled a gap in the Sherman Act by authorizing equitable relief in private actions."); accord General Inv. Co. v. Lake Shore & Mich. S. Ry., 260 U.S. 261, 287 (1922).

The Sherman Act thus "envisaged two classes of actions,— those made available only to the Government, . . . and, in addition, a right of action for treble damages granted to redress private injury." United States v. Cooper Corp., 312 U.S. 600, 608 (1941) (holding that the United States may not recover treble damages under the Sherman Act). The Court reached that conclusion despite the fact "that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute, or of courts generally to entertain complaints on that subject." D.R. Wilder Mfg. Co. v. Corn Prods. Ref. Co., 236 U.S. 165, 174 (1915). The Court explained that "such exclusion must be implied . . . because of the familiar doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which that statute prescribes.'" Id. at 174-75 (quoting Farmers' & Mechs. Nat'l Bank v. Dearing, 91 U.S. 29, 35 (1875)).

Although the Sherman Act authorizes suits in equity in one paragraph (Section 4), while RICO does so in two paragraphs (Section 1964(a) and (b)), the statutes are parallel in the critical respects here. First, both confer on courts "jurisdiction" to prevent and restrain violations through permanent and preliminary equitable relief, but expressly authorize only the Attorney

General to seek such relief. Second, both provide private parties a separate right to recover treble damages and attorney's fees, but no other forms of relief. In light of the Supreme Court's precedents construing the Sherman Act, Congress is presumed to be aware when it enacted RICO that, absent inclusion of an *express* private right to obtain injunctive relief, the language it selected would be construed to exclude such a right. Holmes, 503 U.S. at 268 (construing the term "by reason of " in Section 1964(c) and observing that the Court "may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4").

Indeed, to authorize private antitrust plaintiffs to seek equitable relief, Congress enacted a separate section of the Clayton Act, Section 16. RICO, however, lacks any provision comparable to Section 16 of the Clayton Act. Section 16 expressly provides that private persons "shall be entitled to sue for and have injunctive relief." 15 U.S.C. § 26. Juxtaposed with Congress's explicit modeling of RICO's private treble damages provision "on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act," Holmes, 503 U.S. at 267, the absence of a counterpart to Section 16 makes clear that Congress did not intend to create a private right to equitable relief under RICO.

3. The legislative history of RICO confirms that Congress made a deliberate choice in omitting authority for a private injunctive action. "The civil remedies in the bill passed by the Senate, S.30, were limited to injunctive actions by the United States and became §§ 1964(a), (b), and (d)." Sedima, 473 U.S. at 486-487; Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 152 (1987) (same). "During hearings on S. 30 before the House Judiciary

Committee, Representative Steiger proposed the addition of a private-treble damages action" that was modeled after Section 4 of the Clayton Act. Sedima, 473 U.S. at 487. That Amendment also would have authorized private parties to seek injunctive relief and the government to seek damages, as well as making other procedural changes. 116 CONG. REC. 27,739 (1970). When the Judiciary Committee responded by passing only the private treble damages provision, Representative Steiger complained that the bill did "not do the whole job," since it "fail[ed] to provide . . . two important substantive remedies included in the Clayton Act: compensatory damages to the United States when it is injured in its business or property, and **equitable relief in suits brought by private citizens**." Id. at 35,227, 35,228 (emphasis added).

Representative Steiger subsequently offered another amendment, again to authorize a private injunctive action and a public damages action. Sedima, 473 U.S. at 487; 116 CONG. REC. 35,228; 35,346 (1970). Concerned about "the potential consequences that this new remedy might have," Representative Poff asked Representative Steiger to withdraw the amendment for further study by the Judiciary Committee, and Representative Steiger agreed. Agency Holding Corp., 483 U.S. at 154-55 (citing 116 CONG. REC. at 35,346).

Shortly after RICO was enacted, Senators Hruska and McClellan, RICO's sponsors, introduced S. 16, a bill that again would have authorized damage actions by the United States and injunctive actions by private persons. Agency Holding Corp., 483 U.S. at 155 ("[T]he purpose of [S. 16] was to broaden even further the remedies available under RICO. In particular, . . . it would have further permitted private actions for injunctive relief."). The Senate, but not the House, passed S. 16, and therefore it never became law. Wollersheim, 796 F.2d at 1086.

Congress thus passed RICO without authorizing private injunctive actions despite repeated attempts to do so, and despite Congress's explicit grant of such a right in Section 16 of the Clayton Act. Congress shortly thereafter rejected an amendment to RICO that would have added such a right. The clear conclusion to be drawn from the legislative history is that, consistent with RICO's text, Congress intended to create a private right of action only for treble damages.[29]

E. Equitable Relief Available Under Civil RICO is at Least As Broad as Equitable Relief Under the Antitrust Laws, If Not Broader

It is clear that civil RICO, 18 U.S.C. § 1964, was patterned after the equitable relief provisions under the antitrust laws. See Section II (C), fn. 19 and Section II (D) above. Indeed,

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[29] As of this writing, there is a conflict among the circuit courts of appeals as to whether 18 U.S.C. § 1964 vests the Attorney General of the United States with the exclusive authority to seek equitable relief. The majority of courts to decide this issue have held that private parties may not obtain equitable relief under 18 U.S.C. § 1964. See Conkling v. Turner, 18 F.3d 1285, 1296 (5th Cir. 1994) (collecting cases); Lincoln House, Inc. v. Dupre, 903 F.2d 845, 848 (1st Cir. 1990); Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1080-89 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987); Sterling Suffolk Racecourse v. Burrillville Racing Ass'n, 802 F. Supp. 662, 671 (D.R.I. 1992), aff'd, 989 F.2d 1266 (1st Cir.), cert. denied, 510 U.S. 1024 (1993); Vietnam Veterans of America v. Guerdon Indus., 644 F. Supp. 951, 960-61 (D. Del. 1986); Volkmann v. Edwards, 642 F. Supp. 109, 115 (N.D. Cal. 1986). Cf. Tran Co. v. O'Connor Secs., 718 F.2d 26, 28-29 (2d Cir. 1983); Dan River, Inc. v. Icahn, 701 F.2d 278, 290 (4th Cir. 1983); Kaushal v. State Bank of India, 556 F. Supp. 576, 583 (N.D. Ill. 1983).

In Nat. Org. for Women, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001), reversed on other grounds, 537 U.S. 393 (2003), the Seventh Circuit held that Section 1964 authorizes private litigants to sue for equitable relief. In the course of the Scheidler litigation, the United States filed two *Amicus Curiae* briefs, before the United States Supreme Court, arguing that private litigants lacked such authority and that Section 1964 vests the Attorney General with the exclusive authority to obtain equitable relief. On both occasions, the Supreme Court explicitly refused to decide that issue, and instead reversed the decisions of the Seventh Circuit on other grounds. See Scheidler v. Nat. Org. for Women, Inc., 547 U.S. 9, 16 (2006); Scheidler v. Nat. Org. for Women, Inc., 537 U.S. 393, 411 (2003). The foregoing analysis is derived from the Government's Amicus briefs in the Scheidler litigation.

the "prevent and restrain" language under the antitrust laws is virtually identical to the "prevent and restrain" language under RICO's Section 1964(a).[30] As the Supreme Court has observed, when Congress has used the same words in RICO's Section 1964 as in the corresponding relief provision of the Sherman Act that later was enacted in the Clayton Act, "we can only assume it intended them to have the same meaning that courts had already given them." Holmes, 503 U.S. at 268. Therefore, the scope of a district court's equitable authority under RICO is at least as broad as the scope of its equitable authority under the antitrust laws. Indeed, Congress indicated that it intended the scope of RICO's equitable relief to be even broader than that available under the antitrust laws. In that respect, Senator McClellan, RICO's principal sponsor, stressed that the references to antitrust precedents were not meant to "limit the remedies available [under RICO] to those which have already been established. The ability of our chancery courts to formulate a remedy to fit the wrong is one of the great benefits of our system of justice. This ability is not hindered by the bill." 115 CONG. REC. 9567 (1969).

The Supreme Court and lower courts have repeatedly interpreted the "prevent and restrain" language of the antitrust laws to not only authorize injunctions, dissolution and divestiture, but also to broadly encompass orders designed to ameliorate ongoing and future ill effects of defendants' past violations. For example, in United States v. United States Gypsum Co., 340 U.S. 76 (1950), the Supreme Court ruled that:

> **A trial court upon a finding of a conspiracy in restraint of trade and a monopoly has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects**

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[30] Compare Section 4 of the Sherman Act as originally enacted -- "Courts are hereby invested with jurisdiction to prevent and restrain violations of this act." (see Section II (D), fn. 27, above) with Section 1964(a) - - courts "shall have jurisdiction to prevent and restrain violations of Section 1962." (see Section II (C) above).

> **of the illegal conduct, and assure the public freedom from its continuance.** Such action is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal. Acts entirely proper when viewed alone may be prohibited. **The conspirators should, so far as practicable, be denied future benefits from their forbidden conduct.**

Id. at 88-89 (emphasis added) (footnote omitted).

Accordingly, in that case the Supreme Court sanctioned a variety of equitable relief that went "beyond the narrow limits of the proven violation," including ordering the defendants to undertake actions in the future that would cure the ill effects arising from the defendants' past proven violations.[31] Consistent with the Supreme Court's decisions in this area, the Eighth

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[31] See also United States v. Glaxo Group Ltd., 410 U.S. 52, 64 (1973) ("The purpose of relief in an antitrust case is 'so far as practicable, [to] cure the ill effects of the illegal conduct, and assure the public freedom from its continuance'") (citation omitted); Ford Motor Co. v. United States, 405 U.S. 562, 573 n.8 (1972) ("The suggestion that antitrust 'violators may not be required to do more than return the market to the *status quo ante*.'. . . is not a correct statement of the law. . . Rather, the relief must be directed to that which is 'necessary and appropriate in the public interest *to eliminate the effects* of the acquisitions offensive to the statute.'") (citation omitted); United States v. Ward Baking Co., 376 U.S. 327, 331-34 (1964) (holding that the Government should not be foreclosed from offering evidence at trial justifying its request for relief to "cure the ill effects of the illegal conduct" that violated antitrust laws where the sought relief was "'connected' with and 'related' to practices which the companies may in the past have followed."); United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326, 334 (1961) ("courts are. . . required to decree relief effective to redress the [antitrust] violations, whatever the adverse effect of such a decree on private interests," and may include "complete divestiture."); Int'l Boxing Club v. United States, 358 U.S. 242, 262 (1959) (holding that antitrust "relief to be effective, must go beyond the narrow limits of the proven violations" and hence may prohibit certain contracts "until the effects of the conspiracy are fully dissipated") (citation omitted); United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 607 (1957) (antitrust relief must "eliminate the effects" of the unlawful acquisition); United States v. United Liquors Corp., 352 U.S. 126 (1956) ("The defendants have been found to have violated the antitrust laws and the decree has been framed by the judge of the trial court to correct the evils which resulted from the acts found unlawful."); Schine Chain Theatres v. United States, 334 U.S. 110, 128 (1948) (Divestiture and dissolution "deprives the antitrust defendants of the benefits of their conspiracy"); United States v. Crescent Amusement Co., 323 U.S. 173, 188-89 (1944) ("the Government should not be confined to an injunction against further violations", and accordingly

(continued...)

Circuit has stated:

> Upon finding an antitrust defendant guilty of a violation of the Sherman Act, **a district court is "empowered to fashion appropriate restraints on [the defendant's] future activities both to avoid a recurrence of the violation and to eliminate its consequences."** National Soc. of Professional Engineers v. United States, 435 U.S. 679, 697 (1978). In fashioning a remedy, a district court should endeavor to ensure that the conspirators "so far as practicable, be denied future benefits from their forbidden conduct" [quoting Gypsum]. Thus, the **district court may consider both the "continuing effects of past illegal conduct,"** [citation omitted], and the possibility of "lingering efforts" by the conspirators to capitalize on the benefits of their past illegal conduct. [citation omitted].

ES Dev., Inc. v. RWM Enters., 939 F.2d 547, 557 (8th Cir. 1991) (emphasis added).[32]

The foregoing antitrust cases establish that equitable relief to prevent and restrain future violations is not limited to relief prohibiting future conduct, but also broadly encompasses relief designed to cure the ill effects of violators' past and/or ongoing misconduct and to deprive them of the fruits of their misconduct. For the reasons stated above, RICO's equitable relief must be interpreted to be at least as broad as antitrust equitable relief. Moreover, it is important to bear in

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[31](...continued)
the court ordered "each corporate exhibitor to divest itself of the ownership of any stock or other interest in any other corporate defendant or affiliated corporation."); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 724, 726 (1944) ("Equity has power to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole. . . [this Court's precedents] 'uphold equity's authority to use quite drastic measures to achieve freedom from the influence of the unlawful restraint of trade. . . . The test is whether or not the required action reasonably tends to dissipate the restraints and prevent evasions. Doubts are to 'be resolved in favor of the government and against the conspirators.'") (citations omitted).

[32] See also Wilk v. American Med. Ass'n, 895 F.2d 352, 367-70 (7th Cir. 1990) (affirming district court's grant of injunction against antitrust defendant on several grounds, including "lingering effects" of unlawful conduct); In re Multidistrict Vehicle Air Pollution, 538 F.2d 231, 236 (9th Cir. 1976) ("affirmative equitable remedies may be granted to eliminate the harmful residual effects of past [antitrust] violations . . . ."); United States v. Coca-Cola Bottling Co. of Los Angeles, 575 F.2d 222, 229, 231 (9th Cir. 1978).

mind that the Supreme Court has admonished that "once the Government" has established a violation of law, "all doubts as to the remedy are to be resolved in its favor." United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 334 (1961). Accord United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 726 (1944).

III

ELEMENTS OF GOVERNMENT CIVIL RICO LAWSUITS AND DEFENSES

A. Standards For Obtaining Equitable Relief

1. The Government Must Establish a Reasonable Likelihood of Future Violations By a Preponderance of the Evidence

In Government civil RICO suits to obtain equitable relief, the United States need only prove the same elements as in a RICO criminal case, except that criminal intent is not required. See, e.g., United States v. Local 560, Int'l Bhd. of Teamsters, 780 F. 2d 267, 284 (3d Cir. 1985); United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 812 F. Supp. 1303, 1309 (S.D.N.Y. 1993), modified on other grounds, 831 F. Supp. 167 (S.D.N.Y. 1993), aff'd sub nom. United States v. Carson, 52 F.3d 1173 (2d Cir. 1995). Moreover, the burden of proof in Government civil RICO lawsuits for equitable relief is a preponderance of the evidence.[33] Therefore, to obtain equitable relief, the United States must establish by a preponderance of the evidence that unless relief is granted there is a reasonable likelihood of a future violation by the defendant.[34] Typically, the Government has carried its burden in that regard by, inter alia, proving a pattern of past violations, although such proof of past violations is not necessarily required. Thus, federal

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[33] See United States v. Local 560 of Int'l Bhd. of Teamsters, 780 F.2d 267, 279 n.12 (3d Cir. 1985); United States v. Philip Morris USA, Inc., 449 F. Supp. 2d at 851; United States Local 1804-1, Int'l Longshoremen's Ass'n, 812 F. Supp. 1303, 1311-12 (S.D.N.Y. 1993); United States v. Local 295 of Int'l Bhd. of Teamsters, 784 F. Supp. 15, 19 (E.D.N.Y. 1992); United States v. Local 359, 705 F. Supp. 894, 897 (S.D.N.Y.), aff'd in part and rev'd in part, 899 F.2d 1232 (2d Cir. 1989); United States v. Local 30, United Slate, Tile, etc., 686 F. Supp. 1139, 1165 (E.D. Pa. 1988), aff'd, 871 F. 2d 401 (3d Cir.), cert. denied, 493 U.S. 953 (1989); United States v. Local 560, Int'l Bhd. of Teamsters, 581 F. Supp. 279, 329-30 (D.N.J. 1984) (collecting cases). See also S. Rep. No. 91-617 at 82. Cf., Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491 (1985) (stating that under Section 1964, "[t]here is no indication that Congress sought to depart from [the] general principle" that the "preponderance standard" applies to civil suits).

[34] See cases cited n. 33 above and notes 35 and 36 below.

courts have held that evidence of past violations may establish the requisite reasonable likelihood of future violations in view of the totality of the circumstances, particularly where the defendant's past violations were: (1) "part of a pattern" and not isolated; (2) were "deliberate" and not "merely technical in nature"; and (3) "the defendant's business will present opportunities to violate the law in the future."[35]

The Supreme Court and other federal courts also have emphasized that mere "cessation of violations. . . is no bar to the issuance of an injunction" because past violations are "highly suggestive of the likelihood of future violations."[36]

In accordance with these principles, courts have granted the United States injunctive and other equitable relief in many civil RICO cases based on past violations and have rejected arguments that injunctive relief was not necessary because the unlawful activity had supposedly ceased. In these cases, courts ordered injunctive relief even though many of the wrongdoers had been convicted of crimes and were not in a position to continue their unlawful conduct because

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[35] SEC v. First City Financial Corp., Ltd., 890 F.2d 1215, 1228-29 (D.C. Cir. 1989). Accord SEC v. Bilzerian, 29 F.3d 689, 695 (D.C. Cir. 1994); SEC v. Gruenberg, 989 F.2d 977, 978 (8th Cir. 1993); CFTC v. Hunt, 591 F.2d 1211, 1220-21 (7th Cir. 1979); SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1168 (D.C. Cir. 1978); SEC v. Commonwealth Chemical Securities Inc., 574 F.2d 90, 98-100 (2d Cir. 1978); SEC v. Management Dyn. Inc., 515 F.2d 801, 807-08 (2d Cir. 1975); SEC v. Advance Growth Capital Corp., 470 F.2d 40, 53 (7th Cir. 1972); SEC v.Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1100-01 (2d Cir. 1972); Pullum v. Greene, 396 F.2d 251, 256-57 (5th Cir. 1968); United States v. Philip Morris USA, Inc., 449 F. Supp. 2d at 909-10; United States v. Philip Morris USA, 316 F. Supp. 2d 6, 10 n. 3 (D.C. Cir. 2004) (collecting cases); United States v. Philip Morris, Inc., 116 F. Supp. 2d 131, 148-49 (D.D.C. 2000).

[36] Hecht Co. Bowles, 321 U.S. 327 (1944); SEC v. Management Dyn., Inc., 515 F.2d 801, 807-08 (2d Cir. 1975). Accord City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 and n.10 (1982); United States v. Parke, Davis & Co., 362 U.S. 29, 47-49 (1960); United States v. Odessa Union Warehouse Co-Op., 833 F.2d 172, 176 (9th Cir. 1987); Campbell v. McGruder, 580 F.2d 521, 540 (D.C. Cir. 1978); SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 98-99 (2d Cir. 1978); Pullum v. Greene, 396 F.2d 251, 256-57 (5th Cir. 1968).

they were imprisoned or removed from office in the corrupt enterprise.[37] Many of these courts found it particularly significant that these cases involved the corrupt influence of organized crime because the threat of future violations "may virtually be presumed" from such organized crime involvement. See United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 812 F. Supp. 1303, 1316 (S.D.N.Y. 1993) (citing cases).

Moreover, where the United States seeks equitable relief to protect the public against wrongdoing, as is the case in Government civil RICO suits for equitable relief, the United States need not show an inadequate remedy at law, irreparable injury, or that the harm suffered in the absence of injunctive relief outweighs the harm the defendant will suffer if the injunction is granted, as is required for a private litigant to obtain equitable relief. The Seventh Circuit explained in United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 429 U.S. 925 (1975):

> It was plainly the intention of Congress in adopting Section 1964 to provide for injunctive relief against violations of Section 1962 without any requirement of a showing of irreparable injury other than that injury to the public which Congress found to be inherent in the conduct made unlawful by Section 1962. It is also obvious that Congress did not intend to require a showing of inadequacy of the remedy at law. If as defendants contend the existence of the criminal remedy at law under Section 1963 would defeat an action in equity under Section 1964, the latter Section would be a nullity.
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[37] See United States v. Carson, 52 F.3d 1173, 1183-85 (2d Cir. 1995); United States v. Private Sanitation Indus. Ass'n, 995 F.2d 373, 377-78 (2d Cir. 1993); United States Local 30, United Slate, Tile, 871 F.2d 401, 405-09 (3d Cir. 1989); United States v. Local 295 of Int'l Bhd. of Teamsters, 784 F. Supp. 15, 18, 21-22 (E.D.N.Y. 1992); United States v. Local 30, United Slate, Tile, et al., 686 F. Supp. 1239, 1262-74 (E.D. Pa. 1988), aff'd, 871 F.2d 401 (3d Cir. 1989); United States v. Ianniello, 646 F. Supp. 1289, 1299-1300 (S.D.N.Y. 1986); United States v. Local 560, Int'l Bhd. of Teamsters, 581 F. Supp. 279, 319-26 (D.N.J. 1984), aff'd, 780 F.2d 269, 292-94 (3d Cir. 1986); United States v. Mason Tenders Dist.Council, 1995 WL 679245, at * 7-13 (S.D.N.Y. Nov. 15, 1995).

> [Therefore] whether equitable relief is appropriate depends, as it does in other cases in equity, on whether a preponderance of the evidence shows a likelihood that the defendants will commit wrongful acts in the future, a likelihood which is frequently established by inferences drawn from past conduct.

Id. at 1358-59.[38] Also, there is no requirement that before a civil RICO action can be brought, the defendant must have been previously convicted of a RICO violation or a RICO predicate act. Sedima, 479 U.S. at 488-93.

2. Making Due Provision for the Rights of Innocent Persons

Section 1964(a) of RICO provides, in relevant part, that "district courts of the United States shall have jurisdiction" to impose various equitable remedies "making due provision for the rights of innocent persons." The legislative history to RICO's Section 1964(a) contains only a passing reference that "due provision for the rights of innocent persons be made." See S. REP. No. 91-617 at 160; H.R. Rep. No. 91-1549, at 2 (1970). This provision has not been the subject

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[38] It is well established that different standards than apply to private litigants' request for injunctive relief govern the Government's request for injunctive relief to enforce laws to protect the public's interests, and that accordingly the Government is entitled to injunctive relief when it demonstrates a reasonable likelihood that the defendants and/or their cohorts will commit wrongful acts in the future, without any showing of an inadequate remedy at law or of irreparable injury beyond the injury inherent in the unlawful conduct. See generally United States v. City of San Francisco, 310 U.S. 16, 30-31 (1940); Hunt, 591 F.2d at 1220; United States v. Fed. Deposit Ins. Corp., 881 F.2d 207, 210 (5th Cir. 1989); United States v. Odessa Union Warehouse Co-op, 833 F.2d 172, 175-76 (9th Cir. 1987); Gov. of V.I., Dept. of Conservation v. V.I. Paving, 714 F.2d 283, 286 (3d Cir. 1983) (and cases cited thereat); United States V. Siemens Corp., 621 F.2d 499, 505-06 (2d Cir. 1980); SEC v. Management Dyn., Inc., 515 F.2d 801, 808 (2d Cir. 1975); United States v. Diapulse Corp. of America, 457 F.2d 25, 27-28 (2d Cir. 1972); Shafer v. United States, 229 F.2d 124, 128 (4th Cir.), cert. denied, 351 U.S. 931 (1956); SEC v. Stratton Oakmont, Inc., 878 F. Supp. 250, 255 (D.D.C. 1998); F.T.C. v. Virginia Homes Mfg. Corp., 509 F. Supp. 51, 59 (D. Md. 1981); United States v. Ingersoll-Rand Co., 218 F. Supp. 530, 544-45 (W.D. Pa.), aff'd, 320 F.2d 509 (3d Cir. 1963).

of extensive litigation, and therefore courts have not fully explicated its meaning.[39]

For example, in United States v. Sasso, 215 F.3d 283, 291-92 (2d Cir. 2000), the Second Circuit ruled that requiring a corrupt former union official to contribute toward the cost of a court-authorized monitorship of the union to rid it of corruption was within the district court's discretion under Section 1964(a), because, inter alia, it reduced the cost of monitorship to be borne by "innocent" union members. Similarly, in United States v. Local 560 (I.B.T.), 974 F.2d 315, 347-48 (3d Cir. 1992), the Third Circuit held that removing a corrupt union official from a union, and preventing him from associating with union members, made "due provision for the rights of innocent" union members because such relief would help eliminate corruption within the union. Accord United States v. Local 30, United Slate Tile, 871 F.2d 401, 407-08 (3d Cir. 1989) (rejecting the argument that the district court's removal of 13 union officers and members found to have violated RICO did not protect the rights of innocent third parties because it stripped control of the union from its members, because such relief was necessary to eliminate corruption within the union).[40]

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[39] The forfeiture provision under RICO's Section 1963(c), which was enacted at the same time as § 1964(a), similarly provided that "[t]he United States shall dispose of all [forfeited] property as soon as commercially feasible, **making due provision for the rights of innocent persons**." See S. REP. NO. 91-617, at 23-24 (emphasis added). Under interpretations of the original Section 1963(c), the Attorney General had the exclusive authority to make "due provision for the rights of innocent persons" and provide relief, if any, in a petition for remission or mitigation. However, in 1984, RICO's Section 1963, but not Section 1964(a), was amended to authorize the district court to make due provision for the rights of innocent persons in ancillary proceedings. See United States v. Gilbert, 244 F.3d 888, 909 (11th Cir. 2001); United States v. BCCI Holdings (Luxembourg), S.A. (Petition of Chawla), 46 F.3d 1185, 1190 (D.C. Cir. 1995); S. Rep. No. 98-225 at 205-09 (1990), *reprinted* in 1984 U.S.C.C.A.N. 3182, 3388-92. Therefore, it may be that under § 1964(a) the Attorney General retains the authority to make "due provision for the rights of innocent persons" via a petition for remission or mitigation.

[40] See also Ashland Oil, Inc. v. Gleave, 540 F. Supp. 81, 85 (W.D.N.Y. 1982) (holding (continued...)

B. Substantive Issues In Proving Government Civil RICO Claims

1. A Defendant's Liability For A Racketeering Act May Be Based On "Aiding and Abetting"

To establish the commission of a pattern of racketeering activity, 18 U.S.C. §§ 1961(5) and 1962(c) require that each defendant commit at least two acts of racketeering, "the last of which occurred within ten years . . . after the commission of a prior" racketeering act. See H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237 (1989). The federal circuits have repeatedly held in both criminal[41] and civil[42] RICO cases that a defendant's liability for

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[40](...continued)
that the "concern expressed for the rights of innocent persons cannot be stretched to include" a private litigant's right to sue for an order of attachment under section 1964(a) since section 1964(a) confers a right only on the Attorney General to bring actions for equitable relief, not private litigants.).

[41] See, e.g., United States v. Coon, 187 F.3d 888, 896 (8th Cir. 1999); United States v. Shifman, 124 F.3d 31, 36-37 (1st Cir. 1997); United States v. Darden, 70 F.3d 1507, 1526 (8th Cir. 1995); United States v. Pungitore, 910 F.2d 1084, 1131-32 (3d Cir. 1990); United States v. Hobson, 893 F.2d 1267, 1269 (11th Cir. 1990); United States v. Hogan, 886 F.2d 1497, 1501-02 (7th Cir. 1989); United States v. Rastelli, 870 F.2d 822, 832 (2d Cir. 1989); United States v. Wyatt, 807 F.2d 1480, 1482-83 (9th Cir. 1987); United States v. Qaoud, 777 F.2d 1105, 1117-18 (6th Cir. 1985); United States v. Cauble, 706 F.2d 1322, 1339-40 (5th Cir. 1983); United States v. Phillips, 664 F.2d 971, 1039 (5th Cir. 1981).

[42] See, e.g., Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1560 (1st Cir. 1994); Cox v. Admin. U.S. Steel & Carnegie, 17 F.3d 1386, 1410 (11th Cir. 1994); McLaughlin v. Anderson, 962 F.2d 187, 192-93 (2d Cir. 1992); Petro-Tech, Inc. v. Western Co. of N. Am., 824 F.2d 1349, 1356-57 (3d Cir. 1987); Armco Indus. Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 485 (5th Cir. 1986); Local 560, 780 F.2d at 283-86. See also Baumer v. Pachl, 8 F.3d 1341, 1347 (9th Cir. 1993); In re American Honda Motor Co. Dealerships Relations Litig., 958 F. Supp. 1045, 1057-59 (D. Md. 1997); Park v. Jack's Food Systems, Inc., 907 F. Supp. 914, 918-19 (D. Md. 1995); Downing v. Halliburton & Assocs., Inc., 812 F. Supp. 1175, 1182 (M.D. Ala. 1993); Wait Radio by Rosenfield v. Price Waterhouse, 691 F. Supp. 102, 108 (N.D. Ill. 1988);. Cf. First Am. Corp. v. Al-Nahyan, 17 F. Supp. 2d 10, 23-4 (D.D.C. 1998) (stating, without deciding, that "with respect to RICO, Congress intended there to be aiding and abetting liability in civil actions").

(continued...)

personally committing a predicate racketeering act may be established by proof that the defendant aided and abetted the commission of the racketeering act.

Moreover, such imposition of aiding and abetting liability for racketeering acts does not conflict with Third Circuit's ruling that in a civil action for treble damages brought by "a private plaintiff," a defendant's liability **for an entire RICO violation** may not be based upon aiding and abetting the RICO violations. See, e.g., Pennsylvania Ass'n of Edwards Heirs v. Rightenour, 235 F.3d 839, 841-44 (3d Cir. 2000); Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 656-57 (3d Cir. 1998), abrogation on other grounds recognized, Forbes v. Eagleson, 228 F.3d 471 (3d Cir. 2000). The rationale of those cases is that "Congress has not enacted a general civil aiding and abetting statute . . . under which a person may sue and recover damages from a private defendant," and that 18 U.S.C. § 2 "has no application to private causes of action." Rolo, 155 F. 3d at 656-57 (quoting Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994)). However, a Government civil RICO suit for equitable relief, in contrast, is not a private action for damages. The Third Circuit itself, and other courts as well, has held that in such **Government** civil RICO suits, liability for predicate acts may be established by aiding and abetting under 18 U.S.C. § 2. See Local 560, 780 F.2d at 283-89. Accord Local 1804-1, 812 F. Supp. at 1338-39; United States v. District Council, 778 F. Supp. 738, 748-49 (S.D.N.Y. 1991). See also cases cited in notes 41 & 42 above. As the court stated in Local 1804, 812 F. Supp. at 1347: "In a civil RICO suit [brought by the United States] the Court applies the

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[42](...continued)

"To prove aiding and abetting, the evidence must show that the defendant in some way associated himself with the criminal venture as something he wished to bring about and that he sought by his actions to make it succeed." Pungitore, 910 F.2d at 1132 (internal quotations and citation omitted).

criminal standard in determining aiding and abetting liability." Accord Local 560, 780 F.2d at 284.

Furthermore, Rightenour and Rolo, turned on whether a defendant's liability for **all the elements of a RICO violation** could be based entirely on an aiding and abetting ground. That issue is significantly different from the issue of whether a defendant's liability for **only** the element involving the commission of racketeering acts may be based on aiding and abetting.[43] As stated above, every court to decide that narrow issue has held in the affirmative. For example,

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[43] Indeed, thus far the cases holding that aiding and abetting liability does not apply in civil RICO cases have **involved suits for treble damages by private plaintiffs seeking to impose aiding and abetting liability for the entire alleged RICO violations**, and not just the predicate racketeering acts. See, e.g., Rightenour, 235 F.3d at 841 ("a **private plaintiff** could not maintain a claim of aiding and abetting an alleged RICO violation") (emphasis added); Rolo, 155 F.3d at 656-57 (same); In re Mastercard Int'l Inc., Internet Gambling Litig., 132 F. Supp. 2d 468, 493 (E.D. La. 2001) ("it is doubtful that an aiding and abetting liability cause of action exists" for private plaintiffs seeking treble damages); Jubelirer v. Mastercard Int'l, Inc., 68 F. Supp. 2d 1049, 1054 (W.D. Wis. 1999) ("Central Bank's analysis is controlling and requires dismissal of [private] plaintiff's claim for aiding and abetting a RICO violation."); Touhy v. Northern Trust Bank, No. 98-6302, 1999 WL 342700, at *4 (N.D. Ill. May 17, 1999) (same); Soranno v. N.Y. Life Ins. Co., No. 96-1882, 1999 WL 104403, at *7-8 (N.D. Ill. Feb. 24, 1999) (same); Ross v. Patrusky, Mintz & Semel, No. 90-1356, 1997 WL 214957, at *11 (S.D.N.Y. April 29, 1997) (same); Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison, 955 F. Supp. 248, 256 (S.D.N.Y. 1997) ("Following the reasoning in Central Bank, this Court declines to create **a private right of action** for aiding and abetting a RICO violation") (citation deleted) (emphasis added); La Salle Nat. Bank v. Duff & Phelps Credit Rating Co., 951 F. Supp. 1071, 1088-89 (S.D.N.Y. 1996); Department of Econ. Dev. v. Arthur Anderson & Co., 924 F. Supp. 449, 475 (S.D.N.Y. 1996) (the private plaintiff's "claim for aiding and abetting a RICO violation must be dismissed because there is no such tort").

Moreover, Bowdoin Constr. Corp. v. Rhode Island Hosp. Trust Nat. Bank, 869 F. Supp. 1004, 1009 (D. Mass. 1994), does not support preclusion of aiding and abetting liability for racketeering acts in Government civil RICO suits because Bowdoin's preclusion of aiding and abetting liability was limited to racketeering acts under Section 10(b) of the Securities and Exchange Act of 1934 under a private civil RICO claim for treble damages because "[t]o hold otherwise would enable [private] plaintiffs to use RICO to circumvent the interpreted intent of the Securities Act."

in Department of Economic Development, the court stated:

> [O]ne can commit a primary civil violation of § 1962(a) if one has aided and abetted racketeering activity. But this does not mean that someone who aids and abets another person's violation of § 1962(a) is liable to private parties for damages.

924 F. Supp. at 475.[44]

Furthermore, imposition of aiding and abetting liability for **only** the commission of racketeering acts does not run afoul of the Supreme Court's decision in Reves v. Ernst & Young, 507 U.S. 170, 185 (1993), which held that a defendant is not liable for a substantive RICO violation under 18 U.S.C. § 1962(c) unless the defendant "participate[s] in the operation or management of the enterprise itself." Imposition of aiding and abetting liability for racketeering acts does not eliminate Reves' requirement for proving a substantive RICO offense that the defendant participate in the operation or management of the enterprise. See, e.g., 131 Main Street Associates v. Manko, 897 F. Supp. 1507, 1528 n.17 (S.D.N.Y. 1995) ("We do not read the operation-or-management rule enunciated in Reves as changing the rule that '[c]ivil RICO liability can be predicated on aiding and abetting the commission of the predicate acts by the primary offender.' . . . Clearly, a person can operate or manage an enterprise and yet, through delegation, avoid directly committing predicate acts." (citation omitted)); Fidelity Federal Sav. & Loan Ass'n v. Felicetti, 830 F. Supp. 257, 261 (E.D. Pa. 1993) (aider and abettor liability for

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[44] Moreover, aiding and abetting liability for racketeering acts is not inconsistent with the requirement for a substantive RICO claim that the defendant **personally commit** at least two racketeering acts. Pursuant to 18 U.S.C. § 2, aiding and abetting racketeering activity "makes one punishable as a principal and amounts to [personally] engaging in that racketeering activity"; it does not constitute vicarious liability. See Shifman, 124 F.3d at 36. Accord Pungitore, 910 F.2d at 1131-32; Rastelli, 870 F.2d at 832. If aiding and abetting racketeering acts did not constitute personally committing racketeering acts, then such aiding and abetting liability would not apply in criminal RICO cases. However, numerous decisions have held that aiding and abetting liability applies to racketeering acts in criminal cases. See cases cited above in n. 41.

RICO predicate acts is not inconsistent with Reves' requirement for operation or management of the RICO enterprise).

2. Principles of Respondeat Superior

Government civil RICO suits typically are brought against collective entities such as corporations and labor unions. It is well established that a collective entity, such as a corporation or labor union, may act only through its agents, and hence may be held liable for the acts of its officers, employees, and other agents. This is true in both criminal prosecutions, see United States v. Wise, 370 U.S. 405 (1962); United States v. Najjar, 300 F.3d 466, 483 (4th Cir. 2002); United States v. Sun-Diamond Growers of California, 138 F.3d 961, 970 (D.C. Cir. 1998), aff'd, 526 U.S. 398 (1999), as well as in civil cases. See United States v. Brothers Constr. Co. of Ohio, 219 F.3d 300, 310-311 (4th Cir. 2000). See also Davis v. Mutual Life Ins. Co. of New York, 6 F.3d 367, 378-80 (6th Cir. 1993) (respondeat superior liability in RICO cases permissible, since "corporate principals may act only through their agents."). Accord, United States v. Philip Morris USA, Inc., 449 F. Supp. 2d at 892-93.[45] Therefore, a collective entity may be held liable for the statements or wrongful acts of its agents or employees when they are acting within the scope of their authority or the course of their employment, see Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 756 (1998); Restatement (Second) of Agency § 219 et seq. (1958), so long as the action is motivated, at least in part, to benefit the principal. See Sun-Diamond Growers, 138 F.3d at 970; Local 1814, Int'l Longshoremen's Ass'n v. NLRB, 735 F.2d 1384, 1395 (D.C. Cir.

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[45] See also Oki Semiconductor Co. v. Wells Fargo Bank, 298 F.3d 768, 775-76 (9th Cir. 2002) ("This possibility of respondeat superior liability for an employee's RICO violations encourages employers to monitor closely the activities of their employees to ensure that those employees are not engaged in racketeering. It also serves to compensate the victims of racketeering activity. Vicarious liability based on the doctrine of respondeat superior thereby fosters RICO's deterrent and compensatory goals.") (citations omitted).

1984); Restatement (Second) of Agency § 228 (1958). However, a plaintiff need not show that the agent was acting **exclusively** for the Defendant collective entity; it is enough that the employee was acting in part for the benefit of the collective entity.[46] Likewise, "it is not necessary for agent's actions to have actually benefited the corporate entity." Automated Medical Labs., Inc., 770 F.2d at 407 (citing Old Monastery Co. v. United States, 147 F.2d 905, 908 (4th Cir. 1945)); United States v. Carter, 311 F.2d 934, 942 (6th Cir. 1963); United States v. Sun-Diamond Growers of California, 964 F. Supp. 486, 490 (D.D.C. 1997) (citing cases).

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[46] For instance, in United States v. Gold, 743 F.2d 800 (11th Cir. 1984), the defendant (a corporate medical center) was prosecuted for violations of 18 U.S.C. § 1001 and § 371 for defrauding, and conspiring to defraud, the Government through the corporation's employees. On appeal, the corporation argued that, because the employees were acting primarily for their own benefit, rather than that of the corporation, the company could not be found liable. Rejecting this argument, the court noted that the motivations were not mutually exclusive, and that, in fact, the employees had acted to benefit themselves (via larger bonuses) as well as the corporation (via increased revenue). Moreover, the court reasoned, so long as the employees were acting **in part** for the benefit of the corporation, the corporation may be held liable for their acts. Id. at 823 (citing United States v. Beusch, 596 F.2d 871, 877-78 & n.7 (9th Cir. 1979); United States v. Demauro, 581 F.2d 50, 54 & n.3 (2d Cir. 1978); and Prosser, Torts, § 70 at 461 (4th Ed. 1971)). See also Curtis, Collins & Holbrook Co. v. United States, 262 U.S. 215, 223-24 (1923); United States v. Cincotta, 689 F.2d 238, 241-42 (1st Cir. 1982) (agent must be "performing acts of the kind which he is authorized to perform, and those acts must be motivated – at least in part – by an intent to benefit the corporation" (emphasis added)); United States v. Automated Medical Labs., Inc., 770 F.2d 399, 407 (4th Cir. 1985) ("It would seem entirely possible, therefore, for an agent to have acted for his own benefit while also acting for the benefit of the corporation."). Likewise, in United States v. 141st Street Corp., 911 F.2d 870 (2d Cir. 1990), the Government sought forfeiture from the defendant, 141st Street Realty Corporation, of an apartment building that had been used to facilitate narcotics trafficking. At trial, the Government established that the building superintendent, Nahmias, accepted bribes and collected exorbitant rents from drug dealers in exchange for their use of the building for drug-related activities. On appeal, the corporation argued that the agent acted adversely to its interests "and therefore any knowledge that Nahmias may have had of the narcotics trafficking cannot be imputed to the corporation." Id. at 876. The Court of Appeals for the Second Circuit rejected the corporation's argument, noting that "Nahmias' actions were adverse to the corporation only in the sense that his actions contributed to the imputation of knowledge to Realty Corp.," and that, under the corporation's faulty logic, imputation of knowledge could never be used to impose liability "because the very actions of the agent that cause an imputation of knowledge are 'adverse' to the principal." Id.

Moreover, in civil actions, "there may be no need to show that the agent acted to further the principal's interests – a showing of 'apparent authority' is often enough." Sun-Diamond Growers, 138 F.3d at 970 n.9 (D.C. Cir. 1998) (citing American Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 573-74 (1982)). And, even where the agent's action is beyond the original express, implied, or apparent authority, an act may be attributed to the principal if it is later ratified, either explicitly or by implication. See Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386, 1409 (11th Cir. 1994); IBJ Schroder Bank & Trust Co. v. Resolution Trust Corp., 26 F.3d 370, 375 (2d Cir. 1994); Yellow Bus Lines, Inc. v. Drivers, Chauffeurs, & Helpers Local Union 639, 883 F.2d 132, 136 (D.C. Cir. 1989), rev'd in part on other grounds, 913 F.2d 948 (D.C. Cir. 1990) (en banc). Indeed, if the act is done within the course of employment and with intent to benefit the collective entity, the collective entity is liable even if the act was unlawful,[47] or was done contrary to instructions or policies.[48]

Furthermore, it is well-established that "the knowledge of the employees is the knowledge of the corporation." Apex Oil Co. v. United States, 530 F.2d 1291, 1295 (8th Cir. 1976). See, e.g., United States v. Investment Enters., Inc., 10 F.3d 263, 266 (5th Cir. 1993) (corporation liable for offenses arising from interstate transportation of obscenity based on president's actions); In re Adams Labs. Inc., 3 B.R. 495, 499 & n.2 (Bankr. E.D. Va. 1980) ("The knowledge acquired by a secretary and treasurer who conducts negotiations with a third party

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[47] United States v. American Radiator and Standard Sanitary Corp., 433 F.2d at 204-05; United States v. Automated Medical Labs., 770 F.2d 399, 407 (4th Cir. 1985); Egan v. United States, 137 F.2d 369, 379 (8th Cir. 1943).

[48] Automated Medical Labs., 770 F.2d at 407; United States v. Beusch, 596 F.2d 871, 877 (9th Cir. 1979); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972); United States v. Harry L. Young & Sons, Inc., 464 F.2d 1295, 1296-97 (10th Cir. 1972); Egan, 137 F.2d at 379.

with authority from the corporation to do so will be imputed to the corporation."); Duplex Envelope Co. v. Denominational Envelope Co., 80 F.2d 179, 182 (4th Cir. 1935) (corporation affected with constructive knowledge "of all material facts of which an officer acquires knowledge while acting in the course of his employment and within the scope of his authority."); United States v. Josleyn, 206 F.3d 144, 159 (1st Cir. 2000) (citing cases for agent's knowledge being imputed to the company).[49]

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[49] See also United States v. Josleyn, 206 F.3d 144, 159 (1st Cir. 2000) (there is no requirement that a person be a "central figure" at a corporation in order for that person's knowledge to be imputed to the corporation); Askanase v. Fatjo, 130 F.3d 657, 666 (5th Cir. 1997) (imputing corporate officer's knowledge to corporations for statute of limitations purposes); St. Paul Fire and Marine Ins. Co. v. FDIC, 968 F.2d 695, 700-701 (8th Cir. 1992) ("in general, an agent's actual notice or knowledge may be imputed to the agent's principal."); Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf, 930 F.2d 240, 243-44 (2d Cir. 1991) (corporation owned by Iranian government imputed with knowledge of its agent, United Arab Emirates intermediary, and therefore had imputed knowledge of illegal nature of shipment of chemicals from United States to Iran); Mallis v. Bankers Trust Co., 717 F.2d 683, 689 & n.9 (2d Cir. 1983) ("It is a basic tenet of the law of agency that the knowledge of an agent, or for that matter a partner or joint venturer, is imputed to the principal." (citing cases)); Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 590 (9th Cir. 1983) (knowledge of four senior officers of corporation that corporation's agent had rebated was imputable to corporation; thus, record supported district court's finding that corporation's denial that it had engaged in rebating was knowingly false); Am. Standard Credit, Inc. v. Nat'l Cement Co., 643 F.2d 248, 270-71 (5th Cir. 1981) (imputation of joint venturer's knowledge to entire corporation); Delbrueck & Co. v. Mfrs. Hanover Trust Co., 609 F.2d 1047, 1051-52 (2d Cir. 1979) (notice to bank's paying and receiving agent imputed to bank); Eitel v. Schmidlapp, 459 F.2d 609, 614-16 (4th Cir. 1972) (where defendant's agent fraudulently conveyed property to defendant, agent's knowledge of fraud would be imputed to principal even where no evidence of actual knowledge on part of principal: "the principal cannot claim the fruits of the agent's acts and still repudiate what the agent knew."); Ritchie Grocer Co. v. Aetna Cas. & Sur. Co., 426 F.2d 499, 500 (8th Cir. 1970) (knowledge possessed by branch manager for one of corporate insured's stores that employee had previously committed tire theft was fully attributable to insured within exclusion provision of employee fidelity policy precluding coverage after insured or officer of insured discovers or has knowledge or information that employee has committed any fraudulent or dishonest act in service of insured or otherwise); Bergeson v. Life Ins. Corp. of Am., 265 F.2d 227, 232 (10th Cir. 1959) (corporation necessarily acts vicariously and can acquire knowledge only through its officers and agents and their knowledge is knowledge of corporation); Mollohan v. Masters, 45 App. D.C. 414, 421-22 (D.C. App. 1916) (where promissory notes infected with usury come into the possession of a

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Furthermore, a principal is attributed with the knowledge acquired by its agent even if the information is never communicated to it, see, e.g., New York University v. First Fin. Ins. Co., 322 F.3d 750, 753-54 & n.2 (2d Cir. 2003),[50] or even after termination of the services of that officer, employee, or agent. See Acme Precision Prods., Inc. v. Am. Alloys Corp., 422 F.2d 1395, 1398 (8th Cir. 1970) (knowledge by a corporation, obtained by and through its officers and key employees, of facts of continuing importance to business of the corporation, even after termination of services of that officer or employee, is conclusive upon the corporation).

In affirming corporate criminal liability, the Supreme Court has noted that:

> [w]e see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act.

New York Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495 (1909).

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[49](...continued)
corporation through its agents, who had notice of the usury, the corporation is not in a position to claim that it is an innocent purchaser; notice to the agents being notice to the principal).

[50] See also Bowen v. Mount Vernon Sav. Bank, 105 F.2d 796, 799 (D.C. Cir. 1939) (presumption that a principal knows what his agent knows is irrebuttable, and cannot be avoided by showing that the agent did not in fact communicate his knowledge nor by showing that the agent had such an adverse interest that he would not likely communicate his knowledge); Hand & Johnson Tug Line v. Canada S.S. Lines, 281 F. 779, 783 (6th Cir. 1922) (corporation cannot avoid responsibility by showing that, when a written notice by mail was received in its general office, it was sent to the wrong department).

3. A Corporation's or Labor Union's Scienter May Be Established By The Collective Knowledge of The Corporation's or Labor Union's Employees and Representatives

Insofar as a principal can be attributed with the knowledge of a single agent or employee, see Section III (B)(2) above, a corporation, or a labor union, as a collection of employees and agents, "is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly." United States v. T.I.M.E.-D.C. Inc., 381 F. Supp. 730, 738-39 (W.D. Va. 1974). Therefore, such collective entities are liable for the aggregate knowledge of all employees and agents within (and acting on behalf of) the collective entity, and cannot "plead ignorance" by claiming that the representative making the fraudulent statement, or obtaining the knowledge of its falsity, somehow was insulated from the rest of the corporation or labor union.

The seminal case on the "collective knowledge" doctrine is United States v. Bank of New England, N.A., 821 F.2d 844 (1st Cir. 1987). In that case, the bank was convicted of violating the Currency Transaction Reporting Act for failing to report various financial transactions. At trial, the district court stressed that, unlike a natural person, the jury must consider the bank "as an institution." The trial court instructed the jury as follows:

> In addition, however, you have to look at the bank as an institution. As such, its knowledge is the sum of the knowledge of all of the employees. That is, the **bank's knowledge is the totality of what all of the employees know within the scope of their employment**. So, if Employee A knows one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the bank knows them all. So if you find that an employee within the scope of his employment knew that CTRs had to be filed, even if multiple checks are used, the bank is deemed to know it. The bank is also deemed to know it if each of several employees knew a part of that requirement and the sum of what the separate employees knew amounted to knowledge that such a

requirement existed.

Id. at 855 (emphasis added). After conviction, the bank on appeal challenged the trial court's instructions regarding the bank's knowledge and intent, by allowing the jury to consider the aggregate knowledge of various employees, including the tellers at the bank window (who participated in the withdrawals) and the other employees (who might not have even known of the withdrawals). The individual making the withdrawals was acquitted on all counts, and none of the bank employees had been charged with a crime. Id. at 847. Therefore, the bank contended, "it is error to find that a corporation possesses a particular item of knowledge if one part of the corporation has half the information making up the item, and another part of the entity has the other half." Id. at 856.

The First Circuit rejected the bank's argument, noting that "[a] collective knowledge instruction is entirely appropriate in the context of corporate criminal liability. . . . [T]he knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation." Id. at 856. In addition, the court stressed that it would be unjust to allow a corporation to avoid liability merely because it chose to divide its knowledge, thus allowing it to "plead ignorance":

> Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of these components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation . . . . Since the Bank had the compartmentalized structure common to all large corporations, the court's collective knowledge instruction was not only proper but necessary.

Id. at 856.

Earlier cases also demonstrate that corporate knowledge should be aggregated, and accordingly notice and knowledge of a fact by an employee-representative is imputed to the corporation-principal. For instance, in Inland Freight Lines v. United States, 191 F.2d 313, 315 (10th Cir. 1951), the court ruled that a corporation could be held responsible for the mistakes and falsification by its drivers in preparation of drivers' logs even where no individual agent or employee was shown to have actual knowledge of discrepancies between the business logs and reports. The court explained:

> The logs and the reports did not find their way into the hands of a single agent or representative of the company after they were filed. No single agent or representative in the offices of the company had actual knowledge of their conflicts and falsities. But one agent or representative had knowledge of the material contents of the logs and another had knowledge of the material contents of the reports. And the knowledge of both agents or representatives was attributed to the company.

Id. at 315.[51]

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[51] See also Matter of Pubs., Inc., 618 F.2d 432, 438 (7th Cir. 1980) (collective knowledge of all employees and departments within the corporation is generally imputed to the corporation); Steere Tank Lines, Inc. v. United States, 330 F.2d 719, 721-22 (5th Cir. 1963) ("It is now beyond doubt that a corporation may be held criminally liable. [citing cases]. These cases also settle the proposition that knowledge of employees and agents of the corporation is attributable to the corporation, and that their acts may amount to wilfulness on the part of the corporation."); United States v. U.S. Cartridge Co., 198 F.2d 456, 464 (8th Cir. 1952) (collective knowledge doctrine case in False Claims Act context); Camacho v. Bowling, 562 F. Supp. 1012, 1025 (N.D. Ill. 1983) ("Other organizations, such as private corporations or partnerships, are held to have constructive notice of the collective knowledge of all the employees and departments within the organization."); United States v. Sawyer Transport, Inc., 337 F. Supp. 29, 31 (D. Minn. 1971), aff'd, 463 F.2d 175 (8th Cir. 1972) (knowledge of employees may be joined and imputed to the corporation); United States v. E. Brooke Matlack, Inc., 149 F. Supp. 814, 819-20 (D. Md. 1957) (corporation liable for knowingly and wilfully violating ICC regulations even where main office in Philadelphia did not know or suspect that branch agents in Baltimore were violating duties); People v. Amer. Med. Ctrs., 324 N.W.2d 782, 793 (Mich. App. 1982) ("The combined knowledge of those employees may be imputed to the corporation to find it liable for fraudulent

(continued...)

Moreover, in United States v. Shortt Accountancy Corp., 785 F.2d 1448 (9th Cir. 1986), an accounting firm was convicted for making and subscribing false tax returns, in violation of 26 U.S.C. § 7206(1), for preparing and submitting tax returns claiming deductions for illegal "straddle" investments. The firm's chief operating officer, Ashida, advised the customer about the investment, and provided information to another employee of the firm, Whatley, for the actual preparation of the customer's return. Id. at 1450-51. At trial, the firm contended that a corporation cannot be guilty of a § 7206 offense "when the person who actually subscribes the false return believes it to be true and correct." Id. at 1451. The district court denied the motion, and the jury ultimately convicted the firm.

On appeal, the defendant claimed that six of the convictions should be overturned because there was no evidence that Whatley, the preparer and subscriber of these six tax returns, possessed the requite intent to wilfully make and subscribe a false tax return. The firm conceded that "Ashida, who supplied Whatley with all of his information regarding the straddle losses, did have the requisite intent," but pointed out that Ashida did not physically subscribe to the return. After considering the argument, the court of appeals concluded that it was "completely meritless":

> If it were accepted by the courts, any tax return preparer could escape prosecution for perjury by arranging for an innocent employee to complete the proscribed act of subscribing a false return. This interpretation of section 7206(1) defies logic and has no support in the case law. A corporation will be held liable under section 7206(1) when its agent deliberately causes it to make and subscribe to a false income tax return.

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[51](...continued)
acts."); Gem City Motors Inc. v. Minton, 137 S.E.2d 522, 525 (Ga. App. 1964) (corporation "chargeable with the **composite knowledge** acquired by its officers and agents" (emphasis added)).

Id. at 1454.

Likewise, since Bank of New England, several other courts have allowed such agents' knowledge to be aggregated and imputed to the corporation as a whole. For example, in United States v. Philip Morris USA, Inc., 449 F. Supp. 2d at 893-98, the district court held in a Government civil RICO lawsuit that the defendants-corporations' knowledge and specific intent to commit fraud were properly established by the collective knowledge of their officers, employees and agents. The district court explained:

> There is "every reason in public policy" why a corporation, which can only act through its agents and officers, and which profits by their actions, should be held liable when the totality of circumstances demonstrate that such corporation collectively knew what it was doing or saying was false, by did it or said it nevertheless, even if it is impossible to determine the state of mind of the individual agent or officer at the time. Indeed, if it were otherwise, Defendants could avoid liability by simply dividing up duties to ensure that fraudulent statements were only made by or [sic] uninformed employees.

Id. at 896-97.

Similarly, in United States v. Sun-Diamond Growers, 964 F. Supp. 486 (D.D.C. 1997), the court noted that the defendant "makes much of the fact that purportedly no other corporate officials knew about Mr. Douglas' activities. However, knowledge obtained by a corporate agent acting within the scope of his employment is imputed to the corporation." Id. at 491 n.10. In addition, the Court noted that, under agency principles, the defendant could still be liable for Douglas' actions "even if Mr. Douglas had acted against corporate policy or the corporation's express instructions or even if Sun-Diamond had derived no benefit from Mr. Douglas' actions." Id.

In CPC Intern., Inc. v. Aerojet-General Corp., 825 F. Supp. 795 (W.D. Mich. 1993), the court stressed that "a corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual employee." 825 F. Supp at 811-812 (citations and internal quotations omitted); United States v. T.I.M.E. - D.C. Inc., 381 F. Supp. 730, 738-39 (W.D. Va. 1974) (a corporation "cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual employee who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly."); United States v. LBS Bank-New York Inc., 757 F. Supp. 496, 501 (E.D. Pa. 1990) (knowledge from different employees can be joined in order to establish corporate knowledge, but specific intent cannot be so aggregated); United States v. Farm & Home Sav. Ass'n, 932 F.2d 1256, 1259 (8th Cir. 1991) (imputing collective knowledge of employees participating in multiple illegal transactions to employer).

Similarly in United States ex rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 919 (4th Cir. 2003), a False Claims Act case, though not formally needing to reach the "corporate scienter" rule, the court of appeals declined to adopt the defendant's proposed "single actor" requirement that the same employee know both the certifying requirement and the wrongful conduct. Under that rule, the court reasoned, "corporations would establish segregated 'certifying' offices that did nothing more than execute government contract certifications, thereby immunizing themselves against FCA liability." Id. As acknowledged by the California Supreme Court, the single actor rule is "fraught with danger and would open up avenues of fraud which would lead to incalculable hazards. It would permit a corporation, by not letting its right hand

know what is in its left hand, to mislead and deceive . . . ." Sanders v. Magill, 70 P.2d 159, 163 (Cal. 1937).

Thus, under the collective knowledge doctrine "[t]he knowledge necessary to adversely affect the corporation does not have to be possessed by a single corporate agent; **the cumulative knowledge of several agents** can be imputed to the corporation." WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 790, at 16 (perm. Ed.) (emphasis added); accord WILLIAM E. KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE DIRECTORS AND OFFICERS, § 1.02, at 4 (Supp. 1992).

Imposing the collective scienter upon the corporation follows equity as well as the extensive legal authority cited above. As the First Circuit noted in Bank of New England, the collective knowledge doctrine prevents a corporation from "plead[ing] innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import." 821 F.2d at 856 (citing T.I.M.E.-D.C., 381 F. Supp. at 738). Indeed, numerous courts have prevented corporations (and other organizations) from taking advantage of their corporate form by attempting to "ostrich" themselves away from liability by insulating the actors (or spokespersons) of a corporation from those within the organization who have certain information. As one commentator noted:

> Given the often complex and decentralized nature of many corporations, it is sometimes difficult, if not impossible, to prove that any single corporate agent acted with the necessary intent and knowledge to commit an offense. Under the judicially created "collective knowledge" doctrine, however, this will not preclude a corporation's conviction. That doctrine deems a corporation's knowledge to be the combined knowledge and intent of all of its employees. Thus, even if no single employee has the intent and knowledge necessary to commit a crime, the corporation can be convicted on the basis of its employees [sic] collective knowledge

and intent.

Dan K. Webb et al., Understanding and Avoiding Corporate and Executive Criminal Liability, 49 BUS. LAW 617, 625 (1994).[52]

4. The Prohibition Against Intracorporate Conspiracies Under The Antitrust Laws Does Not Apply To Government Civil RICO Lawsuits

In Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), the Supreme Court held that a parent corporation "and its wholly owned subsidiary . . . are incapable of conspiring with each other for purposes of § 1 of the Sherman Act," 15 U.S.C. § 1. 467 U.S. at 752. But, the Supreme Court rested its decision in Copperweld on the Sherman Act's distinctive intent and purpose. Section 1 of the Sherman Act prevents two or more enterprises from joining

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[52] See also Charles J. Walsh & Alissa Pyrich, Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save its Soul?, 47 RUTGERS L. REV. 605, 625 (1995) (noting that corporations can be convicted of intent-based crimes even where none of their employees possessed the requisite intent); Kevin B. Huff, The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach, 96 COLUM. L. REV. 1252, 1256 n.26 (1996) ("Under the 'collective knowledge' doctrine, courts have found the required intent by imputing to the corporation the aggregate knowledge of more than one employee."); Steere Tank Lines v. United States, 330 F.2d 719, 721 (5th Cir. 1963) ("knowledge of employees' agents of the corporation is attributable to the corporation, and . . . their acts may amount to wilfulness on the part of the corporation").

See also FLETCHER, CORPORATIONS, § 790 (absent collective knowledge doctrine, "corporations could avoid the adverse implications of the [imputed knowledge] rule by restricting the intracorporate flow of information."). As noted by the Fifth Circuit in Continental Oil Co. v. Bonanza Corp., 706 F.2d 1365, 1376 (5th Cir. 1983), "Because a corporation operates through individuals, the privity and knowledge of individuals at a certain level of responsibility must be deemed privity and knowledge of the organization, 'else it could always limit its liability.'" (citing Coryell v. Phipps, 317 U.S. 406, 410-11 (1943)); Silver Line, Ltd. v. United States, 94 F.2d 776, 780 (9th Cir. 1937) (ship owner may not escape liability by giving management functions to employee acting as agent)). As the Eleventh Circuit emphasized in First Ala. Bank v. First State Ins. Co., 899 F.2d 1045, 1060 n.8 (11th Cir. 1990), the reason that courts impose constructive knowledge upon the principal "is to avoid the injustice which would result if the principal could have an agent conduct business for him and at the same time shield himself from the consequences which would ensue from knowledge of conditions or notice of the rights and interests of others had the principal transacted his own business in person."

their economic power to restrain trade; it does not apply to unilateral action by a single enterprise. See id. at 771-775. Because Congress recognized that a prohibition on unilateral action could impede the ability of a single enterprise to compete in the marketplace, the Court held in Copperweld that Section 1 of the Sherman Act does not apply to intra-enterprise agreements. Id. at 775 ("Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote.").

In fact, numerous courts have held that these antitrust considerations simply do not apply to RICO. For example, in Haroco v. Am. Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 403 n.22 (7th Cir. 1984), aff'd on other grounds, 473 U.S. 606 (1985), the court ruled that Copperweld did not apply to civil RICO conspiracy charges, explaining that "the Sherman Act is premised, as RICO is not, on the 'basic distinction between concerted and independent action.' The policy considerations discussed in Copperweld therefore do not apply to RICO, which is targeted primarily at the profits from patterns of racketeering activity."
747 F.2d at 403 n.22 (citation omitted). Similarly, in Ashland Oil, Inc. v. Arnett, 875 F.2d 1271 (7th Cir. 1989), the court stated:

> Since a subsidiary and its parent theoretically have a community of interest, a conspiracy "in restraint of trade" between them poses no threat to the goals of antitrust law -- protecting competition. In contrast, intracorporate conspiracies do threaten RICO's goals of preventing the infiltration of legitimate businesses by racketeers and separating racketeers from their profits.

875 F.2d at 1281 (citations omitted). In accordance with the foregoing reasoning, numerous courts have likewise ruled that the rationale of Copperweld does not apply to civil RICO claims and that, therefore, a civil RICO conspiracy claim properly applies to a conspiracy between a

parent corporation and its subsidiary, between affiliated corporations, or between a corporation and its own officers and representatives.[53]

C. Certain Defenses Do Not Apply to Government Civil RICO Actions For Equitable Relief

1. Laches and Statute of Limitations

The Supreme Court has repeatedly held that the United States is not bound by a statute of limitations or subject to the defense of laches[54] when it brings a lawsuit in its sovereign capacity to enforce a public right or to protect the public's interest. See, e.g., Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917) ("As a general rule, laches or neglect of duty on the part

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[53] See, e.g., Webster v. Omnitrition Intern., Inc., 79 F.3d 776, 787 (9th Cir. 1996); Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1166-67 (3d Cir. 1989); Fed. Reserve Bank of S.F. v. HK Sys., Inc., No. C-95-1190 MHP, 1997 WL 765952, at *3-*4 (N.D. Cal. Nov. 12, 1997); N. Shore Med. Ctr., Ltd. v. Evanston Hosp. Corp., No. 92 C 6533, 1996 WL 435192, at *3 (N.D. Ill. July 31, 1996); Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., No. 95-1698, 1996 WL 135336, at *5 (E.D. Pa.. Mar. 19, 1996); Bowman v. W. Auto Supply Co., 773 F. Supp. 174, 180 (W.D. Mo. 1991), rev'd on other grounds, 985 F. 2d 383 (8th Cir. 1993); Dun-Rite Tool & Fabricating Co. v. Am. Nat'l Bank of DeKalb, No. 89 C 20370, 1991 WL 293092, at *5 (N.D. Ill. Apr. 11, 1991); Rouse v. Rouse, No. 89-CV-597, 1990 WL 160194, at *14 (N.D.N.Y. Oct. 17, 1990); Atlass v. Tex. Air Corp., Civ. A. No. 88-9637, 1989 WL 51724, at *5 (E.D. Pa. May 10, 1989); Curley v. Cumberland Farms Dairy, Inc., 728 F. Supp. 1123, 1135 (D.N.J. 1989); Pandick Inc. v. Rooney, 632 F. Supp. 1430, 1435 (N.D. Ill. 1986); Callan v. State Chemical Mfg. Co., 584 F. Supp. 619, 623 (E.D. Pa. 1984); Saine v. A.I.A., Inc., 582 F. Supp. 1299, 1307 n.9 (D. Colo. 1984); Mauriber v. Shearson/Am. Express, Inc., 567 F. Supp. 1231, 1241 (S.D.N.Y. 1983).

Moreover, Copperweld's prohibition on intracorporate conspiracies does not apply to criminal RICO conspiracy charges or other criminal conspiracy charges. See, e.g., United States v. Hughes Aircraft Co., 20 F. 3d 974, 979 (9th Cir. 1994) (collecting cases); Crockett, 979 F.2d at 1218 n.12.

[54] For laches to apply, a defendant must establish two elements: (1) unreasonable delay in bringing the claim; and (2) prejudice caused by the delay. See, e.g., Trustees of Centennial State Carpenters Pension Trust Fund v. Centric Corp. (In re Centric Corp.), 901 F.2d 1514, 1519 (10th Cir. 1990); Independent Bankers Ass'n of America v. Heimann, 627 F.2d 486, 488 (D.C. Cir. 1980); Allen v. Carmen, 578 F. Supp. 951, 962-63 (D.D.C. 1983).

of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest."). Accord Nevada v. United States, 463 U.S. 110, 141 (1983); United States v. California, 332 U.S. 19, 40 (1947); United States v. Summerlin, 310 U.S. 414, 416 (1940); Bd. of County Comm'rs v. United States, 308 U.S. 343, 351 (1939); Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 132 (1938); Davis v. Corona Coal Co., 265 U.S. 219, 222 (1924); Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123, 125 (1919); United States v. Insley, 130 U.S. 263, 266 (1889); United States v. Thompson, 98 U.S. 486, 489 (1878); United States v. Kirkpatrick, 22 U.S. 720, 735-37 (1824). Accord United States v. Angell, 292 F.3d 333, 338 (2d Cir. 2002); Herman v. South Carolina Nat'l Bank, 140 F.3d 1413, 1427 (11th Cir. 1998); United States v. Arrow Transp. Co., 658 F.2d 392, 394 (5th Cir., Unit B, Oct. 1981); United States v. Weintraub, 613 F.2d 612, 618-19 (6th Cir. 1979). "This principle protects public rights vested in the government for the benefit of all from 'the inadvertence of the agents upon which the government must necessarily rely.'" Herman, 140 F.3d at 1427 (quoting United States v. Alvarado, 5 F.3d 1425, 1427 (11th Cir. 1993)); accord SEC v. Rind, 991 F.2d 1486, 1491 (9th Cir. 1993).

The RICO statute itself does not contain any time limitations upon the United States' ability to bring civil RICO suits for equitable relief. Indeed, Congress recognized in RICO's legislative history that "there is no general statute of limitations applicable to civil suits brought by the United States to enforce public policy, nor is the doctrine of laches applicable." S. REP. No. 91-617 at 160. Therefore, it is clear that, consistent with the general principles discussed above, Congress did not intend to, and affirmatively decided not to, apply a statute of limitations or the doctrine of laches to civil RICO suits for equitable relief brought by the United States.

In accordance with the foregoing authority, every court that has considered the issue has held that a statute of limitations and the doctrine of laches do not apply against claims of the United States to obtain injunctive and other equitable relief under RICO. See United States v. Philip Morris Inc., 300 F. Supp. 2d 61, 72-74 (D.D.C. 2004); United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 793 F. Supp. 1114, 1152 (E.D.N.Y. 1992); United States v. Int'l Bhd. of Teamsters, 708 F. Supp. 1388, 1402 (S.D.N.Y. 1989); United States v. Bonanno Organized Crime Family, 695 F. Supp. 1426, 1430-31 (E.D.N.Y. 1988). Moreover, courts in other analogous enforcement contexts similarly have held that the doctrine of laches does not apply against actions of the United States to enforce the securities laws,[55] antitrust laws,[56] or fair trade laws.[57] Likewise, in various other civil enforcement actions, courts have concluded that limitations periods will not be imposed on suits brought by the United States. See Dole v. Local 427, Int'l Union of Elec. Radio & Mach. Workers, 894 F.2d 607, 610-16 (3d Cir. 1990) (no statute of limitations applies when Secretary of Labor sues under Labor-Management Reporting and Disclosure Act ("LMRDA") to enjoin local union from refusing to allow one of its members to review collective bargaining agreements); Donovan v. West Coast Detective Agency, Inc., 748 F.2d 1341, 1343 (9th Cir.1984) (Secretary of Labor suit to compel filing of requisite reports

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[55] See, e.g., SEC v. Rind, 991 F.2d 1486, 1491 (9th Cir. 1993); SEC v. McCaskey, 56 F. Supp. 2d 323, 327 (S.D.N.Y. 1999); SEC v. Willis, 777 F. Supp. 1165, 1174 (S.D.N.Y. 1991); SEC v. Gulf & Western Indus., Inc., 502 F. Supp. 343, 348-49 (D.D.C. 1980); SEC v. Penn Central Co., 425 F. Supp. 593, 599 (E. D. Pa. 1976).

[56] See, e.g., United States v. Firestone Tire & Rubber Co., 374 F. Supp. 431, 433 (N.D. Ohio 1974).

[57] See, e.g., FTC v. Verity Int'l, Ltd., 194 F. Supp. 2d 270, 286 (S.D.N.Y. 2002); FTC v. Crescent Pub. Group, Inc., 129 F. Supp. 2d 311, 324 (S.D.N.Y. 2001); United States v. Reader's Digest Ass'n, Inc., 464 F. Supp. 1037, 1043 (D. Del. 1978).

under LMRDA); Donovan v. Square D Co., 709 F.2d 335, 341 (5th Cir. 1983) (Secretary of Labor's anti-retaliation suit under Occupational Safety and Health Act); Marshall v. Intermountain Elec. Co., 614 F.2d 260, 263 (10th Cir. 1980) (same); Nabors v. NLRB, 323 F.2d 686, 688-89 (5th Cir. 1963) (National Labor Relations Board enforcement of National Labor Relations Act); see also United States v. Ali, 7 F.2d 728 (E.D. Mich. 1925) (laches inapplicable to denaturalization proceeding brought by the government); United States v. Brass, 37 F. Supp. 698 (E.D.N.Y. 1941) (same).

2. United States' Civil RICO Claims Cannot Be Implicitly Waived

As a matter of law, the United States cannot be found to have implicitly waived its sovereign capacity to protect public interests through civil RICO suits for equitable relief. In United States v. California, 332 U.S. 19 (1947), the Supreme Court considered a dispute between a state and the federal government over ownership and control of submerged coastal land. The state argued, inter alia, that the federal government's policies, decisions and actions, as well as the "conduct of its agents" served to waive the United States' claim to the lands. See id. at 39. The Supreme Court squarely rejected this analysis:

> even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. **The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes . . . .**

Id. at 39-40 (emphasis added); see also cases in Section III (C)(3) below (demonstrating that equitable estoppel does not lie against the United States acting as sovereign to protect the public

interest).[58]

RICO vests the Attorney General with the exclusive authority to bring civil RICO suits for injunctive and equitable remedies to vindicate the public's paramount interests in eliminating corruption from the channels of commerce. See Section II (D) above; United States v. Int'l Bhd. of Teamsters, 3 F.3d 634, 638 (2d Cir. 1993) (when it proceeds under § 1964, "the government sues in its sovereign capacity pursuant to a 'compelling governmental interest' and 'strong congressional policy'") (citations omitted). The public interest vindicated by RICO enforcement actions cannot be understated. The Congressional Statement of Findings and Purpose underlying RICO explains that, among other things, RICO was designed to combat activities that

> weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens . . . .

Pub. L. No. 91-452, 84 Stat., at 922, 923. Indeed, Congress created RICO to provide new and expanded criminal and civil remedies to vindicate the public's interest in combating racketeering activity and "to free the channels of commerce" from such unlawful conduct. See Sections II (B) and (C) above.

Consequently, the United States' right to maintain a civil RICO action, so clearly "charged or colored with public interest," Brooklyn Savs. Bank, 324 U.S. at 704, cannot be

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[58] Similarly, the Supreme Court has explained, in the context of a **private** right granted by federal statute, "Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate." Brooklyn Savs. Bank v. O'Neil, 324 U.S. 697, 704 (1945). See also Tompkins v. United Healthcare of New England, Inc., 203 F.3d 90, 97 (1st Cir. 2000) ("[a] statutory right may not be disclaimed if the waiver could 'do violence to the public policy underlying the legislative enactment.'") (internal quotations and citation omitted).

implicitly waived as a matter of law.[59]

3. Equitable Estoppel Can Not Lie Against the United States, If Ever, Absent Affirmative Misconduct

_____a. It is well settled that "equitable estoppel will not lie against the Government as it lies against private litigants." OPM v. Richmond, 496 U.S. 414, 419 (1990). The Supreme Court has succinctly stated the rationale for this rule: "When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." Heckler v. Community Health Servs. of Crawford County, Inc., 467 U.S. 51, 60 (1984). See also FDIC v. Hulsey, 22 F.3d 1472, 1489 (10th Cir. 1994) (Where estoppel against the United States would "frustrate the purpose of the statutes expressing the will of Congress or unduly undermine the enforcement of the public

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[59] Even assuming arguendo that the right of the United States to bring a civil RICO claim could be waived, a defendant would have an exacting burden to establish a waiver. "A waiver 'is ordinarily an intentional relinquishment or abandonment of a known right or privilege.'" United States v. Robinson, 459 F.2d 1164, 1168 (D.C. Cir. 1972) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)); see also United States v. Olano, 507 U.S. 725, 733 (1993); Britamco Underwriters, Inc. v. Nishi, Papagjika & Assocs., Inc., 20 F. Supp. 2d 73, 77 n.2 (D.D.C. 1998). In the context of a right expressly reserved to the United States as sovereign, the waiver must be "unmistakable." See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982) ("Without regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact **unless surrendered in unmistakable terms**.") (emphasis added); United States v. Cherokee Nation of Okla., 480 U.S. 700, 707 (1987) ("waiver of sovereign authority [to ensure that navigable waters remain free to interstate and foreign commerce] will not be implied, but instead must be surrendered in unmistakable terms") (internal quotation and citation omitted); Bowen v. Public Agencies Opposed to Social Sec. Entrapment, 477 U.S. 41, 52 (1986) ("we have declined in the context of commercial contracts to find that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in the contract." (internal quotation and citation to Merrion omitted)); United States v. Philip Morris Inc., 300 F. Supp. 2d at 69 ("any waiver [of the Government's right to bring a civil RICO lawsuit] must be made in unmistakable terms"); cf. also United States v. Mitchell, 445 U.S. 535, 538 (1980) ("A waiver of sovereign immunity cannot be implied but must be unequivocally expressed.") (internal quotation and citation omitted).

laws," it should not be invoked); Alacare Home Health Servs. Inc. v. Sullivan, 891 F.2d 850, 855 (11th Cir. 1990) (equitable estoppel should not apply when Government acting in its sovereign, rather than proprietary, function); Chapman v. Santa Fe Pac. R. Co., 198 F.2d 498, 519 (D.C. Cir. 1952) ("It is settled law that no estoppel can arise against the Government in the exercise of a public or governmental function as distinguished from a proprietary one.") (citations omitted).

While the Supreme Court has not absolutely foreclosed the possibility that estoppel could lie against the United States in "extreme circumstances," it has never applied the doctrine of equitable estoppel against the United States. See OPM v. Richmond, 496 U.S. at 434; see also id. at 422 ("Courts of Appeals have taken our statements as an invitation to search for an appropriate case in which to apply estoppel against the Government, **yet we have reversed every finding of estoppel that we have reviewed**.") (emphasis added). Accord ATC Petroleum, Inc. v. Sanders, 860 F.2d at 1104, 1111 (D.C. Cir. 1988). For example, in Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917), the Supreme Court stated:

> As presenting another ground of estoppel it is said that the agents in the forestry service and other officers and employees of the government, with knowledge of what the defendants were doing, not only did not object thereto, but impliedly acquiesced therein until after the works were completed and put in operation. This ground also must fail. As a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest.

b. Before equitable estoppel could ever lie against the United States, a Defendant would have to present evidence of significant "affirmative misconduct" on the part of the Government. See, e.g., INS v. Hibi, 414 U.S. 5, 8 (1973); Montana v. Kennedy, 366 U.S. 308, 314-15 (1961); Long v. Area Manager, Bureau of Reclamation, 236 F.3d 910, 916 (8th Cir. 2001); Drozd v. INS, 155 F.3d 81, 90 (2d Cir. 1998); City of New York v. Shalala, 34 F.3d 1161, 1168 (2d Cir. 1994).

Such "affirmative misconduct" must consist, at minimum, of active misrepresentation or concealment; negligent, indifferent, or passive conduct by the Government will not suffice. See, e.g., United States v. Marine Shale Processors, 81 F.3d 1329, 1348-51 (5th Cir. 1996); United States v. Harvey, 661 F.2d 767, 775 (9th Cir. 1981); United States v. City of Toledo, 67 F. Supp. 603, 607 (N.D. Ohio 1994); United States v. City of Menominee, 727 F. Supp. 1110, 1121 (W.D. Mich. 1989). For example, in Alaska Limestone Corp. v. Hodel, 614 F. Supp. 642, 647 (D. Alaska 1985), the court rejected an estoppel claim even though Government officials had failed to comply with certain congressionally mandated deadlines. In so doing, the Alaska Limestone court concluded that the party claiming estoppel had offered nothing to show that the Government had "intentionally ignored" its responsibilities or "affirmatively sought to deceive or mislead" others. 614 F. Supp. at 648.

Moreover, "[t]he case for estoppel against the government must be compelling," and, at a minimum, requires proof of (1) a false representation of fact; (2) a purpose to invite action by the party to whom the representation was made; (3) ignorance of the true facts by that party; (4) reasonable reliance; (5) a showing of injustice; and (6) lack of undue damage to the public interest. ATC Petroleum, 860 F.2d at 1111; Graham, 222 F.3d at 1007; United States v. Philip Morris Inc., 300 F. Supp. 2d at 71-72; Moore v. Blue Cross & Blue Shield of the Nat'l Cap. Area, 70 F. Supp. 2d 9, 31 (D.D.C. 1999). Defendants must demonstrate that all these elements are satisfied in order for equitable estoppel to apply. See, e.g., Heckler, 467 U.S. at 61 ("[H]owever heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present."); ATC Petroleum, 860 F.2d at 1111; Trustees of Michigan Laborers'

Health Care Fund v. Gibbons, 209 F.3d 587, 591 (6th Cir. 2000); Kennedy v. United States, 965 F.2d 413, 417 (7th Cir. 1992).

4. The United States Is Not Subject to the Defenses of Unclean Hands or In Pari Delicto

a. The doctrine of unclean hands derives from the equitable maxim that one "who comes into equity must come with clean hands." See, e.g., Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945). Just as with waiver, equitable estoppel, and laches, this doctrine generally may not be invoked against the United States when it is "attempting to enforce a congressional mandate in the public interest." See SEC v. Gulf & Western Indus., Inc., 502 F. Supp. 343, 348 (D.D.C. 1980); Pan-American Petroleum & Transp. Co. v. United States, 273 U.S. 456, 505-506 (1927) (stating that principle that "he who seeks equity must do equity . . . will not be applied to frustrate the purpose of [the United States'] laws or to thwart public policy"); SEC v. Sprecher, 1993 WL 544306, *2 (D.D.C. 1993) ("an unclean hands defense does not lie in a civil enforcement action brought by a federal agency").[60] As noted above, Government civil RICO actions for equitable relief seek to enforce Congress' mandate to protect the public's interests. Thus, such civil RICO suits "enforc[e] a congressional mandate in the public interest," Gulf & Western, 502 F. Supp. at 348, thereby precluding the application of the doctrine of "unclean hands" against it. Accord United States v. Philip Morris Inc., 300 F. Supp. 2d at 74-76.

b. The doctrine of in pari delicto, which "literally means 'of equal fault,'" Pinter v. Dahl, 486 U.S. 622, 632 (1988), is closely related to the defense of "unclean hands." This defense is

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[60] Accord Kelley v. Thomas Solvent Co., 714 F. Supp. 1439, 1451 (W.D. Mich. 1989); United States v. Vineland Chem. Co., 692 F. Supp. 415, 423-24 (D.N.J. 1988).

not applicable to Government civil RICO lawsuits for the reasons discussed above, but for other legal reasons as well. In order for in pari delicto to apply, "[t]he plaintiff must be an active voluntary participant in the unlawful activity that is the subject of the suit." Pinter, 486 U.S. at 636. Indeed, "[p]laintiffs who are truly in pari delicto are those who have themselves violated the law in cooperation with the defendant." Id.

However, an action can only be barred by in pari delicto "if preclusion of suit does not offend the underlying statutory policies." Id. at 637-38; Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138 (1968) (rejecting in pari delicto defense to private treble damages antitrust suit where nothing in the statutory language indicated that Congress wanted to make in pari delicto defense available, and recognizing "inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes"). It is beyond question that permitting the in pari delicto defense to bar a RICO suit brought by the United States to address alleged violations of RICO and thus protect the American public would offend the important public purposes served by RICO. Accord United States v. Philip Morris Inc., 300 F. Supp. 2d at 76.

Further, the United States is not a "person" within the meaning of the RICO statute. See United States v. Bonanno Organized Crime Family, 879 F.2d 20, 21-27 (2d Cir. 1989); Peia v. United States, 152 F. Supp. 2d 226, 234 (D. Conn. 2001). Thus, the United States cannot, as a matter of law, participate in a RICO Enterprise under 18 U.S.C. § 1962(c) ("It shall be unlawful for any **person** . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs. . . .") (emphasis added), or participate in a RICO conspiracy to violate 1962(c) under 18 U.S.C. § 1962(d) ("It shall be unlawful for any **person** to conspire to violate

[the RICO statute].") (emphasis added). Thus, because the United States is not a person within the meaning of RICO, it may not be held liable for a violation of RICO.

D. Collateral Estoppel

Civil RICO, 18 U.S.C. § 1964 (d), explicitly authorizes the Government to invoke collateral estoppel to prove its civil RICO charges, and provides as follows:

> A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436, 443 (1970). Accord United States v. Console, 13 F.3d 641, 664 (3d Cir. 1993). Moreover, a party invoking collateral estoppel bears the burden of demonstrating that the issue of fact whose litigation he seeks to foreclose was actually decided in his favor by a valid and final judgment in an earlier proceeding. See Dowling v. United States, 493 U.S. 342, 350-51 (1990) (collecting cases); Console, 13 F.3d at 665, n. 28. To determine whether a party has carried his burden of establishing that a jury in a prior prosecution necessarily resolved a particular fact in his favor, "requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" Ashe, 397 U.S. at 444 (citation deleted). Accord Dowling, 493 U.S. at 350; Console, 13 F.3d at 665, n.28.

In accordance with the foregoing authority, courts in several Government civil RICO cases have collaterally estopped defendants from contesting issues and facts which underlaid defendants' prior criminal convictions.[61] For example, in United States v. Private Sanitation Indus. Ass'n, 899 F. Supp. 974, 980-81 (E.D.N.Y. 1994), the court held that under principles of collateral estoppel, a defendant's guilty plea in state court to the New York State offense of coercion in the first degree conclusively established that the defendant committed one predicate act of extortion, in violation of the Hobbs Act (18 U.S.C. § 1951), that was charged in the

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[61] However, collateral estoppel does not bar the United States from relitigating in a civil RICO case an issue upon which a defendant was acquitted in a prior criminal prosecution because a lesser standard of proof applies in a civil proceeding. In United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984), the Supreme Court held that a gun owner's acquittal on criminal charges involving firearms did not preclude a subsequent in rem civil forfeiture proceeding against those same firearms, explaining:

> [The acquittal did] not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt. . . [T]he jury verdict in the criminal action did not negate the possibility that a preponderance of the evidence could show that [the defendant] was engaged in an unlicensed firearms business. . . It is clear that the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel.

Id. at 361-62. Accord Dowling, 493 U.S. at 349 ("an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof"); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235 (1972) (holding that the Double Jeopardy Clause did not bar a forfeiture action subsequent to acquittal on the underlying offense because "the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel"); Helvering v. Mitchell, 303 U.S. 391, 397 (1938) (ruling that "[t]he difference in degree in the burden of proof in criminal and civil cases precludes application of the doctrine of res judicata"). See also, United States v. IBT, 787 F. Supp. 345, 351 (S.D.N.Y. 1992) (holding that a union officer's acquittal on criminal assault charges did not preclude a subsequent civil disciplinary charge, brought by a court-appointed officer in a Government civil RICO suit, based on the same conduct where the preponderance of evidence standard applied); United States v. Ianniello, 646 F. Supp. 1289, 1290-91 (S.D.N.Y. 1986), aff'd, 824 F.2d 203 (2d Cir. 1987) (holding that the defendant's prior acquittal on a criminal RICO conspiracy charge did not preclude a subsequent Government civil RICO suit based on the same conduct).

Government's civil RICO complaint. The court explained that even though the "state offense of coercion in the first degree does not constitute a RICO predicate act. . . a conviction for the state felony of coercion in the first degree can establish the elements of a Hobbs Act violation." Id. at 981. Accord United States v. Private Sanitation Indus. Ass'n, 811 F. Supp. 808, 813-15 (E.D.N.Y. 1992), aff'd, 995 F.2d 375 (2d Cir. 1993) (same as to New York State conviction for coercion in the second degree, and also holding that the defendant's prior guilty plea in state court to the New York misdemeanor offense of conspiring to commit the felony of Second Degree Bribery conclusively established in a subsequent Government civil RICO suit that he committed several state bribery offenses that constitute a predicate act of bribery under 18 U.S.C. § 1961 (1)(A)).

Moreover, in United States v. Local 30, United Slate, Tile, 686 F. Supp. 1139, 1165-66 (E.D.Pa. 1988), aff'd 871 F.2d 401 (3d Cir. 1989), the district court held that the individual union officials-defendants' prior criminal RICO convictions for conspiring to conduct, and conducting, the Roofers Union through a pattern of racketeering activity "collaterally estop them from denying [in a subsequent Government civil RICO lawsuit] that they conducted the affairs of the Roofers Union through a pattern of racketeering activity." 686 F. Supp. at 1165. The district court also held that:

> The statutory estoppel provided in 18 U.S.C. § 1964 (d) operates against the Union defendant as well, because the Union (the principal) is estopped and bound by the actions of its agents (the Union officials and representatives).

686 F. Supp. at 1166.[62]

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[62] See also United States v. IBT, 905 F.2d 610, 620-23 (2d Cir. 1990), aff'g, 725 F. Supp. 162 (S.D.N.Y. 1989) (holding that the defendants were collaterally estopped from denying the (continued...)

As noted above, collateral estoppel bars relitigation of finally resolved issues "between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. at 443. For example, in United States v. IBT, 754 F. Supp. 333, 338 (S.D.N.Y. 1990), the district court rejected a defendant's argument that disciplinary charges, brought by the Investigations Officer appointed by the district court pursuant to a consent decree in a Government civil RICO lawsuit, were barred by the doctrines of collateral estoppel and res judicata because the General President of the IBT had conducted a trusteeship hearing into the matter. The district court explained that "since the Investigations Officer was neither a party to the trusteeship proceeding nor in privity with the General President, those defenses were unavailable." 754 F. Supp. at 338.

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[62](...continued)
facts underlying their state criminal convictions in a disciplinary action brought by a court-appointed officer pursuant to a consent decree in a Government civil RICO lawsuit); United States v. IBT, 777 F. Supp. 1133, 1137 (S.D.N.Y. 1991), aff'd, 970 F.2d 1132 (2d Cir. 1992) (holding in the same Government civil RICO suit that "[b]ecause Parise entered a guilty plea to the criminal charge arising from the September 4, 1987 incident, he is collaterally estopped from contesting the facts underlying the disciplinary charge arising from the same incident.").

IV

JURISDICTION AND VENUE

A. Serving the Summons

"[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." Mississippi Pub. Corp. V. Murphree, 326 U.S. 438, 444-45 (1946). "[S]ervice of process in a federal action is covered generally by Rule 4 of the Federal Rules of Civil Procedure." ("Rule 4 "). Omni Capital Int'l. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104 (1987).

Rule 4(a) sets forth the required contents of a summons, and Rule 4(b) and (c) provides for the manner of issuance and service of a summons. Service of a summons may be waived pursuant to Rule 4(d).[63]

Rule 4(e) authorizes serving an individual within a judicial district of the United States and provides as follows:

> **(e) Serving an individual within a Judicial District of the United States.** Unless federal law provides otherwise, an individual -- other than a minor, an incompetent person, or a person whose waiver has been filed -- may be served in a judicial district of the United States by:
> (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or
> (2) doing any of the following:
> (A) delivering a copy of the summons and of the compliant to the

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[63] This Section addresses the amendments to the Federal Rules of Civil Procedure, including Rule 4, that absent Congressional action, will go into effect December 1, 2007. These amendments were undertaken to make the Rules more easily understood, and to make style and terminology consistent. The changes are primarily stylistic in content; however, where substantive changes are included, they will be specifically noted. See Memorandum from James C. Duff, Sec'y. Judicial Conference of the U.S., to The Chief Justice of the U.S. and the Assoc. Justices of the Supreme Court (Dec. 21, 2006) (Westlaw).

individual personally;
(B) leaving a copy of each at the individual's dwelling or usual place of adobe with someone of suitable age and discretion who resides there; or
(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Service of an individual in a foreign country is covered by Rule 4(f), which provides:

> **(f) Serving an Individual in a Foreign Country**. Unless federal law provides otherwise, an individual -- other than a minor, an incompetent person, or a person whose waiver has been filed -- may be served at a place not within any judicial district of the United States:
> (1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;
> (2) if there is no internationally agreed means, so if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:
> (A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;
> (B) as the foreign authority directs in response to a letter rogatory or letter of request; or
> (C) unless prohibited by the foreign country's law, by:
> (i) delivering a copy of the summons and the complaint to the individual personally; or
> (ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or
> (3) by other means not prohibited by international agreement, as the court orders.

Rule 4(h) provides for serving a corporation, partnership, or association as follows:

> **(h) Serving a Corporation, Partnership, or Association**. Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:
> (1) in a judicial district of the United States:
> (A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or
> (B) by delivering a copy of the summons and of the complaint to

> an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and - - if the agent is one authorized by statute and the statute so requires - - by also mailing a copy of each to the defendant; or (2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

Rule 4(m), provides as follows:

> **(m) Time Limit for Service.** If a defendant is not served [with a summons] within 120 days after the complaint is filed, the court -- on motion or on its own after notice to the plaintiff -- must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

"[T]he core function of service [of a summons] is to supply notice of the pendancy of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections." Henderson v. United States, 517 U.S. 654, 673 (1996).

Pursuant to Rule 4(m), a summons must be dismissed if it is not served "within 120 days after the complaint is filed," unless the court either has ordered "that service be made within a specified time" or the court has found that the plaintiff has shown "good causes for the failure" to timely serve the summons.[64] "If good cause exists, the extension must be granted. If good cause does not exist, the district court must consider whether to grant a discretionary extension of time." Boley v. Kaymark, 123 F.3d 756, 758 (3d Cir. 1997) (internal citations omitted). Accord Troxell v. Fedders of North America, Inc., 160 F.3d 381, 382-83 (7th Cir. 1998); CFTC v. Wall

[64] See, e.g., Henderson v. United States, 517 U.S. 654, 661-64 (1996); Boley v. Kaymark, 123 F.3d 756, 758-59 (3d Cir. 1997); CFTC v. Wall Street Underground, Inc., 221 F.R.D. 554, 556 (D. Kan. 2004).

Street Underground, Inc., 221 F.R.D. 554, 556 (D. Kan. 2004).

As one court noted, although "good cause" is not defined by Rule 4, it "seems to require a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified in the rules." Dominic v. Hess Oil V. I. Corp., 841 F.2d 513, 517 (3d Cir. 1988) (quoting WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1165 (2d ed. 1987)).

Courts consider various factors in deciding whether good cause exists, including:

> 1) whether the inadvertence reflected professional incompetence such as ignorance of rules of procedure, 2) whether an asserted inadvertence reflects an easily manufactured excuse incapable of verification by the court, 3) counsel's failure to provide for a readily foreseeable consequence, 4) a complete lack of diligence or 5) whether the inadvertence resulted despite counsel's substantial good faith efforts towards compliance. . . . [6] whether the enlargement of time will prejudice the opposing party.

Dominic, 841 F. 2d at 517 (citations omitted). Accord MacCauley v. Wahlig, 130 F.R.D. 302, 304 (D. Del. 1990).

Likewise, a court may grant a discretionary extension of time within which to serve a summons for a variety of reasons, including, "for example, if the applicable statute of limitations would bar the refiled action." Boley, 123 F. 3d at 758 (quoting FED.R.CIV.P. 4(m) Adv. Comm. Notes (1993)).

A district court's decision to dismiss the complaint for failure to comply with Rule 4(m) or whether to extend the time to serve a summons is reviewed under the above of discretion standard.[65]

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[65] See, e.g., Thompson v. Maldonado, 309 F.3d 107, 110 (2d Cir. 2002) (collecting cases); Boley, 123 F.3d at 758; Dominic, 841 F.2d at 516.

B. General Principles Governing Subject Matter and Personal Jurisdiction

1. Subject Matter Jurisdiction

Section 1331 of Title 28, United States Code, provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States," and hence confers subject matter jurisdiction upon federal district courts to hear a claim arising from an alleged violation of a federal law or statute (i.e., a federal question). See, e.g., Sec. Investor Prot. Corp. v. Vigman, 764 F.2d 1309, 1314 (9th Cir. 1985). Therefore, federal district courts are empowered to hear civil claims arising from an alleged violation of the RICO statute, 18 U.S.C. §§ 1961, et seq. See e.g., Rolls-Royce Motors, Inc. v. Charles Schmitt & Co., 657 F. Supp. 1040, 1055 (S.D.N.Y. 1987).

2. Due Process Requirements for State Courts' Exercise of In Personam Jurisdiction Under the Fourteenth Amendment as to State Claims

Regarding personal jurisdiction, it is well established that "the judgment of a [state] court lacking [personal] jurisdiction is void" and "violate[s] the Due Process Clause of the Fourteenth Amendment as well." Burnham v. Superior Court of California, County of Marin, 495 U.S. 604, 608-09 (1990). "The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. . . . It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." Omni Capital Int'l Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104 (1987) (quoting Ins. Corp. of Ireland v. Campagnie des Bauxities de Guinee, 456 U.S. 694, 702 (1982)).

The Supreme Court has addressed due process limitations upon courts' exercise of personal jurisdiction under the Due Process Clause of the Fourteenth Amendment as they apply to state courts, but "has never addressed the scope of Due Process Protections under the Fifth

Amendment in the jurisdictional context" in federal suits in federal courts. See Republic of Panama v. BCCI Holdings (Luxembourg), S.A., 119 F. 3d 935, 944 (11th Cir. 1997).[66]

For example, in Burnham v. Superior Court of California, 495 U.S. 604, 608 (1990), the Supreme Court held that consistent with the requirements of due process, California state courts had personal jurisdiction over a non-resident individual, who was personally served with process while temporarily in California, in a suit that was unrelated to his activities in California. The Supreme Court explained:

> Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a state have jurisdiction over non-residents who are physically present in the State. . . . [P]ersonal service upon a physically present defendant [is] sufficient to confer jurisdiction, without regard to whether the defendant was only briefly in the state or whether the cause of action was related to activities there.

Id. at 610, 612.

In the seminal case of International Shoe Co. v. State of Washington, 326 U.S. 310 (1945), the Supreme Court set forth due process requirements to obtain personal jurisdiction in state courts over defendants who were not physically present in the forum state. In International Shoe, the State of Washington sought to collect from International Shoe contributions to an unemployment compensation fund required by a state statute to be made by employers, and personally served a notice of assessment for the years in question upon a sales solicitor employed

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[66] On at least two occasions, the Supreme Court has noted that "the question of whether the Due Process Clause of the Fifth Amendment could be satisfied solely by reference to a defendant's contacts with the nation as a whole was not properly before it." Republic of Panama, 119 F.3d at 944 n.15, citing Omni Capital Int'l, 484 U.S. at 102 n.5; Asahi Metal Indus. v. Superior Court of California, 480 U.S. 102, 113 n.107 (1987) (plurality opinion). Due Process requirements under the Fifth Amendment regarding federal causes of action in federal courts are somewhat different than those under the Fourteenth Amendment as to causes of action under state law. See Section IV(B)(3) below.

by International Shoe in the State of Washington. International Shoe contended that the assessment violated due process because it "was not a corporation of the State of Washington and was not doing business within the State; that it had no agent within the State upon whom service could be made; and that appellant [International Shoe] is not a employer and does not furnish employment within the meaning of the statute." Id. at 312.[67]

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[67] The Supreme Court stated that the following facts were not in dispute:

> Appellant is a Delaware corporation, having its principal place of business in St. Louis, Missouri, and is engaged in the manufacture and sale of shoes and other footwear. It maintains places of business in several states, other than Washington, at which its manufacturing is carried on and from which its merchandise is distributed interstate through several sales units or branches located outside the State of Washington.
>
> Appellant has no office in Washington and makes no contracts either for sale or purchase of merchandise there. It maintains no stock of merchandise in that state and make there no deliveries of goods in intrastate commerce. During the years from 1937 to 1940, now in question, appellant employed eleven to thirteen salesmen under direct supervision and control of sales managers located in St. Louis. These salesmen resided in Washington; their principal activities were confined to that state; and they were compensated by commissions based upon the amount of their sales. The commission for each year totaled more that $31,000. Appellant supplies its salesmen with a line of samples, each consisting of one shoe of a pair, which they display to prospective purchasers. On occasion they rent permanent sample rooms, for exhibiting samples, in business buildings, or rent rooms in hotels or business buildings temporarily for that purpose. The cost of such rentals is reimbursed by appellant.
>
> The authority of the salesmen is limited to exhibiting their samples and soliciting orders from prospective buyers, at prices and on terms fixed by appellant. The salesmen transmit the orders to appellant's office in St. Louis for acceptance or rejection, and when accepted the merchandise for filling the orders is shipped f.o.b. from points outside Washington to the purchasers within the

(continued...)

The Supreme Court rejected these arguments, finding that International Shoe's activities in the State of Washington were sufficient to establish in personam jurisdiction over it regarding a cause of action that arose from International Shoe's activities in the forum state consistent with the requirements of due process under the Fourteenth Amendment. The Supreme Court explained:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

326 U.S. at 316 (citations omitted). The Supreme Court added that:

> "Presence" in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. . . . Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. . . . [The Due Process Clause of the Fourteenth Amendment] does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.

326 U.S. at 317, 319 (internal citations omitted).

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[67](...continued)

> state. All the merchandise shipped into Washington is invoiced at the place of shipment from which collections are made. No salesman has authority to enter into contracts or to make collections.

International Shoe, 326 U.S. at 313-14.

The Supreme Court concluded that International Shoe's activities "in the State of Washington were neither irregular or causal. They were systematic and continuous throughout the years in question," and were sufficient to establish in personam jurisdiction over International Shoe regarding a lawsuit that "arose out of those very activities." 326 U.S. at 320.

In so ruling, the Supreme Court also noted that "there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." 326 U.S. at 318.

Courts have interpreted International Shoe and its progeny to allow in personam jurisdiction in a forum state over a foreign corporation to enforce causes of action not arising out of that corporation's activities in the forum state where the corporation's activities in the forum state are "substantial" and "continuous and systematic," but to disallow in personam jurisdiction where a foreign corporation's activities in the forum state are minimal unless the cause of action at issue arises from those forum contacts. For example, in Wells Fargo & Co. v. Wells Fargo Exp. Co., 556 F.2d 406 (9th Cir. 1977), the court stated:

> The rules which emerge from these [Supreme Court] cases may be summarized as follows: If the defendant corporation has sufficient deliberate "minimum contacts" with the forum state, a court may acquire *in personam* jurisdiction over it in actions which arise from those forum contacts. If, however, a corporation's activities in the forum are so "continuous and systematic" that the corporation may in fact be said already to be "present" there, it may also be served in causes of action unrelated to its forum activities.

Id. at 413 (collecting cases). Accord Butcher's Union Local No. 498 v. SDC Inv., Inc., 788 F.2d

535, 540 (9th Cir. 1986).[68]

Moreover, the Supreme Court has explained that the requisite "minimum contacts" with a forum state may be established when a foreign corporation "purposely avails itself to the privilege of conducting activities within the forum State", such as when a foreign "corporation.. . delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980) (citations omitted). Accord Asahi Metal Ind. Co. v. Super. Ct. of Cal., Solano Cty., 480 U.S. 102, 111-12 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-77 (1985).

Furthermore, the Supreme Court has stated that even when such minimum contacts are established, due process requires that a state's exercise of personal jurisdiction over an out of state defendant not offend "'traditional notions of fair play and substantial justice.'" Asahi Metal Ind., 480 U.S. at 113 (citations omitted). In determining whether the "traditional notions of fair play and substantial justice," have been satisfied,

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[68] See, e.g., Burnham, 495 U.S. at 620 (stating that where jurisdiction of an absent defendant is based on minimum contacts with the forum state, those contacts must be related to the litigation at issue); Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984) ("When a controversy is related to or 'arises out of' a defendant's contacts with the forum, the Court has said that a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of *in personam* jurisdiction. . . . Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation." (citations and footnotes omitted)); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447 (1952) (ruling that it does not violate due process to exercise in personam jurisdiction over a foreign corporation when the corporation's activities in the forum State "was sufficiently substantial. . . . where the cause of action arose from activities entirely distinct from its activities in [the forum State]").

> A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."

Id. at 113 (citations omitted).[69]

3. Due Process Requirements Under the Fifth Amendment for Federal Courts' Exercising In Personam Jurisdiction Over Federal Causes of Action

As noted above in Section IV(B)(2), the Supreme Court has not squarely decided the requirements of due process under the Fifth Amendment as they apply to claims arising under federal law in federal courts. Some courts have ruled that although some of the considerations underlying the Supreme Court's personal jurisdiction jurisprudence under the Fourteenth Amendment are relevant to the dictates of due process under the Fifth Amendment, they are not parallel. For example, in BCCI Holdings (Luxembourg), 119 F. 3d at 945-48, the Eleventh Circuit explained that "contacts with the forum state - the relevant sovereign - are relevant under the Fourteenth Amendment primarily to justify the sovereign exercise of power in asserting jurisdiction [over a foreign defendant]. . . . Because minimum contacts with the United States - the relevant sovereign - satisfy the 'purposeful availment' prong in federal question cases, contacts with the forum state are not constitutionally required." Id. at 946 n.21 (citations omitted). "A court must therefore examine a defendant's aggregate contacts with the nation as a whole rather than his contacts with the forum state in conducting the Fifth Amendment analysis."

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[69] Generally, a district court's dismissal on jurisdictional grounds is reviewed under the *de novo* standard of review. See, e.g., PT United Can Co. Ltd. v. Crown Cork & Seal Co., 138 F.3d 65, 69 (2d Cir. 1998). Moreover, the due process requirements "of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue." Ins. Corp. of Ireland, 456 U.S. at 704.

Id. at 946-47 (collecting cases).

The Eleventh Circuit ruled that where, as under civil RICO, "Congress has provided for nationwide service of process, courts should presume that nationwide personal jurisdiction is necessary to further congressional objectives." Id. at 948; See Section IV(C)(3) below. The Eleventh Circuit further ruled that a defendant may overcome this presumption and establish a violation of due process under a two-part balancing test. First, "[t]he burden is on the defendant to demonstrate that the assertion of jurisdiction in the forum will 'make litigation 'so gravely difficult and inconvenient' that [he] unfairly is at a 'severe disadvantage' in comparison to his opponent.'" BCCI Holdings (Luxembourg), 119 F.3d at 948 (quoting Burger King, 471 U.S. at 478). Only if the defendant carries this burden, then the court must determine "if the federal interest in litigating the dispute in the chosen forum outweighs the burden imposed on the defendant." BCCI Holdings (Luxemborg), 119 F.3d at 948.

The Eleventh Circuit added:

> In evaluating the federal interest, courts should examine the federal policies advanced by the statute, the relationship between nationwide service of process and the advancement of these policies, the connection between the exercise of jurisdiction in the chosen forum and the plaintiff's vindication of his federal right, and concerns of Judicial efficiency and economy."

Id. at 948.[70]

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[70] Applying this balancing test, the Eleventh Circuit concluded that the defendant did not carry its initial burden of demonstrating "any constitutionally significant inconvenience," and, therefore, it was not necessary to "balance the federal interest at stake in this lawsuit." BCCI Holdings (Luxembourg), 119 F.3d at 948. In that respect, the court stated:

> First, we note that the First American defendants are large corporations providing banking services to customers in major metropolitan areas along the eastern seaboard. The fact that they

(continued...)

Other courts, however, have eshewed such balancing tests, ruling that where a federal statute authorizes nationwide service of process, "due process requires only that a defendant in a federal suit have minimum contacts with the United States, 'the sovereign that has created the court'" FTC v. Jim Walker Corp., 651 F.2d 251, 256 (5th Cir. 1981) (citation omitted). Accord Action Embroidery Corp. v. Atlantic Embroidery, Inc., 368 F. 3d 1174, 1179-80 (9th Cir. 2004); In Re Automotive Refinishing Paint Antitrust, 358 F.3d 288, 297-99 (3d Cir. 2004). Cf. Pinker v. Roche Holdings Ltd., 292 F.3d 361, 369-70 (3d Cir. 2002) (collecting cases). See also cases cited in Section IV (C)(3) below.

C. Civil RICO's Jurisdiction and Venue Provision

In order for a district court to adjudicate the merits of a lawsuit, it must have personal jurisdiction over the defendants, as discussed above in Section IV(B), and also venue must properly lie in the district where the lawsuit is brought. The Supreme Court has explained the distinction between "personal jurisdiction" and "venue", stating "personal jurisdiction. . . goes to the court's power to exercise control over the parties . . . [whereas] venue . . . is primarily a matter of choosing a convenient forum." Leroy v. Great Western United Corp., 443 U.S. 173, 180 (1979). Accord Sec. Investor Prot. Corp. v. Vigman, 764 F.2d 1309, 1313 (9th Cir. 1985)

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[70](...continued)

> may not have had significant contacts with Florida is insufficient to render Florida an unreasonably inconvenient forum. In addition, the fact that discovery for this litigation would be conducted throughout the world suggests that Florida is not significantly more inconvenient than other districts in this country. The First American defendants have presented no evidence that their ability to defend this lawsuit will be compromised significantly if they are required to litigate in Miami.

Id.

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("jurisdiction is the *power* to adjudicate, while venue, which relates to the place where judicial authority may be exercised is intended for the *convenience* of the litigants") (citations omitted). The Supreme Court has admonished that "[i]n most instances, the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." Leroy, 443 U.S. at 183-84.

1. Overview of Civil RICO's Jurisdiction and Venue Provision

Civil RICO's jurisdiction and venue provision, 18 U.S.C. § 1965, provides as follows:

> (a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agents, or transacts his affairs.
>
> (b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.
>
> (c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles form the place at which such court is held without approval given by a judge of such court upon a showing of good cause.
>
> (d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

Section 1965 was patterened after the antitrust statutes,[71] and it supplements the general federal venue provision set forth in 28 U.S.C. § 1391.[72] Therefore, both 18 U.S.C. § 1965 and 28 U.S.C. § 1391 may provide the basis for venue in a civil RICO lawsuit.[73] Moreover,

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[71] See S. Rep. No. 91-617 at 160-61. See also Cory v. Aztec Steel Bldg., Inc., 468 F.3d 1226, 1231 (10th Cir. 2006); City of New York v. Cyco. Net, Inc., 383 F. Supp. 2d 526, 541 (S.D.N.Y. 2005); Bulk Oil (USA) Inc. v. Sun Oil Trading Co., 584 F. Supp. 36, 39 (S.D.N.Y. 1983); Farmers Bank of State of Del. v. Bell Mtg. Corp., 452 F. Supp. 1278, 1280 (D. Del. 1978).

[72] When federal jurisdiction is premised on a federal question, as is involved in a civil RICO suit, 28 U.S.C. § 1391(b) establishes that venue is proper in:

> (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Moreover, 28 U.S.C. § 1391(c) provides:

> For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

[73] See, e.g., Cyco. Net, Inc., 383 F. Supp. 2d at 543-44 (collecting cases); Crenshaw v. Antokol, 287 F. Supp. 2d 37, 41-42 (D.D.C. 2003); Gatz v. Penboldt, 271 F. Supp. 2d 1143, 1158-59 (D. Neb. 2003); Eastman v. Initial Invs., Inc., 827 F. Supp. 336, 338 (E.D. Pa. 1993); Monarch Normandy Square Partners v. Normandy Square Assoc., 817 F. Supp. 899, 904 (D. Kansas 1993); Shuman v. Computer Assocs. Int'l, Inc., 762 F. Supp. 114, 116 (E.D. Pa. 1991); Delta Educ. Inc., v. Langlois, 719 F. Supp. 42, 49 (D. N.H. 1989); Anchor Glass Container Corp.

(continued...)

"[a]lthough 18 U.S.C. § 1965 is entitled 'venue and process,' the fact that it also authorizes service of process makes it relevant to personal jurisdiction because of Federal Rules of Civil Procedure 4 (k)(1)(D)." Esab Group, Inc. v. Centricut, Inc., 126 F.3d 617, 626 (4th Cir. 1997). Accord Cory v. Aztec Steel Bldg., Inc., 468 F.3d 1226, 1229-32 (10th Cir. 2006).

In PT United Can Co. Ltd. v. Crown Cork & Seal Co. Inc., 138 F.3d 65, 70 (2d Cir. 1998), the Second Circuit stated that Section "1965 must be read to give effect to all its sections in a way that renders a coherent whole." Accordingly, the Second Circuit succintly explained the different coverage of the subsections of Section 1965 as follows:

> First, § 1965(a) grants personal jurisdiction over an initial defendant in a civil RICO case to the district court for the district in which that person resides, has an agent, or transacts his or her affairs. In other words, a civil RICO action can only be brought in a district court where personal jurisdiction based on minimum contacts is established as to at least one defendant.
>
> Second, § 1965(b) provides for nationwide service and jurisdiction over "other parties" not residing in the district, who may be additional defendants of any kind, including co-defendants, third party defendants, or additional counter-claim defendants. This jurisdiction is not automatic but requires a showing that the "ends of justice" so require.

Id. at 71. The Second Circuit added that Section

> 1965(c) simply refers to service of subpoenas on witnesses. Thus, § 1965(d)'s reference to "[a]ll other process," means process other than a summons of a defendant or subpoena of a witness. This

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[73](...continued)
v. Stand Energy Corp., 711 F. Supp. 325, 327 n.7 (S.D. Miss. 1989); Miller Brewing Co., v. Landau, 616 F. Supp. 1285, 1291 (D. Wis. 1985); So-Comm, Inc. v. Reynolds, 607 F. Supp. 663, 665-66 (N.D. Ill. 1985); Sunray Enterprises Inc. v. David C. Bouza & Assocs., Inc., 606 F. Supp. 116, 119 (S.D.N.Y. 1984); Clement v. Pehar, 575 F. Supp. 436, 443 (N.D. Ga. 1983); DeMoss v. First Artists Prod. Co., 571 F. Supp. 409, 411 (N.D. Ohio 1983); VanShaick v. Church of Scientology of Cal., Inc., 535 F. Supp. 1125, 1133 n.6 (D.MA. 1982); Farmers Bank of State of Del., 452 F. Supp. at 1280.

> interpretation, one which gives meaning to the word "other" by reading sequentially to understand "other" as meaning "different from that already stated in subsections (a)-(c)," gives coherent effect to all sections of § 1965, and effectively provides for all eventualities without rendering any of the sections duplicative, without impeding RICO actions and without unnecessarily burdening parties.

Id. at 72.

2. The Bases for Venue Under Section 1965(a)

a. The District In Which Such Person "Resides"

For venue purposes, a corporation "resides" in the district in which it is incorporated,[74] and a natural person resides in the district wherein he/she maintains his/her domicile.[75]

b. "Found"

"The term 'is found' has been construed to mean presence and continuous local activity." Shuman v. Computer Associates International, Inc., 762 F. Supp. 114, 116 (E.D. Pa. 1991).[76] "For a corporate defendant in a private action under [§ 1965(a)] to be 'found' in the district within the meaning of this section, it must be present in the district by its officers and agents carrying on the business of the corporation."[77]

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[74] See, e.g., Wood v. Barnette, Inc., 648 F. Supp. 936, 939 (E.D. Va. 1986); Grappone, Inc. v. Subaru of America, Inc., 403 F. Supp. 123, 127-28 (D. N.H. 1975).

[75] See, e.g., Farmers Bank of State of Del., 577 F. Supp. at 35; 15 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3805 (1986).

[76] Accord Eastman, 827 F. Supp. at 338; Berry v. New York State Dept. of Corr. Services, 808 F. Supp. 1106, 1111 (S.D.N.Y. 1992) ("to be 'found' under [§ 1965(a)] demands more than mere occasional physical presence; some acts relevant to the RICO claim must have occurred in the venue sought by plaintiff, some kind of business must have been conducted").

[77] Van Shaick, 535 F. Supp. at 1133. Accord DeMoss, 571 F. Supp. at 411; Grappone, Inc., 403 F. Supp. at 128.

c. "Has an Agent"

The meaning of the third clause ("any district in which such person . . . has an agent") has apparently not yet been litigated in a civil RICO case. However, cases decided under Section 4 of the Clayton Antitrust Act, which contains identical language, suggest that the courts look primarily at the amount of control exercised by the alleged principal as well as "the extent to which the public is led to believe that it is dealing with the principal when it deals with the supposed agent" in determining whether the defendant has an agent present in the district. 15 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3818 (1986).

d. "Transacts His Affairs"

The "'transacts his affairs' language of Section 1965(a) has been held to be synonymous with the 'transacts business' language of section 12 of the Clayton Act, 15 U.S.C. § 22," which was the model for Section 1965(a). City of New York v. Cyco. Net, Inc., 383 F. Supp. 2d 526, 542 (S.D.N.Y. 2005). "Moreover, '[t]he test for transacting business for venue purposes under the antitrust law is co-extensive with the test for jurisdiction under New York CPLR § 302.'" Id. at 542 (citation omitted). Accordingly, "[t]he 'transacts his affairs' language in Section 1965(a) has been interpreted to mean that the defendants 'regularly transact business of a substantial and continuous character within the district.'" Gatz v. Pensoldt, 271 F. Supp. 2d 1143, 1158 (D. Neb. 2003) (citations omitted).[78]

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[78] Accord Eastman, 827 F. Supp. at 338; Shuman, 762 F. Supp. at 116; Dody v. Brown, 659 F. Supp. 541, 545 (W.D. Mo. 1987); Miller Brewing Co., 616 F. Supp. at 1288; Bukoil (USA) Inc., 584 F. Supp. at 39-40.

3. Nationwide Service of Process Under Section 1965(b)

The relevant legislative history states that "[s]ubsection (b) [of 18 U.S.C. § 1965] provides Nationwide service of process on parties, if the ends of justice require it," and that the "broad provisions [of § 1965] are required by the nationwide nature of the activity of organized crime in its infiltration efforts." S. REP. NO. 91-617 at 161. Thus, "Congress intended [Section 1965(b)] to enable plaintiffs to bring all members of a nationwide RICO conspiracy before a court in a single trial," and hence Section 1965(b) allows nationwide service of process to defendants residing outside the forum district court provided that the forum district court has "personal jurisdiction over at least one of the participants in the alleged multidistrict conspiracy," and the ends of justice require such service.[79]

Where, "nationwide service of process is authorized," as under Section 1965(b), the plaintiff need not establish that each defendant has contacts with the forum state. Rather,

> the plaintiff's **prima facie** burden is met by showing that a defendant has contacts with the United States. Minimum contacts with the forum state, as required under the traditional long-term jurisdiction analysis, is not necessary. A defendant's contact with the United States is sufficient to satisfy the requirements of due process.

Dooley v. United Technologies Corp., 786 F. Supp. 65, 71 (D.D.C. 1992).[80]

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[79] Butchers Union Local No. 498 v. SDC Inv., Inc., 788 F. 2d 535, 539 (9th Cir. 1986). Accord Cory, 468 F.3d at 1231; PT United Can Co., 138 F.3d at 70-72; Stauffacher v. Bennett, 969 F. 2d 455, 460-61 (7th Cir. 1992); Boon Partners v. Advanced Financial Concepts, Inc., 917 F. Supp. 392, 397 (E.D.NC. 1996); Hawkins v. Upjohn Co., 890 F. Supp. 601, 604 (E.D. Tex. 1994); Magic Toyota, Inc., v. Southwest Toyota Distributors, 784 F. Supp. 306, 311 (D.S.C. 1992); Bridge v. Invest America, Inc., 748 F. Supp. 948, 951 (D. RI. 1990); Rolls-Royce Motors v. Charles Schmitt, 657 F. Supp. 1040, 1055 (S.D.N.Y. 1987).

[80] Accord Cory, 468 F.3d at 1230-31; Boon Partners, 917 F. Supp. at 397; Herbstein v. Bruetman, 768 F. Supp. 79, 81 (S.D.N.Y. 1991); University Sav. Ass'n v. Bank of New Haven,

(continued...)

As noted above, nationwide service of process upon non-resident defendants pursuant to Section 1965(b) is not automatic; rather, "the ends of justice" must require such service. As of this writing, courts have not definitively interpreted the requirements of "the ends of justice." For example, the Ninth Circuit has ruled that to establish the requisite "ends of justice," "the plaintiff must show that there is no other district in which a court will have personal jurisdiction over all the alleged co-conspirators." Butcher's Union Local No. 498, 788 F. 2d at 539. Other courts, however, have taken a more flexible approach, ruling that the absence of another district having personal jurisdiction over all the defendants is a relevant, but not a dispositive factor. See, e.g., Cory, 468 F.3d at 1231-32; Magic Toyota, Inc., 784 F. Supp. at 311-12; Southmark Prime Plus, L.P. v. Falzone, 768 F. Supp. 487, 490-92 (D.Del. 1991).

Moreover, although Section 1965(b) "authorizes nationwide service of process," it does not authorize "*international* service. For that the RICO plaintiff must rely on the long-arm statute of the state in which he files his suit." Stauffacher v. Bennett, 969 F. 2d 455, 460-61 (7th Cir. 1992). Accord Nat'l Asbestos Medical Fund v. Philip Morris, 86 F. Supp. 2d 137, 142 (E.D.N.Y. 2000); Michelson, 709 F. Supp. at 1285.[81]

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[80](...continued)
765 F. Supp. 35, 37 (D. Conn. 1991); Bridge, 748 F. Supp. at 951; Rolls-Royce Motors, 657 F. Supp. at 1055; Soltex Polymer Corp. v. Fortex Industries, Inc., 590 F. Supp. 1453, 1458 (E.D.N.Y. 1984); Hodgden v. Needham-Skyles Oil Co., 556 F. Supp. 75, 77 (D.D.C. 1982).

[81] Some courts have indicated that 18 U.S.C. § 1965(d) provides for nationwide service of a summons against defendants. See, e.g., Esab Group, Inc. v. Centricut, 126 F. 3d 617, 626-27 (4th Cir. 1997); Republic of Panama v. BCCI Holdings (Luxembourg), 119 F.3d 935, 942 (11th Cir. 1997); Michelson v. Merrill Lynch, Pierce, Fenner & Smith, 709 F. Supp. 1279, 1285 (S.D.N.Y. 1989). However, that position arguably cannot be reconciled with the text of Section 1965 or its legislative history. As the Second Circuit stated in PT United Can Co. Ltd., 138 F.3d at 71-72, because Section 1965(b) refers to the service of a summons and Section 1965(c) refers to the service of a subpoena, Section 1965(d)'s reference to the service of "[a]ll other process," (continued...)

4. Transfer of Venue - Forum Non-Conveniens

Even if venue properly lies in a district, the district court has discretion to transfer a civil RICO suit to another district pursuant to the doctrine of forum *non conviens*. To obtain such a transfer, the defendant has the burden of establishing that "the litigation may be conducted elsewhere against all defendants," which may include a foreign country. PT United Can Co. Ltd., 138 F.3d at 73. "If there is no adequate alternative forum, the inquiry ends. . . . If the existence of an adequate alternative forum is established," the district court must consider "private factors includ[ing] the access to sources of proof, cost of obtaining willing witnesses, availability of compulsory process for unwilling witnesses, and other practical concerns," and "public factors [including] court congestion, interest of forums in deciding local disputes, and interest in issues of foreign law being decided by foreign tribunals." Id. at 73-74.[82]

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[81](...continued)
"means process other than a summons of a defendant or subpoena of a witness." Moreover, as noted above, the Senate Report regarding Section 1965 states that "[s]ubsection (b) [of 1965] provides nationwide service of process on parties," and not subsection (d). Accord Cory, 468 F. 3d at 1230-31.

[82] Accord Republic of Panama v. BCCI Holdings (Luxembourg), 119 F.3d at 951-53; Transunion Corp. v. Pepsico, Inc., 811 F. 2d 127, 129-30 (2d Cir. 1987); United States v. International Bhd. of Teamsters, 708 F. Supp. 1388, 1404 (S.D.N.Y. 1989); So-Comm, Inc. v. Reynolds, 607 F. Supp. at 665-67; Clement v. Pehar, 575 F. Supp. at 443-46; Hodgdon, 556 F. Supp. at 78-79.

V

PROCEDURAL MATTERS

A. Expedition of Actions

Section 1966 of Title 18, United States Code, provides as follows:

> Expedition of actions
>
> In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

As of this writing, there are no reported decisions interpreting Section 1966. The explicit terms of Section 1966 do not require that the district court give Government civil RICO lawsuits priority over other civil suits. However, its requirement that, upon receipt of the specified certification, a judge shall be designated immediately to hear and determine the action, implies that the action should be expeditiously considered.

B. Adequacy of the Pleading and Drafting the Complaint

1. Adequacy of the Pleading

a. General Principles

Rule 8(a), FED. R. CIV. P. provides, in relevant part, that:

> A pleading which sets forth a claim for relief. . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief and (3) a demand for judgment for the relief the

> pleader seeks. Relief in the alternative of several different types may be demanded.[83]

Pursuant to Rule 12(b)(6), FED. R. CIV. P., a complaint may be dismissed for "failure to state a claim upon which relief can be granted." "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations. . . [it] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level" and demonstrate "plausible grounds" for relief. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007). Accord Iqbal v. Hasty, 490 F.3d 143, 155-58 (2d Cir. 2007); Kuhns Brothers, Inc. v. Fushi Int'l, Inc., 2007 WL 2071622 (D. Conn. July 16, 2007); Hyland v. Homeservices of America, Inc., 2007 WL 2407233 (W.D. Ky. Aug. 17, 2007). Moreover, "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Bell Atlantic Corp., 127 S. Ct. at 1969..

Furthermore, in considering a motion to dismiss a complaint for alleged failure to state a claim, the court must view the factual allegations in the complaint in the light most favorable to the plaintiff, and those allegations must be presumed to be true. Papasan v. Allain, 478 U.S. 265, 283 (1986). See also Neitzke v. Williams, 490 U.S. 319, 327 (1989) ("What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations"); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other arounds by Davis v. Sherer, 468 U.S. 183, 191 (1984); Harris, 127 F.3d at 1123; Shear v. National Rifle Ass'n of America, 606 F.2d 1251, 1253 (D.C. Cir. 1979) . As the Supreme Court stated in Scheuer, 416 U.S. at 236:

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[83] The above-quoted version is in effect through November 30, 2007. Rule 8(a) will be amended effective December 1, 2007. This amendment clarifies Rule 8(a) but does not change the substance of the Rule.

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Accord Caribbean Broad. Sys., 148 F.3d at 1086. Indeed, the United States Court of Appeals for the District of Columbia pointedly stated: "The rule that the allegations of the complaint must be construed liberally and most favorably to the pleader is so well recognized that no authority need be cited." Sinclair v. Kleindienst, 711 F.2d 291, 293 (D.C. Cir. 1983).

Furthermore, in determining whether the complaint is sufficient, the court is limited to consideration of the four corners of the complaint. Shear, 606 F.2d at 1253; Caudle v. Thomason, 942 F. Supp. 635, 638 (D.D.C. 1996).

Moreover, it is also well established "that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957)(quoting Rule 8(a) (2), FED. R. CIV. P.) Accord Sinclair, 711 F.2d at 293 ("notice pleading' is sufficient") . "[U]nder Rule 8(a), [a] complaint need not state facts or ultimate facts or facts sufficient to constitute a cause of action." United States v. Private Sanitation Indus. Ass'n, 793 F. Supp. 1114, 1124 (E.D.N.Y. 1992) (internal quotations and citation deleted). Accord Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786,

790 (3d Cir. 1984). All that is required is that the complaint "provides enough factual information to make clear the substance of that claim." Caribbean Broad. Sys., 148 F.3d at 1086. "Plaintiffs . . .need only 'adduce a set of facts' supporting their legal claims in order to survive a motion to dismiss" under Rule 12(b)(6) . Wells v. United States, 851 F.2d 1471, 1473 (D.C. Cir. 1988). For more details and facts, the defendants must rely upon "the liberal opportunity for discovery and other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." Conley, 355 U.S. at 47-48. Accord Seville Indus. Mach. Corp., 742 F.2d at 790.

Indeed, motions to dismiss pursuant to Rule 12(b)(6) are "viewed with disfavor and [are] rarely granted." 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 at 321 (1990 ed.); Wilkerson v. United States, 839 F. Supp. 440, 442 (E.D. Tex. 1993). Courts are reluctant to dismiss a case on technical grounds and, consistent with the federal rules, prefer to decide cases on their merits. See, e.g., Kauffman v. Moss, 420 F. 2d 1270, 1276 (3d Cir.)(citing Foman v. Davis, 371 U.S. 178, 181 (1962)) (relying on Conley, court stated "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of . . . mere technicalities."); Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 961 (E.D. Tex. 1997); Yeitrakis v. Schering-Plough Corp., 804 F. Supp. 238, 240 (D.N.M. 1992).

In accordance with these principles, courts have repeatedly denied defendants' motions under Rule 12(b)(6) to dismiss the Government's civil RICO complaints.[84]

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[84] See, e.g., United States v. Philip Morris Inc., 116 F. Supp. 2d 131, 152-155 (D.D.C. 2000); United States v. Private Sanitation Indus. Ass'n, 793 F. Supp. 1114. 1123-49 (E.D.N.Y. 1992); United States v. Dist. Council of New York, 778 F. Supp. 738, 746-60 (S.D.N.Y. 1991); (continued...)

b. Application of Civil Rule 9(b)

Rule 9(b), FED. R. CIV. P. provides as follows:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.[85]

This particularity requirement serves two primary interests: "Protecting a defendant from reputational harm and 'strike' suits, and providing defendant sufficient information to respond to plaintiff's claims." Firestone v. Firestone, 76 F.3d 1205, 1211 (D.C. Cir. 1996) . Generally, Rule 9(b) is satisfied when the complaint "state[s] the 'time, place and content of the false misrepresentations, the fact misrepresented and what was retained or given up as a consequence of the fraud,'" and the identity of the party making the representation. Firestone, 76 F.3d at 1211 (citations deleted). Accord, Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1068 (5th Cir. 1994).

Although such allegations are sufficient to satisfy Rule 9(b), the Rule does not require such allegations. "Plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud." Seville Indus. Mach. Corp, 742 F.2d at 791. Accord, Mayer v. Dell, 1991 WL 21567 (D. D.C. 1991) .

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[84](...continued)
United States v. Int'l Bh'd. of Teamsters, 708 F. Supp. 1388, 1395-1401 (S.D.N.Y. 1989); United States v. Bonanno Organized Crime Family of La Cosa Nostra, 683 F. Supp. 1411, 1422-40 (E.D.N.Y. 1988), aff'd, 879 F. 2d 20 (2d Cir. 1989).

[85] The above-quoted version is in effect through November 30, 2007. Rule 9(a) will be amended effective December 1, 2007. This amendment clarifies Rule 9(a) but does not change the substance of the Rule.

At bottom, the complaint "must provide enough detail about the underlying facts which illustrate that [the defendant's] statements were fraudulent to allow a court to evaluate the claim in a meaningful way." Arazie v. Mullane, 2 F.3d 1456, 1465 (7th Cir. 1993). "However, the "plaintiff need not allege specific evidentiary details needed to prove his claim at trial in order to satisfy Rule 9(b) specificity." Formax, Inc. v. Hostert, 841 F.2d 388, 391 (Fed. Cir. 1988), (citing Seville Indus. Corp., 742 F.2d at 791-92). Cf. Shahmirzadi v. Smith Barney, Harris Upham & Co., 636 F. Supp. 49, 53 (D.D.C. 1985) ("Rule 9 should not be treated as requiring allegations of facts in the pleadings") (citations deleted). See also Brady v. Games, 128 F. 2d 754, 755 (D.C. Cir. 1942). Rather, "bare bones averments of fraudulent schemes coupled with plaintiff's allegations that defendant used the mails" in furtherance of the scheme to defraud is sufficient to allege mail fraud and wire fraud predicate acts. Formax, Inc., 841 F.2d at 391.

Although Rule 9(b) explicitly provides that intent and knowledge "may be averred generally," courts have held that the complaint must allege "specific facts that support an inference of fraud." Tuchman, 14 F.3d at 1068. See also, Greenstone v. Cambex Corp., 975 F.2d 22, 25 (1st Cir. 1992) (The complaint must allege "specific facts that make it reasonable to believe that defendant knew that a statement was materially false or misleading."); DiLeo v. Ernest & Young, 901 F.2d 624, 629 (7th Cir. 1990) ("the complaint still must provide a basis for believing that plaintiffs could prove scienter"); Powers v. British Vita, P.L.C., 57 F. 3d 176, 184 (2d Cir. 1995) (the plaintiff must "allege a motive for committing fraud and a clear opportunity for doing so").

Such inference of fraud and the requisite mental state "can be satisfied by alleging facts that show a defendant's motive to commit [the charged] fraud. Where a defendant's motive is

not apparent, a plaintiff may adequately plead scienter by identifying circumstances that indicate conscious behavior on the part of the defendant, though the strength of the circumstantial allegations must be correspondingly greater." Tuchman, 14 F.3d at 1068. Accord, Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46,50 (2d Cir. 1987), cert. denied, 484 U.S. 1005 (1988), overruled on other grounds by United States v. Indelicato, 865 F.2d 1370 (2d Cir.) (en banc), cert. denied, 493 U.S. 811 (1989).

Moreover, the pleading requirements of Rule 9(b) apply only to RICO predicate offenses sounding in fraud, and not to the other elements of RICO claims.[86]

2. Drafting the Complaint

Of course, the precise content of a civil RICO complaint will depend upon the particular circumstances of each case. However, several guidelines apply to virtually all Government civil RICO complaints. First, although short "notice pleading" is permitted by the Rules of Civil Procedure (see Section V(B)(1) above), it is the policy of OCRS that to the extent feasible, civil RICO complaints at least be as detailed as criminal RICO charges.[87] Therefore, attorneys should consult OCRS' Criminal RICO Manual, which provides guidance in drafting criminal RICO charges.

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[86] See, e.g., Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 26 n.4 (2d Cir. 1990); Rose v. Bartle, 871 F.2d 331, 366 (3d Cir. 1989); United States v. Dist. Council of New York, 778 F. Supp. at 746-47 (collecting cases); Federal Ins. Co. v. Ayers, 741 F. Supp. 1179, 1185-86 (E.D. Pa. 1990); United States v. IBT, 708 F. Supp. at 1395-96; United States v. Bonnano Organized Crime Family, 683 F. Supp. at 1427-28.

[87] Indeed, most Government civil RICO complaints have included lengthy, detailed allegations in excess of 75 pages.

For example, the complaint should include a distinct section describing the alleged RICO enterprise, including identifying the specific known components of the enterprise.[88] Where the alleged enterprise is an association-in-fact, the complaint should include an allegation, in substance, that the members of the enterprise functioned as a continuing unit over a period of time to achieve a shared objective or objectives of the enterprise. It is also preferable to allege a brief factual basis that supports such allegations.

The enterprise section of the complaint should also allege the principal purposes of the enterprise, the manner and means the members of the enterprise used to carry out its affairs, and a brief description of the enterprise's structure and the roles of the defendants in the enterprise.

Moreover, where the RICO complaint alleges a substantive RICO violation under 18 U.S.C. § 1962(c), the enterprise section should include allegations that satisfy the "operation or management" test of Reves v. Ernst & Young, 507 U.S. 170, 177-83 (1993) (holding that to establish liability for a substantive RICO violation under Section 1962(c), the United States must prove that the defendant participated in the operation **or** management of the enterprise). See OCRS' Criminal RICO Manual's discussion of Reves' "operation or management" test.

A substantive RICO violation under 18 U.S.C. § 1962(a),(b) or (c) should allege, in substance, that the defendant engaged in a pattern of racketeering activity that extended over a substantial period of time and/or posed a threat of continuing unlawful activity and that the alleged predicate racketeering acts were related to each other and/or to the affairs of the enterprise. See H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989); OCRS' Criminal RICO Manual's discussion of pattern of racketeering activity.

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[88] This requirement does not preclude alleging, in appropriate circumstances, that the enterprise included unspecificed persons or entities.

Furthermore, where the Government's civil RICO complaint alleges that a defendant is estopped from contesting certain predicate offenses or facts that were the basis of a defendant's prior conviction (see Section III(D) above), it is preferable to plead those offenses, to the extent feasible, just as they were alleged in the criminal indictment and to incorporate those allegations by reference to facilitate the application of collateral estoppel. It is also preferable to attach to the complaint certified copies of the indictment and the defendant's judgment of conviction that provide the basis for application of collateral estoppel.

Moreover, the complaint must allege that there is a reasonable likelihood that the defendant will commit a RICO violation in the future and include supporting factual allegations, as appropriate. For example, the Government's civil RICO complaints involving labor unions (see Section VIII below) typically have included extensive allegations of defendants' past unlawful activities, prior criminal convictions, and systemic corruption of the unions involved, and how the defendants obtained and exercised corrupt influence over the unions involved, that give rise to an inference that the defendants are reasonably likely to engage in similar unlawful activities in the future.

Finally, the complaint should include a separate section for the relief sought which provides, at minimum, a brief description of the specific relief sought.

C. There is No Right to a Jury Trial on Claims for Equitable Relief

1. The Seventh Amendment to the United States Constitution provides, in relevant part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved....

The Supreme Court has long held that the Seventh Amendment creates a right to a jury trial only in suits at "common law," but not in suits within the courts' equity jurisdiction. Thus, the Court stated in Parsons v. Bedford, 28 U.S. 433, 446 (1830):

> The phrase "common law," found in [the Seventh Amendment], is used in contradistinction to equity, and admiralty, and maritime jurisprudence. . . . It is well known, that in civil causes, in courts of equity and admiralty, juries do not intervene, ...

Accord Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41 (1989) ("We have consistently interpreted the phrase 'Suits at common law' to refer to 'suits in which **legal** rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.'")(quoting Parsons v. Bedford, 28 U.S. at 447); Tull v. United States, 481 U.S. 412, 417 (1987) ("The Court has construed [the Seventh Amendment] to require a jury trial on the merits in those actions that are analogous to 'Suits at common law.'. . . In contrast, those actions that are analogous to 18th - century cases tried in courts of equity or admiralty do not require a jury trial. . . . This analysis applies not only to common-law forms of action, but also to causes of action created by congressional enactment."); Barton v. Barbour, 104 U.S. 126, 133 (1881) ("[T]he right of trial by jury . . . does not extend to cases of equity jurisdiction."). See also Colgrove v. Battin, 413 U.S. 149, 155 & n. 9 (1973).

The Supreme Court has adopted a two-pronged test to determine whether a Seventh Amendment right to a jury trial attaches:

> To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty, the Court must examine both the nature of the action and of the remedy sought. First, we compare the statutory action to 18th - century actions brought in the courts of England prior to the merger of the courts of law and equity. . . . Second, we examine the remedy sought and determine whether it is legal or equitable in

nature.

Tull, 481 U.S. at 417-18 (citations omitted). Moreover, the Court has admonished that "[t]he second inquiry is the more important in [its] analysis." Teamsters v. Terry, 494 U.S. 558, 565 (1990). Accord Granfinanciera, 492 U.S. at 42; Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 745 (D.C. Cir. 1995) ("the second part of this test (the nature of the remedy) is more important that the first.").

It is particularly significant that the Supreme Court has repeatedly recognized that civil suits to obtain restitution or "disgorgement" of ill-gotten profits are equitable in nature. See, e.g., Harris Trust & Savings Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 250 (2000) ("an action for restitution of the property (if not already disposed of) or disgorgement of proceeds (if already disposed of), and disgorgement of the third person's profits derived therefrom" is "appropriate equitable relief"); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 352 (1998) ("we have characterized as equitable, such as actions for disgorgement of improper profits"); Teamsters, 494 U.S. at 570 ("we have characterized damages as equitable where they are restitutionary, such as in actions for disgorgement of improper profits") (citation and internal quotation omitted); Tull, 481 U.S. at 424 ("[A]n action for disgorgement of improper profits [is] traditionally considered an equitable remedy"); Porter v. Warner Holding Co., 328 U.S. 399, 402 (1946) (restitution of illegally obtained profits is "within the recognized power and within the highest tradition of a court of equity."). Likewise, the Supreme Court has repeatedly stated that suits to obtain injunctive relief, including to enjoin unlawful conduct, are equitable in nature, and are not "suits at common law."[89]

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[89] See, e.g., Mertens v. Hewitt Ass'n, 508 U.S. 248, 255 (1993); Tull, 481 U.S. at 423;

(continued...)

In Barton v. Barbour, the Supreme Court noted that such suits for injunctive relief and disgorgement of improperly obtained profits are suits in equity to be tried without a jury, stating:

> Thus, upon a bill filed for an injunction to restrain the infringement of letters - patent, and for an account of profits for past infringement, it is now the constant practice of courts of equity to try without a jury issues of fact relating to the title of the patentee, involving questions of the novelty, utility, prior public use, abandonment, and assignment of the invention patented. **The jurisdiction of a court of equity to try such issues according to its own course of practice is too well settled to be shaken.**

104 U.S. at 133-34 (emphasis added).

2. In accordance with the foregoing authority, courts have held that there is no right to a jury trial in Government suits pursuant to 18 U.S.C. § 1964(a). For example, in United States v. Int'l Bhd. of Teamsters, 708 F. Supp. 1388 (S.D.N.Y. 1989), the court stated:

> The Government's complaint clearly seeks equitable relief in that it seeks injunctions and the appointment of a "court liaison officer." The only demand for relief that would result in the payment of money is the demand for disgorgement of proceeds derived from alleged RICO violations and attorney's fees. Disgorgement and attorney's fees are incidental to equitable relief, and thus not considered actions at law. . . . As such, the relief is equitable in nature, thereby not giving rise to the right to a jury trial.

Id. at 1408. Accord United States v. Philip Morris Inc., 273 F. Supp. 2d 3 (D.D.C. 2002) (holding that defendants did not have a right to a jury trial in Government's civil RICO suit for equitable relief, including injunctive relief, disgorgement of unlawful proceeds, appointment of court officers, a medical monitoring fund and other equitable remedies).

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[89](...continued)
Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 291-92 (1960); United Steelworkers of America v. United States, 361 U.S. 39, 40-41 (1959); Porter, 328 U.S. at 399; Barton, 104 U.S. at 133-34.

Likewise, courts have repeatedly held that a Seventh Amendment right to a jury trial does not attach in suits by the Securities and Exchange Commission ("SEC") to enjoin violations of the securities laws and to obtain disgorgement of profits, even if paid to the United States, because such suits are clearly "equitable in nature."[90]

As the Second Circuit explained in SEC v. Commonwealth, supra:

> The [demand for a jury trial] seems surprising since it has been assumed for decades that a suit for an injunction, whether by the Government or a private party, was the antithesis of a suit "at common law" in which the Seventh Amendment requires that the right to trial by jury "shall be preserved." In 1791, when the Seventh Amendment became effective, injunctions, both in England and in this country, were the business of courts of equity, not of courts of common law.
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> . . .
>
> A historic equitable remedy was the grant of restitution "by which defendant is made to disgorge ill-gotten gains". . . [for which] there is no right to jury trial. . . Disgorgement of profits in an action brought by the SEC to enjoin violations of the securities laws appears to fit this description; **the court is not awarding damages to which plaintiff is legally entitled but is exercising the chancellor's discretion to prevent unjust enrichment.**

574 F.2d at 95 (internal quotations and citations deleted) (emphasis added).[91]

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[90] See, e.g., SEC v. Rind, 991 F.2d 1486, 1493 (9th Cir. 1993); SEC v. Tome, 833 F.2d 1086, 1096 & n. 7 (2d Cir. 1987); SEC v. Commonwealth Chem. Sec., 574 F.2d 90, 94-96 (2d Cir. 1978); Bradford v. SEC, 278 F.2d 566, 567 (9th Cir. 1960); SEC v. Asset Mgmt. Corp., 456 F. Supp. 998, 999-1000 (S.D. Ind. 1978); SEC v. Petrofunds, Inc., 420 F. Supp. 958, 959-60 (S.D.N.Y. 1976); SEC v. Associated Minerals, Inc., 75 F.R.D. 724 (E.D. Mich. 1977). Cf. SEC v. Blavin, 760 F.2d 706, 713 (6th Cir. 1985) ("the district court possesses the equitable power to grant disgorgement"); SEC v. Williams, 884 F. Supp. 28, 30-31 (D. Mass. 1995).

[91] Courts have likewise held that a right to a jury trial does not apply to suits by private litigants to obtain a wide variety of equitable relief, including suits for recovery of money. See, e.g., Klein v. Shell Oil Co., 386 F.2d 659, 663-64 (8th Cir. 1967) (suit for specific performance of an executory contract, pursuant to an option agreement); Railex Corp. v. Joseph Guss & Sons, Inc., 40 F.R.D. 119, 123 (D.D.C. 1966) (patent infringement suit for "final injunctions and an

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D. Standards Governing Motions for Summary Judgment

1. General Principles

Under Rule 56, summary judgment on a particular issue is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), FED. R. CIV. P. When "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citation omitted). A dispute about a material fact is genuine "if the evidence is such that a reasonable [trier of fact] could return a verdict for the non-moving party." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986). Whether a fact is "material" is determined by reference to the substantive law – "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id.

A court should consider motions for summary judgment "with caution so that no person will be deprived of his or her day in court to prove a disputed material factual issue." Greenberg v. FDA, 803 F.2d 1213, 1216 (D.C. Cir. 1986); Public Citizen Health Research Group v. FDA, 953 F. Supp. 400, 402 (D.D.C. 1996); Virtual Def. & Dev. Int'l, Inc. v. Republic of Moldova,

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[91](...continued)
accounting of profits, with a prayer for incidental legal relief in the form of an award of money damages"), aff'd, 382 F.2d 179 (D.C. Cir. 1967); Gauthreaux v. Baylor Univ. Med. Ctr., 876 F. Supp. 847, 848-49 (N.D. Tex. 1994) (Plaintiff's suit for backpay for age discrimination under the Rehabilitation Act, 29 U.S.C. § 701 et seq.); Nedd v. Thomas, 316 F. Supp. 74, 76-78 (M.D. Pa. 1970) (suit by retired union members to compel trustees of a union benefit fund to redress a breach of trust by restoring money lost to the fund).

133 F. Supp. 2d 9, 15 (D.D.C. 2001). Consistent with this principle, a court "should review all of the evidence in the record," Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150 (2000), and must accept the evidence of the nonmoving party as true and draw all reasonable inferences in favor of the nonmovant. Anderson, 477 U.S. at 255.[92] Additionally, "[i]f the evidence presented on a dispositive issue is subject to conflicting interpretations, or reasonable persons might differ as to its significance, summary judgment is improper." Greenberg, 803 F.2d at 1216. At the summary judgment stage, "the court is not to make credibility determinations or weigh the evidence." Dunaway, 310 F.3d at 761 (citing Reeves, 530 U.S. at 150).

A party may move for partial summary judgment on particular elements of its claim for liability. See, e.g., United States v. Philip Morris USA, Inc., 327 F. Supp. 2d 13, 18 (D.D.C. 2004) (granting the United States' motion for partial summary judgment, finding that the Government proved that the RICO defendants were distinct from the alleged RICO enterprise); Virden v. Graphics One, 623 F. Supp. 1417 (C.D. Cal. 1986) (granting plaintiff summary judgment on certain elements of civil RICO claim).

A party also may appropriately seek summary judgment to resolve issues of law. See Philip Morris USA, Inc., 327 F. Supp. 2d at 17 ("summary judgment is appropriate for purely legal questions"); United States v. Philip Morris USA Inc., et al., 263 F. Supp. 2d 72, 76 (D.D.C. 2003) ("In the pending [Summary Judgment] Motions, we are concerned with issues of law, rather than factual disputes."); see also Crain v. Board of Police Comm'rs, 920 F.2d 1402, 1405-06 (8th Cir. 1990); Adler v. Madigan, 939 F.2d 476, 478 (7th Cir. 1991); Wyoming Outdoor

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[92] See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Dunaway v. Int'l Bhd. of Teamsters, 310 F.3d 758, 761 (D.C. Cir. 2002); Borgo v. Goldin, 204 F.3d 251, 254 (D.C. Cir. 2000).

Council v. Dombeck, 148 F. Supp. 2d 1, 7 (D.D.C. 2001) ("When the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate.") (citing Crain); Swan v. Clinton, 932 F. Supp. 8, 10 (D.D.C.), aff'd, 100 F.3d 973, 976 (D.C. Cir. 1996) (recognizing that district court's grant of summary judgment "was based on a pure question of law").[93]

Moreover, summary judgment is appropriate to dispose of affirmative defenses that are insupportable as a matter of law.[94] As a defendant bears the burden of proving his affirmative defenses at trial, Rule 56(c) mandates summary judgment rejecting any such defense where the defendant has "fail[ed] to make a showing sufficient to establish the existence of an element essential to" that affirmative defense. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see also id. at 323-24 ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims **or defenses"** (emphasis added). Id. at 327 (Rule 56 must be construed to permit parties opposing affirmative defenses to demonstrate, prior to trial, that the defenses have no factual basis).

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[93] See also Warner v. United States, 698 F. Supp. 877, 880-82 (S.D. Fla. 1988) (resolving legal issue on motion for partial summary judgment to "narrow the issues in the case, advance the progress of the litigation, and provide the parties with some guidance in how they proceed with the case.").

[94] See, e.g., Paraskevaides v. Four Seasons Washington, 292 F.3d 886 (D.C. Cir. 2002) (statutory defense of D.C. Code § 30-101 unavailable as a matter of law); Gray v. Bell, 712 F.2d 490, 496 (D.C. Cir. 1983) (qualified immunity); Reed Research, Inc. v. Schumer Co., 243 F.2d 602 (D.C. Cir. 1957); United States v. Philip Morris USA Inc., 327 F. Supp. 2d at 6-7 (granting United States' motion to dismiss several affirmative defenses); United States v. Philip Morris, 263 F. Supp. 2d at 81 (granting United States' motion for summary judgment, denying defendants' affirmative defense based on pre-emption); see also United States v. Bailey, 444 U.S. 394, 412-413 n.9 (1980) ("In a civil action, the question whether a particular affirmative defense is sufficiently supported by testimony to go to the jury may often be resolved on a motion for summary judgment.").

The moving party bears the initial burden of "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." Id. at 325. However, the party opposing summary judgment "may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); Celotex, 477 U.S. at 323-25. The "mere existence of a scintilla of evidence" is insufficient to oppose a summary judgment motion under Rule 56. Liberty Lobby, 477 U.S. at 252. Indeed, if the evidence presented by the opposing party is "merely colorable" or "not significantly probative," summary judgment may be granted. Id. at 249-50 (citations omitted); see also Matsushita, 475 U.S. at 586 (party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts"). Accordingly, conclusory denials and statements by the party opposing summary judgment are insufficient to preclude summary judgment.[95]

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[95] See, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)("Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and. . . designate 'specific facts showing that there is a genuine issue for trial.'"); Ben-Kotel v. Howard University, 319 F.3d 532, 536 (D.C. Cir. 2003)("If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted); Greene v. Dalton, 164 F.3d 671, 675 (D.C. Cir. 1999) (holding that "conclusory" statements and "unsubstantiated allegations" are not sufficient to defeat a properly supported motion for summary judgment); Harding v. Gray, 9 F.3d 150, 154 (D.C. Cir. 1993) ("a mere unsubstantiated allegation . . . creates no 'genuine issue of fact' and will not withstand summary judgment"); Alyeska Pipeline Service Co. v. U.S. E.P.A., 856 F.2d 309, 314 (D.C. Cir. 1988)("a motion for summary judgment adequately underpinned is not defeated simply by a bare opinion or an unaided claim that a factual controversy persists."); Gardels v. CIA, 689 F.2d 1100, 1106 n.5 (D.C. Cir. 1982) (affiant's "views" insufficient to raise triable issue); Dickerson v. SecTek, Inc., 238 F. Supp. 2d 66, 72-73 (D.D.C. 2002) ("the nonmoving party's opposition must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for trial."); Williams v. Verizon Washington DC, Inc., 266 F. Supp. 2d 107, 115 (D.D.C. 2003)("the non-movant may not rely on conclusory allegations, but must present specific facts from which a reasonable jury could conclude in the non-movant's favor"); Cooper v. First Government Mort. & Investors, 238 F. Supp. 2d 50, 53

(continued...)

2. Issues of Intent Generally are Ill-Suited for Summary Judgment

Generally, issues of intent and credibility are inappropriate for summary judgment. See, e.g., Citizens Bank of Clearwater v. Hunt, 927 F.2d 707, 711 (2d Cir. 1991).[96] For example, in a fraud case, the issue of whether a defendant acted with the requisite fraudulent intent is "purely a question of fact." Id.[97] Likewise, courts have repeatedly held that where the non-movant adduces expert opinions in support of his claims regarding intent summary judgment is inappropriate.[98]

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[95](...continued)
(D.D.C. 2002)("the non-moving party may not rely solely on allegations or conclusory statements").

[96] Accord Leggett & Platt, Inc. v. Hickory Springs Mfg. Co., 285 F.3d 1353, 1361-62 (Fed. Cir. 2002); Provenz v. Miller, 102 F.3d 1478, 1489-90 (9th Cir. 1996); National Soffit & Escutcheons, Inc. v. Superior Sys., Inc., 98 F.3d 262, 267 (7th Cir. 1996); Kand Med., Inc. v. Freund Med. Prods., Inc., 963 F.2d 125, 127 (6th Cir. 1992); Clements v. County of Nassau, 835 F.2d 1000, 1005 (2d Cir. 1987); ABB Daimler-Benz Transport. (N. Amer.), Inc. v. Nat'l RR Passenger Corp., 14 F. Supp. 2d 75, 86 (D.D.C. 1998); In re McGuirl, 162 B.R. 630, 634 (D.D.C. 1993); Mandelkorn v. Patrick, 359 F. Supp. 692, 697 (D.D.C. 1973).

[97] See also Provenz, 102 F.3d at 1489; Kand Med. Inc., 963 F. 2d at 127; Clements, 835 F. 2d at 1005; In re McGuirl, 162 B.R. at 634. Just as "the mere incantation of intent or state of mind [does not] operate as a talisman to defeat an otherwise valid [summary judgment] motion," Citizens Bank of Clearwater, 927 F. 2d at 711 (internal quotation and citation omitted), the mere denial of fraudulent intent does not justify granting a defendant's summary judgment motions in the face of evidence of fraudulent intent.

[98] See, e.g., Hunt v. Cromartie, 526 U.S. 541, 549-54 (1999) (holding that district court erred in granting summary judgment where non-movant provided expert testimony which supported the inference that moving defendant had necessary intent); Provenz, 102 F.3d at 1490-91; In Re Worlds of Wonder Sec. Litig., 35 F.3d 1407, 1425-26 (9th Cir. 1994); See generally Echazabal v. Chevron USA, Inc., 336 F.3d 1023, 1035 (9th Cir. 2003); TFWS, Inc. v. Schafer, 325 F.3d 234, 242 (4th Cir. 2003) (same); Rodgers v. Monumental Life Ins. Co., 289 F.3d 442, 449 (6th Cir. 2002).

VI

DISCOVERY

A.____Civil Investigative Demands ("CID")

1. RICO's CID Provisions

Title 18, United States Code, Section 1968 provides as follows:

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall--

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall--

(1) contain any requirement which would be held to be unreasonable if contained in a subpena (sic) duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by--

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f)(1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available

for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of--

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation,

the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly--

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto,

except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

2. Background

RICO's CID provisions were modeled after the CID provisions of antitrust laws, i.e., 15 U.S.C. §§ 1311-1314. See H.R. REP. No. 91-1549, 91st Cong., 2d Sess. 58 (1970);

see also Section II(D) above; United States v. Forsythe, 429 F. Supp. 715, 721 (W.D. Pa. 1977), rev'd on other grounds, 560 F.2d 1127 (3d Cir. 1977)(observing in dicta that a RICO civil investigative demand is an "analogy to antitrust litigation"). A CID, while similar to a subpoena, is a pre-litigation discovery tool that the Government may use to compel document production before commencing a civil or criminal investigation. Specifically, pursuant to 18 U.S.C. § 1968(a), the Attorney General[99] is authorized to issue and serve a written CID upon any person and/or enterprise believed to possess or be in control of materials that may be relevant to a civil or criminal RICO investigation.[100] Unlike a federal grand jury subpoena, however, a CID may not compel testimony but, instead, only the production of "documentary materials." A CID requires the recipient to comply absent a successful challenge for unreasonableness or privilege.[101]

Despite RICO's enactment in 1970, there is a dearth of case law discussing CIDs' application in RICO cases. In fact, as of the time of this writing, there are no published cases which squarely analyze CIDs in the RICO context. Instead, the published cases that reference RICO CIDs make only fleeting references to the statute in discussing collateral matters. See, e.g., Doe v. Ashcroft, 334 F. Supp. 2d 471, 487 (S.D. N.Y. 2004), vacated on other grounds, Doe v. Gonzales, 449 F.3d 415 (2d Cir. 2006)(observing, in dicta, that "the Government may

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[99] 18 U.S.C. § 1961(10) defines the "Attorney General." (See Section VI(A)(3) below).

[100] See 18 U.S.C. § 1968(a). Although section 1968(a) explicitly authorizes the use of CIDs prior to the institution of a criminal proceeding, CIDs are most often used in civil investigations. Once a criminal investigation has commenced, however, it may be much more expeditious to use a grand jury subpoena to acquire materials, given the power to compel both testimony and physical evidence.

[101] See 18 U.S.C. § 1968(a); see also 18 U.S.C. § 1968(d). These limitations will be discussed below in this section.

issue subpoenas related to criminal investigations even without initiating a formal criminal proceeding" in prosecuting racketeering cases under the RICO statute and that the process is governed by rules that allow for judicial review); Nagle v. Merrill Lynch, 790 F. Supp. 203, 208 (S.D. Iowa 1992)(notes that Section 1968 allows the Attorney General to issue a CID to any "'person or enterprise' to produce relevant materials"); Intel Corp. v. Hartford Acc. & Indem. Co., 662 F. Supp.1507, 1510 (N.D. Cal. 1987), abrogated on other grounds, Tafflin v. Levitt, 493 U.S. 455 (1990) (citation omitted); Karel v. Kroner, 635 F. Supp. 725, 730 (N.D. Ill. 1986)(recognizing that Section 1968 authorizes "Attorney General and his designees" to issue CIDs); Kinsey v. Nestor Exploration, Ltd., 604 F. Supp. 1365, 1370 (E.D. Wash. 1985), abrogated on other grounds, Tafflin, 493 U.S. 455 (recognizing that Section 1968 gives Attorney General exclusive power to issue CIDs); United States v. Hossbach, 518 F. Supp. 759, 766 n.1 (E.D. Pa. 1980) (noting, in dicta in a non-RICO narcotics case, that "the Attorney General was granted executive subpoena power in conducting investigations under the [RICO] Act, 18 U.S.C. § 1968 ").[102] Accordingly, throughout this Section, references will be made to antitrust and grand jury subpoena case law as supporting authority where appropriate and instructive.

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[102] Similarly, the smattering of unpublished cases that involve RICO CIDs provide only cursory observations about statutory language or note the exclusive province of the Attorney General (or his designees) to issue CIDs. See, e.g., Prince v. Schofield, 1999 WL 1007344 (E.D.N.Y. Sept. 23, 1999) (unpublished) (observing that only the Attorney General, and not a private citizen, has power to issue a CID); United States v. Eisenberg, 773 F. Supp. 662, 702 (D.N.J. 1991)(mentions CIDs in a footnote that discusses U.S. Attorney Manual § 9-110.101 noting that before CIDs may issue, prior approval is needed from the Criminal Division); United States v. Benjamin, 1986 WL 15567 (E.D. Cal. May 1, 1986) (same as Eisenberg).

3. Issuance of a CID

Under Section 1968(a), the Attorney General may issue a CID when there is "reason to believe"[103] that any person or enterprise may have "documents" relevant to a racketeering investigation.[104] Title 18, United States Code, Section 1961(9) defines "documents" to include recordings as well as books and papers. The "reason to believe" standard has not been defined under RICO and has not been significantly developed under the analogous antitrust case law.

The CID is designed to be an investigative tool. Because it is issued prior to the filing of a complaint, it allows a civil investigation to continue without being involved in "full-blown litigation." Materials submitted in response to a CID are privileged from disclosure, except for certain statutory exemptions. See 18 U.S.C. § 1968(f)(3). If the civil investigation uncovers evidence of criminal violations, the information can be presented to a grand jury. See 18 U.S.C. § 1968(f)(4). Also, the document custodian may make CID materials available to government attorneys for use in a court or grand jury proceeding which involves racketeering activity. See 18 U.S.C. § 1968(f)(4). It is clear that CID material can be used for a criminal grand jury investigation, and there is no requirement that CID authority cease upon the commencement of a criminal investigation.[105]

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[103] See, e.g., Australia/Eastern U.S.A. Shipping Conference v. United States, 1981 WL 2212 (D.D.C. Dec. 23, 1981)(Government argued that it was not required to have probable cause in order to investigate with antitrust CID; court did not reach issue.).

[104] Under 18 U.S.C. § 1961(8), a racketeering investigation is defined as "any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter."

[105] Under 18 U.S.C. § 1968(f)(4), the document custodian may deliver CID materials to

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A CID can be served upon any person or enterprise believed to have possession, custody, or control of relevant documents. Because the CID power enables the Government to obtain documents from individuals or companies, which are not targets of the investigation, the Government may often obtain more information than is normally available under civil discovery. See generally FED. R. CIV. P. 26(b).

Pursuant to 18 U.S.C. § 1968(a), the Attorney General must issue the CID. However, 18 U.S.C. § 1961(10) defines the "Attorney General" to include:

> the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

Thus, pursuant to this provision, the Attorney General, the Deputy Attorney General or any Assistant Attorney General of the United States may issue a CID. Any other employee of the Department of Justice or any other Department may issue a CID **only** if the Attorney General of the United States specifically designates such person to carry out the powers conferred on the Attorney General by the RICO statute.[106]

(...continued)
any attorney for the United States designated to appear before any court or grand jury. The Antitrust Division's CID authority, however, ceases when the CID uncovers evidence of criminal violations necessitating investigation by a grand jury. See H.R. REP. No. 94-1343, 94th Cong., 2d Sess. 11, reprinted in 1976 U.S.C.C.A.N. 2603.

[106] See 18 U.S.C. § 1968(a)(Attorney General may issue a CID in writing).

Moreover, the U.S. Attorney's Manual, Section 9-110.320, requires the review and approval of the Organized Crime and Racketeering Section before a CID may be issued. The submitting attorney should allow three weeks for review of the CID. Prior to submitting a proposed CID for review, the Government attorney should ensure that the CID does not contravene any other statutes or departmental regulations. For example, a CID should not be issued to an attorney for information relating to representation of a client unless the Assistant Attorney General finds that certain conditions are met.[107] Also, no CID may be issued to a reporter or news media organization except as permitted by 28 C.F.R. § 50.10. Lastly, CIDs should not be used to obtain customer transaction records from a financial institution without complying with the Right to Financial Privacy Act of 1978. [108]

4. Content of a CID

Section 1968(b) sets forth the criteria for a valid CID. Specifically, the CID must adequately describe, with "definiteness and certainty," the class of documents sought to be produced.[109] In particular, the CID must:

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;
(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;
(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

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[107] See United States Attorneys' Manual § 9-13.410.

[108] See 12 U.S.C. §§ 3401- 422; United States Attorneys' Manual § 9-13.800.

[109] See 18 U.S.C. § 1968(b)(2). RICO's legislative history states that the CID should "fairly identify the documents being demanded." H.R. REP. No. 91-1549, 91st Cong., 2d Sess. 58, reprinted in 1970 U.S.C.C.A.N. 4035.

(4) identify the custodian to whom such material shall be made available.[110]

The information in (1), (3), and (4) can be provided in a standard cover page that attaches a list of documents demanded under the CID.

The nature of the conduct, under (1) above, need only be generally described. For example, in Petition of Gold Bond Stamp Co., 221 F. Supp. 391, 397 (D. Minn. 1963), aff'd, 325 F.2d 1018 (8th Cir. 1964), the court rejected a challenge to an antitrust CID, and held that the nature of the conduct being investigated could be set forth in general terms. The test, the court explained, was whether the description of the nature of the conduct being investigated was "sufficient to inform adequately the person being investigated and sufficient to determine the relevancy of the documents demanded for inspection." Gold Bond, 221 F. Supp. at 397.[111] Finally, the CID must identify the custodian for the documents. The custodian is appointed by the Attorney General. See Section VI(A)(6) below for a discussion of the custodian's duties and responsibilities.

5. Proper Service of a CID

Sections 1968(d) and (e) discuss service and return of service requirements related to CIDs. The CID, and any petitions filed in relation to the CID, may be served upon a person (as

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[110] See 18 U.S.C. § 1968(b).

[111] In Gold Bond, the CID described the subject of the investigation as "[r]estrictive practices and acquisitions involving the dispensing, supplying, sale or furnishing of trading stamps and the purchase and sale of goods and services in connection therewith." See 221 F. Supp. at 397. Several other circuits have followed the Gold Bond decision. See Lightning Rod Mfrs. Ass'n v. Staal, 339 F.2d 346, 347 (7th Cir. 1964); Hyster Co. v. United States, 338 F.2d 183 (9th Cir. 1964); Material Handling Inst. Inc. v. McLaren, 426 F.2d 90 (3d Cir. 1970); Finnell v. United States Department of Justice, 535 F. Supp. 410 (D. Kan. 1982); First Multiple Listing Serv. v. Shenefield, 1980 WL 1962 (N.D. Ga. Sept. 3, 1980); Petition of EniPrise Corp., 344 F. Supp. 319, 322-23 (W.D.N.Y. 1972)

defined by 18 U.S.C. § 1961(3)) by delivery of an executed copy to the specified person, to the person's authorized agent, or to the person's principal office or place of business. Service can also be made by certified or registered mail to the person's principal office or place of business. See 18 U.S.C. § 1968(d). Any individual may serve the CID.[112] If an individual delivers the CID, proof of service is provided by a verified return that the person served the CID. When a CID is mailed, proof of service is verified by the return post office receipt of delivery.

6. Racketeering Documents Custodians

Section 1968(f) addresses the authority, duties and responsibilities of the Attorney General and "racketeering document custodians" in the issuing of CIDs and in receiving, keeping and maintaining any documents compelled to be produced by the CID. Section 1968(f)(1) compels the Attorney General to designate a "racketeering investigator" to serve as document custodian. Title 18, United States Code, Section 1961(7) defines a "racketeering investigator" as "any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter." The Attorney General may appoint additional racketeering investigators as necessary to serve as deputies and assist the document custodian. A custodian should be designated for each CID that is issued; in practice, it is likely that the same person will be the custodian for every CID in a given investigation. This is a significant decision as notice of a replacement custodian must be submitted to the producing party in writing if the original document custodian dies, becomes disabled, is separated from service, or is relieved from responsibility.[113] The successor custodian has all of the same duties and responsibilities as

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[112] See 18 U.S.C. § 1968(e) ("by the individual serving any such demand").

[113] This written notice must include the identity and address of the successor. See (continued...)

his predecessor except that he is not responsible for any "default or dereliction which occurred before his designation as custodian." See 18 U.S.C. 1968(f)(7).

The custodian is charged with responsibility for the documents and takes physical possession of them. He or she is authorized to copy the documents for official use and, absent consent of the person who produced the material, is prohibited from disclosing the documents to anyone other than the Attorney General, the person who produced the material, or the person's authorized representative.[114] The custodian may also make the documents available to any attorney for the United States for use in a court or grand jury proceeding involving the United States. See 18 U.S.C. § 1968(f)(4). Upon the conclusion of any such case, the attorney is required to return to the custodian any provided materials which were not made part of the record of the particular proceeding. See 18 U.S.C. § 1968(f)(4).

At the close of the racketeering investigation, or any case or proceeding arising out of such investigation, the custodian is required to return all submitted documents (other than those in control of a court or grand jury) to the person who produced them. See 18 U.S.C. §§ 1968(f)(5). If, after a reasonable time, no case or proceeding has been instituted after the completion of the analysis and examination of the evidence, the person who submitted the documents is entitled to their return upon a written request to the document custodian. See

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[113](...continued)
18 U.S.C. § 1968(f)(7). A senior official should be appointed as custodian because of the strict notice requirements imposed by 18 U.S.C. § 1968(f)(7). Therefore, the United States Attorney, First Assistant United States Attorney, Strike Force Attorney-in-Charge, or other person at a comparable level should be listed as document custodian, with one or more of the attorneys assigned to the matter serving as deputy custodians.

[114] See 18 U.S.C. § 1968(f)(3). Specifically, the statute notes that the Attorney General must proscribe "reasonable terms and conditions" for the CID recipient or her authorized representatives to examine the materials provided while in the government's custody.

18 U.S.C. § 1968(f)(6). In both cases, the Government is only required to return the submitted documents and need not turn over copies made from the submitted documents. See 18 U.S.C. § 1968(f)(5) & (6) ("other than copies thereof").

7. Enforcement and Litigation of CIDs

The person receiving a CID is required to make the requested material available to the custodian for inspection and copying or reproduction at the person's principal place of business on the return date specified in the CID. See 18 U.S.C. § 1968(f)(2). The document custodian and the CID recipient can, in writing, designate another date and/or place than the date and place specified in the CID for return of the documents, and may also agree that copies be submitted in lieu of originals.[115] Should difficulties arise with regard to compliance, the statute provides for a district court to intervene to settle any disputes raised in petitions by the parties.

a. Petitions by the Attorney General

A recipient objecting to a CID can either refuse to respond to the CID or file a petition to modify or set aside the CID. See 18 U.S.C. §§ 1968(g)-1968(h). Section 1968(g) outlines the Attorney General's recourse for compelling compliance. If the person refuses to comply,[116] the

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[115] See 18 U.S.C. § 1968(f)(2). There is no provision setting forth the amount the Government would pay for copying. However, because it may be more expensive for the Government attorney to view and copy documents at the CID recipient's place of business, it may be economical to reimburse the recipient for reproduction and shipping. There is no authority requiring CID recipients to be reimbursed for the actual cost of the search, and Government attorneys should not enter into any agreements with regard to such reimbursement. See, e.g., Finnell, 535 F. Supp. at 415 (antitrust CID recipients sought to be reimbursed for cost of search; court found they had not substantiated claim without discussing whether Antitrust Division would be required to reimburse them).

[116] The statute specifically provides examples of failing to comply to include "wherever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material." See 18 U.S.C. § 1968(g).

(continued...)

Attorney General may petition a district court to enforce the CID. The petition may be filed in any judicial district in which the person resides, is found, or transacts business, except where (1) the person transacts business in more than one district, and therefore the petition must be filed in the district in which the person maintains a principal place of business, or (2) the parties agree that the Attorney General will file the enforcement petition in another district in which the person transacts business.

b. Petitions by the CID Recipient

It is important to note that CID recipients also have explicit rights to challenge their compliance. Specifically, Sections 1968(c) and (h) describe certain limitations that affect the issuance of CIDs and the avenues of relief that may be afforded to an individual upon whom a CID has been served. These limits are similar to those which control the issuance of grand jury subpoenas. Therefore, Government attorneys should rely upon the relevant case law governing the enforcement of grand jury subpoenas. Specifically, § 1968(c) prohibits the Attorney General from making an "unreasonable" demand or to seek the production of documentary evidence that would be otherwise privileged from disclosure "if contained in a subpoena duces tecum before a grand jury [investigating] a racketeering violation."[117] In addition, it is conceivable that a CID may be attacked on relevance grounds, although it is not likely that such a challenge would be

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[116](...continued)

[117] See 18 U.S.C. § 1968(c). The legislative history expands on the term "unreasonable" by also proscribing the seeking of "information which would [be] privileged from disclosure." H.R. REP. No. 91-1549, 91st Cong., 2d Sess. 58, *reprinted in* 1970 U.S. Code Cong. & Admin. News 4035. Applicable grand jury subpoena case law may also be consulted to determine whether the description of documents sought meets the statutory standard and whether the return date is a reasonable one.

successful.[118]

The most significant challenges have arisen when there have been claims that complying with the CID would prove too costly. For example, the district court in Multiple Listing Serv. v. Shenefield, 1980 WL 1962 (N.D. Ga. Sept. 3, 1980), enforced an antitrust CID only after certain modifications were made by both the Department of Justice and the court. The court reasoned that, absent such modifications, the financial burden on the recipient would be too great. Id. at * 3.

As a practical matter, the CID recipient may either refuse to respond to the CID or challenge the CID in court. Besides challenges based on the content or format of the CID, a CID may be successfully challenged if the Government issued it in bad faith (e.g., for the purpose of intimidating a witness or for political reasons),[119] or if the Department does not have jurisdiction to conduct the investigation.[120] Other challenges may become evident as the RICO CID is utilized.[121]

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[118] Accord United States v. R. Enterprises, Inc., 498 US 292, 301 (1991)(in evaluating relevancy challenge to grand jury subpoena, the Supreme Court held that "where subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to general subject of the grand jury's investigation.").

[119] See Chattanooga Pharmaceutical Ass'n v. United States Dept. of Justice, 358 F.2d 864, 866-67 (6th Cir. 1966); Petition of Cleveland Trust, 1969 WL 230 (N.D. Ohio March 4, 1969).

[120] See Australia/Eastern U.S.A. Shipping Conference, 1981 WL 2212 (no clear antitrust exemption from alleged illegal conduct and therefore CID recipient must comply); Amateur Softball Ass'n of America v. United States, 467 F.2d 312 (10th Cir. 1972) (recipients alleged that they were not engaged in commerce; court refused to decide issue at CID stage).

[121] RICO's CID provision, 18 U.S.C. § 1968, does not explicitly make the Federal Rules of Civil Procedure applicable, see antitrust provision, 15 U.S.C. § 1312(c)(1)(B) and 15 U.S.C.

(continued...)

Section 1968(h) provides a person who has been served with a CID with the right to petition to modify or set aside a CID. Specifically, this section authorizes the served person to file a petition for such relief in the district court for the judicial district in which the person resides, is found or transacts business. Such a motion must be filed within the shorter of the following time periods: (1) twenty (20) days after the service of the demand or (2) at any time before the return date of the demand.[122] This petition must be served upon the racketeering document custodian of the issuer of the CID. The petition must "specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of [Section 1968] or upon any constitutional or other legal right or privilege of such person." See 18 U.S.C. § 1968(h). Similarly, section 1968(i) permits a person who has complied with a CID by providing documents to a racketeering custodian to compel the custodian to perform a duty imposed upon him by law by petitioning the appropriate district court for such relief and serving a copy of the petition on the racketeering custodian.

c. Powers of the District Court

Section 1968(j) explicitly provides that when a CID petition is filed, the district court has jurisdiction to litigate and decide these matters and "to enter such order or orders as may be required to carry into effect the provisions of this section."

(...continued)
§ 1314. However, RICO's legislative history provides that the "subsection in the antitrust laws (15 U.S.C. § 1314(e)) which refers to the applicability of the Federal Rules of Civil Procedure, is unnecessary since rule 1 makes the civil rules applicable in this situation." H.R. REP. No. 91-1549, 91st Cong., 2d Sess. 59, *reprinted in* 1970 U.S.C.C.A.N. 4035. Thus, it appears that CID recipients may base challenges on the Federal Rules of Civil Procedure in addition to challenges which may be brought against grand jury subpoenas.

[122] Once the petition is filed and is pending with the Court, the time allowed for compliance is stayed. See 18 U.S.C. § 1968(h).

B. Discovery in General

1. The Federal Rules of Civil Procedure provide for broad avenues of civil discovery, including oral depositions, FED.R.CIV. P. 30, written depositions, FED.R.CIV. P. 31, interrogatories to parties, FED.R.CIV. P. 33, examinations of persons, FED.R.CIV. P. 35, and requests for admission, FED.R.CIV. P. 36.[123] FED.R.CIV. P. 26 sets forth the general provisions governing discovery, and affords "[l]iberal discovery . . . for the sole purpose of assisting in the preparation and trial, or the settlement, of litigation disputes." Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984). FED.R.CIV. P. 26(a) requires certain discovery "without awaiting a discovery request."[124] FED.R.CIV. P. 26(b)(1), provides, in relevant part, that unless otherwise limited by a court,

> [p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence

FED. R. CIV. P. 26(b)(1).

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[123] This Section discusses the rules of discovery that will be effective December 1, 2007. See Section IV, n.63 above.

[124] Such required disclosures includes: the name and address of each individual likely to have discoverable information, FED. R. CIV. P. 26(a)(1)(A); copies of documents or electronic information that the disclosing party will use to support or defend its claim, FED. R. CIV. P. 26(a)(1)(B); a computation of damages and the documents supporting the computation, FED. R. CIV. P. 26(a)(1)(C); insurance agreements, FED. R. CIV. P. 26(a)(1)(D); the identity of all expert witnesses and the basis and reasoning of their opinions, FED. R. CIV. P. 26(a)(2); and the identity and contact information of any potential witnesses - including those presented only through deposition, FED. R. CIV. P. 26(a)(3).

"Under [Rule 26], the only express limitations are that the information sought is not privileged, and is relevant to the subject matter of the pending action." Seattle Times, 467 U.S. at 30. The phrase "relevant to the subject matter" "has been construed broadly, to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." Oppenheimer Fund Inc. v. Sanders, 437 U.S. 340, 351 (1978). "Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action." Seattle Times, 467 U.S. at 33. Thus, discovery "is not limited to matters that will be admissible at trial so long as the information sought 'appears reasonably calculated to lead to the discovery of admissible evidence.'" Seattle Times, 467 U.S. at 29-30. "Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits." Oppenheimer, 437 U.S. at 351. Likewise, "discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues." Id. at 351.

"While the Federal Rules unquestionably allow broad discovery, [the] right to discovery is not unlimited." Micro Motion, Inc. v. Kane Steel Co., 894 F.2d 1318, 1322 (Fed. Cir. 1990). Under Rule 26, a court is authorized to limit the frequency or extent of discovery if it determines that:

> (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

FED. R. CIV. P. 26(b)(2)(C). Moreover, "[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost," unless the requesting party can show good cause; and, the court may set the conditions for the discovery. FED. R. CIV. P. 26(b)(2)(B). In addition, a trial court may deny discovery requests for matters "relevant only to claims or defenses that have been stricken," "information for use in proceedings other than the pending suit," or "when a party's aim is to delay bringing a case to trial, or embarrass or harass the person from whom he seeks discovery," Oppenheimer, 437 U.S. at 352, 353 & n.17, or requests based upon a party's mere suspicion or speculation. Micro Motion, 894 F.2d at 1326. "The discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable without discovery, not to find out if it has any basis for a claim." Id. at 1327. Furthermore, trial courts may issue protective orders where "civil discovery [is being used] to evade restrictions on discovery in criminal cases." Degan v. United States, 517 U.S. 820, 826 (1996).[125]

2. Given the potential breadth of discovery, trial courts are vested with wide discretion in handling pre-trial discovery matters and in fashioning appropriate protective orders. See, e.g., Degen, 517 U.S. at 826; Seattle Times Co., 467 U.S. at 36; Cruden v. Bank of New York, 957 F.2d 961, 972 (2d Cir. 1992). Accordingly, a district court's orders regarding

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[125] For agencies and individuals filing on behalf of the United States, there are additional regulations regarding discovery, to further "promote just and efficient resolution of civil claims." Exec. Order No. 12,988, 61 Fed. Reg. 4,729, 4,729 (Feb. 5, 1996). Litigation counsel is expected to "streamline and expedite discovery in cases under [his] control." Exec. Order No. 12,988, 61 Fed. Reg. at 4730. Federal agencies are expected to coordinate discovery procedures within the agency, including "review by a senior lawyer prior to . . . filing of the request in litigation, to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome, or expensive." Id. Additionally, before petitioning the trial court to resolve discovery motions, "counsel shall attempt to resolve the issue with opposing counsel." Id.

discovery matters may be reversed only upon a clear showing of an abuse of discretion.[126]

"As a general rule, a district court's order enforcing a discovery request is not a final order subject to appellate review under 28 U.S.C. § 1291." Church of Scientology of Cal. v. United States, 506 U.S. 9, 18 n.11 (1992).[127] "Federal appellate jurisdiction generally depends on the existence of a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)). "A party that seeks to present an objection to a discovery order immediately to a court of appeals must refuse compliance, be held in contempt, and then appeal the contempt order." Church of Scientology of Cal., 506 U.S. at 18 n.11; see also Ryan, 402 U.S. at 533.

"However, under the so-called *Perlman* doctrine, see Perlman v. United States, 247 U.S. 7. . . (1918), a discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance." Church of Scientology of Cal., 506 U.S. at 18 n.11. Moreover, some circuits permit a party to take an immediate appeal from an order

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[126] See, e.g., Ins. Corp. of Ireland Ltd. v. Compagnie desBauxities, 456 U.S. 694, 707 (1982); Nat'l Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976); Cruden, 957 F.2d at 972.

[127] Accord Bennett v. City of Boston, 54 F.3d 18, 20 (1st Cir. 1995); In re Att'y Gen.of the United States, 596 F.2d 58, 61 (2d Cir. 1979); In re Ford Motor Co., 110 F.3d 954, 958 (3rd Cir. 1997); MDK, Inc. v. Mike's Train House, Inc., 27 F.3d 116, 119 (4th Cir. 1994); Piratello v. Phillips Elecs. N. Am. Corp., 360 F.3d 506, 508 (5th Cir. 2004); U.S. ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc., 444 F.3d 463, 471 (6th Cir. 2006); Simmons v. City of Racine, PFC, 37 F.3d 325, 327 (7th Cir. 1994); Coleman v. Sherwood Med. Indus., 746 F.2d 445, 446-47 (8th Cir. 1984); Boughton v. Cotter Corp., 10 F.3d 746, 748 (10th Cir. 1993); see also United States v. Ryan, 402 U.S. 530, 532 (1971); Petroleum Prod. Antitrust Litig. v. Standard Oil Co., 747 F.2d 1303, 1305 (9th Cir. 1984).

compelling discovery of alleged privileged materials, provided that the order satisfies the collateral order doctrine.[128] See, e.g., In Re Ford Motor Co., 110 F.3d 954, 963-64 (1997) (appealing an order compelling discovery of documents allegedly protected by attorney-client privilege); United States v. Phillip Morris Inc., 314 F.3d 612, 617-20 (D.C. Cir. 2003) (same); Koch v. Cox, 489 F.3d 384 (D.C. Cir. 2007) (appealing an order compelling discovery of medical records allegedly protected by psychotherapist-patient privilege); Bittaker v. Woodford, 331 F.3d 715, 717-718 (9th Cir. 2003) (appealing an order precluding use of attorney-client privileged documents for proceedings other than litigating the federal habeas corpus petition at issue).

Although a few courts have held that discovery orders involving disclosure of alleged privilege matters are immediately appealable under the collateral order doctrine, most courts have held otherwise, ruling that such orders are not appealable until a final judgment has been rendered. See, e.g., Bennett, 54 F.3d at 20 (order compelling disclosure of various allegedly privileged investigative materials held non-appealable); In re Att'y Gen., 596 F.2d at 61-62 (order compelling disclosure of the identities of several police-informants); MDK, Inc., 27 F.3d at 120-22 (order compelling non-party to disclose trade secrets); Piratello, 360 F.3d at 508-09 (order compelling defendant to submit to depositions and disclose potentially self-incriminating information); Pogue, 444 F.3d at 471-72 (order compelling disclosure of documents allegedly protected by attorney-client privilege); Simmons, 37 F.3d at 327-29 (order compelling discovery

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[128] The collateral order doctrine permits an immediate appeal before final judgment from a "small class" of orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." Coopers & Lybrand, 437 U.S. at 468. See also Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

of informant's identity); Coleman, 746 F.2d at 447 (order imposing attorney's fees on party for failing to comply with discovery order); Boughton, 10 F.3d at 749-50 (order compelling discovery of documents allegedly protected by attorney-client, work-product, and non-testifying expert privilege).

3. A party seeking discovery may move for an order compelling disclosure or discovery. FED. R. CIV. P. 37(a). If a party or a party's officer, director, managing agent, or witness fails to obey an order to provide or permit discovery, the court is authorized to make such orders as are just. FED. R. CIV. P. 37(b)(2). These orders may include:

> An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for purposes of the action in accordance with the claim of the party obtaining the order;
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> _____ An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
>
> An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> _____ In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.
>
> . . . .
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or other circumstances make an award of expenses unjust.

FED. R.CIV. P. 37(b)(2)(A)-(E).

Rule 37 "allows a court all the flexibility it might need in framing an order appropriate to a particular situation." Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197, 208 (1958); B.F. Goodrich Tire Co. v. Lyster, 328 F.2d 411, 415 (5th Cir. 1964). The District Court has wide latitude in imposing sanctions for failure to obey discovery orders; accordingly, a decision will not be reversed absent a clear abuse of discretion. See, e.g., Ins. Corp. of Ireland, 456 U.S. at 707; see also cases cited n.126 above. For example, permissible sanctions in appropriate circumstances include dismissal of an action,[129] contempt,[130] or other appropriate sanction.[131]

"Although a trial judge's latitude in framing orders and in penalizing failures to comply is broad, his discretion is not limitless." BF Goodrich Tire Co., 328 F.2d at 415; see also Indep. Prods., Inc. v. Loew's, Inc., 283 F.2d 730, 733 (2d Cir. 1960). District courts are not required "to select the least drastic or most reasonable sanction," Melendez, 79 F.3d at 672; however, courts may only impose sanctions that are just and specifically related to the circumstances surrounding a party's failure to comply with the discovery rules. Ins. Corp. of Ireland, 456 U.S. at 707; Melendez, 79 F.3d at 672; Daval Steel Prods., 951 F.2d at 1366. "A district court may be found

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[129] See, e.g., Degen, 517 U.S. at 827; National Hockey League, 427 U.S. at 641-42.

[130] See, e.g., Church of Scientology of Cal., 506 U.S. at 18 n.11; see also cases cited n. 127 above.

[131] See, e.g., Daval Steel Prods. v. M/V Fakredine, 951 F.2d 1357, 1365 (2d Cir. 1991) (prohibiting defendant from introducing evidence); Melendez v. Ill. Bell Tel. Co., 79 F.3d 661, 671 (7th Cir. 1996) (sole expert witness barred from testifying); Boardman v. Nat'l Med. Enters., 106 F.3d 840, 843 (8th Cir. 1997) (plaintiff's witness prohibited from testifying); Marchand v. Mercy Med. Ctr., 22 F.3d 933, 936 (9th Cir. 1994) (defendant ordered to pay plaintiff's expenses); Orjias v. Stevenson, 31 F.3d 995, 1005 (10th Cir. 1994) (witness testimony excluded); Ins. Corp. of Ireland v. Compagnie Des Bauxites, 456 U.S. 694, 707 (1982) (certain facts taken as established).

to have abused its discretion if the exclusion of testimony results in fundamental unfairness in the trial of the case." Orjias, 31 F.3d at 1005. "[T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of the case." Societe Internationale, 357 U.S. at 209. Rule 37 does not authorize severe sanctions such as dismissal of a complaint when failure to comply is "due to inability, and not to wilfulness, bad faith, or any fault" of the offending party. Id. at 212; Nat'l Hockey League, 427 U.S. at 640; Melendez, 79 F.3d at 671; Daval Steel, 951 F.2d at 1367; BF Goodrich Tires, 328 F.2d at 415; Indep. Prods., 283 F.2d at 733. "Bad faith, however, is not required for a district court to sanction a party for discovery abuses." Melendez, 79 F.3d at 671.

C. Privileges

1. Deliberative Process, Presidential Communications and Investigatory Files Privileges

The United States, but not private litigants, may rely upon several privileges to shield information from discovery, including the deliberative process, Presidential communications and investigatory files privileges.[132]

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[132] For a detailed analysis of the law and procedures governing these and other Government privileges, Government attorneys should consult DOJ's Civil Division Commercial Litigation Branch's Monograph "The Governmental Privileges" (September 2006) (hereinafter "The Governmental Privileges Monograph"). Prior approval from the Civil Division is required before a Government attorney may make a formal claim of privilege available only to the Government. See USAM § 4-6.332 (E). This Section of the Manual is derived, in part, from The Governmental Privileges Monograph and is limited to a brief description of the deliberative process, Presidential communications and investigatory files privileges.

a. The Deliberative Process Privilege

The deliberative process privilege protects the "decision making process of government agencies" and hence protects from discovery "documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) (citations omitted). Generally, "pre-decisional communications . . . are privileged . . . and communications made after the decision and designed to explain it . . . are not" privileged. Id. at 151-52. Accord Renegotiation Bd. v. Grumman Aircraft Eng'g. Corp., 421 U.S. 168, 184 (1975). See The Governmental Privileges Monograph at 9-27.[133]

As the Supreme Court explained, "the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decision. The quality of a particular agency decision will clearly be affected by the communications received by the decisionmaker on the subject of the decision prior to the time the decision is made." Sears, Roebuck, 421 U.S. at 151.

Assertion of the deliberative process privilege "requires: (1) a formal claim of privilege by the 'head of the department' having control over the requested information; (2) assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, with an explanation why it properly falls within the scope of the privilege." Landry v. F.D.I.C., 204 F.3d 1125, 1135 (D.C. Cir. 2000). Some courts have interpreted the term "head of the department" broadly to include "supervisory personnel of sufficient rank to achieve the necessary deliberations in assertion of the

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[133] Congress codified the deliberative process privilege under Exemption No. 5 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. See, e.g., Grumman Aircraft Eng'g. Corp. , 421 U.S. at 183-84; EPA v. Mink, 410 U.S. 75, 85-87 (1973).

deliberative process" privilege. Id. at 1135-36. See The Governmental Privileges Monograph at 11.

The deliberative process privilege "is not absolute. After the government makes a sufficient showing of entitlement to the privilege, the district court should balance the competing interests of the parties. The party seeking discovery bears the burden of showing that its need for the documents out-weights the government's interest." Redland Soccer Club v. Dept. of Army of the Untied States, 55 F. 3d 827, 854 (3d Cir. 1995). See also The Government Privileges Monograph at pp. 21-22. In balancing the interests, courts consider various factors, including: "(i) the relevant of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; [and] (v) the possibility of future timidity by government employees who would be forced to recognize that their secrets are violable." Redland Soccer Club, 55 F. 3d at 854, quoting First Eastern Corp. V. Mainwaring, 21 F.3d 465, 468 n.5 (D.C. Cir. 1994).

b. The Presidential Communications Privilege

In United States v. Nixon, 418 U.S. 683, 686 (1974), the President of the United States sought "to quash a third-party subpoena *duces tecum* issued by the United States District Court for the District of Columbia, pursuant to Fed. R. Crim. Proc. 17(c). The subpoena directed the President to produce certain tape recordings and documents relating to his conversations with aides and advisers," to be used by a Special Prosecutor in a criminal case against third parties. The President argued, among other matters, that the Constitution provided "an absolute privilege of confidentiality for all Presidential communications." Id. at 703. However, the Supreme Court rejected this claim, holding that confidential Presidential communications are only

"presumptively privileged," and that such a "privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." The Supreme Court explained:

> The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications.

Id. at 708.

The Supreme Court found it highly significant that the President did not base his claim of privilege "to protect military, diplomatic, or sensitive, national security secrets," where the President's interest in confidentiality is greatest. Id. at 706.[134] The Supreme Court explained:

> In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution; he does so on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities. In C. & S. Air Lines v. Waterman

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[134] Pursuant to the state secrets privilege, "matters the revelation of which reasonably could be seen as a threat to the military or diplomatic interests of the Nation - are absolutely privileged from disclosure in the courts . . . . Once the court is satisfied that the information poses a reasonable danger to secrets of state, 'even the most compelling necessity cannot overcome the claim of privilege . . . .'" Harkin v. Helm, 690 F. 2d 977, 990 (D.C. Cir. 1982) (quoting United States v. Reynolds, 345 U.S. 1, 11 (1953)). The states' secret privilege also protects against disclosure of information that would impair the Government's "intelligence - gathering methods or capabilities." Black v. United States, 62 F. 3d 1115, 1118 (8th Cir. 1995). See also The Governmental Privileges Monograph at 3-5.

> S.S. Corp., 333 U.S. 103, 111 (1948), dealing with Presidential authority involving foreign policy considerations, the Court said: "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

Nixon, 418 U.S. at 710. The Court then weighed "the importance of the general privilege of confidentiality of Presidential communication in performance of the President's responsibilities against" the interests in the "fair administration of criminal justice," id. at 711-12, and concluded that the privilege was outweighed by those interests, stating:

> when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

Id. at 713.[135] Accord In Re Sealed Case, 121 F.3d 729, 745 (D.C. Cir. 1997) ("the privilege is

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[135] In a related case, Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc), the District of Columbia Circuit held that the Presidential communications privilege protected the President from complying with a subpoena *duces tecum*, directing him to produce original electronic tape recordings of five conversations between the President and his former Counsel, John W. Dean, III, to a Senate Committee investigating "'illegal, improper or unethical activities' occurring in connection with the presidential campaign and election of 1972." Id. at 726. The appellate court held that the Senate Select Committee did not carry its burden of showing that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's [legislative] functions." Id. at 731. The court explained that: (1) the Senate Select Committee's need for the subpoenaed materials to perform its oversight functions was "merely cumulative" since the House Judiciary Committee had copies of the tape recordings at issue, id. at 732; and (2) because "Congress frequently legislates on the basis of conflicting information provided in its hearings," id. at 732, the Select Committee's alleged need for the tape recordings "to resolve particular conflicts in the voluminous testimony it has heard," id. at 731, did not outweigh the presumption of confidentiality.

qualified, not absolute, and can be overcome by an adequate showing of need").

The Presidential communications privilege "is limited to communications 'in performance of [a President's] responsibilities . . . of his office' . . . and made 'in the process of shaping policies and making decisions.'" Nixon v. Admin. of Gen. Servs., 433 U.S. 425, 449 (1977) (quoting United States v. Nixon, 418 U.S. at 708, 711, 713 (citations omitted)). However, the privilege is not limited "to direct communications with the President," but also extends to "communications made by presidential advisers in the course of preparing advice for the President." In re Sealed Case, 121 F.3d at 746, 751-52. The District of Columbia Circuit explained the scope of the Presidential communications privilege as follows:

> Given the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources, the privilege must apply both to communications which these advisers solicited and received from others as well as those they authored themselves. The privilege must also extend to communications authored or received in response to a solicitation by members of a presidential adviser's staff, since in many instances advisers must rely on their staff to investigate an issue and formulate the advice to be given to the President.
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> . . .
>
> Not every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege. In particular, the privilege should not extend to staff outside the White House in executive branch agencies. Instead, the privilege should apply only to communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate. Only communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers. See AAPS, 997 F.2d at 910 (it is "operational proximity" to the President that matters in determining whether "[t]he President's confidentiality interest" is implicated) (emphasis omitted).

> Of course, the privilege only applies to communications that these advisers and their staff author or solicit and receive in the course of performing their function of advising the President on official government matters. This restriction is particularly important in regard to those officials who exercise substantial independent authority or perform other functions in addition to advising the President, and thus are subject to FOIA and other government statutes.

In Re Sealed Case, 121 F.3d at 752.[136] See also The Governmental Privileges Monograph at 27-30. It is not clear whether the President must assert the privilege personally. See id. at 29.

c. The Investigatory Files Privilege

The investigatory files privilege protects from discovery investigatory files compiled for both civil and criminal law enforcement purposes and testimony about the information in the files. See, e.g., In Re Sealed Case, 856 F.2d 268, 271 (D.C. Cir. 1988); Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1341 (D.C. Cir. 1984); McPeek v. Ashcroft, 202

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[136] The court in In re Sealed Case also explained that:

> [W]hile the presidential communications privilege and the deliberative process privilege are closely affiliated, the two privileges are distinct and have difference scopes. Both are executive privileges designed to protect executive branch decisionmaking, but one applies to decisionmaking of executive officials generally, the other specifically to decisionmaking of the President. The presidential privilege is rooted in constitutional separation of powers principles and the President's unique constitutional role; the deliberative process privilege is primarily a common law privilege. . . . Consequently, congressional or judicial negation of the presidential communications privilege is subject to greater scrutiny than denial of the deliberative privilege.
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> . . .
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> In addition, unlike the deliberative process privilege, the presidential communication privilege applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones.

121 F.3d at 745 (citations omitted).

F.R.D. 332, 335-36 (D.D.C. 2001); The Government Privileges Monograph at 36-41. Congress incorporated the principles underlying this privilege in exemption (b)(7) of the FOIA, 5 U.S.C. § 552 (b)(7), which allows the Government to withhold:

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

See, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223 (1978); see also, United States Dept. of Justice v. Landano, 508 U.S. 165, 171-72 (1993); John Doe Agency v. John Doe Corp., 493 U.S. 146, 153-54 (1989).

To successfully invoke this privilege, the Government must meet three requirements:

> (1) there must be a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege must be based on actual personal consideration by that official; and (3) the information for which the privilege is claimed must be specified, with an explanation why it properly falls within the scope of the privilege.

In re Sealed Case, 856 F.2d at 271. Accord Landry v. F.D.I.C., 204 F.3d 1125, 1135 (D.C. Cir. 2000). The "head of the department" requirement has been broadly interpreted to include, in addition to the head of the department, "supervisory personnel. . . of sufficient rank to achieve the necessary deliberateness in assertion of the [privilege]." Landry, 204 F.3d at 1136.

"[T]he law enforcement privilege is qualified. The public interest in non-disclosure must be balanced against the need of a particular litigant for access to the privileged information." In re Sealed Case, 856 F.2d at 272. Accord Friedman, 738 F.2d at 1341. The District of Columbia Circuit has ruled that in applying this balancing test the district court should consider:

> (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources: (10) the importance of the information sought to the plaintiff's case.

In re Sealed Case, 856 F.2d at 272 (citations omitted). See also The Governmental Privileges Monograph at 39.

2. Confidential Informant Privilege

a. The United States also has the exclusive right to rely upon the confidential informant privilege in both civil and criminal cases regarding information furnished by a confidential informant relating to a violation of the law.[137] Specifically, the confidential

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[137] See, e.g., Gill v. Gulfstream Park Racing Ass'n, Inc., 399 F.3d 391, 401 (1st Cir. 2005)("The privilege is applicable in both criminal and civil proceedings."); Lawmaster v. United States, 993 F.2d 773, 774 (10th Cir. 1993) ("the privilege is applicable in civil cases as well"); Dole v. Local 1942, IBEW, AFL-CIO, 870 F.2d 368, 372 (7th Cir. 1989); Suarez v. United States, 582 F.2d 1007, 1011-12 (5th Cir. 1978); In re United States, 565 F.2d 19, 22 (2d (continued...)

informant privilege allows the United States to shield the identity of those individuals who assist law enforcement officers by providing information about violations of law with the expectation that their identity will remain confidential. See Roviaro v. United States, 353 U.S. 53, 60-61 (1957). These individuals are commonly referred to as "confidential informants" (CIs).

"Exemption 7(D) of the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), exempts from disclosure agency records 'compiled for law enforcement purposes . . . by criminal law enforcement authority in the course of a criminal investigation' if release of those records 'could reasonably be expected to disclose' the identity of, or information provided by, a 'confidential source.' § 552(b)(7)(D)." Landano, 508 U.S. at 167. In Landano, the Supreme Court held that the Government is not entitled to a presumption that all sources supplying information to the FBI in the course of a criminal investigation are confidential sources within the meaning of Exemption 7(D). Id. at 171-78. Rather, the Supreme Court held that:

> A source should be deemed confidential if the source furnished information with the understanding that the FBI would not divulge the communication except to the extent the Bureau thought necessary for law enforcement purposes.

Id. at 174.

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[137](...continued)
Cir. 1977); Mitchell v. Roma, 265 F.2d 633, 635 (3d Cir. 1959); Cofield v. City of LaGrange, 913 F. Supp. 608, 619 (D.D.C. 1996); Michelson v. Daly, 590 F. Supp. 261, 264 (N.D.N.Y. 1984).

The confidential informant privilege, which is broader than Exemption 7(D) of FOIA,[138] is grounded in the United States Supreme Court's long-standing recognition of the importance of protecting the flow of information about criminal violations to the Government. See, e.g., In re Quarles and Butler, 158 U.S. 532, 535-536 (1895)(observing that "information, given by a private citizen [to law enforcement officials], is a privileged and confidential communication . . . the disclosure of which cannot be compelled without the assent of the government"). As the Second Circuit has observed:

> [I]t has been the experience of law enforcement officers that the prospective informer will usually condition his cooperation on an assurance of anonymity, fearing that if disclosure is made, physical harm or other undesirable consequences may be visited upon him or his family. By withholding the identity of the informer, the government profits in that the continued value of informants placed in strategic positions is protected, and other persons are encouraged to cooperate in the administration of justice.

United States v. Tucker, 380 F.2d 206, 213 (2d Cir. 1967); The Governmental Privileges Monograph at 32-33.

It is important to note that, as a general rule, only the identity of the informant is privileged. However, if disclosure of information that the confidential informant provided would reveal his identity, the Government may move to shield that information from disclosure as well. See, e.g., Roviaro, 353 U.S. at 60; Simon v. Dep't of Justice, 980 F.2d 782, 784 (D.C. Cir. 1992);

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[138] Unlike the common law confidential informant privilege, the FOIA Exemption 7(D) is limited to disclosure of "agency records," and in civil cases, the information need not relate to a crime, but may relate to a violation of a regulatory provision or other civil law. See, e.g., Brennan v. Engineered Prods., Inc., 506 F.2d 299, 302-04 (8th Cir. 1974); Wirtz v. Hooper-Holmes Bureau, Inc., 327 F.2d 939, 961-43 (5th Cir. 1964); Wirtz v. Continental Fin. & Loan Co. of West End, 326 F.2d 561, 563 (5th Cir. 1964); Culinary Foods, Inc. v. Raychem Corp., 150 F.R.D. 122, 126-27 (N.D. Ill. 1993); Schultz v. Farino Excavating Co., 55 F.R.D. 346, 347 (E.D. Mich. 1972).

United States v. Tenorio-Angel, 756 F.2d 1505, 1509-10 (11th Cir. 1985). Of course, this privilege may not apply if the informant testifies at a proceeding. See Banks v. Dretke, 540 U.S. 668, 698 (2004)(stating that the Government may not "examine an informant at trial, withholding acknowledgment of his informant status in the hope that (the) defendant will not catch on").

Moreover, the confidential informant privilege is not absolute. Lawmaster, 993 F.2d at 774. A district court may reject the Government's privilege claim where the information sought is essential to the opposition's case and there is no other manner to acquire the information. See Roviaro 353 U.S. at 60-61 (noting that, if the requested information is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way"). Under Roviaro, the courts must apply a balancing test to determine whether disclosure of an informant's identity and related information is required. As the Supreme Court stated in Roviaro:

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Roviaro, 353 U.S. at 62.[139] The person seeking disclosure has the burden of showing that "his need for the information outweighs the government's entitlement to the privilege." Dole,

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[139] Accord Lawmaster, 993 F.2d at 774; United States v. Alexander, 761 F.2d 1294, 1303 (9th Cir. 1985); Tenorio-Angel, 756 F.2d at 1509; United States v. Grisham, 748 F.2d 460, 462-63 (8th Cir. 1984).

870 F.2d at 372-73.[140] Significantly, a person seeking disclosure of matters protected by the confidential informant privilege may not meet his burden by mere speculation, supposition or conclusory allegations that an informant may be able to provide information helpful to his defense. Rather, such person must make a particularized showing that the confidential informant can provide material evidence that "would significantly aid in establishing an asserted defense" Tenorio-Angel, 756 F.2d at 1511, or establish "a reasonable probability that the evidence would change the outcome," Elnasher, 484 F.2d at 1053, or "show that the disclosure is vital to a fair trial." United States v. Weir, 575 F.2d 668, 673 (8th Cir. 1978).[141]

For example, the Supreme Court upheld the Government's invocation of the confidential informant privilege in a criminal case where a defendant claimed he needed the identity of the informant to properly attack an affidavit in support of a search warrant. See Rugendorf v. United States, 376 U.S. 528, 533-36 (1964). In Rugendorf, the Supreme Court determined that the defendant had failed to meet his burden to show that the informant's identity was essential to establish his innocence. Id.; see also McCray v. Illinois, 386 U.S. 300, 309-312 (1967)(holding that the Government was not required under either the Due Process Clause or the Confrontation Clause to disclose the identity of an informer during a pretrial probable cause hearing); Scher v.

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[140] Accord Elnasher v. Speedway Superamerica, LLC, 484 F.3d 1046, 1052-53 (8th Cir. 2007); Lawmaster, 993 F.2d at 774; Alexander, 761 F.2d at 1303; Grisham, 748 F.2d at 463-64; In re United States, 565 F.2d at 23.

[141] Accord Carpenter v. Lock, 257 F.3d 775, 779 (8th Cir. 2001); Holman, 873 F.2d at 946; Alexander, 761 F.2d at 1303; United States v. Kerris, 748 F.2d 610, 614 (11th Cir. 1984); Grisham, 748 F.2d at 463; United States v. Aguierre Aguierre, 716 F.2d 293, 301 (5th Cir. 1983); United States v. Diaz, 655 F.2d 580, 588 (5th Cir. 1981); United States v. Manley, 632 F.2d 978, 985 (2d Cir. 1980); United States v. Larson, 612 F.2d 1301, 1304 (8th Cir. 1980); United States v. Gonzales, 606 F.2d 70, 75 (5th Cir. 1979); United States v. Kim, 577 F.2d 473, 478 (9th Cir. 1978); In re United States, 565 F.2d at 23.

United States, 305 U.S. 251, 254 (1938) (holding that a police officer was not required to reveal the identity of a confidential informant who provided information leading to the arrest of the defendant and stating that "public policy forbids disclosure of an informer's identity unless essential to the defense").

In civil cases, the Government's invocation of the confidential informant privilege is similarly tested. However, in civil cases, "the informer's privilege is arguably stronger, because the constitutional guarantees assured to criminal defendants are inapplicable."[142]

Applying the foregoing principles, courts have frequently denied disclosure of confidential informant matters where the informant was a mere "tipster" who provided valuable information to law enforcement,[143] or the informant was a witness to a crime but did not actively or substantially participate in it,[144] or where the person seeking disclosure failed to carry his burden of showing that the sought information was material to an asserted defense and necessary

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[142] Lawmaster, 993 F.2d at 774-775; accord Elnasher, 484 F.3d at 1053; United States v. One 1986 Chevrolet Van, 927 F.2d 39, 43 (1st Cir. 1991); Holman v. Cayce, 873 F.2d 944, 947 (6th Cir. 1989); Dole v. Local 1942, Int'l Bhd. of Elec. Workers, 870 F.2d 368, 372 (7th Cir. 1989); In re United States, 565 F.2d at 22 (collecting cases); Westinghouse Elec. Corp. v. Burlington, 351 F.2d 762 (D.C. Cir. 1965); Wirtz, 326 F.2d at 563; Michelson, 590 F. Supp. at 264.

[143] See, e.g., Carpenter, 257 F.3d at 779; United States v. Moore, 129 F.3d 989, 992-93 (8th Cir. 1997); Grisham, 748 F.2d at 463-64; United States v. Buras, 633 F.2d 1356, 1359-60 (9th Cir. 1980); United States v. Arrington, 618 F.2d 1119, 1125-26 (5th Cir. 1980); United States v. Larson, 612 F.2d 1301, 1303-04 (8th Cir. 1980).

[144] See, e.g., United States v. Moralez, 908 F.2d 565, 567 (10th Cir. 1990); Holman, 873 F.2d at 946-47; Diaz, 655 F.2d at 588; United States v. Shursen, 649 F.2d 1250, 1254 (8th Cir. 1981); United States v. Anderson, 627 F.2d 161, 164 (8th Cir. 1980); Gonzales, 606 F.2d at 75-76; Suarez v. United States, 582 F.2d 1007, 1012 (5th Cir. 1978).

to secure a fair trial.[145]

Regarding the Government's countervailing interests in maintaining informant confidentiality, such confidentiality is essential to enable the Government to obtain valuable information from informants to carry out its important obligations to uncover unlawful activity. Therefore, the public interest in effective law enforcement strongly supports non-disclosure of confidential informant matters. See, e.g., Roviaro, 353 U.S. at 59; Scher, 305 U.S. at 254; Grisham, 748 F.2d at 462.

Moreover, courts frequently have ruled that the likelihood of danger to an informant or others is a crucial factor weighing heavily in favor of non-disclosure of informant information, and accordingly have relied upon such potential danger as a ground to withhold an informant's identity.[146]

b. There appears to be some tension among the federal circuits about whether an interlocutory appeal may be taken from an order denying discovery of privileged matters or granting discovery and rejecting a claim of privilege. Specifically, the First, Second, Fifth, Seventh, Ninth and Tenth Circuits have held that an interclocutory appeal from such orders may not be taken, including from orders upholding assertion of the confidential informant privilege,

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[145] See Alexander, 761 F.2d at 1303 and cases cited in notes 143 & 144 above and accompanying text.

[146] See, e.g., Aguirre Aguirre, 716 F.2d at 300; United States v. Ward, 703 F.2d 1058, 1062 (8th Cir. 1983); United States v. Lanci, 669 F.2d 391, 393 (6th Cir. 1982); United States v. Jiles, 658 F.2d 194, 198 (3d Cir. 1981); United States v. Garcia, 625 F.2d 162, 165-66 (7th Cir. 1980); United States v. Hernandez-Berceda, 572 F.2d 680, 682-83 (9th Cir. 1978); United States v. McLaughlin, 525 F.2d 517, 519 (9th Cir. 1975); United States v. Toombs, 497 F.2d 88, 94 (5th Cir. 1974); United States v. Picard, 464 F.2d 215, 217 (1st Cir. 1972); United States v. Turchick, 451 F.2d 333, 338 (8th Cir. 1971); United States v. Drew, 436 F.2d 529, 534 (5th Cir. 1970); Gonzales v. Beto, 425 F.2d 963, 971 (5th Cir. 1970).

and instead require the litigants to use the contempt or mandamus processes to seek appellate review.[147] See, e.g., Simmons v. City of Racine, PFC, 37 F.3d 325, 327-329 (7th Cir. 1994)(rejecting claim of collateral order doctrine to appeal discovery order denying disclosure of confidential informant information and observing that litigants may use the contempt process or mandamus to receive immediate review of an adverse discovery order); In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 747 F.2d 1303, 1304-06 (9th Cir. 1984) (denying interlocutory review of a discovery order denying disclosure of confidential informant matters); In re Attorney General of the United States, 596 F.2d 58, 61 (2d Cir. 1979) (holding that an order holding the Attorney General of the United States in civil contempt for refusing to disclose certain confidential informant files was not appealable, but granting the Government's Petition for a Writ of Mandamus); In re United States, 565 F.2d at 21-22 (denying interlocutory appeal of an order requiring in camera inspection of confidential informant files); see also Bennett v. City of Boston, 54 F.3d 18, 20-21 (1st Cir. 1995)(holding that the appellate court did not have jurisdiction to hear an interlocutory appeal of a discovery order denying invocation of privilege against "disclosure of sensitive investigative techniques" and noting that "contempt citation is the ordinary route to appellate review in this context"); Boughton v. Cotter Corp., 10 F.3d 746, 749-751 (10th Cir. 1993)(disallowing interlocutory appeal of a discovery order denying invocation of attorney-client and work product privileges, but noting mandamus relief may be available in some circumstances "to correct a clear abuse of discretion"); Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159, 162-63 (2d Cir. 1992)(holding the court lacked jurisdiction to conduct interlocutory review of district court's discovery order rejecting

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[147] For a discussion of interlocutory appeals involving privilege matters under the collateral order doctrine, see Section VI(B)(2) above.

invocation of attorney client privilege).

However, some courts have allowed interlocutory appeals from discovery orders rejecting privilege claims other than the confidential informant privilege. See, e.g., Koch v. Cox, 489 F.3d 384, 387-388 (D.C. Cir. 2007) (stating that the court of appeals has "jurisdiction over the interluctory appeal of an order denying a motion to quash based upon a privilege," and allowing an interlocutory appeal of a discovery order rejecting an assertion of the psychotherapist-patient privilege); United States v. Phillip Morris Inc., 314 F.3d 612, 617-621 (D.C. Cir. 2003)(allowing interlocutory appeal of a discovery order denying assertion of attorney-client privilege under the collateral order doctrine without requiring the litigants to resort to the contempt process noting that "[i]t would be impossible for a court to sort out and redress the harm caused by the incorrect disclosure," id. at 619); In re Ford Motor Co., 110 F.3d 954, 957-964 (3rd Cir. 1997)(allowing interlocutory appeal of a discovery order denying a claim of attorney-client and work product privileges).

3. Fifth Amendment Privilege

The Fifth Amendment of the United States Constitution provides, in relevant part, that no person "shall be compelled in any criminal case to be a witness against himself." "The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." Lefkowitz v. Turley, 414 U.S. 70, 77 (1973). Accord Baxter v. Palmigiano, 425 U.S. 308, 316-17 (1976); McCarthy v. Arndstein, 266 U.S. 34,

40 (1924).[148] "The privilege protects a mere witness as fully as it does one who is a party defendant." Id. at 40. Accord Malloy v. Hogan, 378 U.S. 1, 11 (1964).

To validly assert the privilege, a witness must establish that he "reasonably believes that the information sought, or discoverable as a result of his testimony, could be used in a subsequent state or federal criminal proceeding." United States v. Balsys, 524 U.S. 666, 672 (1998). Accord Kastigar v. United States, 406 U.S. 441, 444-45 (1972); Hoffman v. United States, 341 U.S. 479, 486 (1951). In that regard, "[t]o sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the questions or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Hoffman, 341 U.S. at 486-87. Accord N.L.R.B. v. Trans Ocean Export Packing, Inc., 473 F.2d 612, 617 (9th Cir. 1973). However, the Fifth Amendment privilege does not apply where the danger of incrimination is "remote, unlikely, or speculative." McCoy v. Comm. of Internal Revenue, 696 F.2d 1234, 1236 (9th Cir. 1983).[149] Significantly, a witness' assertion of his Fifth Amendment privilege does not end the inquiry since the court makes the final determination whether the privilege has been properly invoked.[150]

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[148] However, as a general rule, a person who fears only a future criminal prosecution by a foreign country may not invoke the privilege. See United States v. Balsys, 524 U.S. 666, 698-99 (1998). Moreover, the Fifth Amendment privilege against self-incrimination applies only to natural persons, and not to corporations. See Hale v. Henkel, 201 U.S. 43, 74-75 (1906).

[149] See also Mason v. United States, 244 U.S. 362, 367 (1917) (holding that a witness lacked reasonable cause to fear incrimination from his sought testimony about his participation in a card-game that was not itself illegal); Martin-Trigona v. Gouletas, 634 F.2d 354, 360-62 (7th Cir. 1980) (ruling that the Fifth Amendment privilege did not preclude a witness' testimony about his financial transactions that had "only the most tenuous relationship to any potentially incriminating financial transactions").

[150] See, e.g., Hoffman, 341 U.S. at 486; Rogers v. United States, 340 U.S. 367, 375

(continued...)

Moreover, in a civil proceeding, unlike in a criminal prosecution,[151] the fact-finder may draw an adverse inference from a party's refusal to testify based on his assertion of his Fifth Amendment privilege against self incrimination. See, e.g., Baxter v. Palmigiano, 425 U.S. at 316-19; United States v. 4003-05 5th Ave., Brooklyn, N.Y., 55 F. 3d 78, 83 (2d Cir. 1995); United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 811 F. Supp. 808, 812 (E.D.N.Y. 1992), aff'd, 995 F.2d 375 (2d Cir. 1993); United States v. Bonanno Organized Crime Family, 683 F. Supp. 1411, 1449-50 (E.D.N.Y. 1988), aff'd, 879 F.2d 20 (2d Cir. 1989). Likewise, the fact-finder may draw an adverse inference against a party from the assertion of the Fifth Amendment privilege by a non-party witness whose interests are aligned with a party, such as a party's agents or representatives,[152] current and former employees,[153] and others whose relationships to a party warrant drawing an adverse inference against a party.[154] Indeed, an

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[150](...continued)
(1951); Martin-Trigona, 634 F.2d at 360; In re Corrugated Container Antitrust Litig., 662 F.2d 875, 882 (D.C. Cir. 1981).

[151] See Griffin v. California, 380 U.S. 609 (1965) (holding that it violates a defendant's protection against self-incrimination under the Fifth Amendment to instruct a jury in a criminal case that it may draw an adverse influence of guilt from a defendant's failure to testify about facts relevant to his case).

[152] See, e.g., Curtis v. M&S Petroleum, Inc., 174 F. 3d 661, 673-75 (5th Cir. 1999); United States v. Dist. Council of N.Y. City, 832 F. Supp. 644, 651-52 (S.D.N.Y. 1993).

[153] See, e.g., Rad Servs, Inc. v. Aetna Cas. and Sur. Co., 808 F.2d 271, 273-75 (3d Cir. 1986); Brink's Inc. v. City of New York, 717 F. 2d 700, 707-10 (2d Cir. 1983).

[154] See, e.g., LiButti v. United States, 107 F. 3d 110, 123-24 (2d Cir. 1997) (holding that it was proper to draw an adverse inference from the assertion of the Fifth Amendment privilege by a party's father based on considering the nature of the relationship between the party and the witness, the degree of control of the party over the witness, the compatibility of the interests of the party and the witness in the outcome of the litigation and the role of the non-party witness in the litigation); Cerro Gordo Charity v. Fireman's Fund Am. Life Ins., 819 F.2d 1471, 1481-82
(continued...)

opposing party may even call a non-party witness to the stand to invoke his Fifth Amendment privilege before the jury, provided that the probative value of such evidence is substantially outweighed by the danger of unfair prejudice.[155]

Although the fact-finder may draw an adverse inference from a party's or witness' assertion of his Fifth Amendment privilege, such adverse interest standing alone is not sufficient to impose liability[156] or to defeat or carry a motion for summary judgment.[157]

In accordance with the foregoing principles, courts in Government civil RICO cases have drawn an adverse inference against a party or a witness aligned with a party from their assertion of their Fifth Amendment Privilege against self-incrimination.[158]

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[154](...continued)
(8th Cir. 1987) (adverse inference from party's brother's assertion of his Fifth Amendment privilege).

[155] See, e.g., Cerro Gordo Charity, 819 F.2d at 1480-82; Brink's Inc., 717 F.2d at 707-10; Farace v. Independant Fire Ins. Co., 699 F.2d 204, 210-211 (5th Cir. 1983). Likewise, a witness' deposition in which he asserted his Fifth Amendment privilege is admissible under some circumstances. See, e.g., Koester v. Am. Republic Invs., Inc., 11 F.3d 818, 823 (8th Cir. 1993); Rad Servs., Inc., 808 F.2d at 274, 280-81.

[156] See, e.g., Baxter v. Palmigiano, 425 U.S. at 317-18; La Salle Bank Lake View v. Seguban, 54 F.3d 387, 390 (7th Cir. 1995); Private Sanitation Indus. Ass'n, 811 F. Supp. at 812; Bonanno Organized Crime Family, 683 F. Supp. at 1451-52.

[157] See, e.g., Curtis, 174 F.3d at 675; 4003-4005 5th Ave., Brooklyn, N.Y., 55 F.3d at 83; LaSalle Bank Lake View, 54 F.3d at 392-93; Avirgan v. Hull, 932 F.2d 1572, 1580 (11th Cir. 1991).

[158] See, e.g., Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 995 F.2d at 377; Dist. Council of N.Y. City, 832 F. Supp. at 651-52; United States v. Bonanno Organized Crime Family, 683 F. Supp. at 1449-52; United States v. Ianniello, 646 F. Supp. 1289, 1296-97 (S.D.N.Y. 1986), aff'd, 824 F.2d 203 (2d Cir. 1987).

VII

JUDGMENTS, CONSENT DECREES, AND ENFORCEMENT

A. Judgments and Consent Decree

1. The General Nature of Consent Decrees and Rules of Their Construction

A consent decree is a voluntary agreement, subject to the court's approval, entered into by consent of the parties to a lawsuit to resolve a lawsuit. "The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation." United States v. Armour & Co., 402 U.S. 673, 681 (1971). As the Supreme Court has explained, consent decrees have a "hybrid nature":

> [C]onsent decrees bear some of the earmarks of judgments entered after litigation. At the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts. See United States v. ITT Continental Banking Co., 420 U.S. 223, 235-237 (1975); United States v. Armour & Co., 402 U.S. 673 (1971). . . . [C]onsent decrees "have attributes both of contracts and of judicial decrees," a dual character that resulted in different treatment for different purposes. United States v. ITT Continental Banking Co., supra, at 235-237, and n. 10. The question is not whether we can label a consent decree as a "contract" or a "judgment," for we can do both.

Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986) ("Firefighters").[159]

Insofar as consent decrees share attributes of contracts, consent decrees are interpreted like contracts; that is, "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." Armour &

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[159] Accord System Federation v. Wright, 364 U.S. 642, 650-51 (1961); United States v. Local 359, United Seafood Workers, 55 F.3d 64, 68-69 (2d Cir. 1995); EEOC v. Local 580, Int'l Ass'n of Bridge, Structural and Ornamental Ironworkers, 925 F. 2d 588, 592 (2d Cir. 1991). United States v. Int'l Bhd. of Teamsters, 803 F. Supp. 761, 777 (S.D.N.Y. 1992) ("IBT").

Co., 402 U.S. at 682. [160] Accordingly, "reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meanings words may have had to the parties, and any other documents expressly incorporated in the decree." United States v. ITT Continental Banking Co., 420 U.S. 223, 238 (1975) ("ITT Continental Baking Co.").[161]

Moreover, a "court is not entitled to expand or contract the agreement of the parties as set forth in the consent decree. . . ." Berger v. Heckler, 771 F.2d 1556, 1568 (2d Cir. 1985). Accord EEOC v. New York Times Co., 196 F.3d 72, 78 (2d Cir. 1999); United States v. Iint'l Bhd. of Teamsters, 998 F.2d 1101, 1107 (2d Cir. 1993); IBT, 803 F. Supp. at 777. It follows that a consent decree "should be interpreted in a way that gives effect to what the parties have agreed to, as reflected in the judgment itself," and courts should reject "restrictive and narrow interpretations of the Consent Decree that would thwart implementation of the parties' agreement." IBT, 803 F. Supp. at 778 (citations omitted). Accord Taitt v. Chemical Bank , 810 F.2d 29, 33 (2d Cir. 1987). "[U]ltimately the question for the lower court, when it interprets a consent decree. . . is what a reasonable person in the position of the parties would have thought the language meant." Richardson v. Edwards, 127 F.3d 97, 101 (D.C. Cir. 1997).

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[160] Accord Firefighters, 478 U.S. at 522; Firefighters v. Stotts, 467 U.S. 561, 574 (1984); ITT Continental Banking Co., 420 U.S. 223, 236-38 (1975); EEOC v. New York Times Co., 196 F.3d 72,78 (2d Cir. 1999); United States v. IBT, 998 F. 2d 1102, 1106 (2d Cir. 1993); United States v. O'Rourke, 943 F.2d 180, 187 (2d Cir. 1991); S.E.C. v. Levine, 881 F.2d 1165, 1178-79 (2d Cir. 1989); Berger v. Heckler, 771 F.2d 1556, 1568 (2d Cir. 1985); IBT, 803 F. Supp. at 777.

[161] Accord United States v. Int'l Bhd. of Teamsters, 998 F.2d 1101, 1106 (2d Cir. 1993); O'Rourke, 943 F.2d at 187; SEC v. Levine, 881 F.2d at 1179; IBT, 803 F. Supp. at 778.

Insofar as consent decrees share attributes of a court judgment, "a District Court's order denying entry of a consent decree is appealable under 28 U.S.C. § 1292 (a)(1)";[162] noncompliance with a consent decree is enforceable as a court order through a citation for contempt of court or other sanctions;[163] and, as a general rule, a consent decree binds only the parties to the consent decree.[164]

Moreover, district courts allow parties a wide latitude in the terms of their agreement under a consent decree; and as a general rule, a district court may not reject proposed consent decrees merely because the court might have fashioned different terms or does not believe that

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[162] Firefighters, 478 U.S. at 517. Accord Carson v. American Brands, Inc., 450 U.S. 79, 83-90 (1981); United States v. Microsoft Corp., 56 F.3d 1448, 1455-57 (D.C. Cir. 1995). Moreover, "[a] district court's interpretation of a consent decree that it has approved deserves 'substantial deference.'" Ellis v. Gallatin Steel Co., 390 F.3d 461, 473 (6th Cir. 2004) (citation omitted).

[163] See, e.g., Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375, 378, 380 (1994); Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378-79 (1992); Firefighters, 478 U.S. at 518; ITT Continental Baking Co., 420 U.S. at 226 n.2, 236 n.10; United States v. Local 359 United Seafood Workers, 55 F.3d 64, 69 (2d Cir. 1995); E.E.O.C. v. Local 580, 925 F. 2d 588, 592 (2d Cir. 1991); Berger, 771 F.2d at 1568-69; Investigations Officer v. Lanza, 1996 WL 514871 (S.D.N.Y. Sept. 10, 1996) at * 11.

[164] See, e.g., Firefighters, 478 U.S. at 529; United States v. Ward Baking Co., 376 U.S. 327, 334 (1964); Ashley v. City of Jackson, Miss., 464 U.S. 900, 902 (1983) (Rehnquist, J., dissenting from a denial of certiorari) (stating that "[t]his rule can be traced to an opinion of Chief Justice Marshall in Davis v. Wood, 1 Wheat 6, 8-9 (1816)"). There are "several exemptions" to this general rule. See Sea-Land Services Inc. v. Gaudet, 414 U.S. 573, 593-94 (1974); see also Section VII (C) below, which discusses such exceptions to the general rule that judgments bind only the parties to a lawsuit.

Moreover, "a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefitted by it." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 750 (1975).

the agreement is ideal.[165] Indeed, because consent decrees constitute voluntary agreements between parties to a lawsuit, "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." Firefighters, 478 U.S. at 525.[166]

However, there are limits on the parties' voluntary agreements pursuant to a consent decree. As the Supreme Court has explained, "a consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction. Furthermore, consistent with this requirement, the consent decree must 'come within the general scope of the case made by the pleadings'. . . and must further the objectives of the law upon which the complaint was based." Firefighters, 478 U.S. at 525 (citations omitted). A "District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce." System Federation No. 91, Railway Employees' Department, AFL-CIO v. Wright, 364 U.S. 642, 651 (1961) ("System Federation No. 91"). Accordingly, "the parties may [not] agree to take action that conflicts with or violates the statute upon which the complaint was based." Firefighters, 478 U.S. at 526.[167] A district court's approval of a consent decree that does not satisfy these standards may be overturned as an abuse of discretion.[168]

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[165] See, e.g., United States v. Cannons Engineering Corp., 899 F.2d 79, 84 (1st Cir. 1990); Janus Films, Inc. v. Miller, 801 F.2d 578, 582-83 (2d Cir. 1986).

[166] Accord Swift & Co. v. United States, 276 U.S. 311, 327-31 (1928); Komyatti v. Bayh, 46 F.3d 955, 962 (7th Cir. 1996); Kozlowski v. Coughlin, 871 F.2d 241, 244 (2d Cir. 1989); United States v. Mason Tenders Dist. Council of Greater New York, 1997 WL 97836 (S.D.N.Y. March 6, 1997) at * 8.

[167] Accord System Federation No. 91, 364 U.S. at 650-51.

[168] See, e.g., System Federation No. 91, 364 U.S. at 650-53; Biodiversity Associates v.

(continued...)

For example, in Firefighters v. Stotts, 467 U.S. 561, 572-76 (1984) and System Federation No. 91, 364 U.S. at 650-52, the Supreme Court held that district courts had authority "to reject agreed-upon terms as not in furtherance of statutory objectives" and "to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives." 364 U.S. at 651. See also Firefighters, 478 U.S. at 526-28.[169]

Moreover, a district court has greater authority to review and reject a proposed consent decree that resolves a suit "affecting the public interest," and accordingly, in such cases should not enter a proposed consent decree unless it "decides that it is fair, reasonable, and equitable and does not violate the law or public policy." Sierra Club, Inc. v. Electronic Controls Design, Inc., 909 F.2d 1350, 1355 (9th Cir. 1990).[170] Furthermore, as many of the above-referenced cases

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[168](...continued)
Cables, 357 F. 3d 1152, 1169-70 (10th Cir. 2004); Komyatti v. Bayh, 96 F.3d 955, 961-62 (7th Cir. 1996); United States v. Charles George Trucking, Inc., 34 F.3d 1081, 1084-85 (1st Cir. 1994); Sierra Club Inc. v. Electronic Controls Design, Inc., 909 F.2d 1350, 1355 (9th Cir. 1990); Kozlowski, 891 F.2d at 244; United States v. Wheeling-Pittsburg Steel Corp., 866 F.2d 57, 59-62 (3d Cir. 1988); United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 831 F. Supp. 192, 193 (S.D.N.Y. 1993).

Moreover, a proposed consent decree may be rejected where consent of one of the parties is lacking or was procured through fraud. Swift & Co., 276 U.S. at 324; United States v. Ward Baking Co., 376 U.S. 327, 334-35 (1964).

[169] In Firefighters v. Stotts, 467 U.S. at 576-78, the Supreme Court held that the district court exceeded its authority in imposing injunctive relief and modifications to a consent decree because such relief conflicted with, and was prohibited by, the statute underlying the relief. See also Firefighters, 478 U.S. at 527-28.

Similarly, in System Federation No. 91, 364 U.S. at 646-51, the Supreme Court held that the district court abused its discretion in refusing to modify an injunction and related consent decree when a change in law rendered the relief at issue contrary to the governing law. See also Firefighters, 478 U.S. at 526-27.

[170] Accord Charles George Trucking, Inc., 34 F.3d at 1084-89; Cannons Engineering
(continued...)

indicate, a consent decree also may authorize the district court to retain exclusive jurisdiction over a consent decree to ensure full compliance with it.[171]

2. Courts Have Authority to Modify Judgments and Consent Decrees Under Some Circumstances

Pursuant to Rule 60(b), FED. R. CIV. P., courts are authorized to modify judgments and consent decrees in some circumstances. In that respect, Rule 60(b), FED. R. CIV. P., provides, in relevant part, as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

In accordance with the principles embodied in Rule 60(b), it is well established that courts have the authority to modify a consent decree over the objection of the parties to the consent decree "when a change in law brings those terms in conflict with statutory objectives," or when such a change in law otherwise renders the terms of a consent decree unlawful. System Federation No. 91, 364 U.S. at 651. Accord Firefighters v. Stotts, 467 U.S. at 576, n.9; Biodiversity Assoc. v. Cables, 35 F.3d 1152, 1166-67 (10th Cir. 2004). Modifications of

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[170](...continued)
Corp., 899 F.2d at 84-92; Janus Films, Inc. v. Miller, 801 F.2d 578, 582-83 (2d Cir. 1986); Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1126-27 (D.C. Cir. 1983) (collecting cases).

[171] See, e.g., Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375, 381-82 (1994); Firefighters, 478 U.S. at 512; Railway Employees, 364 U.S. at 646-47; Pigford v. Veneman, 292 F.3d 918, 923-25 (D.C. Cir. 2002); Local 359, 55 F.3d at 69; E.E.O.C. v. Local 580, 925 F.2d at 593; Berger v. Heckler, 771 F.2d at 1568; United States v. IBT, 728 F. Supp. 1032, 1044-45 (S.D.N.Y. 1990), aff'd, 907 F.2d 277 (2d Cir. 1990).

consent decrees by district courts are reviewed under an abuse of discretion standard. See Juan F. v. Weicker, 37 F. 3d 874, 878 (2d Cir. 1994).

In Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992), the Supreme Court adopted greater flexibility in determining whether to modify consent decrees in institutional reform litigation. In United States v. Swift & Co., 286 U.S. 106, 119 (1932), the Supreme Court had ruled that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." In Swift, the defendants agreed to a consent decree, resolving anti-trust litigation, that "enjoined them from manipulating the meat-packing industry and banned them from engaging in the manufacture, sale, or transportation of other foodstuffs." Rufo, 502 U.S. at 379.

However, in Rufo, 502 U.S. at 380-81, the Supreme Court ruled that the Swift "grievous wrong" standard was too rigid, and that the lower courts should employ "a flexible approach" to modifications of consent decrees that "is often essential to achieving the goals of reform litigation." Accordingly, in Rufo, 502 U.S. at 383, the Supreme Court ruled that "a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstances." The Supreme Court added that "[m]odification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more onerous" (id. at 384), or when "one or more of the obligations placed upon the parties has

become impermissible under federal law." Id. at 388.[172]

In the wake of Rufo, the lower courts have approved of[173] and rejected[174] modifications of consent decrees in a wide variety of circumstances.

B. Default Judgments

Rule 55(a), FED. R. CIV. P. provides as follows:

> **(a) Entry**. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

Pursuant to Rule 55(a), a district court may enter an order of default "where the party against whom the judgment is sought has engaged in 'wilful violations of court rules, contumacious conduct, or intentional delays.'" Forsythe v. Hales, 255 F.3d 487, 490 (8th Cir.

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[172] The Supreme Court cautioned that "[a] proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor. . . [t]he focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances. A court should do no more, for a consent decree is a final judgment that may be reopened only to the extent that equity requires." Rufo, 502 U.S. at 391. See also Bd. of Educ. of Oklahoma City Pub. Schs. v. Dowell, 498 U.S. 237 (1991) (holding that the Swift " grievous wrong" standard does not apply to injunctions entered in school desegregation cases).

[173] For cases approving of modifications of consent decree, see, e.g., Evans v. Williams, 206 F.3d 1292, 1297-99 (D.C. Cir. 2000); United States v. Western Elec. Co. Inc., 46 F.3d 1198 (D.C. Cir. 1995); Patterson v. Newspaper & Mail Deliveries'Union, 13 F.3d 33, 36-39(2d Cir. 1993); Roadtechs, INC. V. MJ Highway Technology, Ltd., 83 F. Supp. 2d 677, 687-88 (E.D. Va. 2000).

[174] For cases rejecting proposed modifications of consent decrees, see, e.g., Pigford v. Veneman, 292 F.3d 918, 925-26 (D.C. Cir. 2002); N.L.R.B. v. Harris Teeter Supermarkets, 215 F.3d 32, 35-37 (D.C. Cir. 2000); Thompson v. U.S. Dept of H. U. D., 220 F.3d 241 246-50 (4th Cir. 2000); Alexander v. Britt, 89 F.3d 194 (4th Cir. 1996); Building & Const. Trades v. NLRB, 64 F.3d 880, 888-91 (3d Cir. 1995); In Re Midlands Utility, Inc., 253 B. R. 683, 688-90 (Bankr. D.S.C. 2000).

2001) (citation omitted).[175] However, default judgments are disfavored, and should be entered only when clearly supported by the record.[176]

Rule 55(c), FED. R. CIV. P. provides that "[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."[177] "[T]he standard to set aside an entry of default under Rule 55(c) is essentially the same as the standard for vacating a default under Rule 60(b)";[178] and hence

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[175] Accord Davis v. Hutchins, 321 F.3d 641, 646 (7th Cir. 2003) ("Where it appears that the defaulting party has willfully chosen not to conduct its litigation with the degree of diligence and expediency prescribed by the trial court, this Circuit has repeatedly upheld the trial court's [refusal to grant relief from the default]") (quoting C.K.S. Eng'rs, Inc. v. White Mountain Gypsum Co., 726 F. 2d 1202, 1205 (7th Cir. 1984)); Johnson v. Dayton Elec. Mfg. Co., 140 F. 3d 781, 783 (8th Cir. 1988); New York Life Ins. Co. v. Brown, 84 F.3d 137, 141 (5th Cir. 1996) ("A default occurs when a defendant has failed to plead or otherwise respond to the complaint within the time required by the Federal Rules"); Au Bon Pain Corp. v. Artect, Inc., 653 F.2d 61, 65 (2d Cir. 1981) ("failing to appear for a deposition, dismissing counsel, giving vague and unresponsive answers to interrogatories, and failing to appear for trial were sufficient to support a finding [of default]").

[176] See, e.g., Comiskey v. JFTJ Corp., 989 F.2d 1007, 1009 (8th Cir. 1993); C.K.S. Engineers, Inc., 726 F.2d at 1205; Meehan v. Snow, 652 F.2d 274, 277 (2d Cir. 1981); E.F. Hutton & Co., Inc. v. Moffatt, 460 F.2d 284, 285 (5th Cir. 1972).

[177] Rule 60(b), FED. R. CIV. P. provides, in relevant part, as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

[178] Davis v. Hutchins, 321 F.3d at 646 n.2 (citations omitted).

under both Rules 55(c) and 60(b), to have an entry of default vacated, "the moving party must show: (1) good cause for the default; (2) quick action to correct it; and (3) a meritorious defense to the complaint." Sun v. Bd. of Trustees of Univ. of Illinois, 473 F.3d 799, 810 (7th Cir. 2007).[179] However, "[m]ost decisions . . . hold that relief from a default judgment [under Rule 60(b)] requires a stronger showing of excuse than relief from a mere default order."[180]

A district court's decision to impose a default judgment and whether to set aside a default order or default judgment under Rules 55(c) or 60(b) are reviewable under the abuse of discretion standard.[181]

C. Scope Of Injunctions, Requisite Specifity, And Their Application To Non-Parties

1. Scope of Injunctions and Requisite Specifity

The permissible breadth of an injunction depends upon the circumstances of the particular case, "the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts. . . found to have been committed . . . . in the past." NLRB v. Express Publ'g. Co., 312 U.S. 426, 436-37 (1941). Therefore, courts in equitable actions may not only enjoin unlawful acts, but also may enjoin otherwise lawful conduct to ensure effective relief. As the Supreme Court explained in United States v. Loew's

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[179] Accord Forsythe v. Hales, 255 F.3d at 490; Robinson Eng'g Co. Pension Plan and Trust v. George, 223 F.3d 445, 453 (7th Cir. 2000); Johnson v. Dayton Elec. Mfg. Co., 140 F.3d at 783-84; Commercial Bank of Kuwait v. Rafidain, 15 F.3d 238, 243 (2d Cir. 1994); Meehan v. Snow, 652 F.2d at 276-77.

[180] Johnson v. Dayton Elec. Mfg. Co., 140 F.3d at 783 (citations omitted).

[181] See, e.g., Sun v. Bd. of Trustees of Univ. of Illinois, 473 F.3d at 810; Davis v. Hutchins, 321 F.3d at 646; Johnson v. Dayton Elec. Mfg. Co., 140 F.3d at 784-85; Inman v. American Home Furniture Placement, Inc., 120 F.3d 117, 118 (8th Cir. 1997); Pretzel & Stouffer v. Imperial Adjusters, 28 F.3d 42, 44-45 (7th Cir. 1994); Commercial Bank of Kuwait, 15 F.3d at 243; Hal Commodity Cycles Management Co. v. Kirsh, 825 F.2d 1136, 1138 (7th Cir. 1987).

Inc., 371 U.S. 38 (1962), abrogated on other grounds by Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28 (2006):

> Some of the practices which the Government seeks to have enjoined . . . are acts which may be entirely proper when viewed alone. To ensure, however, that relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined.

Loew's Inc., 371 U.S. at 53.[182]

An injunction, however broad, must satisfy the particularity requirements of Rule 65(d), FED. R. CIV. P., which provides, in relevant part, as follows:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained.

This "Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague

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[182] Accord United States v. Gypsum Co., 340 U.S. 76, 88-89 (1950) (Equitable relief in antitrust cases "is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal. Acts entirely proper when viewed alone may be prohibited."); Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case"); EEOC v. Wilson Metal Casket, Co., 24 F.3d 836, 842 (6th Cir. 1994) ("The proper scope of an injunction is to enjoin conduct which has been found to have been pursued or is related to the proven unlawful conduct."); United States v. Holtzman, 762 F.2d 720, 726 (9th Cir. 1985) ("[F]ederal courts have the equitable power to enjoin otherwise lawful activity if they have jurisdiction over the general subject matter and if the injunction is necessary and appropriate in the public interest to correct or dissipate the evil effects of past unlawful conduct."); Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 390 (5th Cir. 1977) ("In fashioning relief against a party who has transgressed the governing legal standard, a court of equity is free to proscribe activities that, standing alone would have been unassailable.").

to be understood." Marshall v. United States, 414 U.S. 473, 476 (1974).[183]

Accordingly, an injunction when "read as a whole. . . [must provide] people of ordinary intelligence. . . a reasonable opportunity to know what is prohibited." Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 383 (1997) (citations and internal quotations omitted). Accord Reno Air Racing Ass'n, Inc. V. McCord, 452 F.3d 1126, 1133-34 (9th Cir. 2006); Coca-Cola Co. v. Purdy, 382 F.3d 774, 790-91 (8th Cir. 2004); S.C. Johnson & Son, Inc. v. Clorox Co., 241 F.3d 232, 240-41 (2d Cir. 2001).[184]

Regarding the requisite specificity, "Rule 65(d) requires only that the enjoined conduct be described in reasonable, not excessive, detail." Reliance Ins. Co. v. Mast Const. Co., 159 F.3d 1311, 1316 (10th Cir. 1998). Rule 65(d) "does not require the impossible. There is a limit to what words can convey. . . . The right to seek clarifications or modification of the injunction provides assurance, if any be sought, that proposed conduct is not proscribed." Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1431-32 (7th Cir. 1985). Accord Pye v. Teamsters Local Union No. 122, 61 F.3d 1013, 1025 (1st Cir. 1995) ("The requirement that. . . injunctions be clear and specific, Fed. R. Civ. P. 65(d), does not mean that they must read like the working plans for building hydrogen bombs"); Medtronic, Inc. v. Benda, 689 F.2d 645, 649 (7th Cir. 1983) ("It would be impossible for any court to identify every conceivable act that would be

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[183] Accord Reno Air Racing Ass'n, Inc. v. McCord, 452 F.3d 1126, 1132 (9th Cir. 2006); S.C. Johnson & Son, Inc. v. Clorox Co., 241 F.3d 232, 241 (2d Cir. 2001); CPC Intern., Inc. v. Skippy Inc., 214 F.3d 456, 459 (4th Cir. 2000); Reliance Ins. Co. v. Mast Constr. Co., 159 F.3d 1311, 1316 (10th Cir. 1998).

[184] In constructing an injunction "as a whole," some circuits allow courts to consider materials incorporated by reference (see, e.g., Reno Air Racing Ass'n Inc., 452 F.3d at 1130-32 (collecting cases)); while some circuits do not allow such incorporation. See, e.g., Dupuy v. Samuels, 465 F.3d 757, 758 (7th Cir. 2006) (collecting cases).

covered by [an injunction]"); Sucrs De A. Mayol & Co. v. Mitchell, 280 F.2d 477, 482 (1st Cir. 1960) ("Some compromise must be effected in a decree between the need for articulation, and the need for sufficient comprehensiveness to prevent 'easy evasion.'").

Moreover, to determine whether an injunction provides the requisite specific notice, courts evaluate an injunction "'in the light of the circumstances surrounding (the injunction's) entry: the relief sought by the moving party, the evidence produced at the hearing on the injunction, and the mischief that the injunction seeks to prevent.'" Common Cause v. Nuclear Regulatory Comm., 674 F.2d 921, 927 (D.C. Cir. 1982) quoting United States v. Christie Indus., Inc., 465 F.2d 1000, 1007 (3d Cir. 1972).

In accordance with the foregoing authority, courts in a wide variety of circumstances have held that broad injunctions satisfy the particularity requirement of Rule 65(d).[185] On the other hand, courts have held that "an injunction broadly to obey" a statute or the law, which in essence restrains "the commission of unlawful acts which are. . . dissociated from those which a

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[185] See, e.g., S.C. Johnson & Son, Inc., 241 F.3d at 240-41 (enjoining false and misleading advertisements); Pye, 61 F.3d at 1018, n. 4, 1025 (enjoining "organizing and conducting mass demonstrations. . . where an object thereof is to force or require [named entities] or any other person to cease using, selling, handling, transporting or otherwise dealing in the products of or to cease doing business with August A. Busch & Co.", and also enjoining "in any manner or by any means, threatening, coercing or restraining [any person]" to achieve the above objectives); Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1021 (9th Cir. 1985) (enjoining the defendant from "using any name, designation or material. . . likely to cause confusion, mistake or deception as to source relative to plaintiff's trademark"); Pacific Maritime Ass'n v. Int'l Longshoremen's and Warehousemen's Union, 517 F.2d 1158, 1162-63, & n. 2 (9th Cir. 1975) (ordering a union and its members "[t]o cease and desist from using any coercion to nullify the right of Container Stevedoring Co., Inc. to use Steady Men or inducing, encouraging or causing such coercion; and [t]o take all necessary action to stop any [such] coercion"); Mitchell, 280 F.2d at 479, 481-82 (enjoining "defendant from violating the minimum wage and overtime provisions of the [Fair Labor Standards Act of 1938]"); F.T.C. v. Think Achievement Corp., 144 F. Supp. 2d 1013, 1017 (N.D. Ind. 2000) ("Defendants may be enjoined from making misrepresentations or false representations" in violation of the F.T.C. Act.).

defendant has committed," does not satisfy the particularity requirement of Rule 65(d).[186] The Supreme Court, however, has limited the potential breadth of that principle, and has stated that "[a] federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past." NLRB v. Express Pub. Co., 312 U.S. at 435.

For example, in McComb v. Jacksonville Paper Co., 336 U.S. 187, 191-92 (1949), the district court ordered the defendants "to obey the provisions of the [Fair Labor Standards] Act dealing with minimum wages, overtime, and the keeping of records." The Supreme Court upheld the injunction, stating:

> Decrees of that generality are often necessary to prevent further violations where any proclivity for unlawful conduct has been shown. . . [Defendants'] record of continuing and persistent violations of the Act would indicate that that kind of a decree was wholly warranted in this case. Yet if there were extenuating circumstances or if the decree was too burdensome in operation, . . . [defendants] could have petitioned the District Court for a modification, clarification or construction of the order.

Id. at 192.

Similarly, in United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 831 F. Supp. 177, 191-92 (S.D.N.Y. 1993), following a bench trial, the district court enjoined certain defendants found to have violated RICO: (1) "from committing any acts of racketeering activity defined in [18 U.S.C. § 1961]"; (2) "from having any dealings, directly or indirectly, with any

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[186] See NLRB v. Express Publishing Co., 312 U.S. 426, 435-36 (1941). Accord Belitskus v. Pizzingrilli, 343 F.3d 632, 650 (3d Cir. 2003); Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41, 51 (2d Cir. 1996); Keyes v. School Dist. No. 1, Denver, Colo., 895 F.2d 659, 668-69 (10th Cir. 1990).

members or associates of organized crime for any commercial purpose concerning the affairs of the [alleged RICO] Waterfront [Enterprise]. . . or any labor organization"; (3) "from having any dealings, directly or indirectly, with any other defendant in this action for any commercial purpose concerning the affairs of the Waterfront [Enterprise] or any labor organization"; (4) "from participating in any way in the affairs of or having any dealings, directly or indirectly, with (i) any labor organization. . . .(ii) any officer, agent, representative, employee, or member of [several ILA locals], (iii) any other officer, agent, representative, employee, or member of the ILA, or any other labor organization concerning the affairs of such organization or the Waterfront [Enterprise]"; "and (iv) any person or entity that does business on the Waterfront; and (5) from visiting the site of any ILA entity or other labor organization or communicating with any person who is at the site of any ILA entity or other labor organization."

On appeal, the Second Circuit rejected the argument that this injunction was overly broad. See United States v. Carson, 52 F.3d 1173, 1183-85 (2d Cir. 1995). The Second Circuit explained that this injunction was necessary to prevent future unlawful activity in light of the scope of the defendants' unlawful activity, involving the creation of a climate of fear and intimidation within the ILA by the defendant and his LCN co-conspirators. Id. at 1185.

Courts have approved similar broad injunctive relief in other Government civil RICO cases involving labor unions, including prohibiting any act of racketeering activity as defined in 18 U.S.C. § 1961(1), where such relief was necessary to prevent future unlawful activity in light of the extensive unlawful activity by the defendants and their co-conspirators. See Sections VIII(B)(1) and (C) below.[187]

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[187] See also McLendon v. Continental Can Co., 908 F.2d 1171, 1174, 1182 (3d Cir. 1990) (continued...)

It is also significant to note that failure to satisfy the requirements of Rule 65 (d) does not render an injunction unenforceable when the error is harmless. See, e.g., Dupuy, 465 F.3d at 759-60; Chathas v. Local 134 IBEW, 233 F. 3d 508, 512-13 (7th Cir. 2000).

2. An Injunction May Apply to Non-Parties in Various Circumstances

a. It has long been the general rule that a non-party is "not bound by a judgment . . . in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." Hansberry v. Lee, 311 U.S. 22, 40 (1940).[188] "This rule is part of our deep-rooted historic tradition that everyone should have his own day in court.'" Martin v. Wilks, 490 U.S. 755, 762 (1989).

There are several exceptions to this general rule. For example, a non-party may be bound by a judgment order, including an injunction, when the non-party "has his interests adequately represented by someone with the same interests who is a party." Martin, 490 U.S. at 762 n.2.[189]

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[187](...continued)
(holding that a nationwide injunction barring the defendant from using a particular program of operation to violate Section 510 of the ERISA statute was "not an 'obey the law' injunction"); United States v. Miller, 588 F.2d 1256, 1261 (9th Cir. 1978) (holding that "the mere fact that [an] injunction is framed in language almost identical to the statutory mandate does not make the language vague. . . [where] the statutory terms adequately describe the impermissible conduct"); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1103 (2d Cir. 1972) (upholding an injunction "enjoining further violations of the antifraud provisions of the federal securities laws . . . in language virtually identical to that of Rule 10b-5"); Interstate Commerce Comm'n v. Keeshin Motor Exp. Co., 134 F.2d 228, 231 (7th Cir. 1943) (holding that while "courts may not issue a blanket order enjoining *any* violation of a statute upon a showing that the Act has been violated in some particular respects, nevertheless, they do possess authority to restrain violations similar to those already committed").

[188] Accord Martin v. Wilks, 490 U.S. 755, 761-62 (1989); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969); Pennoyer v. Neff, 95 U.S. 714 (1877).

[189] Accord Hansberry v. Lee, 311 U.S. at 41 ("[T]he judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the
(continued...)

"Additionally, where a special remedial scheme exists foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process." Martin, 490 U.S. at 762, n. 2.[190]

Rule 65(d), FED. R. CIV. P. also sets forth several exceptions to the general rule that non-parties are not bound by a judgment, and provides, in relevant part, that:

> Every order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

The Supreme Court stated that this rule:

> is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in "privity" with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.

Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14 (1945).

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[189](...continued)
class or those represented who were not parties to it"); Montana v. United States, 440 U.S. 147, 154-55 (1979) (collateral estoppel barred a non-party, the United States, from relitigating an issue resolved in prior litigation over which the non-party exercised control). See also Section VIII(B)(8) below, which discusses various exceptions to the general rule that non-parties are not bound by judgment in Government civil RICO lawsuits involving labor unions.

[190] See, e.g., NLRB v. Bildisco & Bildisco, 465 U.S. 513, 529 (1984) ("Under the Bankruptcy Code a proof of claim must be presented to the Bankruptcy Court for administration, or be lost when a plan of reorganization is confirmed"); Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 479-80 (1988) (a probate statute that "requires creditors to file claims against an estate within a specified time period. . . .generally bars untimely claims").

Rule 65(d) establishes two distinct, abeit related, bases of liability for a non-party. Under the first basis, a non-party, who is in "privity" with an enjoined party and hence bears a close relationship with the enjoined party, may be subject to the provisions of an injunction and liable for its violation on the rationale that the enjoined party has adequately represented the interests of the non-party. Whereas under the second basis, the focus is on the non-party's conduct after an injunction has been imposed - - that is, a non-party, regardless of whether the non-party is otherwise "in privity" with the party, may be held in contempt when the non-party aids and abets an enjoined party's violation of an injunction. In such circumstances, the non-party is not otherwise compelled to comply with the injunction; rather, such non-party is merely liable for aiding and abetting an enjoined party's violation of an injunction.[191]

As one court explained, "a non-party may be enjoined under [the "in privity" rationale of] Rule 65(d) only when its interests closely 'identify with' those of the defendant, when the non-party and defendant stand in 'privity,' or when the defendant 'represents' or 'controls' the non-party." Thompson v. Freeman, 648 F.2d 1144, 1147 (8th Cir. 1981). For example, under the first "in privity" rationale, "[p]ersons acquiring an interest in property [such as successors and assigns] that is a subject of litigation are bound by, or entitled to the benefit of, a subsequent judgment", and are deemed "in privity" with their predecessor for purposes of

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[191] See, e.g., Regal Knitwear Co., 324 U.S. at 13-14; Chase National Bank v. Norwalk, 291 U.S. 431, 436-37 (1934); Goya Foods, Inc. v. Wallack Management Co., 290 F.3d 63, 75-76 (1st Cir. 2002); Microsystems Software, Inc. v. Scandinavia Online AB, 226 F.3d 35, 42-43 (1st Cir. 2000); Chicago Truck Drivers v. Brotherhood Labor Leasing, 207 F.3d 500, 507 (8th Cir. 2000); United States v. Kirschenbaum, 156 F.3d 784, 794-96 (7th Cir. 1998); Additive Controls & Measurement Sys. v. Flowdata, Inc., 96 F.3d 1390, 1395 (Fed. Cir. 1996); Rockwell Graphics Systems, Inc. v. DEV Industries, Inc., 91 F.3d 914, 919 (7th Cir. 1996) (collecting cases); Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 833 (2d Cir. 1930); Paramount Pictures Corp. v. Carol Publ'g Group, Inc., 25 F. Supp. 2d 372, 374 (S.D.N.Y. 1998).

Rule 65(d). Golden State Bottling Co. v. NLRB, 414 U.S. 168, 179-80 (1973). Accord Regal Knitwear Co., 324 U.S. at 13-14; Walling James v. Reuter, Inc., 321 U.S. 671, 674-75 (1944).

Similarly, Rule 65(d)'s application of an injunction to a party's "officers, agents, servants, employees, and attorneys," even though they may be non-parties to a litigation, is grounded in the recognition that such employees and agents are identified with their principal and that because corporations and other business entities can act only through such natural persons, such business entities may easily avoid compliance with an injunction's mandates through the actions of their agents unless the injunction also applied to their agents.[192]

Turning to the aiding and abetting basis of liability under Rule 65(d), a non-party who is not otherwise subject to an injunction may be held in contempt **only** for post-injunction activity of aiding and abetting an enjoined party's violation of an injunction.[193] Moreover, although such a non-party must have actual knowledge of the injunction, personal service of it is not required.[194] It also bears emphasis that under the second basis of liability imposed by Rule 65(d), a district

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[192] See, e.g., Walling, 321 U.S. at 674-75; FTC v. Standard Education Society, 302 U.S. 112, 119 (1937); Ex Parte Lennon, 166 U.S. 548, 553-55 (1897); Doctor's Associates, Inc. v. Reinert & Duree, P.C.,191 F.3d 297, 302-03 (2d Cir. 1999); Petersen v. Fee International, Ltd., 435 F. Supp. 938, 941-42 (W.D. Okla. 1975). Cf. Wilson v. United States, 221 U.S. 361, 376-77 (1911).

However, such a corporate employee, agent, or officer "is bound by an injunction against his corporation *only in his capacity as an officer*." Saga International, Inc. v. John D. Brush & Co., Inc., 984 F. Supp. 1283, 1287 (C.D. Cal. 1997).

[193] See, e.g., Additive Controls & Measurement Sys., 96 F.3d at 1395; Spindelfabrik Suessen-Schurr v. Schubert & Salzer, 903 F.2d 1568, 1580-81 (Fed. Cir. 1990); G&C Merriam Co., 639 F.2d at 35; Paramount Pictures Corp., 25 F. Supp. 2d at 374-75. See also cases cited supra n.191.

[194] See, e.g., Goya Foods, Inc., 290 F. 3d at 75; Chicago Truck Drivers, 207 F.3d at 507; Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 129 (2d Cir 1979) (collecting cases); Reich v. United States, 239 F.2d 134, 137-38 (1st Cir. 1956).

court may not enforce an injunction against all persons having notice of an injunction, or against persons acting independently from an enjoined party, but rather must confine its enforcement to those persons who aid and abet an enjoined party's violation of the injunction.[195]

b. Apart from the authority to enjoin non-parties under Rule 65(d), FED.R.CIV.P., the All Writs Act[196] vests federal courts with the authority to enjoin "non-parties who interfere with the implementation of court orders establishing public rights." Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 692 n.32 (1979).[197] The Supreme Court has also emphasized that "[t]he power conferred by the [All Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice... and encompasses even those who have not taken any affirmative action to hinder justice." United States v. New York Telephone Co., 434 U.S. 159, 174 (1977) (citations omitted).

Accordingly, the All Writs Act vests district courts with the authority to issue orders to non-parties "when needed to preserve the court's ability to reach or enforce its decision in a case over which it has proper jurisdiction." In re Baldwin-United Corp., 770 F.2d 328, 338 (2d Cir.

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[195] See, e.g., Regal Knitwear Co., 324 U.S. at 13; Chase National Bank v. Norwalk Ohio, 291 U.S. at 436-37; Doctor's Associates, Inc. v. Reinert & Duree, P.C., 191 F.3d 297, 303 (2d Cir. 1999); Max's Seafood Café ex rel. Lou-Ann v. Quinteros, 176 F.3d 669, 674-75 (3d Cir. 1999); Heyman v, Klein, 444 F.2d 65 (2d Cir. 1971); Alemite, 42 F.2d at 832 ("a court of equity. . . cannot lawfully enjoin the world at large, no matter how broadly it words its decree").

[196] In that respect, the All Writs Act, 28 U.S.C. § 1651(a), provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[197] Accord United States v. Paccione, 964 F.2d 1269, 1274-75 (2d Cir. 1992) ("A court may bind non-parties to the terms of an injunction or restraining order to preserve its ability to render a judgment in a case over which it has jurisdiction."); Vuitton et Fils S.A., 592 F.2d at 129 n. 6 (same); United States v. Hall, 472 F.2d 262, 265 (5th Cir. 1972) (same); NAACP, Jefferson County Branch v. Brock, 619 F. Supp. 846, 852 (D.D.C. 1985) (same).

1985). Accord United States v. City of Detroit, 329 F.3d 515, 522-24 (6th Cir. 2003); United States v. IBT, 911 F.Supp. 743, 750 (S.D.N.Y. 1996). For example, "[a] court can obtain equitable relief from a non-party against whom no wrong doing is alleged if it is established that the non-party possesses illegally obtained profits but has no legitimate claim to them. Courts have jurisdiction to decide the legitimacy of ownership claims made by non-parties alleged to be [illegal] proceeds." S.E.C. v. Cherif, 933 F.2d 403, 414 n.11 (7th Cir. 1991).[198] See Section VIII (B)(8) below, which discusses relief against non-parties in Government Civil RICO cases involving labor unions.

D. Removal Orders and Prohibition of Future Activities May Implicate Property Rights Protected By Due Process

1. As noted above in Section II (C)(4), civil RICO, 18 U.S.C. § 1964(a), empowers district courts to remove a person from a position of employment with an entity and to prohibit such person from holding that position in the future. This remedy should be carefully considered because it may implicate an individual's constitutional protection to due precess. The Fifth Amendment to the United States Constitution provides, in relevant part, that "[n]o person shall be... deprived of life, liberty, or property, without due process of law." However, such property interests subject to due process protections "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits ." Bd. of Regents of State Colleges v. Roth,

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[198] Accord S.E.C. v. Antar, 831 F. Supp. 380, 399 (D.N.J. 1993) (collecting cases); S.E.C. v. Shiv, 379 F. Supp.2d 609, 619 (S.D.N.Y. 2005); F.T.C. v. Think Achievement Corp., 144 F. Supp.2d 1013, 1020 (N.D. Ind. 2000) (collecting cases); S.E.C. v. The Infinity Group Co., 27 F. Supp. 2d 559, 563 (E.D. Pa. 1998).

408 U.S. 564, 577 (1972). Accord Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984). Federal law, regulations, contractual agreements and licenses may also give rise to property interests protected by due process.[199] Moreover, while the underlying property right may be created by state law or regulation, "federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause." Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 9 (1978) (citations omitted).

In accordance with these principles, it has long been recognized that a person has a property right in continued employment when a person has "more than an abstract need or desire for it," but rather can demonstrate that he has "a legitimate claim of entitlement to it." Roth, 408 U.S. at 577.[200] For example, in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985), the Supreme Court ruled that a public civil service employee had a property right in his job when a state statute provided that such civil service employees were "entitled to retain their positions 'during good behavior and efficient service,' [and] could not be dismissed 'except... for... misfeasance, malfeasance, or nonfeasance in office.'" (citations omitted).

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[199] See, e.g., Perry v. Sindermann, 408 U.S. 593, 600-01 (1972); Lynch v. United States, 292 U.S. 571, 579 (1934); United States v. Gotti, 459 F.3d 296, 327-28 (2d Cir. 2006); United States v. Granberry, 908 F.2d 278, 279-80 (8th Cir. 1990); United States v. Rastelli, 870 F.2d 822, 831 (2d Cir. 1989); United States v. Local 560 of Int'l Bhd. of Teamsters, 780 F.2d 267, 280-82 (3d Cir. 1985).

[200] Accord Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985); Bishop v. Wood, 426 U.S. 341, 344-45 (1976); Perry v. Sindermann, 408 U.S. 593 599-602 (1972); Greene v. McElroy, 360 U.S. 474, 492 (1959) ("[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable government interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment."); DiMartini v. Ferrin, 906 F.2d 465, 466 (9th Cir. 1950) (A person "has a clearly established constitutional right to be free from unreasonable government interference with his private employment.").

Moreover, in Perry v. Sindermann, 408 U.S. 593, 599-602 (1972), the Supreme Court held that notwithstanding the absence of a formal contractual tenure provision, a college professor "might be able to show from the circumstances of [his service for a number of years] - and from other relevant facts - that he has a legitimate claim of entitlement to job tenure." 408 U.S. at 602. In particular, the Supreme Court stated that the college teacher at issue could establish such an entitlement from: (1) his college's "official Faculty Guide" that stated that "the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work," and (2) upon guidelines that a person "who had been employed as a teacher in the state college and university system for seven years or more has some form of job tenure." 408 U.S. at 600. The Court remanded the case to allow the petitioner to make such a showing.[201]

2.a. Applying the forgoing authority, an officer or employee of a private corporation or other legitimate private entity may have a property interest in continued employment protected by due process from governmental interference when he demonstrates that he has a legitimate claim of entitlement to it, such as when he has an employment contract guaranteeing continued employment for a term of years, unless removed for just cause, misconduct or malfeasance.

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[201] See also Bishop v. Wood, 426 U.S. 341, 344-45 (1976)(stating that "[a] property interest in employment can, of course, be created by ordinance, or by an implied contract," but that a property right in employment is not established by a "position [held] at the will and pleasure" of the employer); Bd. of Regents v. Roth, 408 U.S. at 567-68 (holding that a teacher, with no-tenure rights, hired for one year who is not rehired at the end of the one-year period does not have a property right in continued employment); Federal Deposit Ins. Corp. v. Henderson, 940 F.2d 465, 475 (9th Cir. 1991) ("[I]n most states, the general rule is that a public employee terminable at will does not have a property interest in continued employment, while an employee whose contract provides, either expressly or by implication, that he may only be terminated for cause does have such an interest.") (citations omitted).

For example, in Federal Deposit Ins. Corp. v. Henderson, 940 F.2d 465, 467-70 (9th Cir. 1991), a former bank president sued the Supervisor of Banking for the State of Washington under 42 U.S.C. § 1983, alleging, among other matters, that actions of the Supervisor of Banking pressuring his employer, a private bank, to fire him deprived him of his property interest to continued employment. The Ninth Circuit held that the bank president's employment contract, requiring that he be given ninety days notice if he was to be terminated, created a property interest in his continued employment with the bank for ninety days. 940 F.2d at 476. The Ninth Circuit also held that:

> The fact that the private employer and not the governmental officials actually fired the plaintiff did not shield the officials from liability, because they "set in motion a series of acts by others which they knew or reasonably should have known would cause others to inflict the constitutional injury."

940 F.2d at 476 (citations omitted).

Similarly, in Merrit v. Mackey, 827 F.2d 1368, 1370 (9th Cir. 1987), the plaintiff sued federal and state officials under 42 U.S.C. § 1983, alleging that they caused his termination from employment with a private corporation providing alcohol and drug counseling services without a hearing, thereby depriving him of liberty and property interests without due process, in violation of the Fifth and Fourteenth Amendments. The Ninth Circuit held that the plaintiff had a property interest in continued employment because his employer's "personnel policies stated that permanent employees could be fired only for cause." Id. at 1371. The Ninth Circuit also held that even though the plaintiff was fired by a private employer, state activity was responsible for the plaintiff's discharge because government officials threatened to cut off state and federal funding for the employer unless it fired the plaintiff. Id. at 1370-72. Accordingly, the Ninth

Circuit concluded that the plaintiff was entitled to "some predeprivation process." Id. at 1372. See also Stein v. Bd. of City of New York, 792 F.2d 13, 15-17(2d Cir. 1986) (holding that a bus driver's contract, providing that he could not be discharged except for "good cause," created a property interest in continued employment, entitling him to adequate notice and a hearing before being discharged); McLaurin v. Fischer, 768 F.2d 98, 102-03 (6th Cir. 1985) (ruling that a reasonable jury could find that the plaintiff had a property interest in his continued employment as the head of the Division of Neurosurgery of a university hospital where there was a mutual understanding between the plaintiff and his employer that his employment was permanent unless he became physically unable to perform his job or he resigned).

b. A labor union official or union employee, likewise, may have a property interest in his continued employment or union position when the terms of his employment contract or his union's constitution or bylaws guarantee his continued employment or his position for a fixed term, or unless removed for cause.[202] Operation of federal law may also give rise to a union official's property right in his union office.[203]

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[202] The constitution and bylaws of a union constitute a contract between a union member and his union. See, e.g., Shea v. McCarthy, 953 F.2d 29, 31-32 (2d Cir. 1992); Doty v. Sewall, 908 F.2d 1053, 1060 (1st Cir.1990) (citing cases).

[203] In that respect, 29 U.S.C. § 481(a) provides:

> Every national or international labor organization, except a federation of national or international labor organizations, shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.

In turn, 29 U.S.C. §§ 481(h) and (i) provide:

(continued...)

For example, in Brennan v. Silvergate District Lodge No. 50, Int'l Ass'n of Machinists, 503 F.2d 800, 807 (9th Cir. 1974), the court held that an order denying an incumbent union local officer's motion to intervene as a party-defendant in an action by the Secretary of Labor to have the officer's election set aside, did not deprive "him of property, the right to hold his office, without due process, because" the officer had another remedy under 29 U.S.C. § 464(a) to assert his claims.

Moreover, in United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267, 275, 281-82 (3d Cir. 1986), the Third Circuit held that provisions of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411, which guarantee the rights of union members to, inter alia, "nominate candidates, to vote in elections or referendums of the labor organization," gave rise to union members' property rights to participate in internal union democracy. In so ruling, the Third Circuit quoted with approval a statement by another court that:

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[203](...continued)

(h) Removal of officers guilty of serious misconduct

> If the Secretary [of Labor], upon application of any member of a local labor organization, finds after hearing in accordance with subchapter II of chapter 5 of Title 5 that the constitution and bylaws of such labor organization do not provide an adequate procedure for the removal of an elected officer guilty of serious misconduct, such officer may be removed, for cause shown and after notice and hearing, by the members in good standing voting in a secret ballot, conducted by the officers of such labor organization in accordance with its constitution and bylaws insofar as they are not inconsistent with the provisions of this subchapter.

(i) Rules and regulations for determining adequacy of removal procedures

> The Secretary [of Labor] shall promulgate rules and regulations prescribing minimum standards and procedures for determining the adequacy of the removal procedures to which reference is made in subsection (h) of this section.

> If a member has a "property right" in his position on the roster. . . . he has an equally enforceable property right in the election of men who will represent him in dealing with his economic security and collective bargaining where that right exists by virtue of express contract in the language of a union constitution.

Id. at 281. See also United States v. Gotti, 459 F.3d 296, 321, 327 (2d Cir. 2006) (stating that "the right of the members of a union to democratic participation in a union election is property," and upholding a jury instruction that union members have a property right in "union positions."[204]

3. A person who has such a property interest in continued employment may, nonetheless, be removed from his employment, provided he is afforded "due process." The Supreme Court has described the process that is due in such circumstances as follows:

> An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case.". . .. We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." . .. . This principle recognizes "some kind of hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment."

Loudermill, 470 U.S. at 542 (citations omitted). Accord Bd. of Regents v. Roth, 408 U.S. at 570-71.

The Supreme Court has not specified "any minimally acceptable procedures for termination of employment" that govern all such cases. See Davis v. Scherer, 468 U.S. 183, 193 n .10 (1984). Rather, the determination of what process is due "would require a careful balancing of the competing interests - of the employee and the [government] - implicated in the official decision at issue." Id. at 192 n.10. Accord Bell v. Burson, 402 U.S. 535, 541-42 (1971)

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[204] For a discussion of union members' property rights to participation in union democracy, see Section VIII(F) below.

("The hearing required by the Due Process Clause must be 'meaningful' . . . and 'appropriate to the nature of the case'") (citations omitted); Boddie v. Connecticut, 401 U.S. 371, 377-80 (1971) (same); Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313-15 (1950) (same).

For example, in Arnett v. Kennedy, 416 U.S. 134, 150 (1974), a federal statute created a property right to continued employment by providing that an employee had the right not to be discharged "except for such cause as will promote the efficiency of said service." The Supreme Court rejected a claim by a covered employee that his discharge for misconduct violated due process because he was not afforded "a right to a trial-type hearing before an impartial officer before he could be removed from his employment." Id. at 137. The Supreme Court held that due process was satisfied because prior to his discharge, the employee was given notice of the charges and the opportunity to respond orally and in writing. Id. at 140-58.

Similarly, in Davis v. Scherer, 468 U.S. at 192, the Supreme Court held that procedural due process was satisfied where a state highway patrol officer was discharged without a formal pretermination hearing, but was informed several times of the basis for his discharge and had several opportunities to present his reasons for his retention. See also Barry v. Barchi, 443 U.S. 55, 65 (1979) (holding that due process was satisfied where a horse trainer, whose license was suspended without "a formal hearing," was notified of the basis for suspension "and he was given more than one opportunity to present his side of the story to the state's investigators.").

4. Under the forgoing authority, OCRS maintains that under civil RICO, 18 U.S.C. § 1964(a), a person who has a property right to continued employment in a position or office may be removed, and barred from holding such a position or office, in compliance with due process when:

(1) Such person is a named defendant in a civil RICO action pursuant to 18 U.S.C. § 1964(a), and is found to have violated RICO after due notice and a trial, summary judgment, or other appropriate adjudicatory proceeding, or by default; or

(2) Such person, whether or not named as a defendant in a civil RICO action, is subject to an injunction issued pursuant to 18 U.S.C. § 1964(a), and is found after due notice and an appropriate adjudicatory proceeding, or by default, to have violated, or aided and abetted one or more named defendant's violation of a provision of a district court's injunction or judgment order that warrants removal; or

(3) Such person, even though not named as a defendant in a civil RICO action nor otherwise subject to an injunction issued pursuant to 18 U.S.C. § 1964(a), is found after due notice and an appropriate adjudicatory proceeding, or by default, to have aided and abetted an enjoined person's violation of a district court's injunction or judgment order that warrants removal.

See Sections II(C)(4) and VII(D) above and VIII(B)(6) below.

Manifestly, imposition of such a sanction following a full scale trial, as in (1) above, affords more rights than is minimally required by due process to discharge a person from employment or a union office. In the same vein, the adjudicatory procedures typically employed during the enforcement phase of Government civil RICO cases (which often involve notice of the charges, an evidentiary hearing in a trial-like adversary proceeding, a right to counsel, and a right of review by the district court) before removing and barring a person from holding a particular position or office for a violation of an injunction or judgment order issued pursuant to 18 U.S.C. § 1964(a), afford greater rights than the minimum requirements of due process.[205]

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[205] For a discussion of such removal orders, adjudicatory procedures, and due process in Government civil RICO cases involving labor unions, see Sections VIII(B)(4) and (6) below.

E. Court-Appointed Officers in General

1. Courts Have Inherent Authority to Appoint Officers to Assist Them in Executing Their Duties

As discussed in Section II(A)(2) above, courts are vested with broad equitable powers to impose highly intrusive remedies to redress unlawful conduct, especially in institutional reform cases. As a corollary principle,

> Courts have . . . inherent power to provide themselves with appropriate instruments required for the performance of their duties. . . . **This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties**. . . . From the commencement of our Government, it has been exercised by the federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters, auditors, examiners and commissioners. To take and report testimony; to audit and state accounts; to make computations; to determine, where the facts are complicated and the evidence voluminous, what questions are actually in issue; to hear conflicting evidence, and make findings thereon; these are among the purposes for which such aids to the judges have been appointed.

Ex Parte Peterson, 253 U.S. 300, 312-13 (1920) (citations omitted) (emphasis added).

One commentator has noted:

> These court appointed agents are identified by a confusing plethora of titles: "receiver," "Master," "Special Master," "Master Hearing Officer," "Monitor," . . . . "Administrator" . . . . Terminological confusion is compounded by functional confusion. A "Master" may at the same time gather information, make recommendations, and act to implement a decree. While the first two activities are part of the Master's traditional role, the latter is not.

Special Project: The Remedies Process in Institutional Reform Litigation, 78 COLUM. L. REV. 784, 826-27 (1978) (footnotes omitted) ("Special Project").

An examination of Rules 53 and 66, FED. R. CIV. P., illustrates this potentially confusing mix of labels and functions. Rule 53 provides, in relevant part, as follows:

(a) Appointment.

(1) Unless a statute provides otherwise, a court may appoint a master only to:
(A) perform duties consented to by the parties;
(B) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by
(i) some exceptional condition,[206] or
(ii) the need to perform an accounting or resolve a difficult computation of damages; or
(C) address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

. . . .

(d) Evidentiary Hearings. Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence.

. . . .

(g) Action on Master's Order, Report, or Recommendations.

(1) Action. In acting on a master's order, report, or recommendations, the court must afford an opportunity to be heard and may receive evidence, and may: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions.

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[206] In LaBuy v. Howes Leather Co., 352 U.S. 249 (1957), the Supreme Court held that "an extremely congested calendar" (id. at 253) did not satisfy the "exceptional condition" requirement of Rule 53(a), and accordingly ruled that the trial court abused its discretion in appointing a special master to "hear" the case and to conduct hearings and prepare findings of fact and conclusions of law in a civil anti-trust case that was expected to take six weeks to try. "[S]everal cases decided subsequent to LaBuy indicate that the trial court's authority to appoint special masters is not [unduly] limited" by LaBuy. See United States v. Conservation Chemical Co., 106 F.R.D. 210, 218-222 (W.D. Mo. 1985) (collecting cases). Indeed, the "United States Supreme Court, exercising its original jurisdiction to resolve governmental boundary disputes pursuant to Art. III § 2 of the Constitution, regularly appoints Special Masters to hold and conduct hearings and to submit comprehensive recommendations resolving contested issues." Id. at 218, citing United States v. Louisiana, 470 U.S. 93, 97-101, 115 (1985); United States v. Maine, 469 U.S. 504, 506, 526 (1985); Oklahoma v. Arkansas, 469 U.S. 1101 (1985); Texas v. New Mexico, 465 U.S. 1063 (1984). See also cases cited below in Sections VII(E)(2) and (3) and VII(B)(3) and (4).

(2) Time To Object or Move. A party may file objections to - - or a motion to adopt or modify - - the master's order, report, or recommendations no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time.

(3) Fact Findings. The court must decide de novo all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that:
   (A) the master's findings will be reviewed for clear error, or
   (B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(4) Legal Conclusions. The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) Procedural Matters. Unless the order of appointment establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

Rule 66, FED. R. CIV. P. provides:

> An action wherein a receiver has been appointed shall not be dismissed except by order of the court. The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.

Rules 53 and 66 address only some of the functions often assigned to court-appointed officers. Significantly, Rules 53 and 66 do not squarely address the various roles of court-appointed officers to assist the court in devising and implementing remedies[207] or in administering the operations of public or private wrongdoers to carry out court-ordered relief and to prevent future unlawful conduct. See Special Project, 78 COLUM. L. REV. at 826, n.322 ("The terms 'master' and 'receiver' are used in the federal rules. Fed. R. Civ. P. 53, 66. However, the

[207] In that regard, Rule 53 specifically addresses only a master's functions involving making or recommending findings of fact, "accounting" or "difficult computation of damages," and does not address a court-officer's broader services in devising appropriate remedies, especially in institutional reform cases. See Sections II(A)(2) above, and VIII(B)(3) below.

use of 'masters' as court-appointed agents to administer the remedy bears little relation to the traditional use of masters envisaged in the federal rules").

More fundamentally, Rules 53 and 66 are not the exclusive bases of authority for appointing officers. Rather, as noted above, "courts have. . . inherent authority. . . to appoint persons. . . to aid judges in the performance of specific judicial duties." Ex Parte Peterson, 253 U.S. at 312. As Judge Irving Kaufman observed:

> Over and above the authority contained in Rule 53 to direct a reference, there has always existed in the federal courts an inherent authority to appoint masters as a natural concomitant of their judicial powers. . . .[R]ule 53 was intended merely as a codification of pre-existing procedures, and it may be assumed that references sanctioned by long usage and practice in the federal courts were not intended to be forever foreclosed by the rule.

Irving R. Kaufman, Masters in the Federal Courts: Rule 53, 58 COLUM. L. REV. 452, 462 (1958).[208]

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[208] See, e.g., Trull v. Dayco Products, LLC, 178 Fed. Appx. 247, at * 3 (4th Cir. 2006) (unpublished) ("Defendants' reliance on Rule 53 of the Federal Rules of Civil Procedure is misguided, as the district court appointed the special master based on its inherent authority to fashion appropriate post-verdict relief."); Jenkins by Agyei v. State of Mo., 890 F.2d 65, 67 (8th Cir. 1989) ("The district court did not rely upon Rule 53 when it created the Monitoring Committee, and we need not decide whether its actions are consistent with that Rule" because "'Rule 53 does not terminate or modify the district court's inherent equitable power to appoint a person, whatever be his title, to assist it in administering a remedy.'")(citation omitted); Reilly v. United States, 863 F.2d 149, 154 n.4 (1st Cir. 1988) (noting that because district court's authority to appoint a technical advisor "inheres generally in a district court," court of appeals need not decide whether Rule 53 served as additional source of such authority); Nat'l Org. for the Reform of Marijuana Laws v. Mullen, 828 F.2d 536, 544 (9th Cir. 1987) (ruling that in addition to Rule 53, district court had inherent authority under the All Writs Act to appoint a special master to monitor compliance with an injunction); Ruiz v. Estelle, 679 F.2d 1115, 1161 (5th Cir. 1982), vacated in part on other grounds, 688 F.2d 266 (5th Cir. 1982) ("[R]ule 53 does not terminate or modify the district court's inherent equitable power to appoint a person, whatever be his title, to assist it in administering a remedy"); Reed v. Cleveland Bd. of Ed., 607 F.2d 737, 743 (6th Cir. 1979) ("[A] judge in equity has inherent power to appoint persons from outside the court system for assistance," especially "in the remedial phase of a school desegregation or institutional reform

(continued...)

2. Court-Appointed Officers Perform Varied Functions

In light of above-referenced concerns regarding confusing titles, OCRS' analysis below focuses on three distinct, albeit related, categories of functions typically performed by court-appointed officers to assist courts in executing their equitable powers, rather than focusing on the titles of such officers: (1) devising remedies; (2) administering operations of an institutional defendant; and (3) monitoring compliance with court-ordered relief and related adjudicatory functions. Of course, in any particular case, a court-appointed officer may perform more than one of these functions and may be given different titles.[209]

a. Devising Remedies --

Court-appointed officers are often assigned the tasks of gathering information and making recommendations as to appropriate remedies in complex litigation. For example, in Swann v. Bd. of Educ., 402 U.S. at 9-11, 18-32, a court-appointed expert devised a comprehensive school desegregation plan, adopted by the district court, involving re-zoning, busing of students, and re-

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[208](...continued)
case"); Schwimmer v. United States, 232 F.2d 855, 865 (8th Cir. 1956) ("Beyond the provisions of Rule 53 . . . for appointing and making references to Masters, a Federal District Court has 'the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential'") (citation omitted); United States v. State of Conn., 931 F. Supp. 974, 984 (D. Conn. 1996) ("It is well settled in the law that federal courts have the inherent power to appoint an agent to oversee the implementation of its consent decrees. . . '[b]eyond the provisions of [FED. R. CIV. P. 53]'") (citation omitted); Powell v. Ward, 487 F. Supp. 917, 935 (S.D.N.Y. 1980), aff'd 643 F. 2d 924 (2d Cir. 1981) ("Courts have inherent authority to appoint nonjudicial officers to aid in carrying out their judicial functions."); Jordan v. Wolke, 75 F.R.D. 696, 701 (E.D. Wis. 1977) (appointing a special master "pursuant to the court's general equity powers and not under Rule 53 "). Cf. Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987) (holding that courts have inherent authority to appoint counsel to investigate and prosecute violations of a court's order).

[209] See Section VIII(B)(3) below, which discusses court-appointed officers' performance of these functions in Government civil RICO case involving labor unions.

assignment of teachers to different schools.

Similarly, in Sheet Metal Workers v. EEOC, supra, 478 U.S. 421, the district court found that Local 28 of the Sheet Metal Workers Union ("Local 28") discriminated against non-white workers in recruitment, selection, training and admission to the union. The district court ordered the parties "to devise and to implement recruitment and admission procedures designed to achieve [a goal of 29% non-white membership] under the supervision of the court-appointed administrator." Id. at 432. The court-appointed administrator proposed, and the district court adopted, an affirmative action program requiring Local 28 to adopt various changes to its practices and policies, including requiring Local 28 "to offer annual, nondiscriminatory journeyman and apprentice examinations, select members according to a white-non-white ratio to be negotiated by the parties, conduct extensive recruitment and publicity campaigns aimed at minorities, secure the administrator's consent before issuing temporary work permits, and maintain detailed membership records." Id. at 432-33.

The Supreme Court rejected Local 28's argument that "the District Court's appointment of an administrator with broad powers to supervise its compliance with the court's orders [was] an unjustifiable interference with its statutory right to self-governance." Id. at 481-82. The Supreme Court stated: "While the administrator may substantially interfere with petitioner's membership operations, such 'interference' is necessary to put an end to [Local 28's] discriminatory ways." Id. at 482.[210]

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[210] See also EEOC v. Local 638, 532 F.2d 821, 829-30 (2d Cir. 1976) (approving court-appointed administrator with broad powers to develop and enforce detailed plans to remedy racially discriminatory employment practices); Hart v. Cmty. Sch. Bd. of Educ., N.Y. Sch. Dist. #21, 512 F.2d at 42-43, 52 (approving court-appointed master to devise plans for school desegregation); SEC v. Heritage Trust Co., 402 F. Supp. 744, 754 (D. Ariz., 1975) ("appointment (continued...)

b. Administering Operations - -

Court appointed officers, typically titled "Administrator," "Trustee" or "Receiver," are also assigned the duties of taking over the management of all or parts of an institutional defendant's operations. Such function "extends beyond that of the Master, Monitor, or Mediator." See generally Special Project, 78 COLUM. L. REV. at 831.[211]

c. Monitoring Compliance and Adjudicatory Functions --

The Supreme Court has long recognized the authority of courts in equity to appoint officers "[t]o take and report testimony. . . to hear conflicting evidence, and make findings thereon." Ex Parte Peterson, 253 U.S. at 313. See also California v. Texas, 459 U.S. 963 (1982) (Mem.) (The Supreme Court approved of the appointment of a Special Master "with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for . . . [and] to submit such

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[210](...continued)
of a receiver. . . to take charge of all books, records and assets of defendant corporation [found liable for violations of securities laws], and to investigate and make recommendations to the Court as to proceedings to be taken in the interest of and for the protection of all investors and trustors").

[211] See e.g., Morgan v. McDonough, 540 F.2d 527, 529-35 (1st Cir. 1976) (upholding the power of the district court to appoint a receiver for South Boston High School with broad powers to devise plans to enroll students and to renovate the school, to evaluate the qualifications of personnel and to transfer personnel, and to make other proposals to achieve school desegregation); EEOC v. Local 638, 532 F.2d at 829 ("a court-appointed administrator is granted extensive supervisory power over Local 28" including authority "to develop and enforce" detailed plans to remedy racially discriminatory employment practices); SEC v. Bartlett, 422 F.2d 475 (8th Cir. 1970) (appointing a receiver to liquidate corporate defendant's assets where the defendant violated securities laws); Turner v. Goolsby, 255 F. Supp. 724, 730 (S.D. Ga. 1966) (receiver appointed to implement a plan to desegregate a school system); see also Section VIII(B)(3) below.

reports as he may deem appropriate."); Mississippi v. Arkansas, 402 U.S. 926 (1971) (same); Arizona v. California, 347 U.S. 986 (1954) (same); City of Richmond v. United States, 422 U.S. 358, 366-67 (1995) (special master appointed to hold evidentiary hearings and submit recommended findings of fact and conclusions of law regarding the effect of a municipal annexation plan on diluting the right of black persons to vote).

Lower courts, likewise, have sanctioned appointing court-officers to assist district courts in pre-liability adjudication functions, as well as monitoring compliance with court-ordered relief, including performing adjudicatory functions such as investigating allegations of violations of court orders, conducting evidentiary hearings, making factual findings, and recommending sanctions.[212]

3. Article III Considerations

Appointment of a non-Article III officer to perform adjudicatory functions may constitute an unconstitutional delegation of judicial powers in violation of Article III of the Constitution when such a non-judicial officer's adjudicatory functions usurp the judicial authority of the district court to decide the dispositive issues in a lawsuit.[213] As the Supreme Court stated, absent

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[212] See, e.g., Juan F. v. Weicker, 37 F.3d 874, 879-80 (2d Cir. 1994); In Re Pearson, 990 F.2d 653, 659 (1st Cir. 1993); Nat'l. Org. for the Reform of Marijuana Laws, 828 F.2d at 542-45; United States v. Suquamish Indian Tribe of Washington, 901 F.2d 772, 774-75 (9th Cir. 1990); Williams v. Lane, 851 F.2d 867, 884 (7th Cir. 1988); In Re Armco, Inc., 770 F.2d 103, 105 (8th Cir. 1985); New York State Ass'n For Retarded Children v. Carey, 706 F.2d 956, 962-65 (2d Cir. 1983); Ruiz, 679 F.2d at 1159-62; Rosen v. Tennessee Com'r of Finance and Admin., 204 F. Supp. 2d 1061, 1095 (M.D. Tenn. 2001); United States v. Connecticut, 931 F. Supp. at 984 (collecting cases); Taylor v. Perini, 413 F. Supp. 189 (N.D. Ohio 1976); Bell v. Hall, 392 F. Supp. 274 (D. Mass. 1975); United States v. Conservation Chem. Co., 106 F.R.D. 210, 218-222 (W.D. Mo. 1985) (collecting cases).

[213] See, e.g., Cobell v. Norton, 392 F.3d 461, 476-78 (D.C. Cir. 2004); Stauble v. Warrob, 977 F.2d 690, 695-96 (1st Cir. 1992); In Re Bituminous Coal Operators' Ass'n, Inc.,

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consent of the parties, Article III bars a district court, "of its own motion, or upon the request of one party," from "abdicat[ing] its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers." Kimberly v. Arms, 129 U.S. 512, 524 (1889).

However, the Supreme Court has made clear that, in equitable suits involving "public rights,"[214] "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determination of fact in constitutional courts shall be made by judges." Crowell v. Benson, 285 U.S. 22, 51 (1932). The Supreme Court added:

> In cases of equity and admiralty, it is historic practice to call to the assistance of the courts, without the consent of the parties, masters and commissioners or assessors, to pass upon certain classes of questions, as, for example, to take and state an account or to find the amount of damages. While the reports of masters and commissioners in such cases are essentially of an advisory nature, it has not been the practice to disturb their findings when they are properly based upon evidence, in the absence of errors of law **and the parties have no right to demand that the court shall redetermine the facts.**

Crowell, 285 U.S. at 51-52 (emphasis added).

In Crowell, the Supreme Court rejected an Article III challenge to a statutory scheme that authorized an administrative agency to make initial factual determinations pursuant to a federal

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[213](...continued)
949 F.2d 1165, 1168-69 (D.C. Cir. 1991).

[214] In Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 (1982), the Supreme Court stated that "[t]he distinction between public rights and private rights has not been definitively explained in our precedents . . . [but] it suffices to observe that a matter of public rights must at a minimum arise 'between the government and others'") (citation omitted). Manifestly, civil RICO equitable suits brought by the Government under 18 U.S.C. § 1964(a) to vindicate the public's interests to reform corrupt institutions involve such "a matter of public rights." See Section VIII below.

statute requiring employers to compensate their employees for work-related injuries occurring upon the navigable waters of the United States. Id. at 37-45. The Court noted that, under that statutory scheme, "[i]n conducting investigations and hearings, the [Administrative Agency] is not bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, except as the Act provides." Id. at 43.

In upholding this statutory scheme, the Supreme Court found it significant that the administrative agency had the "limited" role "of determining the questions of fact," the statute reserved "full authority of the court to deal with matters of law" (id. at 54), and that the administrative agency did not have the power to enforce any of its compensation orders. Rather, "every compensation order was appealable to the appropriate federal district court, which had the sole power to enforce it or set it aside, depending upon whether the court determined it to be 'in accordance with law' and supported by evidence in the record." See Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50, 78 (1982) quoting Crowell, 285 U.S. at 44.

Similarly, in United States v. Raddatz, 447 U.S. 677 (1980), the Supreme Court held that the 1978 Federal Magistrates Act, which permitted district court judges to refer certain pretrial motions, including motions to suppress evidence based on alleged constitutional violations, to a magistrate for initial determination, did not violate Article III of the Constitution. The Act also provided that the district court shall make a "de novo determination" of those portions of the magistrate's report, findings, or recommendations to which objection is made. Id. at 673. The Supreme Court stated that:

> although the statute permits the district court to give to the magistrate's proposed findings of fact and recommendations "such weight as [their] merit commands and the sound discretion of the judge warrants,". . . that delegation does not violate Art. III so long

as the ultimate decision is made by the district court.

Id. at 683 (citation omitted; brackets in original).

Morever, in Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n., 430 U.S. 442 (1977), the Supreme Court held that the Seventh Amendment does not prohibit Congress from assigning to an administrative agency the task of adjudicating violations of the Occupational Safety and Health Act of 1970. The administrative agency's findings of a violation and imposition of sanctions were final, subject to judicial review in the appropriate court of appeals. Id. at 446-47. The Supreme Court explained:

> At least in cases in which "public rights" are being litigated - e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact - the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.
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> . . .
>
> In cases which do involve only "private rights," this Court has accepted factfinding by an administrative agency, without intervention by a jury, only as an adjunct to an Art. III court, analogizing the agency to a jury or a special master and permitting it in admiralty cases to perform the function of the special master.

Id. at 450 and n.7.

The foregoing authority demonstrates that it does not violate Article III to assign adjudicatory functions, including making factual findings, to a non-Article III body, when the court retains its authority to decide dispositive issues of liability and remedies. In accordance with the foregoing authority, courts have noted that it did not violate Article III to assign a variety of adjudicatory functions to court-appointed officers, provided that the district court retains sufficient authority to decide the dispositive issues. For example, in Stauble v. Warrob, Inc.,

977 F.2d 690 (1st Cir. 1992), the court stated:

> Article III does not require that a district judge find every fact and determine every issue of law involved in a case. In respect to . . . remedy-related issues . . . a master may be appointed to make findings of fact and recommend conclusions of law. As long as the district court discerns sufficient supporting evidence and is satisfied that the master applied the correct legal standards, it may rely on the master's report as part of its own determination of liability.

Id. at 695.

Similarly, in In Re Armco, Inc., 770 F.2d 103 (8th Cir. 1985), the court ruled:

> If the district court determines that liability rests with some or all of the parties, it may request the master to conduct evidentiary rehearings with respect to damages and alternative relief and make recommendations with respect to these matters. It may also direct the magistrate to monitor and supervise any injunctive relief granted and to make reports to it with respect to compliance with any decrees entered.

Id. at 105.

Moreover, in United States v. Conservation Chem. Co., 106 F.R.D. 210 (W.D. Mo. 1985), the district court appointed a Special Master with "the power to order and preside over pretrial hearings, the authority to supervise and issue recommendations regarding pretrial matters, and the authority to hold hearings and issue recommendations on the claims for inclusion in any injunctive relief order and appointment of costs." Id. at 216. The "court expressly reserved its judicial authority and responsibility to make the ultimate determinations on all issues." Id. The court concluded that the scope of the Special Master's authority "does not violate the constraints of Article III because the ultimate decision making authority clearly

remains with the District Court." Id. at 234.[215]

F. Contempt

1. Determining Whether Contempt is Civil or Criminal in Nature

Courts have inherent authority to enforce their orders through contempt sanctions and to appoint private attorneys to investigate and prosecute a violation of a court's order.[216] Moreover, 18 U.S.C. § 401[217] authorizes courts to impose both civil and criminal contempt sanctions[218] under the following principles.

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[215] See also In re Pearson, 990 F.2d 653, 655, 659 (1st Cir. 1993) (holding that Article III was not violated by appointing a special master to assist in the implementation of a consent decree "to analyze 'the impact of existing and pending legislation on the consent decree' and on 'the operation of the Treatment Center'; to study all unresolved claims alleging violations of the consent decrees; and to advise the court concerning the Treatments Center's operation and the continued viability of the King decrees."); Jenkins By Agyei, 890 F.2d at 66-67 (authorizing court-appointed officers to decide any dispute involving interpretation of the district court's desegregation orders did not violate Article III when the district court retained de novo review).

[216] See, e.g., Kokkonem v. Guardian Life Ins. Co. of America, 511 U.S. 375, 380 (1994); Young, 481 U.S. at 793-96; Shillitani v. United States, 384 U.S. 364, 370 (1966); Michaelson v. United States ex rel Chicago, St. P., M., & R. Co., 266 U.S. 42, 65-66 (1924); Armstrong v. Guccione, 470 F.3d 89, 103-106 (2d Cir. 2006).

[217] 18 U.S.C. § 401 provides as follows:

> A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as -
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> (1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
> (2) misbehavior of any of its officers in their official transactions;
> (3) disobedience or resistence to its lawful writ, process, order, rule, decree, or command.

See also 28 U.S.C. § 1826.

[218] See, e.g., Armstrong, 470 F.3d at 100-05.

a. The Bagwell Decision

In Int'l Union, United Mine Workers of America v. Bagwell, 512 U.S. 821 (1994) ("Bagwell"), the Supreme Court set forth the basic principles to determine whether a contempt sanction is considered civil or criminal, stating:

> In the leading early case addressing this issue in the context of imprisonment, *Gompers v. Bucks Stove & Range Co.*, 221 U.S., at 441, the Court emphasized that whether contempt is civil or criminal turns on the "character and purpose" of the sanction involved. Thus, a contempt sanction is considered civil if it "is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court." *Ibid.*

Id. at 827-28.

The Bagwell Court added:

> As *Gompers* recognized, however, the stated purposes of a contempt sanction alone cannot be determinative. *Id.*, at 443. "[W]hen a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it also is seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order." *Hicks*, 485 U.S., at 635. Most contempt sanctions, like most criminal punishments, to some extent punish a prior offense as well as coerce and offender's future obedience . . .
>
> The paradigmatic coercive, civil contempt sanction, as set forth in *Gompers*, involves confining a contemnor indefinitely until he complies with an affirmative command such as an order "to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance." 221 U.S. at 442; see also *McCrone v. United States*, 307 U.S. 61, 64 (1939) (failure to testify). Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of earlier release if he complies. Shillitani v. United States, 384 U.S. 364, 370, n.6 (1966) (upholding as civil "a determinate [2-year] sentence which includes a purge clause"). In these circumstances, the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus, "'carries the keys of his prison in his own

> pocket.'" *Gompers*, 221 U.S. , at 442, quoting *In re Nevitt*, 117 F. 448, 451 (CA8 1902).
>
> By contrast, a fixed sentence of imprisonment is punitive and criminal if it is imposed retrospectively for a "completed act of disobedience," *Gompers*, 221 U.S., at 443, such that the contemnor cannot avoid or abbreviate the confinement through later compliance. Thus, the *Gompers* Court concluded that a 12-month sentence imposed on Samuel Gompers for violating an antiboycott injunction was criminal. When a contempt involves the prior conduct of an isolated, prohibited act, the resulting sanction has no coercive effect. "[T]he defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense." Id., at 442.

Bagwell, 512 U.S. at 828-29.

Thus, affording a contemnor the opportunity to purge his contempt by complying with the order at issue renders a sanction of imprisonment civil in nature. The same principles apply to contempt sanctions involving fines. In that respect, the Bagwell Court stated:

> This dichotomy between coercive and punitive imprisonment has been extended to the fine context. A contempt fine accordingly is considered civil and remedial if it either "coerce[s] the defendant into compliance with the court's order, [or] . . . compensate[s] the complainant for losses sustained." *United States v. Mine Workers*, 330 U.S. 258, 303-304 (1947). Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge. See *Penfield Co. of Cal. v. SEC*, 330 U.S. 585, 590 (1947). Thus, a "flat, unconditional fine" totaling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance. *Id.*, at 588.

Bagwell, 512 U.S. at 829. Thus, as in the case of imprisonment, affording the contemnor an opportunity to purge a non-compensatory contempt fine will render the contempt civil in nature.[219]

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[219] See, e.g., Armstrong, 470 F. 3d at 101-02; N.Y. State Nat'l Org. for Women v. Terry, (continued...)

Applying these principles, the Bagwell Court concluded that the fines involved rendered the contempt criminal in nature. In Bagwell, the trial court enjoined a union and its members from conducting certain unlawful strike-related activities against certain mining companies, and "ordered the union to take all steps necessary to ensure compliance with the injunction, to place supervisors at picket sites, and to report all violations to the court." 512 U.S. at 823-24. Following a civil contempt hearing, the trial court found that the union and its members committed 72 violations of the injunction. The trial court also stated that "it would fine the union $100,000 for any future violent breach of the injunction and $20,000 for any future non-violent infraction." Id. at 824.

In seven subsequent contempt hearings, the trial court found the union in contempt for more than 400 separate violations of the injunction, many of them violent, and levied approximately $52 million in fines against the union, payable to the State of Virginia and two counties most affected by the union's unlawful activity. "The trial court required the contumacious acts to be proved beyond a reasonable doubt, but did not afford the union a right to a jury trial." Id. at 824.

On appeal, the Supreme Court of Virginia held that "[b]ecause the trial court's prospective fine schedule was intended to coerce compliance with the injunction and the union could avoid the fines through obedience . . . . . the fines were civil and coercive and properly imposed in civil proceedings." Id. at 826.

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[219](...continued)
159 F.3d 86, 94-95 (2d Cir. 1998) (collecting cases). See also cases cited in Section VII(F)(1)(b) below.

The Supreme Court reversed, finding that the "serious" contempt fines were criminal and constitutionally could be imposed only through a jury trial. Id. at 826-39. First, the Court noted that because none of the parties argued that the challenged fines are "compensatory," they are civil only if they were designed to coerce the defendants into compliance with the Court's orders and the defendants were afforded an opportunity to purge. Id. at 834. Second, the Court rejected the argument that "the mere fact that the sanctions were announced in advance rendered them coercive and civil as a matter of constitutional law." Id. at 837. In that regard, the Court reasoned that the trial court's statement that it would impose "determinate fines of $20,000 or $100,000 per violation" for future contempts made them "more closely analogous to fixed, determinate, retrospective criminal fines which [the union] had no opportunity to purge once imposed." Id. at 837. Finally, the Court stated:

> Other considerations convince us that the fines challenged here are criminal . . . [T]he union's contumacy [did not] involve simple, affirmative acts, such as the paradigmatic civil contempts examined in Gompers. Instead, the Virginia trial court levied contempt fines for widespread, ongoing, out-of-court violations of a complex injunction. In so doing, the court effectively policed petitioners' compliance with an entire code of conduct that the court itself had imposed. The union's contumacy lasted many months and spanned a substantial portion of the State. The fines assessed were serious, totaling over $52 million. Under such circumstances, disinterested factfinding and evenhanded adjudication were essential, and petitioners were entitled to a criminal jury trial.

Id. at 837-38.

b. Decisions Following Bagwell

(1.) Following Bagwell, circuit courts have held that various contempt fines and sanctions were civil in nature. For example, in NLRB v. Ironworkers Local 433, 169 F.3d 1217

(9th Cir. 1999), the district court imposed a contempt fine on the Ironworkers union for picketing in violation of a consent decree. The Ninth Circuit held that, although the fine was for past conduct and had a punitive aspect, the fine was civil in nature because it had a remedial purpose to compel future compliance. Id. at 1221-22.

Similarly, in N.Y. State Nat'l Org. for Women v. Terry, 159 F.3d 86, 89-90 (2d Cir. 1998), the district court imposed "coercive civil penalties" in the amount of $100,000 against anti-abortion protestors for violating a court order which enjoined them from blocking access to abortion clinics. The penalties were subject to a "purge provision" by which the defendants could avoid the contempt penalties if they obeyed the injunction. Id. at 91. The Second Circuit held that the penalties were civil in nature because they had a coercive purpose and allowed the defendants to purge the contempt. Id. at 94.

In Chadwick v. Janecka, 312 F.3d 597 (3d Cir. 2002), Chadwick petitioned the district court for habeas corpus relief from his civil contempt incarceration for failure to pay $2.5 million in a divorce proceeding. The district court granted the petition, finding that, after petitioner had spent seven years in prison, the incarceration had lost its coercive effect and had become punitive. Id. at 599. The Third Circuit reversed, holding that there was no federal constitutional bar to indefinite confinement for civil contempt, so long as the contemnor could still comply with the order and purge the contempt. Id. at 613.

Finally, in F.T.C. v. Kuykendall, 312 F.3d 1329 (10th Cir. 2002), the district court imposed a $39 million contempt fine on defendants for violating an injunction relating to telemarketing activities. The fine was payable to the FTC to redress injuries to consumers for the violations. The Tenth Circuit held that consumer redress was a classic remedial sanction, was

"not designed to vindicate the authority of the court, and that therefore the fine was civil in nature." Id. at 1337.

(2.) Following Bagwell, circuit courts have held that various contempt fines and sanctions were **criminal** in nature. For example, in Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003), the district court found the Secretary of Interior "in civil contempt of court," id. at 1136, for failing to comply with a court order regarding Native American land trust accounts and failing to disclose information to the court related to these accounts. Although the district court denominated the contempt as "civil," and there was no "clear sanction," the Appellate Court held that it was criminal contempt because it was for past conduct and clearly intended to punish for violation of a court order. Id. at 1145-47.

In Evans v. Williams, 206 F.3d 1292 (D.C. Cir. 2000), the district court sanctioned the District of Columbia for violating a consent decree concerning the management of institutions for the mentally retarded, and ordered the defendant to pay over $5 million in fines. The United States Court of Appeals for the District of Columbia held that this sanction was criminal in nature because of the complexity of the consent decree,[220] the lack of an opportunity to purge, and the fact that the fine was designed more to punish the city agency for past violations, rather than gain compliance with the consent decree. Id. at 1296-97.

In F.J. Hanshaw Enterprises, Inc. v. Emerald River Dev, Inc., 244 F.3d 1128 (9th Cir. 2001), the district court sanctioned Frederick Hanshaw for $500,000 and ordered $200,000 in compensatory civil award to the opposing party after Hanshaw attempted to bribe a court receiver

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[220] In that respect, the court stated that the consent "decree governs the administration of an entire governmental program in the District of Columbia. It prescribes a complete code of conduct - originally covering everything from bill payments to staffing to air conditioning - that the district court has enforced for years." Evans, 206 F.3d at 1297.

in a partnership dissolution. The Ninth Circuit held that the $500,000 sanction was criminal in nature, because it was "clearly punitive and intended to vindicate the court's authority and the integrity of the judicial process." Id. at 1138. However, the court held that the $200,000 award to the opposing party was civil in nature, because it was intended to compensate the opposing party for costs attributable to the bribe attempt. Id. at 1143.[221]

2. Different Elements and Procedures Apply to Criminal and Civil Contempt

In Bagwell, the Supreme Court explained the fundamental differences in procedures that apply to civil and criminal contempts, stating:

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[221] See also Jake's, Ltd. v. City of Coates, 356 F.3d 896 (8th Cir. 2004) (the district court enjoined the owner of an adult club from operating in violation of city zoning laws and ordered payment of $1,000 per day if the operation continued. Id. at 898. The club continued to operate but with clothed dancers in an attempt to comply with zoning. Id. The district court again found the owner in contempt and ordered a $68,000 contempt fine based on the $1,000 per-day penalty. The Eighth Circuit held that the $68,000 fine was criminal in nature, because of the complexity of city zoning laws, the lack of an opportunity to purge, and the non-compensatory nature of payment to the court. Id. at 902-03.); Mellon v. Cessna Aircraft Co., 229 F.3d 1164 (10th Cir. 2000) (the district court found Cessna in contempt for refusing to service plaintiff's aircraft in violation of a court order. The district court ordered Cessna to pay the plaintiff for service by another aircraft company. The Tenth Circuit held that, although the order appears compensatory, the penalty was criminal in nature because it was imposed **before** the plaintiff had actually incurred any losses.); United States v. Ayres, 166 F.3d 991 (9th Cir. 1999) (the district court held the defendant in contempt for failing to testify before the IRS, but allowed a 10-day grace period during which the defendant could testify and purge the contempt. Id. at 994. For each day beyond the grace period, the defendant would be fined $500. The defendant agreed to testify on the last day of the grace period, but due to scheduling problems attributable to the IRS, he was not able to do so. The district court imposed a contempt fine of $1500 on the defendant for testifying too late. Id. at 993-94. The Ninth Circuit held that although the contempt was originally intended to coerce compliance, it became punitive when Ayres was not permitted to purge by testifying, thereby invoking the heightened procedural protections of Bagwell. Id. at 997.); Crowe v. Smith, 151 F.3d 217, 221-28 (5th Cir. 1998) (the district court sanctioned defendants $5 million payable to the court for concealing an insurance policy in a civil RICO case. Id. at 221. The Fifth Circuit held that the fines were criminal in nature because they were not compensatory, and there was no opportunity to purge.)

> "Criminal contempt is a crime in the ordinary sense," *Bloom v. Illinois*, 391 U.S. 194, 201 (1968), and "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings," *Hicks v. Feiock*, 485 U.S. 624, 632 (1988). See *In re Bradley*, 318 U.S. 50 (1943) (double jeopardy); *Cooke v. United States*, 267 U.S. 517, 537 (1925) (rights to notice of charges, assistance of counsel, summary process, and to present a defense); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911) (privilege against self-incrimination, right to proof beyond a reasonable doubt). For "serious" criminal contempts involving imprisonment of more than six months, these protections include the right to jury trial. *Bloom*, 391 U.S., at 199; see also *Taylor v. Hayes*, 418 U.S. 488, 495 (1974). In contrast, civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required.

Id. at 862-27.[222]

a. Principles Governing Criminal Contempt

To convict a person for criminal contempt for violation of a court's order, the plaintiff must establish beyond a reasonable doubt that: (1) the contemnor violated the court's order; (2)

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[222] The Bagwell Court added:

> We address only the procedures required for adjudication of indirect contempts, i.e., those occurring out of court. Direct contempts that occur in the court's presence may be immediately adjudged and sanctioned summarily, see, e.g., Ex parte Terry, 128 U.S. 289 (1888), and, except for serious criminal contempts in which a jury trial is required, Bloom v. Illinois, 391 U.S. 194, 209-210 (1968), the traditional distinction between civil and criminal contempt proceedings does not pertain, cf. United States v. Wilson, 421 U.S. 309, 316 (1975).

Bagwell, 512 U.S. at 826 n.2.

the order was clear and reasonably specific; and (3) the contemnor's violation was willful.[223] And, as noted above, the full panoply of constitutional rights that apply to criminal proceedings also apply to criminal contempt proceedings. Moreover, a criminal contempt sanction is immediately appealable,[224] and is reviewed under an abuse of discretion standard.[225]

b. Principles Governing Civil Contempt

To establish a person's liability for civil contempt for violating a court's order, the plaintiff must prove by clear and convincing evidence that the contemnor had notice of the court's order and violated the court's order.[226] Significantly, however, the plaintiff need not establish that the contemnor acted willfully or with any other wrongful intent. In McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949), the Supreme Court held that civil contempt did not require wilfulness, explaining:

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[223] See, e.g., Panico v. United States, 375 U.S. 29, 30 (1963); United States v. United Mine Workers of America, 330 U.S. 258, 303 (1947); Cobell v. Norton, 334 F.3d 1128, 1147 (D.C. Cir. 2003); In re Smothers, 322 F.3d 438, 441-42 (6th Cir. 2003); United States v. Mourad, 289 F.3d 174, 188 (1st Cir. 2002); United States v. Vezina, 165 F.3d 176, 178 (2d Cir. 1999); United States v. Rapone, 131 F.3d 188, 192-95 (D.C. Cir. 1997); United States v. Nynex Corp., 8 F.3d 52, 54 (D.C. Cir. 1993); Taberer v. Armstrong World Indus., Inc., 954 F.2d 888, 908 (3d Cir. 1992).

[224] See, e.g., Union Tool Co. v. Wilson, 259 U.S. 107, 110 (1922); S. Railway Co. v. Lanham, 403 F.2d 119, 124 (5th Cir. 1968).

[225] See, e.g., F.J. Hanshaw Enterprises, 244 F.3d at 1135.

[226] See, e.g., United States v. Dist. Council of N.Y. City & Vicinity, 2007 WL 1157143 at * 3 (2d Cir. April 18, 2007); United States v. Dowell, 257 F.3d 694, 699 (7th Cir. 2001); United States v. Ayres, 166 F.3d 991, 995 (9th Cir. 1999); United States v. Mircosoft Corp., 147 F.3d 935, 940 (D.C. Cir. 1998); Local 1804-1 Int'l Longshoremen's Ass'n., 44 F.3d at 1096; Howard Johnson Co., Inc. v. Khimani, 892 F.2d 1512, 1516 (11th Cir. 1990); Perfect Fit Indus., Inc. v. Acme Quilting Co., Inc., 646 F.2d 800, 808 (2d Cir. 1981).

> The absence of wilfulness does not relieve from civil contempt . . . Since the purpose [of civil contempt] is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents. It laid on them a duty to obey specified provisions of the statute. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently.

Id. at 191 (footnote and citations omitted). Accord NLRB v. Blevins Popcorn Co., 659 F.2d 1173, 1184 (D.C. Cir. 1981) (holding "the intent of the recalcitrant party is irrelevant").[227]

"An alleged contemnor may defend against a finding of contempt by demonstrating a present inability to comply." United States v. Ayres, 166 F.3d 991, 994 (9th Cir. 1999). The contemnor bears the burden of establishing his present inability to comply with a court's order.[228] However, such "present inability to comply" is not the same as continuing to refuse to comply. In that regard, the Supreme Court has stated that a court may imprison a civil contemnor "indefinitely until he complies with [a court's order]," Bagwell, 512 U.S. at 828, or he "adduces evidence as to his present inability to comply with that order." United States v. Rylander, 460 U.S. 752, 761 (1983). Accord Maggio v. Zeitz, 333 U.S. 56, 74, n.7 (1948) ("The defendant can not, of course, be committed for the failure to do something which is beyond his power") (citation omitted); Shillitani, 384 U.S. at 371 ("[T]he justification for coercive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court's order . . . Where the grand jury has been finally discharged, a contumacious witness can no

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[227] Moreover, as noted above, a civil contemnor does not have a right to a jury trial or to other procedural constitutional rights that attach to criminal proceedings.

[228] See, e.g., McPhaul v. United States, 364 U.S. 372, 379 (1960); In re Lawrence, 279 F.3d 1294, 1297 (11th Cir. 2002); Chicago Truck Drivers v. Bhd. Labor Leasing, 207 F.3d 500, 506 (8th Cir. 2000); United States v. Jenkins, 760 F.2d 736, 739-40 (7th Cir. 1985); Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 781-82 (9th Cir. 1983).

longer be confined since he then has no further opportunity to purge himself of contempt.")

The decision in Armstrong v. Guccione, 470 F.3d 89 (2d Cir. 2006), illustrates the distinction between "a present inability to comply" with a court's order and a contemnor's persistent refusal to comply with a court's order notwithstanding his ability to comply with it. In Armstrong, the contemnor was held in civil contempt for his refusal to return to a court-appointed receiver corporate records and assets totaling approximately $16 million, and was imprisoned until he complied with the court's order. Id. at 92. Over nearly seven years, the district court afforded the contemnor numerous opportunities to either comply with the court's orders or demonstrate his inability to comply with them, but he did neither. Id. at 95-96.

On appeal, the contemnor argued, among other matters, that his length of incarceration without compliance with the court's orders warranted an inference of his inability to comply and rendered any further imprisonment "coercive" in violation of due process. Id. at 110-112. The Second Circuit rejected this argument, explaining that persistence in refusing to comply with a court's order does not by itself establish a present inability to comply. Id. at 111-12. The Second Circuit added that "[t]he Due Process Clause does not demand that the test of [the contemnor's] obduracy end today, or for that matter, at any specific time." Id. at 113. Accordingly, the Second Circuit remanded for a determination of whether the contemnor's continued failure to comply with the district court's orders was due to his present inability to comply or to his refusal to comply, notwithstanding his present ability to comply. Id. at 113.

Similarly, in Chadwick v. Janecka, 312 F.3d 597 (3d Cir. 2002), the Third Circuit refused to release a contemnor who had been incarcerated for nearly seven years for refusing to comply with a court's order, and rejected the contemnor's claim that he should be released because there

was no substantial likelihood of his compliance with the court's order. The Third Circuit stated:

> The Supreme Court has never endorsed the proposition that confinement for civil contempt must cease when there is "no substantial likelihood of compliance" . . . [T]here is no federal constitutional bar to [the contemnor's] indefinite confinement for civil contempt so long as he retains the ability to comply with the order requiring him to pay over the money at issue.

Id. at 613. Accord Wronke v. Madigan, 26 F. Supp. 2d 1102, 1106 (C.D. Ill. 1998) ("a civil contemnor may be incarcerated until he either complies with the court's order or adduces evidence as to his present inability to comply with that order".)[229]

Moreover, as a general rule, a party to a lawsuit may not appeal a civil contempt sanction until a final judgment is rendered in the underlying lawsuit. As the Supreme Court stated in Fox v. Capital Co., 299 U.S. 105 (1936):

> The rule is settled in this Court that except in connection with an appeal from a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of a civil contempt.

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[229] However, some courts have held that incarceration for civil contempt "cannot last forever," and that a contemnor should be released from prison when a contemnor who has been incarcerated for a substantial period of time persists in his refusal to comply with a court's order and there is no "realistic possibility" that the contemnor will comply with the court's order, notwithstanding his present ability to comply with the court's order. In such circumstances, courts have concluded that "contempt sanctions lose their coercive effect [and] become punitive and violate the contemnor's due process rights." In re Lawrence v. Goldberg, 279 F.3d 1294, 1300 (11th Cir. 2002) (citations omitted). Accord CFTC v. Wellington Precious Metals, Inc., 950 F.2d 1525, 1530-31 (11th Cir. 1992) (collecting cases); United States v. Jenkins, 760 F.2d 736, 740 (7th Cir. 1985).

The Supreme Court has not resolved the tension between the rulings of these cases and the rulings in Armstrong v. Guccione, Chadwick v. Janecka, and Wronke v. Madigan discussed above. Cf. McNeil v. Director, Patuxent Inst., 407 U.S. 245, 251 (1972) (noting that if after a hearing on remand petitioner's confinement, "potentially for life" "were explicitly premised on a finding of contempt, then it would be appropriate to consider what limitations the Due Process Clause places on the contempt power. The precise contours of that power need not be traced here.").

Id. at 107.[230] However, an order holding a non-party in civil contempt is immediately appealable,[231] and a post-judgment, non-contingent order holding a party in contempt is immediately appealable.[232] A civil contempt sanction is reviewable under the abuse of discretion standard.[233]

3. A Jury Trial for Criminal Contempt is Required When the Sanction Involves A "Serious Fine" or Imprisonment of More Than Six Months

In Bagwell, 512 U.S. at 826-27, the Supreme Court stated that "criminal contempts involving imprisonment of more than six months" trigger a constitutional right to a jury trial. Accord Taylor v. Hayes, 418 U.S. 488, 495 (1974); Bloom v. State of Illinois, 391 U.S. 194 (1968).[234] The Bagwell Court also held that the imposition "of serious criminal contempt fines triggers the right to jury trial," 512 U.S. at 837, n.5,[235] and that the fines imposed in Bagwell, totaling over $52 million were "serious," and hence required a jury trial. 512 U.S. at

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[230] Accord United States v. Philip Morris Inc., 314 F.3d 612, 620 (D.C. Cir. 2003); Howard Johnson Co., Inc., v. Khimani, 892 F.2d 1512, 1515 (11th Cir. 1990); S. Railway Co. v. Lanham, 403 F.2d 119, 124 (5th Cir. 1968).

[231] See, e.g., U.S. Catholic Conference v. Abortion Rights Mobilization, 487 U.S. 72, 76 (1988); United States v. Accetturo, 842 F.2d 1408, 1412 (3d Cir. 1988) (collecting cases); Union of Professional Airmen v. Alaska Aeronautical Industries, Inc., 625 F.2d 881, 884 (9th Cir. 1980).

[232] See, e.g., Gates v. Shinn, 98 F.3d 463, 467 (9th Cir. 1999); Combs v. Ryan's Coal Co., 785 F.2d 970, 976-77 (11th Cir. 1986).

[233] See, e.g., United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 44 F.3d 1091, 1095 (2d Cir. 1995); Armstrong v. Executive Office of President, 1 F.3d 1274, 1289 (D.C. Cir. 1993).

[234] See also Frank v. United States, 395 U.S. 147 (1969) (holding that a sentence of three years probation for criminal contempt was not a serious offense and did not require a jury trial).

[235] Accord Bloom, 391 U.S. at 210.

837-39.

The Bagwell Court added that "to date [it] has not specified what magnitude of contempt fine may constitute a serious criminal sanction, although it has held that a fine of $10,000 imposed on a union was insufficient to trigger the Sixth Amendment right to jury trial." 512 U.S. at 837, n.5, citing Muniz v. Hoffman, 422 U.S. 454, 477 (1975). The Bagwell Court concluded:

> We need not answer today the difficult question where the line between petty and serious contempt fines should be drawn, since a $52 million fine unquestionably is a serious contempt sanction.

512 U.S. at 838 n.5.

Lower courts have held that various fines for contempt were "serious," which required a jury trial,[236] while other fines were not "serious" and did not require a jury trial.[237]

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[236] See, e.g., Jake's Ltd. v. City of Coates, 356 F.3d 896, 903 (8th Cir. 2004) (requiring a jury trial for a $68,000 contempt fine against an adult club owner for violating a court order to comply with city zoning laws, where state law would have provided a jury trial for the city zoning violations); F. J. Hanshaw Enterprises, Inc., 244 F.3d at 1139-41 (requiring a jury trial for a $500,000 contempt fine for attempted bribery); Evans, 206 F.3d at 1297-99 (requiring a jury trial for a $5 million contempt fine against the District of Columbia for its failure to comply with a consent decree); Crowe v. Smith, 151 F.3d 217, 228, n. 13 (5th Cir. 1998) (stating that contempt fines of $75,000 for an individual and $5 million for a corporation were "non-petty" sanctions, requiring a jury trial); Mackler Productions, Inc. v. Cohen, 146 F.3d 126, 129-130 (2d Cir. 1998) (holding that a $10,000 punitive sanction on an individual required a jury trial); N.Y. State Nat'l Org. for Women v. Terry, 41 F.3d 794, 798 (2d Cir. 1994) (holding that non-compensatory contempt fines of $500,000 for defendants' anti-abortion activities in violation of an injunction required a jury trial).

[237] See, e.g., United States v. Linney, 134 F.3d 274, 280-81 (4th Cir. 1998) ($5,000 criminal contempt fine for an individual did not require a jury trial); United States v. Troxler Hosiery Co., Inc., 681 F.2d 934 (4th Cir. 1982) ($80,000 contempt fine for a corporation did not require a jury trial); Musidor, B.V. v. Great American Screen, 658 F.2d 60, 62 (2d Cir. 1981) ($10,000 contempt fine for a corporation's violation of a court order did not require a jury trial).

VIII

GOVERNMENT CIVIL RICO CASES INVOLVING LABOR UNIONS

A. Overview of Government Civil RICO Cases Involving Labor Unions

As of this writing, the United States has obtained relief in 23 civil RICO cases involving labor unions.[238] The initiation of each civil RICO case was prompted by evidence of the La Cosa Nostra's extensive corrupt influence over the labor unions involved.

1. Overview of Labor Racketeering

The La Cosa Nostra ("LCN") gained substantial corrupt influence, and even control in some instances, over labor unions through creating a climate of fear and intimidation by threats and acts of violence. Through such domination, the LCN was able to place its associates in key official positions of various unions, and then use their control over such union officers to place additional LCN associates in union positions, and to use such control over union officials to exploit the unions, and derive illegal proceeds from the operation of the unions' affairs.[239]

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[238] Appendix B ("App." B) includes an index and detailed summary of each of these 23 cases. RICO suits were filed in 22 of these 23 cases. Only one case involving the Laborers' International Union of North America ("LIUNA") was settled before a complaint was filed, which resulted in the United States obtaining relief similar to the relief obtained in the RICO suits that were filed. See App. B at 178-90 and Section VIII(A)(4) and (B) below.

For the sake of brevity, these 23 RICO cases sometimes will be cited by a shorthand reference after the initial full cite, as indicated in summary headings in App. B. For example, the case involving the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America will be cited as the IBT or the Teamsters Union case, and Local 560 of the International Brotherhood of Teamsters case will be cited as the IBT Local 560 case.

[239] See, e.g., United States v. Gotti, 459 F.3d 296, 302-08, 324-30 (2d Cir. 2006); United States v. Bellomo, 176 F.3d 580, 592-93 (2d Cir. 1999); United States v. Local 560 of the Int'l Bhd. of Teamsters, 581 F. Supp. 279, 303-21 (D.N.J. 1984), aff'd, 780 F.2d 267, 278-79 (3d Cir. 1986). See generally, The President's Commission on Organized Crime: THE EDGE: ORGANIZED CRIME, BUSINESS AND LABOR UNIONS (U.S. Government Printing Office,

(continued...)

For example, the LCN was able to use its control and influence over labor unions and their assets to derive illegal proceeds through a variety of typical labor racketeering activities, including the following: (1) obtain illegal payoffs in exchange for loans or vendor contracts from union-related pension, health and welfare, and other benefit funds established for the benefit of union members;[240] (2) extort payments and obtain unlawful payoffs from employers in exchange for labor peace, relaxed enforcement of costly union work rules, and other benefits;[241] (3) obtain no show jobs or superfluous jobs for friends and associates of the LCN through extortion and other illegal means,[242] (4) embezzlement of union funds and other assets;[243] and (5) obtain illegal payoffs for "sweet heart" contracts that reduce costs to the employers and benefits to their union

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[239](...continued)
Washington, DC 1986) ("PCOC: THE EDGE") at 1-6, 9-11, 33-40, 72-75, 89-98, 114-127, 146-160. See also cases cited below in Section VIII and accompanying text.

[240] See, e.g., United States v. Norton, 867 F.2d 1354, 1357-59 (11th Cir. 1989); United States v. Cerone, 830 F.2d 938 (8th Cir. 1987); United States v. Robilotto, 828 F.2d 940, 944, 946 (2d Cir. 1987); United States v. Caporale, 806 F.2d 1487, 1495-97 (11th Cir. 1986).

[241] See, e.g., Gotti, 459 3d at 305-12, 331-35; United States v. Cervone, 907 F.2d 332, 336-40 (2d Cir. 1990); United States v. Rastelli, 870 F.2d 822, 826, 828-29 (2d Cir. 1989); United States v. Davidoff, 845 F.2d 1151, 1153 (2d Cir. 1988); United States v.Daly, 842 F.2d 1380, 1383-90 (2d Cir. 1986); Robilotto, 828 F.2d at 942-44; United States v. Kopituk, 690 F.2d 1289, 1294-1305 (11th Cir. 1982); United States v. Provenzano, 688 F.2d 194, 196-98 (3d Cir. 1982); United States v. Provenzano, 620 F.2d 985, 989-91 (3d Cir. 1980).

[242] See, e.g., Bellomo, 176 F.3d at 592; United States v. Presser, 844 F.2d 1275, 1276-77 (6th Cir. 1988); Robilotto, 828 F.2d at 943, 945-46. See generally United States v. Green, 350 U.S. 415, 417, 412 (1956); United States v. Quinn, 514 F.2d 1250, 1257 (5th Cir. 1975); Bianchi v. United States, 219 F.2d 182, 186-87 (8th Cir. 1955).

[243] See, e.g., United States v. Lore, 430 F.3d 190, 197-204 (3d Cir. 2005); Carson, 52 F.3d at 1176-78; United States v. Int'l Bhd. of Teamsters, 753 F. Supp. 1181, 1190-91 (S.D.N.Y. 1990); United States v. Int'l Longshoremen Ass'n, Local 1814, 1993 WL 330578 at * 5-8, 10-11 (S.D.N.Y. Jan. 14, 1993); PCOC. THE EDGE at 12-15.

employees.[244]

Perhaps the most lucrative illegal scheme involving the LCN's corrupt influence over labor unions entails establishing illegal cartels that control awarding contracts and allocation of business in a particular industry or business sector. Such illegal cartels involve conspiracies among LCN members and associates and corrupt labor union officials and businessmen, whereby the conspirators threaten businesses with physical harm and/or labor strife and other forms of economic harm unless they participate in their unlawful scheme to rig bids to control or allocate business in a particular industry. Typically, the LCN and labor union conspirators obtain unlawful payoffs from the proceeds of the ensuing contracts for business and, in exchange, the corrupt businesses receive lucrative contracts, labor peace, relaxed enforcement of costly union work rules and other benefits. For example, the LCN previously established such illegal cartels in the commercial moving and storage industry in Metropolitan New York City,[245] the waste-hauling industry in New York City and Long Island,[246] the construction industry involving concrete pouring contracts in Metropolitan New York City,[247] window replacement[248] and

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[244] See, e.g., United States v. Local 560 of the Int'l Bhd. of Teamsters, 974 F.2d 315, 325-27 (3d Cir. 1992); United States v. Boffa, 688 F.2d 919, 923-24 (3d Cir. 1982); PCOC: THE EDGE at 10, 16-18.

[245] See, e.g., Rastelli, 870 F.2d at 829-30.

[246] See, e.g., Sanitation and Recycling Indus. v. City of New York, 107 F.3d 985 (2d Cir. 1997); United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 793 F. Supp. 1114 (E.D.N.Y. 1992); App. B at 82-94.

[247] See, e.g., United States v. Salerno, 868 F.2d 524, 528-32 (2d Cir. 1989); United States v. Scopo, 861 F.2d 339, 341-42 (2d Cir. 1988); United States v. Persico, 832 F.2d 705, 707-09 (2d. Cir. 1987).

[248] See, e.g., United States v. Gigante, 166 F.3d 75, 78-79 (2d Cir. 1999); United States v. (continued...)

commercial painting[249] industries in New York City.

2. Congress Designed Civil RICO to Combat the LCN's Corrupt Influence Over Labor Unions

RICO's legislative history makes clear that Congress specifically intended the civil RICO remedies provided in 18 U.S.C. §§ 1964(a) and (b) to be used vigorously by the United States to eliminate organized crime's control and influence over labor unions. See S. REP. No. 91-617 at 77-83; H.R. REP. No. 1574, 90th Cong., 2d Sess. at 5-9 (1968); see also Sections II(B) and (C) above; Local 1814, Int'l Longshoremen's Ass'n v. New York Shipping Ass'n. Inc., 965 F.2d 1224, 1236-37 (2d Cir. 1992), cert. denied, 506 U.S. 953 (1992). For example, the Senate Report regarding RICO states:

> Closely paralleling its takeover of legitimate businesses, organized crime has moved into legitimate unions. Control of labor supply through control of unions can prevent the unionization of some industries or can guarantee sweetheart contracts in others. It provides the opportunity for theft from union funds, extortion through the threat of economic pressure, and the profit to be gained from the manipulation of welfare and pension funds and insurance contracts. Trucking, construction, and waterfront entrepreneurs have been persuaded for labor peace to countenance gambling, loan sharking and pilferage. As the takeover of organized crime cannot be tolerated in legitimate business, so, too, it cannot be tolerated here.
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> . . .
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> [RICO] recognizes that present efforts to dislodge the forces of organized crime from legitimate fields of endeavor have proven unsuccessful. To remedy this failure, the proposed statute adopts the most direct route open to accomplish the desired objective. Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from

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[248](...continued)
McGowan, 58 F.3d 8 (2d Cir. 1995); United States v. Gigante, 39 F.3d 42, 44-45 (2d Cir. 1994); United States v. Amuso, 21 F.3d 1251, 1254 (2d Cir. 1994).

[249] See, e.g., People v. Capaldo, 572 N.Y.S.2d 989 (Sup. Ct. N.Y. County 1991).

> the organization, either by the criminal law approach of fine, imprisonment and forfeiture, or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity.

S. REP. No. 91-617 at 78-79 (footnote omitted).

It also bears emphasis that, because the public interest is involved in the Government's efforts to reform corrupt institutions through its civil RICO suits involving labor unions, the courts' equitable powers are at their zenith. See Sections II(A)(2) and VII(E) above.

3. The United States Department of Justice Adopted A Strategy to Eliminate the LCN's Corrupt Influence Over Labor Unions

In March, 1986, The President's Commission on Organized Crime ("PCOC") issued a report to the President and the Attorney General entitled: THE EDGE: ORGANIZED CRIME, BUSINESS AND LABOR UNIONS (U.S. Government Printing Office, Washington, DC 1986) ("PCOC: THE EDGE"). The PCOC concluded that the LCN had for decades controlled and corruptly influenced major labor unions in the United States, including "the International Brotherhood of Teamsters (IBT), the Laborers International Union of North American (LIUNA), the Hotel Employees and Restaurant Employees International Union (HEREIU), and the International Longshoreman's Association (ILA)." PCOC: THE EDGE at 4.

In particular, the PCOC stated that "since the 1950's," the Teamsters Union had been "The Most Controlled Union" by the LCN, and that during the period 1952-1985, the LCN "exercised substantial influence" over the Teamsters Union through its control of the five persons who served as President of the Teamsters Union during that period. See PCOC: THE EDGE at 89. Similarly, the PCOC found that for many years the LCN, particularly the Chicago LCN Family or "Outfit," had controlled the principal officials of LIUNA, including its

Presidents, as well as officials in many LIUNA Locals. See id. at 145-163, 217-32.

The PCOC also found that since the 1920's, "the International Longshoremen's Association (ILA) has been virtually a synonym for organized crime in the labor movement." Id. at 33. The PCOC added that, "[i]n 1937, New York La Cosa Nostra leader Albert Anastasia muscled into" control of "the Brooklyn Waterfront," and that the ILA did "little, if anything, to disturb La Cosa Nostra influence in its locals." Id. at 36-37. The PCOC further found that, since at least the late 1930's, the LCN had exercised substantial corrupt influence over the HEREIU and its locals, including the selection of Edward Hanley to be President of HEREIU. Id. at 71-85.

The PCOC recommended a national strategy to eliminate the LCN's corrupt domination of labor unions. Id. at 307-59. In particular, the PCOC recommended that the Department of Justice "should use the RICO statute more aggressively in civil and criminal proceeding, and it should pursue more vigorously breaches of fiduciary duty by union officers and employee benefit plan trustees." Id. at 314. In accordance with the PCOC's recommendations, the OCRS, working with the United States Attorneys' Offices in the Eastern and Southern Districts of New York, the District of New Jersey and the Northern District of Illinois, devised a strategy to bring civil RICO lawsuits against the four most corrupt international unions (The Teamsters Union, The LIUNA, the HEREIU, and the ILA) to eliminate the LCN's corrupt influences. See App. B at 42-79, 178-208, 243-55. In addition, the Department of Justice brought 17 civil RICO lawsuits against LCN dominated local unions in New York and New Jersey (see App. B at 1-33, 40-42, 79-178, 220-243), and one civil RICO lawsuit in the Eastern District of Pennsylvania and one in the Northern District of Illinois. See App. B at 33-40, 208-20. These Government civil

RICO lawsuits have achieved considerable success toward eliminating the LCN's corrupt domination of labor unions. See App. B.

4. Overview of Essential Relief

Although the relief obtained in these civil RICO lawsuits vary somewhat, they typically have involved the issuance of injunctions to prohibit unlawful activities and conduct that might facilitate union corruption. District courts also have appointed officers, usually experienced former prosecutors and law enforcement investigators, to assist the district courts to implement relief designed to eliminate corruption by the defendants and in the alleged RICO enterprises and to prevent future unlawful activity. District courts have authorized such officers to exercise broad powers, subject to review by the district courts, including the following: (1) conduct the legitimate business of the defendants and the RICO enterprises; (2) review and approve hiring, certain contracts and financial expenditures of defendants and affiliated entities; (3) impose and implement various structural reforms in the defendants and entities comprising the RICO enterprises, including union election reform, revised rules and practices for conducting business; (4) impose and implement ethical practices codes governing the defendants and members of the RICO enterprises; (5) investigate, prosecute, and adjudicate in civil proceedings allegations of violations of the consent decrees, judgment orders and related ethical practices codes; and (6) imposition of fines, discipline or removal from the defendants' entities or RICO enterprises and prohibition of certain activities in the future for individuals found guilty of such violations.[250]

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[250] See e.g., United States v. Local 359, United Seafood Workers, 55 F.3d 64 (2d Cir. 1995); United States v. Local 1804-1, Int'l Longshoreman's Ass'n, 44 F.3d 1091, 1093-95 (2d Cir. 1995); United States v. Int'l Bhd. of Teamsters, 948 F.2d 98, 106 (2d Cir. 1991); United States Int'l Bhd. of Teamsters, 907 F.2d 277, 279-81 (2d Cir. 1990); United States v. Int'l Bhd. of Teamsters, 905 F.2d 610, 613-17 (2d Cir. 1990); United States v. Int'l Bhd. of Teamsters,

(continued...)

Such relief has significantly contributed to the Government's success in combating the LCN's corrupt control over labor unions and related businesses, and is discussed in more detail below in this Section.[251]

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[250](...continued)
899 F.2d 143, 145-46 (2d Cir. 1990); United States v. Hotel Employees & Rest. Employees, Int'l Union, 974 F. Supp. 411 (D.N.J. 1997); United States v. Dist. Council of New York City, 941 F. Supp. 349, 355 (S.D.N.Y. 1996); United States v. Local 6A, Cement and Concrete Workers, 832 F. Supp. 674 (S.D.N.Y. 1993); United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 831 F. Supp. 192, 193-95 (S.D.N.Y. 1993); United States v. Int'l Bhd. of Teamsters, 803 F. Supp. 761, 766-71 (S.D.N.Y. 1992); United States v. Int'l Bhd. of Teamsters, 782 F. Supp. 243, 248-51 (S.D.N.Y. 1992); United States v. Int'l Bhd. of Teamsters, 723 F. Supp. 203 (S.D.N.Y. 1989), aff'd as modified, 931 F.2d 177 (2d Cir. 1991). See also Sections VIII(B) and (C) below.

[251] In the LIUNA civil RICO matter (see App. B at 178-90), the United States agreed to settle a civil RICO lawsuit before it was filed, and for the first time agreed to allow a union an opportunity to implement a reform program without court supervision and court-appointed officers. The Initial Settlement Agreement provided that if after 90 days "the Assistant Attorney General for the Criminal Division determines, in her sole discretion, that the imposition of a consent decree is necessary or desirable, after having given LIUNA an opportunity to have a meeting to be heard, the parties agree to the filing of the attached complaint and entry and implementation of the attached consent decree." See App. B at 183-84.

The attached consent decree provided for, among other matters: (1) a permanent injunction against LIUNA officers, representatives and members from committing any act of racketeering and other misconduct; (2) court-appointed officers to investigate, prosecute, and discipline LIUNA officers, representatives, employees and members for misconduct; (3) adoption of procedures to conduct investigations and adjudication of disciplinary charges; (4) various reforms in LIUNA's Job Referral Rules and financial practices; and (5) union election reforms. See App. B at 184.

This agreement provided the Government with virtually unlimited discretion to obtain imposition of court-supervision and court-appointed officers if it believed that such relief was "necessary or desirable." However, the United States did not seek such court-supervised relief because LIUNA achieved considerable success in eliminating LCN influence over its affairs through the efforts of experienced, independent attorneys and investigators. See App. B at 185-88. Throughout the period of LIUNA's reform efforts, the Government closely monitored LIUNA's reform efforts through regular meetings and discussions, insisted upon various reforms and provided information and evidence to enable LIUNA's reform team to eliminate corruption. Thus, the United States obtained essentially the same relief regarding LIUNA that it would have

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B. Specific Relief Obtained in Government Civil RICO Cases Involving Labor Unions

1. Injunctions

Courts have granted similar broad injunctive relief in 20 of the 22 filed Government civil RICO cases involving labor unions.[252] The injunctive relief granted under a Consent Decree in United States v. Local 69 of the Hotel Employees and Rest. Employees Int'l Union, Civil No. 1733, U.S. District Court for the District of New Jersey (hereinafter "HEREIU Local 69"), is typical of the injunctions granted in those 20 cases, and it provided, in substance, as follows (see App. B at 231-32):

> All current and future officers, agents, employees, representatives, members of, and persons holding positions of trust in Local 69 or its affiliated entities (other than representatives of employers) and any and all persons in active concert or participation with any or all of them, were permanently restrained and enjoined from directly or indirectly:
>
> a. committing any crime listed in 18 U.S.C. § 1961(1);
>
> b. knowingly associating with any member or associate of any criminal group or with any barred person;
>
> c. knowingly permitting any member or associate of any criminal group or any barred person to exercise any control or influence, directly or indirectly, in any way or degree, in the conduct of the affairs of Local 69 and its affiliated entities; and

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[251](...continued)
obtained through court-supervision. See App. B at 188.

[252] The two exceptions were the John F. Long (see App. B at 40-42) and Vincent Gigante cases (see App. B at 79-82), which imposed limited injunctive relief, barring certain persons from specified union-related activities.

It bears repeating that injunctive relief is not limited to enjoining future unlawful conduct, but also may broadly encompass relief necessary to cure the ill-effects of the defendants' past unlawful conduct, and may also include enjoining otherwise lawful practices connected to the unlawful conduct. See Sections II(E) and VII(C)(1) above.

d. obstructing or otherwise interfering, directly or indirectly, with the efforts of anyone effectuating or attempting to effectuate the terms of this Consent Decree or in attempting to prevent any criminal groups or barred person from exercising influence on the conduct of the affairs of the Local 69 and its affiliated entities.

As used in the HEREIU Local 69 Consent Decree, the term "knowingly associating" meant that: (a) an enjoined party knows or should know that the person with whom he or she is associating is a member or associate of any criminal group or is a barred person; and (b) the association is more than fleeting.

As used in the HEREIU Local 69 Consent Decree, a "barred person" was defined as: (a) any member or associate of any organized crime family or other criminal group, or (b) any person prohibited from participating in the affairs of any union pursuant to or by operation of this Consent Decree, other court order or statute, and/or a disciplinary disposition or agreement by the HEREIU's Public Review Board.[253]

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[253] Similar injunctions were also granted in the following additional 19 Government civil RICO cases involving labor unions:

(1) The Teamsters Local 560 Case; see App. B at 6-7; United States v. Local 560, Int'l Bhd. of Teamsters, 581 F. Supp. 279, 337 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1986); United States v. Local 560 Int'l Bhd. of Teamsters, 974 F.2d 315, 324 (3d Cir. 1992);

(2) The Local 6A, Cement and Concrete Workers Case; see App. B at 16-17;

(3) The Bonanno Family Case; see App. B at 22-24;

(4) The Fulton Fish Market Case; see App. 30-31;

(5) The Roofers Union Case; see App. B at 37-38; United States v. Local 30, United Slate, Tile and Composition Roofers, 686 F. Supp. 1139, 1162-74 (E.D. Pa. 1988) ("Local 30 Roofers Union");

(6) The International Brotherhood of Teamsters Union Case; see App. B at 47, and cases cited in App. B at 51, n. 7;

(7) The Private Sanitation Industry of Long Island Case; see App. B at 85-86, 91; United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 811 F. Supp. 808, 818 (E.D.N.Y. 1992), aff'd, 995 F.2d 375 (2d Cir. 1993) ("Private Sanitation Indus. Case"); United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 899 F. Supp. 974, 983-84

(continued...)

2. Dissolution, Divestiture and Reorganization

As noted in Section II(C)(2) above, 18 U.S.C. § 1964 (a) explicitly authorizes equitable relief involving divestiture, dissolution and reorganization. Accordingly, courts have approved of such relief in Government civil RICO cases involving labor unions. See, e.g., United States v. Local 30, United Slate, Tile and Composition Roofers and Waterproof Workers Ass'n, 871 F.2d 401, 407 (3d Cir. 1989); United States v. Local 560 of Int'l Bhd. of Teamsters, 780 F.2d 267, 295 (3d Cir. 1985); United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 899 F. Supp. 974, 983-84 (E.D.N.Y. 1994) and 811 F. Supp. 808, 818 (E.D.N.Y. 1992), aff'd, 995 F.2d 375 (2d Cir. 1993); United States v. Bonanno Organized Crime Family of La Cosa Nostra, 683 F. Supp. 1411, 1442-44 (E.D.N.Y. 1988), aff'd, 879 F.2d 20 (2d Cir. 1989).

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[253](...continued)
(E.D.N.Y. 1994), aff'd 47 F.3d 1158 (2d Cir. 1995) (Table);

(8) The ILA Local 10804-1 Case; see App. B at 98-102; United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 831 F. Supp. 177, 191-92 (S.D.N.Y. 1993), aff'd and vacated in part on other grounds, 52 F.3d 1173 (2d Cir. 1995); ("ILA Local 1804-1");

(9) The IBT Local 295 Case; see App. at 113-115, 118;

(10) The New York Carpenters Union Case; See App. B at 123-25; United States v. Dist. Council of New York City, 409 F. Supp.2d 439, 442 (S.D.N.Y. 2006);

(11) The HEREIU Local 54 Case; see App. B at 136-38;

(12) The HEREIU Local 100 Case; see App. B at 145;

(13) The Teamsters Local 282 Case; see App. B at 149; United States v. Local 282 of the Int'l Bhd. of Teamsters, 13 F. Supp.2d 401, 402 (E.D.N.Y. 1988); aff'd in part, and vacated and remanded in part on other grounds, 215 F.3d 283 (2d Cir. 2000) ("Teamsters Local 282 Case");

(14) The Mason Tenders District Council of Greater New York Case; see App. B at 161-62, 173-75; United States v. Mason Tenders Dist. Council of Greater New York, 1994 WL 742637 (S.D.N.Y. Dec. 27, 1994); United States v. Mason Tenders Dist. Council of Greater New York, 1995 WL 679245 (S.D.N.Y. Nov. 15, 1995) ("Mason Tenders District Council");

(15) The Hotel Employees and Restaurant Employees International Union Case; see App. B at 194-95;

(16) The Chicago District Council of LIUNA Case; see App. B at 211-12;

(17) The LIUNA Local 210 Case; see App. B at 222, 225-26;

(18) The ILA Bellomo Case; see App. B at 241-42; and

(19) The International Longshoremen's Ass'n Case; see App. B at 250-55.

Moreover, in numerous Government civil RICO cases involving labor unions, courts have authorized a wide variety of relief that required wrongdoers to change their business practices and policies, such as adopt new union and job referral rules, and restructure other aspects of their operations. See United States v. Dist. Council of New York City, 409 F. Supp. 2d 439, 442-44 (S.D.N.Y. 2006).[254]

3. Court-Appointed Officers

(a) Officers to Administer the Affairs of a Union

In 17 of the 22 filed Government civil RICO cases involving labor unions, courts have appointed officers to administer the affairs of unions with broad powers to, among other things, oversee or carryout various aspects of the unions' operations; negotiate, approve or void contracts and expenditures; and discipline union officers and members. For example, in the HEREIU Local 69 civil RICO case, the district court appointed a Monitor with the powers, rights and authority of all officers and other persons holding positions of trust in Local 69 including the powers, rights and authority of the Local 69 President; the Executive Board of Local 69; the union's other committees; the union trustees on Local 69's pension, and health and welfare funds; and any other officer, agent, employee or representative of Local 69. Accordingly, the Monitor was authorized to:

a. oversee, approve or disapprove of all disbursements and distributions of Local 69 funds and other assets, purchases and financial obligations of Local 69;

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[254] See also, App. B at 3-8, 16-17, 22-24, 37-39, 47-49, 86, 99-102, 107, 115-18, 123-26, 136-38, 142-45, 149-54, 162-174, 195-96, 199-200, 213-15, 218, 223-25, 232-36. See also Section VIII(B)(5) below, which discusses reorganization of unions' election procedures.

b. approve or disapprove of the hiring, appointment, discharge or reassignment of Local 69 officers and others holding positions of trust in Local 69, employees, agents, representatives, commissioners and committee members of Local 69;

c. carry on and supervise the legitimate activities of Local 69;

d. hold (or designate the persons who hold) the positions currently held by Local 69 representatives in Local 69's affiliated entities;

e. review, oversee and otherwise take action upon all collective bargaining agreements, the processing of grievances, grievance awards, or other matters involving employers with whom Local 69 deals or seeks to deal;

f. investigate, audit and review all aspects of Local 69 and its affiliated entities. These powers shall include the power of the Monitor to conduct investigatory interviews and sworn depositions;

g. issue subpoenas and serve such subpoenas in this or any other judicial district pursuant to 18 U.S.C. § 1965(c) without the need for prior application to the district court. Such subpoenas shall be issued only for good cause if the individuals reside in another district at a place more than one hundred miles from the district court;

h. initiate charges or disallow nominations or elections of persons in accordance with this Consent Decree;

i. refer matters to the Public Review Board of the HEREIU for disciplinary action or, in the alternative, exercise the disciplinary authority and powers described in this Consent Decree over any person described in Paragraph (3)(a) above;

j. refer any matter to the United States Attorney for appropriate action or request the United States Attorney or any agency of the United States to provide legal, audit and investigative personnel to assist in the execution of the Monitor's duties;

k. retain legal, investigative, accounting and other support personnel at Local 69's expense;

l. attend any and all meetings of Local 69 and its affiliated entities, including, but not limited to, meetings of the Local 69 Executive Board, the membership, committees, negotiation meetings or grievance proceedings regarding Local 69 members involving employers with whom

Local 69 deals or seeks to deal and meetings of employee benefit plans in which Local 69 members participate;

m. enter into, disapprove or terminate any contract (including, but not limited to, contracts with service providers or vendors), lease, or other obligation of Local 69 or any of Local 69's affiliated entities for which representatives of Local 69 otherwise have authority to enter into, disapprove or terminate;

n. oversee and monitor all affairs of Local 69, including, but not limited to, any Local 69 elections;

o. act to preclude actions or inactions that violate the law or otherwise are inimical to the remedial objectives of this Consent Decree;

p. perform all such functions and duties not specifically enumerated herein in order to fulfill his/her duties as Monitor; and

q. delegate any of his/her powers or duties to any other person(s).

See Appendix B at 232-34.

The HEREIU Local 69 Consent Decree also provided, in substance, that:

a. The Monitor was given unfettered access to, and the right to make copies of, all records or documents of officials, agents, employees, and members of Local 69 and its affiliated entities.

b. The Monitor was required to report to the district court at least every 6 months or when requested by the court regarding the progress of Local 69 and its affiliated entities in achieving the remedial objectives of this Consent Decree.

c. The term of the Monitor would expire four years from the date the Consent Decree was entered.

d. The Consent Decree also provided that the Monitor, the United States or the HEREIU may make application to the district court to modify or enforce this Consent Decree and the court may grant such relief as may be equitable and just, having due regard for the purposes of the underlying litigation, the remedial purposes of this Consent Decree and the circumstances at the time of the application.

e. The district court retained jurisdiction over the parties and signatories to the Consent Decree and the subject matter of the litigation in order to implement the terms of the Consent Decree.

f. Pursuant to the All Writs Act, 28 U.S.C. § 1651, all parties and non-parties to the Consent Decree were permanently restrained and enjoined from litigating any and all issues relating to the Consent Decree or arising from the interpretation or application of the Consent Decree in any court or forum in any jurisdiction except the United States District Court for the District of New Jersey. Such issues relating to the Consent Decree include, but are not limited to, challenges to actions of the Monitor and/or his delegates and challenges to issuance of or compliance with subpoenas.

See App. B at 236.[255]

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[255] Courts appointed officers with similar or some of the administrative powers granted the Monitor in the HEREIU Local 69 case in the following 16 additional Government civil RICO cases involving labor unions:

(1) The Teamsters Local 560 Case; see App. B at 3-7; Local 560 Int'l Bhd. of Teamsters, 780 F.2d at 295-96; United States v. Sciarra, 851 F.2d 621, 623-24, 632-33 (3d Cir. 1988); Local 560 Int'l Bhd. of Teamsters, 694 F. Supp. 1158, 1160-62 (D.N.J. 1988); see also, Section VIII(C)(1) below.

(2) The Local 6A, Cement and Concrete Workers Case; see App. B at 16-17;

(3) The Bonanno Family Case; see App. B at 22-24;

(4) The Fulton Fish Market Case; see App. B at 30-31, 32; United States v. Local 359 United Seafood Workers Union, 1991 WL 172962 (S.D.N.Y. August 21, 1991);

(5) The Local 30 Roofers Union Case; see App. B at 37-39; United States v. Local 30, United Slate, Tile, 871 F.2d 401, 404-07 (3d Cir. 1989); United States v. Local 30, United Slate, Tile, 686 F. Supp. 1139, 1162, 1169-74 (E.D. Pa. 1988);

(6) The International Brotherhood of Teamsters Union Case; see App. B at 47-51; United States v. Int'l Bhd. of Teamsters, 905 F.2d 610, 613 (2d Cir. 1990); United States v. Int'l Bhd. of Teamsters, 899 F.2d 143, 145 (2d Cir. 1990); United States v. Int'l Bhd. of Teamsters, 765 F. Supp. 1206 (S.D.N.Y. 1991); United States v. Int'l Bhd. of Teamsters, 761 F. Supp. 315, 316-17 (S.D.N.Y. 1991);

(7) The ILA Local 1804-1 Case; see App. B at 99-102;

(8) The IBT Local 295 Case; see App. B at 115-18; United States v. Local 295 of the Int'l Bhd. of Teamsters, 784 F. Supp. 15 (E.D.N.Y. 1992);

(9) The New York Carpenters Union Case; see App. B at 123-26;

(10) The HEREIU Local 54 Case; see App. B at 136-38;

(11) The HEREIU Local 100 Case; see App. B at 142-45;

(12) The Teamsters Local 282 Case; see App. B at 149-54;

(continued...)

(b) Adjudication Officers

In most of the Government civil RICO cases involving labor unions, district courts have also appointed officers to carry-out various adjudication functions, including to investigate violations of the district courts' injunctions and judgment orders, other misconduct by union members, and to recommend or impose sanctions for such violations; all subject to the district court's review. For example, in the HEREIU civil RICO case, the district court appointed a Monitor for a 4-year term, subject to extensions. The Monitor's powers included the following:

(i) General Powers

a. To investigate, audit and review all aspects of the HEREIU and its constituent entities to advance the remedial objective of this action. These powers shall include the power of the Monitor to conduct investigatory interviews and sworn depositions to advance the remedial objective of this action;

b. To request the United States Attorney or any agency of the United States to provide legal, audit and investigative personnel to assist in the execution of the Monitor's duties;

c. To retain legal, investigative, accounting and other support personnel at the HEREIU's expense and delegate any of his/her powers or duties to such persons, where, in the Monitor's discretion, such personnel and delegation are necessary to execute the Monitor's duties as set forth herein;

d. To attend all HEREIU Executive Board meetings and HEREIU committee meetings (with the exception of bargaining committee meetings);

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[255](...continued)

(13) The Mason Tenders District Council of Greater New York Case; see App. B at 162-66, 172-74; United States v. Mason Tenders Dist. Council of Greater New York, 1994 WL 742637 (S.D.N.Y. Dec. 27, 1994);

(14) The HEREIU Case; see App. B at 195-96;

(15) The Chicago District Council of LIUNA Case; see App. B at 218;

(16) The LIUNA Local 210 Case; see App. B at 223-25.

e. To refer matters to the HEREIU or the United States Attorney for appropriate action;

f. To perform all such functions and duties not specifically enumerated herein in order to fulfill his/her duties as Monitor.

(ii) Review Authority

Whenever the Monitor reasonably believes that any of the following actions, proposed actions, or omissions to act (a) may violate the injunctive prohibitions of this Consent Decree, (b) may constitute any crime involving labor organizations or employee benefit plans, or (c) may further the direct or indirect influence of any organized crime group or the threat of such influence now or in the future, he or she has the power to:

a. disapprove the hiring, appointment, reassignment or discharge of any person or business entity by the HEREIU or its constituent entities; and

b. disapprove or terminate any contract (including, but not limited to, contracts with service providers or vendors) lease, or other obligation of the HEREIU or its constituent entities.

The HEREIU had a right to appeal any such decision to the district court.

(iii) Disciplinary Powers

The Monitor had the right and power to remove, suspend, expel, fine or forfeit the benefits (with the exception of vested employee retirement benefits subject to title I of the Employee Retirement Income Security Act -- 29 U.S.C. § 1001, et seq.) of any officer, representative, agent, employee or person holding a position of trust in the HEREIU and its constituent entities or member of HEREIU when such person engages or has engaged in actions or inactions which (i) violate the injunctive prohibitions of this Consent Decree, (ii) violate any criminal law involving the operation of a labor organization or employee benefit plan, or (iii)

> further the direct or indirect influence of any organized crime group or the threat of such influence now or in the future.

See App. B at 195-97.[256]

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[256] Courts appointed officers with similar adjudication powers in the following 17 additional Government civil RICO cases involving labor unions:

(1) The Teamsters Local 560 Case; see App. B at 4;

(2) The Local 6A, Cement and Concrete Workers Case; see App. B at 16-17; United States v. Local 6A, Cement & Concrete Workers, Laboreres Int'l Union of North America, 832 F. Supp. 674 (S.D.N.Y. 1993);

(3) The Bonanno Family Case; see App. B at 22-24;

(4) The Fulton Fish Market Case; see App. B at 30-31; United States v. Local 359 United Seafood Workers, 55 F.3d 64 (2d Cir. 1995);

(5) The Local 30 Roofers Union Case; see App. B at 38; United States v. Local 30, United Slate, Tile and Composition Roofers, 686 F. Supp. 1139, 1171 (E.D. Pa. 1988); United States v. Local 20, United Slate, Tile and Composition Roofers, 871 F.2d 401 (3d Cir. 1989);

(6) The International Brotherhood of Teamsters Union Case; see App. B at 48-51; United States v. Int'l Bhd. of Teamsters, 745 F. Supp. 908 (S.D.N.Y. 1990), aff'd, 941 F.2d 1292, 1294-95 (2d Cir. 1991); United States v. Int'l Bhd. of Teamsters, 743 F. Supp. 155 (S.D.N.Y. 1990), aff'd, 905 F.2d 610 (2d Cir. 1990);

(7) The Private Sanitation Industry of Long Island Case; see App. B at 86-87;

(8) The ILA Local 1804-1 Case; see App. B at 99-100; United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 831 F. Supp. 192 (S.D.N.Y. 1993);

(9) The IBT Local 295 Case; see App. B at 115-118; United States v. Local 295 of the Int'l Bhd. of Teamsters, 784 F. Supp. 15 (E.D.N.Y. 1992);

(10) The New York Carpenters Union Case; see App. B at 123-26;

(11) The HEREIU Local 54 Case; see App. B at 136-38;

(12) The HEREIU Local 100 Case; see App. B at 144-45;

(13) The IBT Local 282 Case; see App. B at 150-53;

(14) The Mason Tenders District Council of Greater New York Case; see App. B at 162, 164-66;

(15) The LIUNA Chicago District Council Case; see App. B at 212-15;

(16) The LIUNA Local 210 Case; see App. B at 224-25;

(17) The HEREIU Local 69 Case; see App. B at 232-35.

4. Imposition of Ethical Practices Codes and Disciplinary Procedures

a. Disciplinary Procedures

In conjunction with appointing adjudication officers, courts have also approved ethical practices codes and disciplinary procedures designed to prevent future misconduct and to impose appropriate sanctions for violations of the courts' injunctions and other orders. For example, in the HEREIU civil RICO case, the district court approved of the following procedures for imposing disciplinary sanctions (see App. B 196-200):

i. Disciplinary Procedure. In order to discharge disciplinary duties under this decree, the Monitor shall have the same rights and authority as the HEREIU General President, the HEREIU General Executive Board, and any other officer, agent, employee, or representative of the HEREIU as well as the full authority derived from any and all provisions of law. When exercising his/her disciplinary rights and powers, the Monitor shall afford the subject of the potential disciplinary action written notice of the charge(s) against him/her and an opportunity to be heard. The Monitor shall conduct any hearing on any disciplinary charges, render the final decision regarding whether discipline is appropriate and impose the particular discipline. The charged party shall have 20 days to answer the charges against him/her and may be represented by counsel at any hearing conducted by the Monitor. Any hearing shall be conducted under the rules and procedures generally applicable in labor arbitration proceedings and decisions shall be made using a "just cause" standard. In conducting any hearing, the Monitor shall have the right and power:

i. to administer oaths. All testimony and other evidence shall be subject to penalties of perjury to the same extent as if such evidence was submitted directly to the district court;

ii. to examine witnesses or conduct depositions;

iii. to receive evidence. The Monitor may receive evidence withheld from the charged party and the public which contains or constitutes sensitive information provided by a law enforcement agency, and can choose what weight, if any, to give such evidence, but in no case shall the identity of a confidential source of law enforcement information be required to be disclosed; and

iv. to issue subpoenas requiring the attendance and presentation of testimony of any person and/or the production of documentary or other evidence. In the case of contumacy or failure to obey a subpoena issued under this Paragraph, the Monitor may: (i) impose discipline upon the person in accordance with this Consent Decree; and/or (ii) seek an order from the Court requiring the person to testify or to produce documentary or other evidence.

ii. Appeal of Disciplinary Action. Any discipline imposed by the Monitor shall be final and binding, subject to review by the district court. A person disciplined by the Monitor may obtain review of the Monitor's decision regarding such discipline by filing a written appeal of such decision with the Court within thirty (30) days of such decision by the Monitor. The Monitor's decision, all papers or other material relied upon by the Monitor and the papers filed or issued pursuant to this appeal procedure shall constitute the exclusive record for review. The Monitor's decisions pursuant to this Paragraph shall be reviewed by the district court, if necessary, under the substantial evidence standard set forth in 5 U.S.C. § 706(2)(E). Materials considered by the Monitor but withheld from the appellant and the public which contain sensitive information provided by a law enforcement

agency shall be submitted to the district court for ex parte, in camera consideration and shall remain sealed. The person disciplined by the Monitor may appeal the Monitor's decision regarding the discipline imposed against him/her and any decision by the Monitor regarding discipline imposed against a person which is not appealed in accordance with this Paragraph may not be appealed or otherwise challenged. HEREIU or the United States may seek the district court's review of the Monitor's decision not to impose discipline.

iii. The Public Review Board. The Consent Decree further provided that the HEREIU would create a three-member Public Review Board (PRB) within the HEREIU to enforce an Ethical Practices Code (EPC) attached to the Consent Decree. The PRB and EPC were to be presented to the HEREIU Convention in 1996 for incorporation within the HEREIU Constitution. If these steps were taken by the HEREIU, the Consent Decree further provided that the Monitor would become a member of the PRB and his independent disciplinary authority would expire within 6 months of the date when the PRB became effective, or not later than March 5, 1997. All new matters arising after the Monitor's appointment to the PRB would be jointly investigated and pursued by the Monitor and the two other members of the PRB.

See App. B at 196-200.

Moreover, courts in 13 additional Government civil RICO cases involving labor unions have adopted similar disciplinary procedures, which typically require written notice of the charges, the rights to representation by an attorney and to present a defense at an evidentiary

hearing that is fair, impartial and adversarial in nature, and a right of review by the district court.[257]

b. Due Process and Article III Considerations

The disciplinary procedures in these cases do not violate Article III of the Constitution because the district courts retain their authority to decide dispositive issues of liability and sanctions. See Section VII(E)(3) above. Furthermore, even assuming, arguendo, that due

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[257] See:

(1) The Fulton Fish Market Case; see App. B at 30; United States v. Local 359, United Seafood Workers, 55 F.3d 64, 66-69 (2d Cir. 1995);

(2) The International Brotherhood of Teamsters Union Case; see App. B at 48-50. See also the following decisions that are all entitled United States v. Int'l Bhd. of Teamsters: 998 F.2d 1101 (2d Cir. 1993); 998 F.2d 120 (2d Cir. 1993); 968 F.2d 1506 (2d Cir. 1992); 725 F. Supp. 162 (S.D.N.Y. 1989), aff'd, 905 F.2d 610 (2d Cir. 1990); 741 F. Supp. 491 (S.D.N.Y. 1990); 764 F. Supp. 787 (S.D.N.Y. 1991); 775 F. Supp. 90 (S.D.N.Y. 1991), aff'd in part and reversed in part, 948 F.2d 1278 (2d Cir. 1991) (Table); 803 F. Supp. 761 (S.D.N.Y. 1992), aff'd and reversed in part, 998 F.2d 1101 (2d Cir. 1993); 829 F. Supp. 602 (S.D.N.Y. 1993); 842 F. Supp. 1550 (S.D.N.Y. 1994);

(3) The Private Sanitation Industry of Long Island Case; see App. B at 86-88;

(4) The ILA Local 1804-1 Case; see App. B at 99, 106-07; United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 831 F. Supp. 192, 194-198 (S.D.N.Y. 1993);

(5) The IBT Local 295 Case; see App. B at 117-18; United States v. Local 295 of the Int'l Bhd. of Teamsters, 784 F. Supp. 15 (E.D.N.Y. 1992);

(6) The New York Carpenters Union Case; see App. B at 123-26; United States v. Dist. Council of New York City, 409 F. Supp.2d 439, 442-44 (S.D.N.Y. 2006) and 941 F. Supp. 349, 355, 361-64 (S.D.N.Y. 1996);

(7) The HEREIU Local 54 Case; see App. B at 137-38;

(8) The HEREIU Local 100 Case; see App. B at 144-45;

(9) The Teamsters Local 282 Case; see App. B at 150-53;

(10) The Mason Tenders District Council of Greater New York Case; see App. B at 164-171; United States v. Mason Tenders Dist. Council of Greater New York, 1994 WL 742637 (S.D.N.Y. Dec. 27, 1994);

(11) The LIUNA Chicago District Council Case; see App. B at 214-17;

(12) The LIUNA Local 210 Case; see App. B at 224-25;

(13) The HEREIU Local 69 Case; see App. B at 234-35.

process applies to these disciplinary procedures,[258] they afford greater rights than the minimum requirements of due process, and hence do not violate due process. See Section VII(D)(3) above; see also the following cases ruling that the disciplinary and adjudicatory procedures employed in Government civil RICO cases involving labor unions satisfy due process: United States v. Int'l Bhd. of Teamsters, 954 F.2d 801, 807 (2d Cir. 1992); United States v. Int'l Bhd. of Teamsters, 948 F.2d 98, 104-105 (2d Cir. 1991); United States v. Int'l Bhd. of Teamsters, 941 F.2d 1292, 1297-98 (2d Cir. 1991); United States v. Int'l Bhd. of Teamsters, 791 F. Supp. 421, 426 (S.D.N.Y. 1992).

Analogous case law under 29 U.S.C. § 411(a)(5) of the LMRDA also supports the Government's position that the disciplinary procedures adopted in Government civil RICO cases involving labor unions satisfy the requirements of due process. Indeed, it is the policy of OCRS that court-ordered disciplinary procedures in Government civil RICO cases involving labor unions comply with the due process requirements embodied in 29 U.S.C. § 411(a)(5). Section 411(a)(5), which applies to internal union disciplinary procedures, provides as follows:

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

"The 'full and fair hearing' requirement of the LMRDA incorporates the 'traditional concepts of due process.'" United States v. Int'l Bhd. of Teamsters, 247 F.3d 370, 385 (2d Cir. 2001), quoting Kuebler v. Central Lithographers & Photoengravers Union Local 24-P, 473 F.2d

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[258] See Section VIII(E)(1) below, which indicates that due process and other Constitutional protections may not apply to procedures to discipline union members under a Consent Decree because the requisite state action is lacking in some circumstances.

359, 363-64 (6th Cir. 1973).[259] To obtain relief for a violation of a union member's LMRDA rights, it is not enough to establish that an internal union disciplinary hearing violated the union's constitution or bylaws; rather, the union member must also establish that the violation deprived him of a fair trial within the meaning of the LMRDA.[260]

Moreover, Section 411 (a) (5) of the LMRDA "was not intended to authorize courts to determine the scope of offenses for which a union may discipline its members," and therefore unions have wide discretion to decide the scope of proscribed conduct, provided that the union does not violate the protections afforded union members under the LMRDA. Int'l Bhd. of Boilermakers v. Hardeman, 401 U.S. 233, 244 (1971)("Hardeman").[261] Indeed, the LMRDA "does not require that these charges to be valid, must be based on activity that the union had proscribed prior to the union member having engaged in such activity." Hardeman, 401 U.S. at 244 (internal quotations and citation omitted).

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[259] Accord N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 194 (1967); Holmes v. Donovan, 984 F.2d 732, 737-38 (6th Cir. 1993); Wellman v. Int'l Union of Operating Engineers, 812 F.2d 1204, 1205 (9th Cir. 1987); Tincher v. Piasecki, 520 F.2d 851, 854 (7th Cir. 1975); Falcone v. Dantinne, 420 F.2d 1157, 1163-65 (3d Cir. 1970); Parks v. Int'l Bhd. of Electrical Workers, 314 F.2d 886, 911-12 (4th Cir. 1963); Loekle v. Hansen, 551 F. Supp. 74, 82 (S.D.N.Y. 1982). See generally, Risa L. Lieberwitz, Due Process and the LMRDA: An Analysis of Democratic Rights in the Union and at the Workplace, 29 B. C. L. REV. 21 (1987).

[260] See, e.g., United States v. Int'l Bhd. of Teamsters, 247 F.3d at 387; Wellman, 812 F.2d at 1206; Yager v. Carey, 910 F. Supp. 704, 713 (D.D.C. 1995).

[261] Accord Ferguson v. Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers, 854 F.2d 1169, 1174-75 (9th Cir. 1988); Rosario v. Amalgamated Ladies Garment Cutters Union, 605 F.2d 1228, 1240 (2d Cir. 1979) (collecting cases); Tincher v. Plasecki, 520 F.2d 851, 854 (7th Cir. 1975); Kuebler v. Cleveland, Lithographers & Photo Union Local 24-P, 473 F.2d 359, 363-64 (6th Cir. 1973); Falcone, 420 F.2d at 1163-65; Hurley v. Steamfitters Local Union No. 464, 714 F. Supp. 996, 1001 (D. Neb. 1989).

Regarding the requisite specificity, the "charges must be . . . specific enough to inform the accused member of the offense that he has allegedly committed,"[262] and provide "the information needed to conduct a meaningful investigation and prepare a defense."[263] Moreover, Section 411(a)(5) of the LMRDA does not specify a time period to satisfy "as reasonable time to prepare [the accused's] defense." One court has noted that "[a]t a minimum, however, due process does require that the accused be told [of the charges], far enough in advance of trial to be of some use to him. . . ." Reilly v. Sheet Metal Workers' Int'l Ass'n, 488 F. Supp. 1121, 1127 (S.D.N.Y. 1980).[264]

The right to a "full and fair hearing" encompasses the rights to be present and "a reasonable opportunity to be heard - including the right to present evidence and the right to confront and cross examine witnesses." Milne v. Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, AFL-CIO Local 15, 156 F. Supp.2d 172, 178 (D. Conn. 2001) (internal quotations and citations omitted).[265] Accordingly, courts have found that an accused was denied a right to a "full and fair hearing" under the LMRDA when: (1) the discipline was

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[262] Hardeman, 401 U.S. at 245 (finding sufficient notice of the charges based on a detailed statement of facts underlying the charges) (internal quotations omitted).

[263] Gleason v. Chain Serv. Rest., 422 F.2d 342, 343 (2d Cir. 1970). See also, Curtis v. Int'l Alliance of Theatrical Stage Emp., 687 F. 2d 1024, 1027 (7th Cir. 1982) (Section 411 (a) (5) "does not require the elaborate specificity of a criminal indictment") (collecting cases); Null v. Carpenters Dist. Council of Houston, 239 F. Supp. 809, 815 (S.D. Tex. 1965).

[264] See, e.g., Wellman, 812 F. 2d at 1206 (28 days was sufficient notice); Stewart v. St. Louis Typographical Union No. 8, 451 F. Supp. 314, 315-16 (E.D. Mo. (1978) (14 days was sufficient); Null, 239 F. Supp. at 815 (20 days was sufficient).

[265] Accord Ritz v. O'Donnell, 566 F.2d 731, 735 (D.C. Cir. 1977); Parks v. Int'l Bhd. of Electrical Workers, 314 F.2d 886, 912 (4th Cir. 1963); Yager v. Carey, 910 F. Supp. 704, 715 (D.D.C. 1995); Loekle, 551 F. Supp. at 82; Reilly, 488 F. Supp. at 1127; Steward, 451 F. Supp. 316.

unsupported by any evidence; [266] (2) the tribunal was not impartial;[267] (3) the accused was not allowed to record the trial when the union did not do so;[268] and (4) the accused's rights to cross-examination and to present a defense were unduly limited.[269]

However, while courts "apply traditional due process concepts, [courts] recognize that a union has a significant interest in controlling internal discipline, and so do not require the union's disciplinary proceeding to incorporate the same protections found in criminal proceedings." Wellman v. Int'l Union of Operating Eng'rs, 812 F.2d 1204, 1205 (9th Cir. 1987).[270]

5. Election Reform

In light of the LCN's corrupt influence over union officials and union elections (see Section VIII(A) above), union election reform is essential to eliminate such corruption and

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[266] See, e.g., Hardeman, 401 U.S. at 246 (collecting cases).

[267] See, e.g., Murphy v. Int'l Union of Operating Eng'rs, Local 18, 774 F.2d 114, 125 (6th Cir. 1985); Semancik v. United Mineworkers of America, Dist. No. 5, 466 F.2d 144, 159 (3d Cir. 1972); Falcone, 420 F.2d at 1166-67.

[268] See, e.g., Knight v. Int'l Longshoremen's Ass'n, 457 F.3d 331, 340-42 (3d Cir. 2006); Rosario, 605 F.2d at 1240-42; Tincher, 520 F.2d at 854-56.

[269] See, e.g., Kuebler, 473 F.2d at 362-64; Milne, 156 F. Supp. 2d at 177-81; Loekle, 551 F. Supp. at 82-83.

[270] Accord United States v. Int'l Bhd. of Teamsters, 247 F.3d at 385-86 (rights to compulsory process and to subpoena witness are not required); United States v. Boggia, 167 F.3d 113, 118-19 (2d Cir. 1999) (right to representation of counsel at a disciplinary hearing is not required and reliable hearsay is admissible); Wilderger v. AFGE, 86 F.3d 1188, 1193-95 (D.C. Cir. 1996) (overlap of investigative, prosecutorial, and adjudicatory functions in the union's president did not violate due process); Curtis, 687 F.2d at 1027-29 (right to counsel at disciplinary hearing is not required) (collecting cases); Yager v. Carey, 910 F. Supp. 704, 714-15 (D.D.C. 1995) (no rights to be represented by counsel or to the application of the "technical rules of pleading, procedure and evidence") (citations omitted); Hurley v. Steamfitters Local Union No. 464, 714 F. Supp. 996, 1002 (D. Neb. 1988) (union members "need not be provided with the full panoply of procedural safeguards afforded to criminal defendants"); Null v. Carpenters Dist. Council of Houston, 239 F. Supp. 809, 814 (S.D. Tx. 1965).

restore union democracy to rank-and-file union members. Accordingly, in most of the Government civil RICO cases involving labor unions, courts have imposed various union election reforms, including: (1) requiring election of new officers; and (2) appointing court-officers to promulgate election rules, conduct and oversee union elections to guarantee uncoerced and untainted elections, and to review and approve candidates for union office.[271] Indeed, in the International Brotherhood of Teamsters Union Case, the district court approved a consent decree requiring the IBT to amend its Constitution to provide, for the first time, elections of the IBT General President and other International Officers by direct rank-and-file secret balloting. See

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[271] See:

(1) The Teamsters Local 560 Case; App. B at 3-6; United States v. Local 560 (I.B.T.), 736 F. Supp. 601 (D.N.J. 1990);

(2) The Local 6A, Cement and Concrete Workers Case; see App. B at 16-17;

(3) The Bonanno Family Case; see App. B at 22-24;

(4) The International Brotherhood of Teamsters Union Case; see App. B at 47-51; see also the following decisions all entitled United States v. Int'l Bhd. of Teamsters: 247 F.3d 370 (2d Cir. 2001); 723 F. Supp. 203 (S.D.N.Y. 1989), aff'd as modified, 931 F.2d 177 (2d Cir. 1991); 742 F. Supp. 94 (S.D.N.Y. 1990), aff'd as modified, 931 F.2d 177 (2d Cir. 1991); 764 F. Supp. 787 (S.D.N.Y. 1991); 782 F. Supp. 243 (S.D.N.Y. 1992); 803 F. Supp. 761 (S.D.N.Y. 1992), aff'd and reversed in part, 998 F.2d 1101 (2d Cir. 1993);

(5) The ILA Local 1804-1 Case; see App. B at 100-02;

(6) The IBT Local 295 Case; see App. B at 117;

(7) The New York Carpenters Union Case; see App. B at 125-27; United States v. Dist. Council of New York City & Vicinity of the United Bhd. of Carpenters and Joiners of America, 880 F. Supp. 1051 (S.D.N.Y. 1995);

(8) The HEREIU Local 54 Case; see App. B at 135-38;

(9) The Teamsters Local 282 Case; see App. B at 154;

(10) The Mason Tenders District Council of Greater New York Case; see App. B at 166; United States v. Mason Tenders Dist. Council of Greater New York, 1994 WL 742637 (S.D.N.Y. Dec. 27, 1994); 1997 WL 340993 (S.D.N.Y. June 20, 1997); and 1997 WL 345036 (S.D.N.Y. June 20, 1997);

(11) The HEREIU Case; see App. B at 200-2001;

(12) The Chicago District Council of LIUNA Case; see App. B at 214-15, 218;

(13) The LIUNA Local 210 Case; see App. B at 221-25;

(14) The HEREIU Local 69 Case; see App. B at 234.

App. B at 47-48; United States v. Int'l Bhd. of Teamsters, 931 F.2d 177 (2d Cir. 1991); United States v. Int'l Bhd. of Teamsters, 803 F. Supp. 761, 767-772, 774-76 (S.D.N.Y. 1992) (the IBT election rules are set forth as exhibit A at 803 F. Supp. at 800-806), aff'd and reversed in part, 998 F.2d 1101 (2d Cir. 1993).

6. Removal of Persons From Union Office and Membership, and Prohibitions on Holding Union Office or Membership

As demonstrated in Sections II(C)(4) and VII(D) above, 18 U.S.C. § 1964(a) authorizes district courts to remove a person from a position or office and to bar a person from holding a position or engaging in specified activity in the future when:

(1) Such person is a named defendant in a civil RICO action pursuant to 18 U.S.C. § 1964(a) and is found to have violated RICO after due notice and a trial, summary judgment, or other appropriate adjudicatory proceeding, or by default; or

(2) Such person, whether or not named as a defendant in a civil RICO action, is subject to an injunction issued pursuant to 18 U.S.C. § 1964(a), and is found after due notice and an appropriate adjudicatory proceeding, or by default, to have violated, or aided and abetted one or more named defendant's violation of a provision of a district court's injunction or judgment order that warrants removal; or

(3) Such person, even though not named as a defendant in a civil RICO action nor otherwise subject to an injunction issued pursuant to 18 U.S.C. § 1964(a), is found after due notice and an appropriate adjudicatory proceeding, or by default, to have aided and abetted an enjoined person's violation of a district court's injunction or judgment order that warrants removal.

Accordingly, in many Government civil RICO cases involving labor unions, courts have removed persons found to have violated RICO from membership or holding an office in a labor union, and prohibited such persons from holding membership or office in a labor union in the future, or have otherwise prohibited such person from engaging in activities related to union

matters.[272]

Moreover, in all 22 filed Government civil RICO cases involving labor unions, courts have authorized such sanctions and other sanctions for persons who consented to such sanctions, or who, after an appropriate adjudicatory procedure, were found to have violated the district courts' injunctions or other court orders.[273] But see United States v. Local 30, United Slate, Tile,

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[272] See:

(1) The Teamsters Local 560 Case, see App. B at 3-12; United States v. Local 560 of the Int'l Bhd. of Teamsters, 581 F. Supp. 279, 321, 336-37 (D.N.J. 1984), aff'd, 780 F.2d 267, 295-96 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1988); United States v. Local 560 of the Int'l Bhd. of Teamsters, 694 F. Supp. 1158, 1160-62, 1191-92 (D.N.J. 1988), aff'd, 865 F.2d 252 (3d Cir. 1986) (Table); United States v. Sciarra, 851 F.2d 621, 623-24, 632-33 (3d Cir. 1988);

(2) The Local 6A Cement and Concrete Workers Case, see App. B at 17;

(3) The Local 30, Roofers Union Case, see App. B at 30-32; United States v. Local 30, United Slate, Tile and Composition Roofers, 686 F. Supp. 1139, 1162, 1171-74 (E.D. Pa. 1988), aff'd, 871 F.2d 401, 407-09 (3d Cir. 1989);

(4) The Private Sanitation Industry of Long Island Case, see App. B at 89-94; United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 811 F. Supp. 808, 818 (E.D.N.Y. 1992), aff'd, 995 F.2d 375 (2d Cir. 1993); United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 899 F. Supp. 974, 983-84 (E.D.N.Y. 1994), aff'd 47 F.3d 1158 (2d Cir. 1995) (Table);

(5) The ILA Local 1804-1 Case, see App. B at 101-02, 105-07; United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 831 F. Supp. 177, 191-92 (S.D.N.Y. 1993), aff'd and vacated in part on other grounds, United States v. Carson, 52 F.3d 1173, 1183-85 (2d Cir. 1995);

(6) The IBT Local 295 Case, see App. B at 117-18; United States v. Local 295 of the Int'l Bhd. of Teamsters, 784 F. Supp. 15, 19 (E.D.N.Y. 1992);

(7) The Teamsters Local 282 Case, see App. B at 152-54; United States v. Local 282 of the Int'l Bhd. of Teamsters, 13 F. Supp.2d 401, 402 (E.D.N.Y. 1998), aff'd in part and vacated and remanded on other grounds in part, 215 F.3d 283 (2d Cir. 2000);

(8) The Mason Tenders District Council Case, see App. B at 173-74; United States v. Mason Tenders Dist. Council of Greater New York, 1995 WL 679245 (S.D.N.Y. Nov. 15, 1995).

[273] See: **(1)** App. B at 3-7; United States v. Local 560 of the Int'l Bhd. of Teamsters, 736 F. Supp. 601 (D.N.J. 1990), United States v. Local 560 of the Int'l Bhd. of Teamsters, 754 F. Supp. 395 (D.N.J. 1991), aff'd 974 F.2d 315 (3d Cir. 1992);

(2) App. B at 16-17; United States v. Local 6A, Cement & Concrete Workers, Laborers Int'l Union of North America, 832 F. Supp. 674 (S.D.N.Y. 1993);

(3) App. B at 23-24;

(continued...)

and Composition Roofers, 686 F. Supp. 1139, 1167-68 (E.D. Pa. 1988), aff'd, 871 F.2d 401 (3d Cir. 1989) (the district court rejected the Government's argument that the court should remove newly elected union officers who were not defendants and who were not found to have violated RICO, because they were close to the defendants found liable for RICO violations and were likely "to follow the course that the old regime did").

7. Disgorgement

As noted in Section II(C)(3) above, there is a conflict between the Second Circuit and the District of Columbia Circuit regarding the issue whether disgorgement is an available remedy

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[273](...continued)
(4) App. B at 30;
(5) App. B at 37-39;
(6) App. B at 41;
(7) App. B at 47-51; United States v. Int'l Bhd. of Teamsters, 247 F.3d 370 (2d Cir. 2001) and cases cited at App. B at 51, n. 7;
(8) App. B at 81;
(9) App. B at 86, 91;
(10) App. B at 101-102; United States v. Local 1804-1, Int'l Longshoremen's Ass'n, et al., 831 F. Supp. 192 (S.D.N.Y. 1993);
(11) App. B at 115-18;
(12) App. B at 123, 126; United States v. Dist. Council of New York City of the United Bhd. of Carpenters and Joiners of America., 941 F. Supp. 349, 364-87 (S.D.N.Y. 1996);
(13) App. B at 136-38;
(14) App. B at 144-46;
(15) App. B at 152, 154-55;
(16) App. B at 165, 167-68, 173-75; United States v. Mason Tenders Dist. Council of Greater New York, 1994 WL 742637 (S.D.N.Y. Dec. 27, 2994); Investigations Officers v. Lanza, 1996 WL 514871 (S.D.N.Y. Sept. 10, 1996); United States v. Mason Tenders Dist. Council of Greater New York, 1998 WL 23214 (S.D.N.Y. Jan. 13, 1998);
(17) App. B at 196, 201-06; United States v. Hotel Employees and Rest. Employees Int'l Union, 974 F. Supp. 411 (D.N.J. 1997);
(18) App. B at 211-14, 219;
(19) App. B at 223-25;
(20) App. B at 231-34, 236-37;
(21) App. B at 241-42;
(22) App. B at 250-55.

under 18 U.S.C. § 1964. Courts in the Second Circuit have repeatedly held that disgorgement of a wrongdoer's ill-gotten gains is an equitable remedy available to the United States under 18 U.S.C. § 1964 (a).[274]

8. Relief Against Non-Parties

In accordance with the authority set forth in Section VII(C)(2) above, courts have frequently imposed equitable relief against non-parties in Government civil RICO lawsuits. For example, in the Government's civil RICO suit against the International Brotherhood of Teamsters Union, courts have held that provisions of the Consent Decree entered into by the Government and the International Teamsters Union defendant, involving application of disciplinary rules and related sanctions and rules governing union elections, applied to Teamsters Union members and Teamsters Union affiliated entities that were non-parties and non-signatories to the Consent Decree on the grounds that: (1) the interests of such non-parties were adequately represented by the International Teamsters Union defendant, and (2) because the investigatory and disciplinary powers of the officers appointed under the Teamsters' Consent Decree are proper delegations of the powers of the IBT General President and the IBT's General Executive Board within the scope of the IBT Constitution that binds all members of the IBT.[275]

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[274] See United States v. Carson, 52 F.3d 1173, 1180-82 (2d Cir. 1995); United States v. Private Sanitation Indus. Ass'n, 914 F. Supp. 895, 900-01 (E.D.N.Y. 1996); United States v. Private Sanitation Indus. Ass'n, 899 F. Supp. 974, 983-84 (E.D.N.Y. 1994), aff'd, 47 F.3d 1158 (2d Cir. 1995); United States v. Private Sanitation Indus. Ass'n, 811 F. Supp. 808, 818 (E.D.N.Y. 1992), aff'd, 995 F.2d 375 (2d Cir. 1993); United States v. Int'l Bhd. of Teamsters, 708 F. Supp. 1389, 1408 (S.D.N.Y. 1989); United States v. Bonanno Organized Crime Family, 683 F. Supp. 1411, 1446-49 (E.D.N.Y. 1988), aff'd, 879 F.2d 20 (2d Cir. 1989).

[275] See, e.g., United States v. Int'l Bhd. of Teamsters, 998 F.2d 120, 124 (2d Cir. 1993); United States v. Int'l Bhd. of Teamsters, 964 F.2d 180, 183 (2d Cir. 1992); United States v. Int'l Bhd. of Teamsters, 931 F.2d 177, 184-87 (2d Cir. 1991); United States v. Int'l Bhd. of

(continued...)

Moreover, courts have enforced consent decrees against non-parties and non-signatories under the All Writs Act, 28 U.S.C. § 1651(a), when "necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law." See, e.g., United States v. Int'l Bhd. of Teamsters, 954 F.2d 801, 806-07 (2d Cir. 1992) (affirming district court order directing an employer to comply with the decision of a court officer appointed pursuant to the IBT Consent Decree to reinstate a union employee whom it had dismissed in retaliation for engaging in Teamsters union campaign activity, which was protected by election rules promulgated pursuant to the IBT Consent Decree); United States v. Int'l Bhd. of Teamsters, 948 F.2d 98, 101-105 (2d Cir. 1991) (approving district court's authority to issue an order affirming a ruling by an officer appointed by the district court pursuant to the Teamsters Consent Decree granting non-employee members of the IBT access to the premises of the employer to campaign for union office, which order was necessary to effectuate the provisions of the Teamsters Consent Decree relating to holding open and fair elections for union officers); United States v. Int'l Bhd. of Teamsters, 907 F.2d 277, 279-281 (2d Cir. 1990) (affirming district court's order enjoining all members and affiliates of the IBT from litigating issues related to a Consent Decree between the IBT and the Government in any court other than the Southern District of New York, where the Consent Decree was entered, as necessary to aid the Southern District of New York's jurisdiction because collateral lawsuits in other jurisdictions "created a 'significant risk of subjecting the

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[275](...continued)
Teamsters, 905 F.2d 610, 622 (2d Cir. 1990); United States v. Int'l Bhd. of Teamsters, 808 F. Supp. 279, 282 (S.D.N.Y. 1992); United States v. Int'l Bhd. of Teamsters, 777 F. Supp. 1123, 1125-26 (S.D.N.Y. 1991) (collecting cases); United States v. Int'l Bhd. of Teamsters, 764 F. Supp. 787, 789-90 (S.D.N.Y. 1991); United States V. Int'l Bhd. of Teamsters, 745 F. Supp. 908, 912 (S.D.N.Y. 1990); Joint Council 73 v. Int'l Bhd. of Teamsters, 741 F. Supp. 491, 493 (S.D.N.Y. 1990).

Consent Decree to inconsistent interpretations and the Court Officers to inconsistent judgments.'"[276]

C. Relief Obtained In Contested Civil RICO Cases Involving Labor Unions

For the most part, the equitable relief discussed in Section VIII(B) above was obtained through consent decrees voluntarily agreed upon by the parties in the litigation. Substantially similar equitable relief also has been obtained in eight contested Government civil RICO cases involving labor unions over the objections of defendants, as discussed below.[277]

1. The IBT Local 560 Case -

United States v. Local 560 of the Int'l Bhd. of Teamsters, 581 F. Supp. 279 (D.N.J. 1984) ("Local 560"), was the first civil RICO suit brought by the United States against a labor union. In Local 560, 581 F. Supp. at 321, 336-37, following a bench trial, and over the objection of the defendants, the district court imposed an injunction, enjoining two defendants "from any future contacts of any kind with Local 560." The district court also removed the members of the Local 560 Executive Board, who the court found had violated RICO, ordered a court-supervised election of new officers for Local 560, and appointed a Trustee who conducted the business and operations of Local 560. The trusteeship was imposed in order "to effectively dispel the existing atmosphere of intimidation within Local 560, to restore union democracy, and to ensure (to the

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[276] See also United States v. Sciarra, 851 F.2d 621, 629-633 (3d Cir. 1988) (affirming an order of the district court compelling non-parties to submit to depositions to effectuate the administration of a court imposed trusteeship over the defendant-union).

[277] Moreover, the case law involving equitable relief obtained through consent decrees is also relevant to the issue of what equitable relief is available in contested Government civil RICO cases over the objections of defendants, because a court may not approve a consent decree unless it determines that the terms of the consent decree are consistent with, and do not violate, the governing law, and that they further the objectives of the statute underlying the cause of action. See Section VII(A)(1) above.

extent possible) that racketeers do not obtain positions of trust within the Local." Id. at 326.[278]

In United States v. Local 560 of the Int'l Bhd. of Teamsters, 780 F.3d 267, 295-96 (3d Cir. 1986), cert. denied, 476 U.S. 1140 (1986), the Third Circuit affirmed the district court's relief, stating that the power to appoint "a trustee to be in charge of Local 560 . . . falls within the broad equitable powers granted to district courts under Section 1964(a), " Id. at 296 n. 39, particularly the "broad remedial powers of 'divestiture' and 'reasonable restrictions' provided for under Section 1964." Id. at 295.

During the course of the trusteeship, which was in place for over twelve years, the district court authorized the Trustee, subject to review by the district court, to, among other matters, administer the affairs of Local 560, negotiate contracts, hire and discharge employees and investigate acts of wrongdoing within the union.[279]

In particular, the powers of the court-appointed Trustee included, but were not limited to, the following:

a. All powers accorded to the members of the Local 560 Executive Board, either individually or collectively, by virtue of the bylaws and, constitutions of the Local and International Union;

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[278] The district court found that various defendants, including members and associates of the LCN and corrupt Local 560 officials, had created a climate of intimidation that induced Local 560 members to surrender their rights to union democracy through a pattern of racketeering activity involving several murders, extortion and the systematic appointment and re-appointment to union positions of persons with ties to organized crime and/or serious and extensive criminal records. See Local 560, 581 F. Supp. at 284-85, 290-92, 306-19.

[279] See App. B at 3-12. See also United States v. Local 560 of the Int'l Bhd. of Teamsters, Civil No. 82-689 (D.N.J. Opinion and Order dated May 12, 1987); United States v. Local 560 of the Int'l Bhd. of Teamsters, 694 F. Supp. 1158, 1160-62, 1191-92 (D.N.J. 1988), aff'd, 865 F.2d 252 (3d Cir. 1988)(Table); United States v. Sciarra, 851 F.2d 621, 623-24, 632-33 (3d Cir. 1988).

b. All powers accorded to the offices formerly held by those persons removed from office pursuant to the Judgment Order of March 16, 1984, by virtue of the bylaws and constitutions of the Local and International Union;

c. The power to enter into negotiations, execute contracts, pursue grievances, conduct organizing campaigns, and otherwise direct and engage in all lawful activities of Local 560;

d. The power to initiate pursue, defend or settle litigation on behalf of Local 560 or its members in accordance with the lawful powers of the Union;

e. The power to hire and discharge employees of Local 560 and set the wages, terms and conditions of employment, subject to any limitations that may be created by law or existing written contracts;

f. The power to appoint and remove business agents, stewards and other representatives of Local 560, subject to any limitations that may be created by the bylaws and constitutions of the Local and International Unions;

g. The power to retain or terminate any legal counsel, accountants, consultants or other professionals that he may deem necessary to the accomplishment of his duties under such terms and conditions as he may determine appropriate, including the fixing of compensation which shall be paid by Local 560;

h. The power to make all determinations with respect to the affairs of Local 560 in any and all aspects of its operations; and

i. The power to participate in the affairs of the Joint Council, the Benefit Plans and other bodies related to Local 560 to the same extent as was customary for Executive Board members prior to the imposition of, the Trusteeship.

See United States v. Local 560 of the Int'l Bhd. of Teamsters, Civ. No. 82-689 (D.N.J. Opinion and Order dated May 12, 1987) at 6-7.

2. The Local 30, Roofers Union Case -

In United States v. Local 30, United Slate, Tile and Composition Roofers, 686 F. Supp. 1139, 1162-1174 (E.D. Pa. 1988) ("Local 30, United Slate, Tile"), following an

evidentiary hearing, the district court found that defendants had violated RICO and imposed a "Decreeship" over the Roofers Union that included the following equitable relief over the defendants' objections:

a. The district court barred defendants who violated RICO "from the roofing industry within the jurisdiction of Local 30/30B." Id. at 1162.

b. The district court appointed a Chief Liaison Officer "who will serve as the principal enforcement officer of all provisions of the Decree," id. at 1171, and "will have the authority, upon application and approval of [the District] Court, to hire such assistants and support services as will be needed to fulfill his responsibilities under the Decree." Id. at 1169.

c. The district court ordered an audit of all accounts of Local 30/30B and any affiliated entity by a designee of the Court. Id. at 1169, 1172.

d. The district court barred all defendants found to have violated RICO "from holding, occupying, or controlling any position of leadership or influence in respect to any matter within the jurisdiction of Local 30/30B or any of its affiliated entities"and "from engaging in employment in the roofing or related construction industries, in any capacity, within the geographical area of the jurisdiction of Local 30/30B". Id. at 1171.

e. The district court ordered that Local 30/30B develop with the appropriate employer representative groups an industry-wide grievance/arbitration procedure for resolving contractual disputes between the union and employers, subject to the court's approval. Id. at 1172-73.

f. The district court ordered that all face-to-face collective bargaining agreement negotiations take place under the supervision of the Court Liaison Officer. Id. at 1172-73.

g. The district court prohibited any collective bargaining agreement from taking effect until it was approved by the Court Liaison Officer. Id. at 1173.

h. The district court established "direct control of all matters within the jurisdiction of the union that require the expenditure of any funds of the Union or any affiliated entity for the transfer of any of its assets" and enjoined defendants "from transferring any funds, property, or interests in any assets of any kind of Local 30/30B or any of its affiliated entities, except in the ordinary course of business without the express written

consent of the court." Id. at 1172.

i. The district court ordered that the "Court Liaison Officer shall have the right, without prior notice, to have access to any records, wherever located, at the offices, locations and other property of Local 30/30B or any affiliated entity" and to copy such records. Id. at 1173.

j. The district court required the union to "provide written notice to the court of all meetings, proceedings, or decisions providing for nominations and/or elections for offices or positions within Local 30/30B, or any affiliated entity." Id. at 1173.

k. The district court prohibited the union and any affiliated entity and the individual defendants "in respect to any member within the jurisdiction of Local 30/30B, or any affiliated entity, from intimidating, inflicting violence, fear, or threats of personal or property damage upon any person, corporation or entity, or attempting to do so." Id. at 1174.

l. The district court retained jurisdiction of all matters relating to the union and any affiliated entity and ordered that "[a]ll costs incurred in the administration of the Decreeship shall be borne by Local 30/30B and, where appropriate, its affiliated entities." Id.

In United States v. Local 30, United Slate, Tile and Composition Roofers, 871 F.3d 401, 404 (3d Cir. 1989), the Third Circuit affirmed this equitable relief, noting that "the District Court converted the preliminary injunction into a 'final decree.'" The Third Circuit concluded that the relief granted was authorized by 18 U.S.C. § 1964(a), and that the District Court did not abuse its discretion in imposing a decreeship against the Roofers Union and deciding that the ordered relief was necessary to eliminate and prevent corruption in the union. Id. at 404-09.

The Third Circuit stated that, under Section 1964 of RICO, "[t]he district court is empowered not only to restrain but also to prevent future violations of § 1962 by ordering reorganization or even dissolution of any enterprise, as long as the court makes due provision for the rights of innocent parties." Id. at 407. The Third Circuit also explained that the intrusive relief was necessary because the evidence "supports the district court's finding that the removal

of the thirteen individual defendants would not have eliminated that corrupt influence from the Roofers Union." Id. at 407. Finally, the court of appeals noted that the evidence showed:

> that the newly elected officials are long time associates and allies of the thirteen individual defendants in this case, which indicates that corrupt influences continue to exist within the Union. [Consequently] the district court properly found a likelihood of wrongful acts continuing into the future.

Id. at 409.

3. The ILA Local 1804-1 Case -

In United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 831 F. Supp. 177, 191-192 (S.D.N.Y. 1993), following a bench trial, the district court enjoined certain defendants found to have violated RICO:

> (1) from committing any acts of racketeering, as defined in [18 U.S.C. § 1961]; (2) from having any dealings, directly or indirectly, with any members or associates of organized crime for any commercial purpose concerning the affairs of the Waterfront [Enterprise]. . . or any labor organization; and (3) from having any dealings, directly or indirectly, with any other defendant in this action for any commercial purpose concerning the affairs of the Waterfront [Enterprise] or any labor organization; and (4) from participating in any way in the affairs of or having any dealings, directly or indirectly, with (i) any labor organization. . . .(ii) any officer, agent, representative, employee, or member of [several ILA locals], (iii) any other officer, agent, representative, employee, or member of the ILA, or any other labor organization concerning the affairs of such organization or the Waterfront [Enterprise]; and (iv) any person or entity that does business on the Waterfront; and (5) from visiting the site of any ILA entity or other labor organization or communicating with any person who is at the site of any ILA entity or other labor organization.

In United States v. Carson, 52 F.3d 1173, 1183-85 (2d Cir. 1995), the Second Circuit upheld this injunctive relief. The Second Circuit ruled that the above restrictions on the defendants were "reasonable," not overly broad, were specifically authorized by Section 1964 (a)

that allows "reasonable restrictions on the future activities" of RICO violators (id. at 1183), and did not violate the defendants' First Amendment rights to freedom of association.

4. The IBT Local 295 Case -

In United States v. Local 295 of the Int'l Bhd. of Teamsters, 784 F. Supp. 15 (E.D.N.Y. 1992), over the objection of Local 295, the district court imposed a court - trusteeship to conduct various operations of Local 295 and to conduct investigations to eliminate corruption within Local 295. The district court stated that it had authority to "appoint a trustee to oversee the affairs of a local union under [Section 1964(a) of RICO]." Id. at 19. The district court also quoted a Senate Report stating that "'[t]he implementation of trusteeships under civil RICO is no longer a novel, one-time experiment. It is quickly being recognized as an extremely valuable part of effective law enforcement.'" Id. at 19.

In a subsequent order, the district court authorized the Trustee, among other matters:

a. "To conduct, administer and supervise the daily affairs of Local 295, including the power to handle grievances, arbitration and collect and disburse monies (including member dues) on behalf of the Local; [and negotiate, enter, and terminate contracts and leases]".

. . .

b. "To investigate corruption and abuse within Local 295, with or without probable cause, and with such investigative assistance as he deems appropriates."

. . .

c. To discipline, remove and replace any officer, administrator, organizer, business agent, employee, shop steward, negotiator, or trustee of Local 295, for just cause as follows:

   i. The Trustee's decisions with respect to discipline of members shall be final and binding. Any member's appeal shall be to the United States District Court for the Eastern District of New York within fourteen days of receipt of the Trustee's decision.

ii. In any appeal pursuant to paragraph 2(e)(1), the standard of review shall be whether the Trustee's decision is supported by a preponderance of the evidence. Such evidence may consist of or include hearsay.

iii. Any actions of the Trustee pursuant to this subparagraph shall be reviewable, exclusively by this Court, and are not subject to arbitration or other challenge under the IBT Constitution or Local 295 By-Laws.

. . .

d. To take possession of and review all current and past books, records, files, accounts and correspondence of Local 295 and the Executive Board.

e. [To conduct and supervise union elections].

f. "To subpoena witnesses and documents."

g. "To take testimony formally or informally, on the record under oath before a court reporter or otherwise as the circumstances may require in the Trustee's sole discretion."

h. "To receive assistance of federal and local law enforcement" and to "refer possible violations of criminal law to federal or local law enforcement authorities."

i. "To apply to the [district] Court for such assistance as may be necessary and appropriate to carry out the powers conferred upon the Trustee."

j. To provide periodic written reports to the district court and the government.

k. To provide the Trustee with "all powers granted to Trustees of locals pursuant to the IBT Constitution and all powers formerly held by the Executive Board of [Local 295] to the extent that such powers, including the power to conduct hearings, discipline, remove and replace officers, employees and members, are broader than those emumerated [in the district court's order]."

l. To petition the district court for modification of any of the terms of the district court's order.

See App. B at 117-18.

5. The IBT Local 282 Case -

In United States v. Local 282 of the Int'l Bhd. of Teamsters, 13 F. Supp.2d 401 (E.D.N.Y. 1998), aff'd in part, and vacated and remanded in part, by 215 F.3d 283 (2d. Cir. 2000), based on Robert Sasso's guilty plea to a RICO conspiracy charge, the district court granted the Government's motion for summary judgment in its civil RICO action "to the extent of finding Sasso liable in that he 'conspired with the other individual defendants and members of organized crime to conduct the affairs of defendant Local 282 of the International Brotherhood of Teamsters as an enterprise through a pattern of labor racketeering activities, including acts of extortion and illegal receipt of money from employers, from the late 1970s through 1991 in violation of 18 U.S.C. § 1962(c).'" Id. at 402. The district court also permanently enjoined Sasso from: (1) "owning, operating, or working for any business in the construction, demolition, or excavation industries or part of the trucking industry which was engaged in construction, demolition, or excavation"; (2) "working in any capacity for any person or business doing business with the construction, demolition, or excavation industries and from associating for any commercial purpose with any member or associate of organized crime"; and (3) "from visiting the work sites of the International Brotherhood of Teamsters and, with limited exceptions, communicating with any person at these sites." Id. at 402.

The district court also ordered Sasso to pay 15% of the costs of a monitorship (i.e., $136,000) that the district court had imposed over Local 282 pursuant to a Consent Decree. In so ruling, the district court stated:

> The broad discretion in fashioning remedies granted by section 1964(a) affords this Court the power to order Sasso to fund the monitorship which the Consent Judgment created. Ordering Sasso to fund the monitorship does not violate the restraints on district courts'

> powers under § 1964(a) emphasized in [*United States v. Carson*, 52 F. 3d 1173 (2d Cir. 1995)]. In *Carson*, the Second Circuit warned that district courts have the power to "'prevent and restrain' *future* conduct" but not the power to "punish *past* conduct." *Carson*, 52 F.3d at 1182 (emphasis in original). The Second Circuit held that the *Carson* district court overstepped its jurisdiction by ordering Carson to disgorge profits he illicitly acquired eight years before the launch of the civil suit. *Id.* at 1182. Carson's profits were garnered "too far in the past to be part of an effort to 'prevent' and 'restrain future conduct.'" *Id.* (emphasis in original).
>
> Here, in contrast, the plaintiff does not request that Sasso disgorge profits. Rather, plaintiff only moves the Court to order Sasso to contribute to the funding of the monitorship. As Judge Glasser noted, funding a monitorship furthers the prevention and the restraint of future illegal conduct. *See Private Sanitation Indus. Ass'n.*, 914 F. Supp. at 901, *surpra*. Here, there is no question that additional funding for the Local 282 monitorship will help prevent the illegal conduct Sasso fostered at Local 282. Indeed, the monitorship in this case was created for the express purpose of eradicating the possibility of future labor racketeering by Local 282 officials. Additionally, funding the monitorship will further prevent future illegal conduct by Sasso. Sasso will be deterred from engaging in labor racketeering because a fully funded monitorship is difficult to evade.

Id. at 403.

In United States v. Sasso, 215 F.3d 283 (2d Cir. 2000), on appeal of the above-referenced opinion, the Second Circuit held that the district court's order requiring Sasso to fund a portion of the costs of the court-imposed Monitorship of Local 282 fell within the district court's broad equitable powers under 18 U.S.C. § 1964. The Second Circuit distinguished its earlier opinion in United States v. Carson, 52 F.3d 1173 (2d Cir. 1995), stating:

> In *Carson*, we dealt with a disgorgement order, not with an order of contribution to the funding of a monitorship; and we reversed only to the extent that the sums ordered disgorged were not meant for the prevention of future RICO violations. Our remand plainly allowed an order requiring the payment of any amounts that were "intended soley to prevent and restrain future RICO violations." 52 F.3d at 1182 (internal quotation marks omitted).

> In the present case, we deal with an order for Sasso's payment of money into a fund that plainly is to be used to prevent further violations of section 1962.

Sasso, 215 F.3d at 291.

The Second Circuit also rejected Sasso's argument "that ordering contribution from him is inappropriate because he has now been enjoined from engaging in the pertinent activities, thereby preventing him from committing any future RICO offense." Id. at 291. The Second Circuit explained:

> First, there was evidence from the Corruption Officer that Sasso, while imprisoned following his RICO conviction, had hundreds of communications with persons associated with organized crime, persons associated with Local 282, persons whose businesses were within the Local's jurisdiction, and persons who had previously made illegal payments to corrupt Local officials. That evidence easily demonstrates that there can be no effective monitorship without attention to Sasso's own current activities. Sasso's suggestion that such attention is unnecessary because he has been enjoined rings hollow in light of his postconviction conduct and in light of the pattern of concealment previously engaged in by the individual defendants, which included clandestine meetings, surreptitious money transfers, and lying under oath. Second, even if Sasso himself had not continued to have suspicious contacts with the persons described above, it would be well within the court's equity powers to conclude that Sasso, having engaged in conduct that corrupted the union, should bear part of the cost of eliminating that corruption.

Id. at 291.

The Second Circuit remanded the matter to the district court to make appropriate findings as to "how it arrived at 15 percent as Sasso's appropriate share of the [monitorship] expense." Id. at 292.

6. The Mason Tenders District Council of LIUNA Case -

In United States v. Mason Tenders Dist. Council of Greater New York, 1995 WL 679245 (S.D.N.Y. Nov. 15, 1995), the Government sought permanent injunctive relief against individual defendants Casciano, LaBarbara, Mandragona, Messera, Soussi, and Vario ("the Individual Defendants"), seeking to limit their involvement in organized crime, union affairs, and the construction and asbestos removal industries. Each of these defendants was at one time an official of the Mason Tenders District Council, the Trust Funds, or a constituent local union. Between 1989 and 1992, each had pled guilty to various racketeering charges. At the time the Government's proposed injunctions were submitted, all of the Individual Defendants either had been recently released from prison for those offenses or were pending imminent release. The District Court rejected defendants' argument that their guilty plea agreements precluded any relief in this action, noting that "[t]he RICO statute specifically contemplates simultaneous criminal and civil liability for the identical acts of a single defendant." Id. at * 21. The district court also rejected defendant Vario's argument that the conditions of his supervised release subjected him to conditions that made the injunctive relief unnecessary.

The Government's proposed injunction sought various restraints on the activities of the Individual Defendants, barring them from any further racketeering activity, all contacts with LCN members, all association with labor unions or the trust funds, all commercial activities involving the District Council or its unions, and involvement in the construction and asbestos removal industries. Several defendants filed various objections to the breadth and scope of these proposed restraints, asserting that the terms of the requested relief were vague and overbroad and violated their First Amendment rights. However, the District Court ruled that, under United

States v. Carson, 52 F.3d 1173 (2d Cir. 1995), and other government civil RICO cases, the court's authority to fashion equitable relief in order to accomplish RICO's purposes was very broad. In particular, the District Court enjoined the defendants from:

a. committing any act of racketeering as defined in 18 U.S.C. § 1961;

b. knowingly associating for commercial purposes, directly or indirectly, with any member or associate of organized crime, with any defendant in this action, with any member of the MTDC or its constituent locals, or with any owner, officer, agent, or employee of any business employing members of LIUNA, the MTDC, or the MTDC's constituent local unions;

c. visiting any social clubs where commercial activities are discussed, or which is known to be frequented by members or associates of organized crime;

d. participating in any way in the affairs of, or continuing as a member of, or having any dealings, directly or indirectly, with any labor organization or employee benefit fund, including, without limitation, any entity or employee benefit fund affiliated with LIUNA, the MTDC, or an MTDC constituent local, provided that nothing in this judgment shall prohibit any one of the Six Individual Defendants from (a) making application for or receiving a pension from the MTDC Pension Fund, or from communicating with the MTDC Pension Fund concerning these pension payments; (b) permitting any business not employing members of LIUNA, the MTDC, or the MTDC constituent local unions, which business employs any one of the Six Individual Defendants, from deducting money from his wages and from remitting such money to a labor organization not affiliated with LIUNA, the MTDC, or any MTDC constituent local; or (c) seeking and receiving benefits provided for by a collective bargaining agreement binding on any business not employing members of LIUNA, the MTDC, or the MTDC constituent local unions, which business employs any one of the Six Individual Defendants, or provided for by an ERISA-protected employee benefit plan established by that business;

e. knowingly associating for any commercial purpose, directly or indirectly, with any officer, agent, delegate, representative, shop steward, or employee of any labor organization or employee benefit fund, including, without limitation, any labor organization or employee benefit fund affiliated with LIUNA, the MTDC, and the MTDC constituent locals;

f. owning, operating, having any interest in or control of, doing business with, or having any commercial dealings, directly or indirectly, with any entity that employs members of LIUNA or the MTDC, including, but not limited to, such entities in the construction or asbestos removal industries.

Masson Tenders Dist. Council of Greater New York, 1995 WL 679245 at * 22-23.

7. The Private Sanitation Industry Ass'n Case -

(1.) In United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 811 F. Supp. 808 (E.D.N.Y. 1992), aff'd, 995 F. 2d 375 (2d Cir. 1993), the district court granted the Government's motion for partial summary judgment, providing for broad injunctive relief against defendant Salvatore Avellino, and denied Avellino's request for a continuance to conduct discovery pursuant to FED. R. CIV. P. 56(f).

The complaint alleged, and the district court found, that Avellino, a capo in the Luchese LCN Family and hidden owner in two corporate defendant carting companies, collected extortion payments and tribute from area carters. Avellino divided these illegal proceeds between the Luchese LCN Family and the Gambino LCN Family, which controlled IBT Local 813, the union that represented workers employed by employers engaged in the solid waste industry on Long Island. To control the carting industry, Avellino used and threatened to use force against rebel carters, controlled bidding on certain jobs, and bribed public and union officials to ensure continued control of the carting industry. 811 F. Supp. at 810-11.

The district court rejected Avellino's contention that the broad injunctive relief sought by the Government impermissibly infringed on his constitutional right of association. In that respect, the district court ordered that:

a. defendant Avellino refrain from participating directly or indirectly in the carting industry, any company engaged in the business of carting, any trade waste association and in the affairs of Local 813;

b. defendant Avellino be divested of his interests in the carting industry and in PSIA enterprises;

c. defendant Avellino disgorge the illicit proceeds of his racketeering activity;

d. defendant Avellino refrain from associating with the other defendants in this action for any commercial purpose; and

e. defendant Avellino refrain from associating with known members and associates of organized crime for any commercial purpose.

811 F. Supp. at 818.

The district court, citing United States v. Bonanno Organized Crime Family of La Cosa Nostra, 683 F. Supp. 1411, 1441 (E.D.N.Y. 1988), aff'd, 879 F.2d 20 (2d Cir. 1989), ruled that 18 U.S.C. § 1964(a) granted the court authority "'to enter reasonable injunctions against violators restricting their future business activities.'" 811 F. Supp. at 818. The district court found that the injunction against associating with other defendants and with known members and associates of organized crime was "designed to further the significant governmental interest in eliminating the insidious impact upon a captive community of corruption and racketeering in the Long Island carting industry." Id.

(2.) In United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 899 F. Supp. 974 (E.D.N.Y. 1994), aff'd 47 F.3d 1158 (2d Cir. 1995) (table), the district court granted the Government's motion for summary judgment and broad injunctive relief against defendant Nicholas Ferrante. The complaint alleged, and the district court found, that Ferrante, a reputed associate of the Lucchese LCN Family and owner of two Long Island carting companies, was a close associate of Salvatore Avellino, an alleged Capo in the Lucchese LCN Family, and assisted Avellino on a regular basis in collecting extortion payments and tribute from area carters. In

reaching its conclusion that Ferrante failed to show a genuine issue of fact as to his civil liability, the district court found that under principles of collateral estoppel, Ferrante's guilty plea in state court to coercion in the first degree conclusively established that he had committed one predicate racketeering act and that undisputed evidence submitted by the Government established the second predicate act alleged, second degree bribery under New York State Penal Law Section 200.00. 899 F. Supp. at 980-82. Ferrante's liability for the bribery charge, the district court found, was based on the adverse inference which arises when a defendant invokes the privilege against self-incrimination and "independent corroborative evidence of the matters to be inferred" presented by the Government. Id. at 982 (citations omitted).

The district court found Ferrante liable for a RICO violation and enjoined Ferrante from:

> (i) engaging in any activities involved in connection with the collection, transportation or disposal of solid waste, (ii) violating, aiding or abetting the violation of, and/or conspiring to violate any of the provisions of Title 18, United States Code Section 1961 et seq., (iii) participating in the affairs of PSIA or other trade waste association, and from participating in the affairs of Local 813 and its Trust Funds, any other union and its trust funds, (iv) associating with any other defendant or member or associate of organized crime for any commercial purpose and (b) ordered to divest his interests in the named enterprises and to disgorge the proceeds derived from his unlawful conduct and participation therein into a Court-administered fund.

899 F. Supp. at 983-84.

(3.) In United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 914 F. Supp. 895 (E.D.N.Y. 1996), the district court granted the Government's motion for summary judgment against defendants Sanitation and U-Need-a-Roll Off. Corp., finding that under principles of collateral estoppel, the corporate-defendants' guilty pleas to criminal charges conclusively established that they committed the racketeering acts charged against them in the

civil RICO suit. Id. at 896-98.

The district court ruled that United States v. Carson, 52 F.3d 1173 (2d Cir. 1995), did not preclude its order requiring Ferrante and the corporate defendants to disgore the proceeds of their RICO violations because "unlike Carson, the defendants in this case continue to be actively involved in the identical activities upon which this RICO suit is predicated," and hence "the monies these corporations gained illegally obviously constitute capital available for the purpose of funding or promoting the illegal conduct." 914 F. Supp. at 901.

The district court also ordered that the defendants were subject to the same equitable relief provided in the Consent Judgment entered by the district court on February 28, 1994. Id. at 901-02. See App. B at 85-87.

8. The LIUNA Local 6A Case -

In United States v. Local 6A, Cement and Concrete Workers, Laborers International Union of North America, Complaint No. 86 Civ. 4819 (S.D.N.Y.), in an order entered April 23, 1987, the district court granted the Government's motion for summary judgment against eight alleged organized crime figures and permanently enjoined them from:

a. participating in any way, in the affairs of Local 6A, Cement and Concrete Workers, Laborers International Union of North America ("Local 6A"), the District Council of Cement and Concrete Workers, Laborers International Union of North America (the "District Council"), or any other labor organization or employee benefit plan, as defined in Title 29 of the United States Code;

b. having any dealings with any officer, auditor or employee of Local 6A, the District Council or any other labor organization or employee benefit plan, about any matter which relates, directly or indirectly, to the affairs of Local 6A, the District Council or any other labor organization; and

c. participating in any way in, or profiting from, any concrete construction business in the Southern District of New York or elsewhere.

See App. B at 17.

D. Union Officials and Entities As Nominal Defendants

1. Evidence of Wrongdoing is Not Required to Obtain Relief Against a Nominal Defendant

Rule 19 (a), FED. R. CIV. P. provides as follows:

> Rule 19. Joinder of Persons Needed for Just Adjudication
>
> (a) Persons to be Joined if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect the interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

Pursuant to Rule 19(a)(1), FED. R. CIV. P., a person may be joined as a "nominal defendant" when joinder is necessary to afford "complete relief . . . among those already parties," even though: (1) no cause of action is asserted against the nominal defendant; (2) the nominal defendant is not liable for any wrongdoing; and (3) there is no evidence of wrongdoing by the nominal defendant.[280]

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[280] See, e.g., Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 400 (1982); Int'l Bhd. of Teamsters v. United States 431 U.S. 324, 355-56 n.43 (1977); Providence Bank v. Patterson, 390 U.S. 102, 107-08 (1968); City of Syracuse v. Onondaga County, 464 F.3d 297, 307-11 (2d Cir. 2006); Commodity Future Trading Comm'n v. Kimberlynn Creek Ranch, Inc., 276 F.3d 187, (continued...)

For example, in Teamsters v. United States, 431 U.S. 324 (1977), the United States brought a civil rights suit against a nationwide common carrier and a union that represented many of the company's employees, alleging that the company had engaged in a pattern of discrimination against "Negroes and Spanish-surnamed" persons by giving them lower paying, less desirable jobs than whites. The Supreme Court ruled that the union did not engage in any misconduct and that the injunction against it must be vacated. However, the Court ruled that the union should remain "as a defendant so that full relief may be awarded the victims of the employer's . . . discrimination." Id. at 356 n.43. In that regard, the Supreme Court directed that, on remand, the district court was to determine which minority members were actual victims of discrimination and "balance the equities of each minority employee's situation in allocating the limited number of vacancies that were discriminatorily refused to class members." 431 U.S. at 371-72.

Similarly, in EEOC v. MacMillian Bloedel Containers, Inc., 503 F.2d 1086, 1095-96 (6th Cir. 1974), the Equal Employment Opportunity Commission ("EEOC") sued MacMillian Bloedel Containers, Inc., ("MacMillian") for alleged race and sex discrimination. A union which represented MacMillian's employees argued that it was improperly joined as a nominal defendant under Rule 19(a), FED. R. CIV. P., because it was not charged with any unlawful conduct and that

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[280](...continued)
191-93 (4th Cir. 2002); Local 1351 Int'l Longshoreman's Ass'n v. Sea-Land Servs. Inc. 214 F.3d 566, 569-70 (5th Cir. 2002); SEC v. Cavanagh, 155 F.3d 129, 136 (2d Cir. 1998); SEC v. Colello, 139 F.3d 674, 675-77 (9th Cir. 1998); Shaw v. Dow Brands, Inc., 994 F.2d 364, 369 (7th Cir. 1993); SEC v. Cherif,, 933 F.2d 403, 414 (7th Cir. 1991), EEOC v. MacMillian Blodedel Containers, Inc., 503 F.2d 1086, 1095-96 (6th Cir. 1974); Selfix, Inc. v. Bisk, 867 F. Supp. 1333, 1335-36 (N.D. Ill. 1994); SEC v. Egan, 856 F. Supp. 401, 402 (N.D. Ill. 1993); SEC v. Antar, 831 F. Supp 380, 399 (D.N.J. 1993); Eldredge v. Carpenters 46 N. Cal. Joint Apprenticeship and Training Comm., 440 F. Supp. 506, 518 -524 (N.D. Cal. 1977).

it was "inequitable [to be] put through the expense of hiring an attorney and doing involuntary discovery work for EEOC." Id. at 1096. The Court of Appeals rejected the union's arguments, upholding the district court's finding that it was appropriate to join the union as a nominal defendant "because the decree entered by the court may affect, in some way, its collective bargaining agreement" with MacMillian. Id. at 1095.[281]

Moreover, in Commodity Futures Trading Commission v. Kimberlynn Creek Ranch, Inc., 276 F.3d 187, 191-93 (4th Cir. 2002), the Fourth Circuit rejected nominal defendants' argument that an injunction, which froze their assets and directed them to transfer those assets to a court appointed receiver, could not be imposed against them because they were not accused of any unlawful conduct. The Fourth Circuit explained that the district court had broad equitable authority to order the transfer of assets alleged to be unlawful proceeds held by the nominal defendants because the nominal defendants were simply holding the alleged proceeds on behalf of the defendants who were charged with unlawful conduct, and hence the relief against the nominal defendants was necessary to effectuate the relief against defendants accused of wrongdoing.

2. Nominal Defendants in Government Civil RICO Cases Involving Labor Unions

In accordance with the above-referenced authority, the Government has often named union entities and union officials as nominal defendants in order to obtain full and effective relief. See App. B at 1, 27-28, 43, 95, 133, 139, 157-58, 243-44. As the court observed in United States v. Local 359, United Seafood Workers, Smoked Fish & Cannery Union,

[281] The Court of Appeals added that "[a]s a practical matter, the union need not play a role in the litigation until the court finds that MacMillian" had engaged in the alleged violations. 503 F.2d at 1095.

1991 WL 230613, *2 (S.D.N.Y. Oct. 24, 1991), "it is common practice in [Government] civil RICO cases to add as nominal defendants entities that are not themselves charged with RICO violations but that would be directly affected by the equitable relief sought."

For example, in United States v. Local 560 of the Int'l Bhd. of Teamsters, 581 F. Supp. 279, 337 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1986), the district court found that various defendants, including corrupt union officials and persons associated with organized crime, had created a climate of intimidation in Local 560 through murder and other acts of violence and misconduct, that induced Local 560 members to surrender their rights to democratic participation in internal affairs. See Section VIII(C)(1) above. The district court ruled that Local 560 and its benefit funds and plans were not liable for violating RICO because, although their employees and representatives had committed the charged racketeering acts in the scope of their employment, such persons were not intending to benefit their principals, as is required to impose liability against a principal under the principles of "Respondeat Superior." See generally, Section III(B)(2) above. However, the district court retained Local 560 "as a nominal defendant to effectuate the equitable relief heretofore specified and as may be ordered in the future." Local 560, 581 F. Supp. at 337.

In that regard, the district court removed the Executive Board of Local 560, who were found to have violated RICO, and the district court appointed a trustee to administer and oversee the affairs of Local 560, and ordered new elections for Local 560's offices. See App. B at 3-4; Section VIII(C)(1) above. Therefore, it was necessary to retain Local 560 as a nominal defendant because the relief granted directly effected Local 560 and was necessary to cure the ill effects on Local 560 caused by the defendants' wrongdoing.

In United States v. Dist. Council of New York City and Vicinity of the United Bhd. of Carpenters and Joiners of America, 778 F. Supp. 738, 752, n.7 (S.D.N.Y. 1991), the district court rejected a defendant's argument that the RICO complaint should be dismissed against him because he was not charged with committing any racketeering acts. The district court explained that the defendant "is a nominal defendant who must be included to ensure effective relief." Id. at 752, n.7. Similarly, in United States v. Int'l Bhd. of Teamsters, 708 F. Supp. 1388, 1401-02 (S.D.N.Y. 1989), the district court rejected the pre-trial argument of the General Executive Board ("GEB") of the IBT that the RICO complaint should be dismissed against it because the GEB was charged only as a nominal defendant, was not charged with any wrongdoing, and was not a "person" within the meaning of RICO that could be charged as a defendant. The district court explained that if the evidence demonstrated that the GEB is not a proper defendant because it is in fact not a person under 18 U.S.C. § 1963(3), then the GEB could not be included as a nominal defendant, and the RICO complaint would be dismissed against the GEB. Id. at 1402.

In United States v. Local 1804-1, Int'l Longshoremans Ass'n, 831 F. Supp. 192, 194-99 (S.D.N.Y. 1993), the district court approved a consent decree between the Government and the New York Shipping Association's ("NYSA") employers which imposed equitable relief against the NYSA employers who were nominal defendants, including the appointment of court officers to take necessary actions to remove and prohibit organized crime figures and other corrupt persons from employment on the alleged waterfront RICO enterprise.[282]

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[282] See also United States v. Local 1804-1, Int'l Longshoremen's Ass'n, 812 F. Supp. 1303, 1308, n.2 (S.D.N.Y. 1993) (The district court noted in passing that "[t]he union locals, the waterfront employers, and the employers' organizations were not named as RICO violators, but as nominal defendants in order to effectuate complete relief."); United States v. Local 359, United Seafood Workers, Smoked Fish & Cannery Union, 1991 WL 230613 (S.D.N.Y. Oct. 24,

(continued...)

In sum, courts may order relief against unions and other entities that are named as nominal defendants even though they are not accused of, or found liable for, RICO violations in order to enable the United States to obtain full and effective relief against defendants found to have committed RICO violations. This is especially the case when it is necessary to impose relief to cure the adverse effects upon unions by corrupt union officials and their conspirators found to have violated RICO, such as ordering new, untainted elections for union officials and appointing officers to administer and oversee union operations to eliminate corruption and prevent future corruption within unions.

E. Specific Issues in Government Civil RICO Cases Involving Labor Unions

1. State Action and Due Process Considerations

a. It is well established that the constitutional guarantees of due process of law and most other constitutional rights "are protected only against infringement by governments," and such rights afford no protection against purely private conduct. Lugar v. Edmonson Oil Co., 457 U.S. 922, 936 (1982), quoting Flagg Bros, Inc. v. Brooks, 436 U.S. 149, 156 (1978). Accord Blum v. Yaretsky, 457 U.S. 991, 1002-03 (1982); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171-73 (1972); Shelley v. Kraemer, 334 U.S. 1, 13 (1948). Therefore, a person claiming that his constitutional rights have been violated must establish that the alleged violation was "fairly attributable" to "state action" before he is entitled to relief for such violations. See, e.g., Lugar, 457 U.S. at 936-39. Accord Blum, 457 U.S. at 1002-05.

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[282](...continued)
1991) (denying motion of nominal defendants Benefits Funds for an award of attorneys' fees and cost, finding that the Government acted with reasonable justification in naming the Benefit Funds as nominal defendants to effectuate the prospective equitable relief it sought).

The Supreme Court has adopted a two-part approach to determine whether an alleged deprivation of a constitutional right is "fairly attributable" to the requisite "state action":

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a State actor. This may be because he is a State official, because he has acted together with or has obtained significant aid from State officials, or because his conduct is otherwise chargeable to the State.

Lugar, 457 U.S. at 937.

Moreover, "'[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the state for purposes'" of establishing the requisite state action. Blum, 457 U.S. at 1004 quoting Jackson v. Metro Edison Co., 419 US 345, 350 (1974). "The complaining party must also show that 'there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.'" Blum, 457 U.S. at 1004 quoting Jackson, 419 U.S. at 350-51. Likewise, "[m]ere approval of or acquiescence in the initiative of a private party is not sufficient to justify holding the State responsible for those initiatives" for purposes of establishing the requisite state action. Blum, 457 U.S. at 1004-05. However, "the required nexus may be present if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the state.'" Blum, 457 U.S. at 1005 quoting Jackson, 419 U.S. at 353.

b. Applying these principles, courts repeatedly have held in the Teamsters Union civil RICO case brought by the United States that various actions by the court-officers appointed by the district court pursuant to the Teamsters Union Consent Decree did not constitute the requisite "state action," and therefore could not provide the basis for alleged violations of

complainants' constitutional rights. For example, in United States v. Int'l Bhd. of Teamsters, 941 F.2d 1292, 1294-97 (2d Cir. 1991), the Investigations Officer ("IO") appointed by the district court pursuant to the Teamsters Union Consent Decree found, after an evidentiary hearing, that two officials of IBT Locals (Dominic Senese and Joseph Talerico) had violated the IBT Constitution by conducting themselves in a manner to bring reproach upon the IBT in that they, *inter alia*, knowingly associated with members of the LCN. As sanctions, the Independent Administrator ("IA") permanently removed the two officials from all of their IBT positions, expelled them from the IBT, and prohibited them from drawing any money from the IBT or its affiliated entities.

Senese and Talerico argued that the IA's imposition of sanctions violated their First, Fifth, and Eighth Amendment rights under the United States Constitution. The Second Circuit held that Senese and Talerico did not establish the requisite state action, stating:

> First, in sanctioning Sanese and Talerico, the IA acted pursuant to the IBT Constitution - a private agreement - and not pursuant to a "right or privilege created by the State." Thus, the charges he brought were premised on violations of Article II, section 2(a) of the IBT Constitution, not on violations of any federal or state law. Similarly, the IA's authority to impose the sanctions stemmed from the post-Decree amendments to the IBT Constitution, which established the IA and empowered him to oversee the IBT's internal disciplinary affairs, *see United States v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers, AFL-CIO*, 905 F.2d 610, 622 (2d Cir. 1990), and not from any provision of federal or state law. Thus, Senese and Talerico fail to satisfy the first element of the definition of state action set forth above [in Lugar].
>
> Senese and Talerico are also unable to establish that the IA "may fairly be said to be a state actor." Lugar, 457 U.S. at 937, 102 S. Ct. at 2754. The IA has offices that are provided by the IBT, and the IBT pays his salary. Thus, the position is under the control of the IBT, and remains a private, not a governmental role.

United States v. Int'l Bhd. of Teamsters, 941 F.2d at 1296. The Second Circuit also ruled that the district court's affirmance of the IA's disciplinary action and the "governmental oversight of a private institution does not convert the institution's decisions into those of the State, as long as the decision in question is based on the institution's independent assessment of its own policies and needs." Id. at 1297. The Second Circuit concluded that "because the IA's decision to sanction Senese and Talerico was based on the policies and procedures embodied in the IBT's own Constitution, and not on state or federal law, the decision was not state action." Id. at 1297.[283] In any event, the Second Circuit also ruled that "Senese and Talerico's constitutional claims are entirely without merit." Id.[284]

2. First Amendment Issues

Union members and officers have substantial First Amendment protections, involving their rights to associate together in a union to further their common interests and to participate in internal union affairs. See Section VIII(F) below and cases cited below in this Section. However, courts have repeatedly held in Government civil RICO cases involving labor unions that such First Amendment rights "may be curtailed" to further the Government's "compelling

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[283] Accord United States v. Int'l Bhd. of Teamsters, 954 F.2d at 806-07; United States v. Int'l Bhd. of Teamsters, 838 F. Supp. 800, 811-12 (S.D.N.Y. 1993) (collecting cases); United States v. Int'l Bhd. of Teamsters, 791 F. Supp. 421, 425-26 (S.D.N.Y. 1992); United States v. Int'l Bhd. of Teamsters, 787 F. Supp. 345, 351 (S.D.N.Y. 1992), aff'd, 970 F.2d 1132 (2d Cir. 1992); United States v. Int'l Bhd. of Teamsters, 777 F. Supp. 1123, 1126, (S.D.N.Y. 1991); United States v. Int'l Bhd. of Teamsters, 777 F. Supp. 1133-1138 (S.D.N.Y. 1991); United States v. Int'l Bhd. of Teamsters, 764 F. Supp. 797, 801 (S.D.N.Y. 1991), aff'd 956 F. 2d 1162 (2d Cir. 1992) (Table).

[284] Other courts have likewise ruled in the alternative that the challenged conduct did not constitute "state action," and in any event did not violate the claimants' rights to due process (see Section VIII(B)(4)(b) above) or rights guaranteed by the First Amendment. See Section VIII(E)(2) below.

interest in eliminating the public evils of crime, corruption, and racketeering in union activity." United States v. Int'l Bhd. of Teamsters, 941 F. 2d at 1297 (citations and internal quotations omitted).[285]

For example, courts have upheld, against First Amendment challenges, injunctions prohibiting union members and officials from knowingly associating with union members, organized crime members and others associated with organized crime, or from participating in union affairs,[286] and have upheld disciplinary sanctions for such knowing association and other misconduct, including contempt and removal and permanent bar from holding union membership or union office.[287] Courts have also rejected First Amendment challenges to equitable relief

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[285] See generally Nat'l Society of Prof'l Eng'r v. United States, 435 U.S. 679 (1978), where the Court stated:

> "[T]he District Court was empowered to fashion appropriate restraints on the Society's future activities both to avoid a recurrence of the violation and eliminate its consequences. . . . While the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. . . . The First Amendment does not "make it . . . impossible ever to enforce laws against agreements in restraint of trade."

Id. at 697 quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (internal citations omitted).

[286] See, e.g., Carson, 52 F. 3d at 1179, 1185; United States v. Private Sanitation Indus. Ass'n, 995 F. 2d 375, 377-78 (2d Cir. 1993); United States v. Local 560 of the Int'l Bhd. of Teamsters, 974 F.2d at 321, 339-46; United States v. Int'l Bhd. of Teamsters, 708 F. Supp. 1388, 1392-94 (S.D.N.Y. 1989); United States v. Mason Tenders Dist. Council of Greater New York, 1995 WL 679245 at * 11-12 (S.D.N.Y. Nov. 15, 1995).

[287] See, e.g., United States v. Int'l Bhd. of Teamsters, 19 F.3d 816, 819, 823 (2d Cir. 1994); United States v. Int'l Bhd. of Teamsters, 998 F.2d at 124-27, n.4; United States v. Int'l Bhd. of Teamsters, 941 F.2d at 1295, 1297; United States v. Int'l Bhd. of Teamsters, 838 F. Supp. 800, 811-12 (S.D.N.Y. 1993), aff'd, 33 F. 3d 50 (2d Cir. 1994) (Table); United States v.

(continued...)

involving holding new union elections and imposition of union election procedures.[288]

3. Equitable Relief in Government Civil RICO Cases Does Not Violate, And Is Not-Pre-empted By, The NLRA, The LMRDA or Other Labor Laws

a. General Principles

Courts have repeatedly rejected claims that various federal labor laws pre-empt charges and relief in Government civil RICO cases. The general principles governing such pre-emption claims are well established. "It is a cardinal principle of construction that repeals by implication are not favored. When there are two [federal] acts upon the same subject, the rule is to give effect to both if possible . . . the intention of the legislature to repeal must be clear and manifest." United States v. Borden Co., 308 U.S. 188, 198 (1939)(citations and internal quotations omitted). Moreover, to trigger pre-emption the two statutes must:

> be in "irreconcilable conflict" in the sense that there is a positive repugnancy between them or that they cannot mutually coexist. It is not enough to show that the two statues produce differing results when applied to the same factual situation, for that no more than states the problem. Rather, when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective.

Radzanower v. Touche Ross & Co., 426 U.S. 148, 155 (1976) (citations and internal quotations omitted). Accord United States v. Batchelder, 442 U.S. 114, 122 (1979).

In making these determinations, courts consider various factors, including the primary purposes of the statutes, the degree of overlap in the statutory provisions, evidence of Congress'

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[287](...continued)
Int'l Bhd. of Teamsters, 764 F. Supp. at 800-801. Cf. Hotel and Rest. Employees & Bartenders v. Read, 597 F. Supp. 1431, 1446-48 (D.N.J. 1984).

[288] See, e.g., United States v. Dist. Council, 778 F. Supp. at 762-64; United States v. Int'l Bhd. of Teamsters, 742 F. Supp. 94, 99-100 (S.D.N.Y. 1990), aff'd as modified, 931 F.2d 177 (2d Cir. 1991). Cf. United States v. Int'l Bhd. of Teamsters, 803 F. Supp. at 784-788.

clear intent to repeal, and whether the statutes are irreconcilably inconsistent such that it is necessary to pre-empt one to make the other work. See, e.g., Batchelder, 442 U.S. at 118-22; Radzanower, 426 U.S. at 155-58; Borden Co., 308 U.S. at 198-203.

These factors weigh heavily against pre-emption of RICO charges. RICO was enacted in 1970 (Pub. L. No. 91-452, 84 Stat. 941 (1970)), and its principal, although not exclusive, purpose was "to seek the eradication of organized crime in the United States . . . by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." See 84 Stat. 922-23; United States v. Turkette, 452 U.S. 576, 588-89 (1981); see also, Sections II(B) and VIII(A)(2) above. To that end, RICO created new and expansive offenses – participating in the affairs of an enterprise through a pattern of racketeering activity, and conspiring to do so (18 U.S.C. §§ 1962(c) and (d)). By definition, the pattern of racketeering activity includes an extensive list of state and federal offenses, (see 18 U.S.C. § 1961 (1)), thereby indicating that Congress intended RICO to augment existing remedies.

The legislative history to RICO likewise firmly establishes that Congress adopted the civil and criminal remedies of RICO to add to, not subtract from, existing remedies. See Turkette, 452 U.S. at 589 (observing that Congress stated that it intended RICO to provide "enhanced sanctions and new remedies," which expressly denotes Congress' intent that RICO add remedies to existing ones.). See generally United States v. Sutton, 700 F.2d 1078, 1080-81 (6th Cir. 1983); United States v. Hartley, 678 F.2d 961, 992 (11th Cir. 1982), abrogated on other grounds, United States v. Goldin Indus, Inc., 219 F.3d 1268 (11th Cir. 2000). Moreover, Congress explicitly mandated that RICO "shall be liberally construed to effectuate its remedial

purposes." Turkette, 452 U.S. at 587, quoting 84 Stat. 947. In sum, RICO's broad purposes and legislative history compels the conclusion that, as a general rule, Congress did not intend RICO to be supplanted by other available remedies.[289]

b. The NLRA Does Not Pre-empt Government Civil RICO Lawsuits

In San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 240-44 (1959), the Supreme Court held under federal supremacy analysis that Congress intended, as a general rule, to vest the National Labor Relations Board (NLRB) with exclusive authority to decide: (1) whether an employee's rights under Section 7 of the NLRA (29 U.S.C. § 157) to join a union, "to bargain collectively . . . and to engage in other concerted activities" were violated, and (2) whether an unfair labor practice was committed in violation of Section 8 (29 U.S.C. § 158) of the NLRA. In that regard the Court stated:

> When it is clear or may fairly be assumed that the activities which a **State** purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, **due regard for the federal enactment requires that state jurisdiction must yield.**

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[289] See also United States v. Kragness, 830 F.2d 842, 864 (8th Cir. 1987) ("[n]othing in [RICO] shall supersede any provision of Federal . . . law imposing criminal penalties . . . in addition to those provided for in [RICO].")(quoting Pub. L. No. 91-452, §§ 904(b), 84 Stat. 947); United States v. Deshaw, 974 F.2d 667, 671-72 (5th Cir. 1992)("RICO's statutory language reflects congressional intent to supplement, rather than supplant, existing crimes and penalties."); Nat'l Asbestos Workers Med. Fund v. Philip Morris, 74 F. Supp.2d 221, 235-36 (E.D.N.Y. 1999) ("There are alternative remedies for every injury caused by the predicate acts of racketeers. A victim whose window or arm was broken by racketeering has a number of alternative tort claims from which to choose. The purpose of RICO was to superimpose another layer of remedies in order to deter racketeering. As the statute's preface states, RICO is designed to 'seek the eradication of organized crime in the United States . . . by providing **enhanced sanctions and new remedies**.' Pub.L. No. 91-452, §§ 1, 84 Stat. 922, 923 (1970)")(emphasis added).

359 U.S. at 244 (emphasis added).[290]

The Supreme Court, however, has cautioned that the doctrine of NLRA pre-emption is grounded in the specific congressional intent underlying the NLRA and "special factors" which do not readily apply to other regulatory schemes. See English v. Gen. Elec. Co., 496 U.S. 72, 86-87, n.8 (1990). Moreover, in United States v. Palumbo Bros. Inc., 145 F.3d 850, 861-76 (7th Cir. 1998), the Seventh Circuit held that well-established pre-emption principles compel the conclusion that the NLRA and other federal labor laws do not pre-empt a **federal** criminal RICO case (as distinguished from pre-empting state law) brought by the United States to vindicate the public's interest in enforcement of the criminal laws, especially because of the differences in various statutes' purposes, scope and remedies. Cf. Smith v. Nat'l Steel & Shipbuilding Co., 125 F.3d 751, 755 (9th Cir. 1997)("the Supreme Court has indicated on several occasions that Garmon pre-emption is not implicated where the potential conflict is with federal law."); United States v. Int'l Bhd. of Teamsters, 948 F.2d at 105 ("where federal laws and policies other than the NLRA are implicated, the Garmon rule is frequently considered inapplicable").

In any event, the Garmon pre-emption doctrine is somewhat limited. Under Garmon and its progeny, the NLRA pre-empts a civil RICO charge "only when the Court would be forced to determine whether some portion of the defendant's conduct violated [the NLRA] before a RICO predicate act would be established." Tamburello v. Comm-Tract Corp., 67 F.3d 973, 978 (1st Cir. 1995)(citations omitted). Accord Brennan v. Chestnut, 973 F.2d 644, 646 (8th Cir. 1992)("If the Court must look to the [NLRA] to define the fraud, then pre-emption applies.").

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[290] The Supreme Court has recognized several exceptions to the general rule announced in Garmon. See Tamburello v. Comm-Tract Corp., 67 F.3d 973, 977 (1st Cir. 1995); Linn v. United Plant Guard Workers, 383 U.S. 53 (1966); Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

Conversely, courts have repeatedly held that the NLRA does not pre-empt a RICO case where either the right or legal duty at issue is derived from law independent of the NLRA or the court is not required to determine whether the charged conduct violated the NLRA, even if the charged conduct violated both the NLRA and RICO's definition of unlawful racketeering activity.[291] Put another way, "civil RICO charges may survive Garmon pre-emption if the predicate acts are violative of federal law independent of the NLRA. However, **if the predicate acts are only illegal because of the proscriptions of the NLRA**, then the civil RICO charge must fail." Mariah Boat, Inc. v. Laborers Int'l Union of North America, 19 F. Supp.2d 893, 899 (S.D. Ill. 1998)(emphasis added).

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[291] See, e.g., Palumbo, Bros. Inc., 145 F.3d at 871-76 (holding that RICO predicate acts of mail fraud, based upon employers' scheme to defraud their employees of monetary benefits obtained through collective bargaining within the ambit of the NLRA, were not pre-empted since the unlawfulness of the charged conduct is determined by "the scope of the mail fraud statute"; the court stated (145 F.3d at 875) that "[t]he unfair labor practices implicated in the indictment cannot be defined solely in relation to federal labor law and policy; rather, that conduct also must be defined and analyzed in the context of the criminal offenses charged in the indictment"); United States v. Boffa, 688 F.2d 919, 930 (3d Cir. 1982)(holding that the NLRA did not pre-empt mail fraud and RICO charges where employees were defrauded of property rights independently derived from their rights under a collective bargaining agreement even though such rights "may have been obtained as a result of employees' exercise of rights guaranteed by section 7 of the NLRA"); United States v. Thordarson, 646 F.2d 1323, 1330-31 (9th Cir. 1981)(holding that the NLRA did not pre-empt RICO predicate acts involving union violence even if "the federal labor laws do reach union violence" where the charged conduct was made unlawful by criminal statutes independent of the NLRA); Mariah Boat, Inc. v. Laborers Int'l Union, 19 F. Supp.2d 893, 899 (S.D. Ill. 1998)(holding that mail and wire fraud predicate acts not pre-empted since the charged conduct was not illegal solely because of the NLRA); A. Terzi Productions, Inc. v. Theatrical Protective Union, 2 F. Supp.2d 485, 502-04 (S.D.N.Y. 1998)(same as to extortion predicate acts); Teamsters Local 372 v. Detroit Newspapers, 956 F.Supp. 753, 761 (E.D. Mich. 1997) ("predicate acts alleging robbery, arson, destruction of property . . . do not require an interpretation of labor law" and are not pre-empted); Nat'l Elec. Benefit Fund v. Heary Bros. Lightning Prot. Co., 931 F. Supp. 169, 185 (W.D.N.Y. 1995)("while these allegations also describe conduct proscribed by the NLRA as unfair labor practices . . . they are not pre-empted by the NLRA because they state RICO claims which do not require the resolution of labor law questions"). See also O'Rourke v. Crosley, 847 F. Supp. 1208, 1212-13 (D.N.J. 1994); Hood v. Smith's Transfer Corp., 762 F. Supp. 1274, 1286-87 (W.D. Ky. 1991).

In accordance with the foregoing authority, in United States v. Int'l Bhd. of Teamsters, 948 F.2d at 105-106, the Second Circuit held that provisions of the NLRA, 29 U.S.C. §§ 157 and 158(a)(1), did not vest exclusive jurisdiction in the NLRA and did not pre-empt a decision by the Independent Administrator, appointed by the district court pursuant to the Teamsters Union Consent Decree, "that granted non-employee members of the IBT access to premises of [an employer] to campaign for union office, and denied [the employer's] application for declaratory and injunctive relief from that determination." Id. at 99. See also, United States v. Private Sanitation Indus. Ass'n, 793 F. Supp. 1114, 1153-54 (E.D.N.Y. 1992) (holding that the NLRA did not pre-empt a Government civil RICO lawsuit against a labor union and other defendants); United States v. Int'l Bhd. of Teamsters, 708 F. Supp. 1388, 1394-95 (S.D.N.Y. 1989) (same).

c. The LMRDA Does Not Pre-empt Government Civil RICO Lawsuits

The Labor Management Reporting and Disclosure Procedure Act, 29 U.S.C. § 401-531 ("LMRDA"), guarantees union members the rights to vote in secret and to participate in fair and honest union elections, and provides causes of action to vindicate these rights. In particular, 29 U.S.C. §§ 411(a)(1) and (2) provide as follows:

> (a)(1) Equal Rights
>
> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(a)(2) Freedom of Speech and Assembly

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U.S.C. § 412 provides as follows:

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

29 U.S.C. §§ 481(a), (b), (d), and (e) provide as follows:

(a) Officers of national or international labor organizations; manner of election

Every national or international labor organization, except a federation of national or international labor organizations, shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.

(b) Officers of local labor organizations; manner of election

Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

(d) Officers of intermediate bodies; manner of election

Officers of intermediate bodies, such as general committees, system boards, joint boards, or joint councils, shall be elected not less than once every four years by secret ballot among the members in good standing or by labor organization officers representative of such members who have been elected by secret ballot.

(e) Nomination of candidates; eligibility; notice of election; voting rights; counting and publication of results; preservation of ballots and records

In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this subchapter.

29 U.S.C. § 501(a) and (c) provide as follows:

(a) Duties of Officers; exculpatory provisions and resolutions void

> The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any manner connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization for any profit received by him in whatever capacity in connection with transactions conducted by him under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.
>
> (c) Embezzlement of assets: penalty
>
> Any person who embezzles, steals, or unlawfully and willfully abstracts, converts to his own use or, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

Defendants in various Government civil RICO cases involving labor unions have argued that equitable relief in those cases (such as disciplinary procedures and sanctions, ordering new union elections, and procedures governing union elections) contravenes the rights and procedures set forth in the above-referenced provisions of the LMRDA, and that the LMRDA pre-empts such equitable relief because the LMRDA is the exclusive vehicle for vindicating the rights guaranteed by the LMRDA. Courts have uniformly rejected these claims under the pre-emption

principles set forth in Section VIII(E)(3)(a) and (b) above.[292]

d. Other Labor Laws Do Not Pre-empt Government Civil RICO Lawsuits

Courts have likewise held that other labor laws do not pre-empt Government civil RICO lawsuits. See, e.g., Local 1814 v. New York Shipping Ass'n, 965 F.2d 1224, 1231-39 (2d Cir. 1992) (holding that the anti-injunction provisions of the Norris-LaGuardia Act (29 U.S.C. §§ 101-115), which divests courts of jurisdiction to issue any injunction in a case involving or growing out of a labor dispute, did not pre-empt injunctive relief to further RICO's civil remedial purposes); United States v. Int'l Bhd. of Teamsters, 954 F.2d 801, 807-10 (2d Cir. 1992) (holding that the binding arbitration provisions of the Labor-Management Relations Act, 29 U.S.C. § 185, did not pre-empt the decisions of the Independent Administrator appointed by the district court pursuant to the Teamsters Union Consent Decree); United States v. Local 560 of the Int'l Bhd. of Teamsters, 694 F. Supp. 1158, 1187 (D.N.J. 1988) (holding that 29 U.S.C. § 504, which prohibits certain persons from holding union office, was not "the exclusive means by which a court can bar a person from holding union office," and hence did not pre-empt such relief in a Government civil RICO suit).[293]

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[292] See, e.g., United States v. Int'l Bhd. of Teamsters, 19 F.3d 816, 823 (2d Cir. 1994); United States v. Local 560 of the Int'l Bhd. of Teamsters, 974 F.2d 315, 346-47 (3d Cir. 1992); United States v. Int'l Bhd. of Teamsters, 931 F.2d 177, 188-89 (2d Cir. 1991); United States v. Local 560 of the Int'l Bhd. of Teamsters, 780 F.2d at 282-83; United States v. Int'l Bhd. of Teamsters, 838 F. Supp. at 812; United States v. Private Sanitation Indus, Ass'n, 793 F. Supp. at 1153-54; United States v. Int'l Bhd. of Teamsters, 782 F. Supp. 243, 249-250 (S.D.N.Y. 1992); United States v. Int'l Bhd. of Teamsters, 708 F. Supp. at 1394.

[293] Cf. United States v. Philip Morris Inc., 263 F. Supp.2d 72 (D.D.C. 2003) (holding that the Government's civil RICO suit against manufacturers of cigarettes and other tobacco-related entities was not pre-empted by Congress' regulatory scheme governing tobacco products, including the Federal Trade Commission Act (15 U.S.C. §§ 1331-40)).

F. Extortion Of Union Members' Rights To Free Speech and To Participate In Internal Union Democracy Guaranteed By The LMRDA

In many of its civil RICO lawsuits involving labor unions, the Government has alleged that LCN figures and corrupt union officials have extorted union members' rights to democratic participation in internal union affairs, as guaranted by the LMRDA, in violation of the Hobbs Act, 18 U.S.C. § 1951. See Section VIII(A)(1) above.[294] Such alleged violations raise two significant issues: (1) whether such rights of union members constitute "property" within the meaning of the Hobbs Act; and (2) under what circumstances does a defendant "obtain" or "seek to obtain" such property rights within the meaning of the Hobbs Act.[295]

1. Union Members' Rights Under the LMRDA Constitute Intangible Property Within The Meaning of the Hobbs Act

a. The Hobbs Act, enacted in 1946, was modeled on two New York sources: the Penal Code of New York and the Field Code, a 19th Century Model Penal Code.[296] New York law then defined extortion as "the obtaining of property from another, with his consent, induced by a wrongful use of force or fear" and further provided that "[f]ear . . . may be induced by a threat . . . [t]o do an unlawful injury to . . . property." N.Y. Penal Code §§ 850, 851 (Consol.

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[294] It bears repeating that statutory protections, such as the LMRDA, may create property rights. See Section VII(D) above.

[295] The Hobbs Act, 18 U.S.C. § 1951(b)(2), provides, in relevant part, that:

> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

[296] See 89 Cong. Rec. 3227 (1943); 91 Cong. Rec. 11, 900, 11, 906, 11, 910 (1945). See Scheidler v. Nat'l Org. For Women, Inc., 537 U.S. 393, 403 (2003); Evans v. United States, 504 U.S. 255, 261-62, 269 n.9, 264 (1992); United States v. Enmons, 410 U.S. 396, 406 n.16 (1973).

1909); accord Commissioners of the Code, Proposed Penal Code of the State of New York §§ 613 and 614 (1865). By the time the Hobbs Act was adopted, it was well-established that the meaning of "property" under New York's extortion statute broadly extended to "real and personal property, things in action, money, bank bills and all articles of value," as well as to intangible property; and that an injury to a business in the form of work stoppages occasioned by a strike constituted an "injury to property." See People v. Barondes, 31 N.E. 240, 241-42 (N.Y. 1892). Accord People v. Hughes, 137 N.Y. 29, 37-39, 32 N.E. 1105 (N.Y. 1893)(head of union who threatened manufacturer that he would compel retail dealers to cease doing business with manufacturer unless the manufacturer hired union apprentices and paid him money threatened the requisite "injury to [manufacturer's] property" and committed extortion); People v. Weinseimer, 117 A.D. 603, 102 N.Y.S. 579, 614 (1st Dept. 1907)("an injury to one's business is an injury to property within the provisions of the Penal Code defining the Crime of extortion, and that a loss resulting from the suspension or interruption of business would constitute an injury to property."); People ex rel Short v. Warden of City Prison, 145 A.D. 861, 130 N.Y.S. 698, 700 (1st Dept. 1911), aff'd, 206 N.Y. 632 (N.Y. 1912)("Property" under the extortion statute, Penal Law § 850, "is intended to embrace every species of valuable right and interest whatever tends in any degree, no matter how small, to deprive one of that right, or interest, deprives him of his property."); People v. Wisch, 58 Misc. 2d 766, 296 N.Y. S. 2d 882, 885-86 (N.Y. Sup. Ct. 1969)(holding that "intangible property may be the subject of Extortion" under N.Y. Penal Law § 850, "[a] milk route which has a pecuniary value is property and may be the subject of an extortion," and that threats to put milk dealers out of business are sufficient to support a charge of extortion). See also People v. Spatarella, 34 N.Y. 2d 157, 160, 162, 356 N.Y.S. 2d 566 (N.Y.

1994)(stating that the foregoing New York decisions have "consistently held" that the term "property" under the New York extortion statute includes "intangible rights," such as a demand under threat of force that a business "give up a business customer").[297]

By using New York extortion law as the model for the Hobbs Act, Congress specifically understood that "[i]t is a cardinal principle of the law, that a law when adopted in another state, or when being construed, it it [sic] be a state law, by a Federal court, carries with it all reasonable constructions placed upon it by the courts of the state of its origins." See 89 Cong. Rec. 3197 (1943).[298] Therefore, it must be presumed that Congress intended the Hobbs Act to embrace the expansive meaning of property that was within the ambit of New York extortion law as established in the foregoing cases, which includes "everything of value" such as the intangible property rights to conduct one's business and control its assets free from interruption caused by wrongful threats of force, violence or fear. Indeed, in accordance with the broad meaning of "extortion" under New York State law, federal courts have long interpreted "property" covered

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[297] By 1946, the Supreme Court had likewise held in a variety of contexts that "property" included intangible rights. See, e.g., Dorchy v. State of Kansas, 272 U.S. 306, 311 (1926) ("The right to carry on business - be it called liberty or property - has value. To interfere with this right without just cause is unlawful."); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 465 (1921) (holding that the "complainant's business of manufacturing printing presses and disposing of them in commerce is a property right."). See also Carpenter v. United States, 484 U.S. 19, 26-27 (1987) (holding that property under the mail and wire fraud statutes (18 U.S.C. §§ 1341 and 1343) includes the "right to exclusive use" of confidential business information, including control over the timing of the release of the information, "for exclusivity is an important aspect of confidential business information and most private property for that matter."). See also fn. 303 below.

[298] See generally Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992) (stating that when Congress enacted civil RICO, it is presumed to know the interpretations courts had given earlier statutes that served as the model for civil RICO); Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 479 (1992) (noting "basic canon of statutory construction that identical terms within an Act bear the same meaning").

by the Hobbs Act broadly to encompass "any valuable right or interest considered primarily as a source or element of wealth." Bianchi v. United States, 219 F.2d 182, 189 (8th Cir. 1955) (quoting Webster's New Int'l Dictionary (2d Ed. 1936).

b. The LMRDA guarantees the rights of union members to, inter alia, vote in secret in union elections, participate in fair and honest union elections, nominate candidates, attend membership meetings, meet and assemble freely with other members, and to express any views, arguments or opinions in such union meetings and union elections. See Section VIII(E)(3)(c) above. The Second, Third and Sixth Circuits and district courts in the Second and Third Circuits have held that such LMRDA rights constitute intangible "property" within the meaning of the Hobbs Act on the ground that such rights constitute "a source or element of wealth" since the exercise of these rights enable union members to secure financial benefits through collective bargaining, and corrupt deprivation of these rights may cause union members economic deprivation through loss of livelihood and/or reduced benefits.[299]

The rationale underlying these decisions is firmly supported by the scope of New York extortion law that served as the model for the Hobbs Act, discussed above, as well as by the

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[299] See, e.g., United States v. Gotti, 459 F.3d 296, 320-21 (2d Cir. 2006); United States v. Bellomo, 176 F.3d 580, 592-93 (2d Cir. 1999); United States v. Debs, 949 F.2d 199, 201-02 (6th Cir. 1991), cert. denied, 504 U.S. 975 (1992); United States v. Local 560 of the Int'l Bhd. of Teamsters, 780 F.2d 267, 281-282 (3rd Cir. 1985), cert. denied, 476 U.S. 1140 (1986), affirming, 581 F. Supp. 279, 311-316 (D.N.J. 1984); United States v. Dist. Council of New York City and Vicinity of the United Bhd. of Carpenters and Joiners of America, 778 F. Supp. 738, 753-56 (S.D.N.Y. 1991), cert. denied, 112 S. Ct. 975 (1992); United States v. International Brotherhood of Teamsters, 708 F. Supp. 1388, 1397-99 (S.D.N.Y. 1989); United States v. Local 560 of the Int'l Bhd. of Teamsters, 694 F. Supp. 1158, 1188-90 (D.N.J.), aff'd, 865 F.2d 252 (3d Cir. 1988), cert. denied, 489 U.S. 1068 (1989); Rodonich v. House Wreckers Union, Local 95, 627 F. Supp. 176, 178-79 (S.D.N.Y. 1985); United States v. Local 560 of the Int'l Bhd. of Teamsters, 550 F. Supp. 511, 513-525 (D.N.J. 1982). But see United States v. DeFries, 129 F.3d 1293, 1304 (D.C. Cir. 1997)(ruling that 'union members' right to a fair [union] election is an 'ethereal' interest that does not constitute 'property' under [the mail fraud statute]").

LMRDA's legislative history, the Supreme Court's decision noting that union members' LMDRA rights are economic rights designed to secure union members' economic interests, and the common law understanding that extortion broadly encompassed the taking of any "thing of value."[300]

In that respect, both the Senate and House Reports accompanying the LMRDA adopted the same statement of the purpose concerning the election provisions:

> It needs no argument to demonstrate the importance of free and democratic union elections. Under the National Labor Relations and Railway Labor Acts the union which is the bargaining representative has power, in conjunction with the employer, to fix a man's wages, hours, and conditions of employment. The individual employee may not lawfully negotiate with his employer. He is bound by the union contract. In practice, the union also has significant role in enforcing the grievance procedure where a man's contract rights are enforced. The Government which gives the union this power has an obligation to insure that the officials who wield it are responsive to the desires of the men and women who they represent. The best assurance which can be given is a legal guaranty of free and periodic elections.

SEN. REP. NO. 187, 86th Cong., 1st Sess., at 20 (1959); H.R. REP. No. 741, 86th Cong., 1st Sess., at 15 (reprinted in 1 National Labor Relations Board, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 417, 773 (1959)). Further, in floor debate,

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[300] 1 W. Russell, *Crimes and Misdemeanors*, 573-574 (8th ed. 1923) ("Extortion . . . signifies the unlawful taking by any officer, by colour of his office, of any money or thing of value."); 2 J. Bishop, *Criminal Law* § 401, at 331-332 (9th ed. 1923) ("In most cases, the thing obtained is money . . . . But probably anything of value will suffice."); 3 F. Wharton, *A Treatise on Criminal Law* § 1898, at 2095 (1912) ("it is enough if any valuable thing is received"); 2 E. Coke, *Institutes of the Laws of England* pt. 1, at 368b (1832) ("Extortion . . . is a great misprision, by wresting or unlawfully taking by any officer, by colour of his office, any money or valuable thing."); 4 W. Blackstone, *Commentaries* *141 (extortion is "an abuse of public justice, which consists in an officer's unlawfully taking, by colour of his office, from any man, any money or thing of value."). The phrase "thing of value" is a term of art that includes intangible rights. See, e.g., United States v. Girard, 601 F.2d 69, 71 (2d Cir. 1979); cf. Bell v. United States, 462 U.S. 356, 360 (1983).

senators specifically underscored the economic nature of the rights created by the LMRDA:

> Sen. Carroll: They are economic rights, as I have said. They arise from economic problems and deal with economic democracy. They are not constitutional rights arising under the 14th amendment, dealing with political democracy.
>
> Sen. Kennedy: The Senator is correct.

105 CONG. REC. 5919 (daily ed. April 22, 1959)(reprinted in 1 National Labor Relations Board, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 1111 (1959)).

Moreover, in Finnegan v. Leo, 456 U.S. 431, 435-36 (1982), the Supreme Court stated that the LMRDA protects "the rights of union members to freedom of expression without fear of sanctions by the union, which in many instances could mean the loss of union membership and in turn loss of livelihood." See also Rodonich v. House Wreckers Union, 627 F. Supp. 176, 179 (S.D.N.Y. 1985)(court rejected defendants' contention that union members' rights were "any less a 'source of wealth' than ordinary rights to do business. To the contrary, it would appear that LMRDA rights provide union members with a source of livelihood."). It is also particularly significant that by the time the Hobbs Act was enacted in 1946, New York law recognized that union members' rights to union democracy constituted "property." For example, in Dusing v. Nuzzo, 177 Misc. 35, 29 N.Y.S. 2d 882 (N.Y. Sup. Ct.), aff'd, 263 A.D. 59, 31 N.Y.S. 2d 849 (3d Dept. 1941), the court held that union members' right to union elections constituted a "property" right which entitled the union members to an injunction mandating that a proper election be held. The court explained:

> [A] labor union is not a social club. It is an economic instrumentality conceived in the necessity of making a living . . . The right to membership in a union is empty if the corresponding right to an election guaranteed with equal solemnity in the

> fundamental law of the union is denied. If a member has a "property right" in his position on the roster, I think he has an equally enforceable property right in the election of men who will represent him in dealing with his economic security and collective bargaining where that right exists by virtue of express contract in the language of a union constitution. Where an election is required by the law of a union, the member denied the right to participate is denied a substantial right which is neither nebulous nor ephemeral.

29 N.Y.S.2d at 884. Accord United States v. Local 560 of the Int'l Bhd. of Teamsters, 780 F.2d at 281.[301]

In sum, union members' rights guaranteed by the LMRDA constitute economic rights and "a source or element of wealth," and hence constitute intangible property within the meaning of the Hobbs Act.

c. In McNally v. United States, 483 U.S. 350 (1987), the Supreme Court held that a citizen's intangible right to honest state government did not constitute "property" under the mail fraud statute, 18 U.S.C. § 1341. The Supreme Court explained that it read the mail fraud statute narrowly in that case to avoid adverse effects upon the due regard for federalism, stating:

> Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights.

McNally, 483 U.S. at 360.

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[301] See also Carroll v. Electrical Workers, IBEW, Local 269, 133 N.J. Eq. 144, 147, 31 A.2d 223, 225 (N.J. 1973) (the court stated that without union democracy union members "would be deprived of their constitutional right to earn a livelihood."); Dorrington v. Manning, 135 Pa. Super. 194, 201, 4 A.2d 886, 890 (Pa. Sup. Ct. 1939)("The right to work . . . constitutes a property right" which union officials may not interfere with); Bianco v. Eisen, 190 Misc. 609, 610, 75 N.Y.S.2d 914, 916 (N.Y. Sup. Ct. 1944) (holding that the right to be elected to a union's executive board constitutes property since the executive board has authority to "make decisions affecting . . . the economic interests of its members.").

McNally, however, involved an interpretation of the mail fraud statute, and did not address the scope of "property" under the Hobbs Act. More fundamentally, union members' rights under the LMRDA are significantly different from a citizen's "political" right to fair and honest elections for public officials involved in McNally because LMRDA rights are essentially "economic rights" which constitute "a source or element of wealth," which has long been recognized to be an important attribute of a "property" right.

Moreover, the federalism concerns that were paramount in the Supreme Court's analysis in McNally are not implicated by a ruling that union members' LMRDA rights constitute property under the Hobbs Act. As one court perceptively ruled, rejecting McNally's application to the Hobbs Act and LMRDA rights:

> First, assuming property carries the same meaning in the mail and wire fraud statutes as in the Hobbs Act, in McNally the Supreme Court was clearly concerned with federalism. The Court read the statute narrowly in order to prevent the federal government from "setting standards of disclosure and good government for local and state officials." [483 U.S. at 360].
>
> McNally's federalism rationale has no analogue in the union arena. With regard to the federal-state balance in this case, there is no doubt that Congress has had a longstanding interest in regulating the affairs of labor unions. McNally therefore cannot control the federal government's obligations toward the conduct of union business.
>
> Second, the intangible right to honest government at issue in McNally is substantially different from the right to participate in union elections. Honest government is subject to control by an informed electorate operating in a vital two-party system. The federal government need not impose its will where a regime of political accountability is already in place.
>
> By contrast, union politics is more like one-party government. The statutory right to participate in union government is not held accountable by anything remotely like a thriving two-party system.

> Here, the federal legislature and courts have a greater duty to combat labor corruption and electoral vice. The Hobbs Act is an important instrument in service of this democratic objective. For all of these reasons, LMRDA rights are property under the Hobbs Act.

United States v. Debs, 949 F.2d 199, 201-02 (6th Cir. 1991).[302]

2. A Defendant "Obtains" or Seeks to "Obtain" Intangible Property Rights From A Victim Within The Scope of the Hobbs Act When He Uses Extortionate Means In Order to Exercise Those Rights For Himself or a Third Party in a Way That Would Profit Them Financially

a. In Scheidler v. Nat. Org. for Women, Inc., 537 U.S. 393 (2003), the Supreme Court reversed the Seventh Circuit's holding that the plaintiffs (an organization that supports availability of abortion services and two clinics that provide medical services including abortions) were entitled to a permanent injunction against the defendants (individuals and organizations engaged in anti-abortion activities) and treble damages under RICO's civil remedies, 18 U.S.C. § 1964. The Seventh Circuit ruled that the defendants had committed a

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[302] Accord, United States v. Int'l Bhd. of Teamsters, 708 F. Supp. at 1399, where the court stated:

> Even assuming McNally . . . were to apply in the Hobbs Act context, the court finds that the rights guaranteed by the LMRDA to union members are "property" within the meaning of the Hobbs Act . . . . The holding of McNally is limited to the "standards of disclosure and good government for local and state officials." McNally, supra, 107 S.Ct at 2881. In the instant case, there is no doubt as to the standards to which labor officials ought to be held; the LMRDA sets forth with particularity the standards of disclosure to which labor leaders must adhere and the fiduciary nature of labor leaders position. Thus, characterizing those rights created by the federal labor statutes as "property" does not involve the federal government in setting arbitrary standards for conduct in the way that the same characterization of the ethereal and changeable notions of "good government" or "honest and faithful services" would.

pattern of Hobbs Act and state extortions arising from their use of force, violence and fear to cause the plaintiffs "'to give up' property rights, namely, 'a woman's right to seek medical services [i.e., abortion services] from a clinic, the right of the doctors, nurses or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion and fear.'" Id. at 400 n.4, quoting the jury instructions. The Seventh Circuit had also ruled that "as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required." Id. at 399-400 (citation and internal quotations omitted).

The Supreme Court granted *certiorari* to decide two questions: (1) whether private litigants may obtain injunctive relief in a civil RICO action pursuant to 18 U.S.C. § 1964; and (2) whether the defendants "obtained" or sought to obtain "property" in violation of the Hobbs Act, 18 U.S.C. § 1951. The Supreme Court explicitly stated that it need not address the first question because it reversed the Seventh Circuit's decision on the second question. Scheidler, 537 U.S. at 397.

Regarding the Hobbs Act question, the Supreme Court also did not decide whether the matters the defendants sought constitute "property" within the meaning of the Hobbs Act. Id. at 401-02. The Court then decided that the defendants did not "obtain" or seek to obtain property within the meaning of the Hobbs Act, stating:

> But even when [the defendants'] acts of interference and disruption achieved their ultimate goal of "shutting down" a clinic that performed abortions, such acts did not constitute extortion because [defendants] did not "obtain" [plaintiffs'] property. [Defendants] may have deprived or sought to deprive [plaintiffs] of their alleged property right of exclusive control of their business assets, but they did not acquire any such property. [Defendants] neither pursued nor received "something of value from" [plaintiffs] that they could exercise, transfer, or sell. United States v.

> Nardello, 393 U.S. 286, 290, 89 S. Ct. 534, 21 L.Ed. 2d 487 (1969). To conclude that such actions constituted extortion would effectively discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion.

Scheidler, 537 U.S. at 404-05. The Court further explained that:

> Eliminating the requirement that property must be obtained to constitute extortion would not only conflict with the express requirement of the Hobbs Act, it would also eliminate the recognized distinction between extortion and the separate crime of coercion -- a distinction that is implicated in these cases. The crime of coercion, which more accurately describes the nature of [defendants'] actions, involves the use of force or threat of force to restrict another's freedom of action. Coercion's origin is statutory, and it was clearly defined in the New York Penal Code as a separate, and lesser offense than extortion when Congress turned to New York law in drafting the Hobbs Act. New York case law applying the coercion statute before the passage of the Hobbs Act involved the prosecution of individuals who, like [defendants], employed threats and acts of force and violence to dictate and restrict the actions and decisions of businesses. See, e.g., People v. Ginsberg, 262 N.Y. 556, 188 N.E. 62 (1933)(affirming convictions for coercion where defendant used threatened and actual property damage to compel the owner of a drug store to become a member of a local trade association and to remove price advertisements for specific merchandise from his store's windows); People v. Scotti, 266 N.Y. 480, 195 N.E. 162 (1934)(affirming conviction for coercion where defendants used threatened and actual force to compel a manufacturer to enter into an agreement with a labor union of which the defendants were members); People v. Kaplan, 240 App. Div. 72, 269 N.Y.S. 161 (1934)(affirming convictions for coercion where defendants, members of a labor union, used threatened and actual physical violence to compel other members of the union to drop lawsuits challenging the manner in which defendants were handling the union's finances).

Scheidler, 537 U.S. at 405-06 (footnotes omitted).

The Court explained the distinction between "extortion" and "coercion," stating:

> Under the Model Penal Code § 223.4, Comment 1, pp. 201-202, extortion requires that one "obtains [the] property of another" using threat as "the method employed to deprive the victim of his property." This "obtaining" is further explained as "bring[ing] about a transfer or purported transfer of a legal interest in the property, whether to the obtainer or another." Id., § 223.3, Comment 2, at 182, Coercion, on the other hand, is defined as

> making "specified categories of threats . . . with the purpose of unlawfully restricting another's freedom of action to his detriment." Id., § 212.5, Comment 2, at 264.

Scheidler, 537 U.S. at 408 n.13. The Court added that:

> [W]hile coercion and extortion certainly overlap to the extent that extortion necessarily involves the use of coercive conduct to obtain property, there has been and continues to be a recognized difference between these two crimes, see, e.g., ALI, Model Penal Code and Commentaries §§ 212.5, 232.4 (1980) . . . and we find it evident that this distinction was not lost on Congress in formulating the Hobbs Act.

Id. at 407-08. Accordingly, the Supreme Court concluded that the defendants "did not obtain or attempt to obtain property from [the plaintiffs]." Id. at 409.

Scheidler establishes a general rule that a defendant does not "obtain" or seek to obtain property within the meaning of the Hobbs Act by merely interfering with or depriving someone of property, or by merely depriving or seeking to deprive someone of his "exclusive control of [his] business assets." Id. at 404-05. However, the Supreme Court did not foreclose the view that a violation of the Hobbs Act may be based upon a defendant's obtaining or attempting to obtain for himself or a third party the exercise of a victim's intangible property rights in such a way that would profit the defendants or his cohorts financially.

For example, the Court stated:

> We need not now trace what are the outer boundaries of extortion liability under the Hobbs Act, so that liability might be based on obtaining something as intangible as another's right to exercise exclusive control over the use of a party's business assets.
>
> . . .
>
> Accordingly, the dissent is mistaken to suggest that our decision reaches, much less rejects, lower court decisions such as United States v. Tropiano, 418 F.2d 1069, 1076 (1969), in which the Second Circuit concluded that the intangible right to solicit refuse collection accounts "constituted property within the Hobbs Act

definition."

Id. at 402 and n.6.[303]

These statements indicate that the Scheidler Court did not necessarily reject Tropiano's holding. In Tropiano, the defendants, who were partners in C&A Refuse Removal Company ("C&A"), were convicted of attempted and completed Hobbs Act extortion offenses arising from their threats of force, violence and fear to competitor refuse removal dealers, including one

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[303] It was settled when Congress passed the Hobbs Act in 1946 that the term "property" includes the exclusive right to control the use of business assets, such as buildings and equipment, in any legitimate manner. It is "elementary" that "[p]roperty is more than the mere thing which a person owns," and "consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land." Buchanan v. Warley, 245 U.S. 60, 74 (1917) (citing 1 W. Blackstone, *Commentaries* 127 (Cooley's Ed. 1872)). In other words, the "bundle of rights," Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979), that constitutes property includes the exclusive "power over [the] use" of physical assets. Marsh v. Nichols, Shepard & Co., 128 U.S. 605, 612 (1888).

Because "[t]here can be no conception of property aside from its control and use," 73 C.J.S. *Property* § 5, at 170 (1983), the Supreme Court has recognized in a variety of contexts that the intangible right to use property is itself property. See, e.g., United States v. Craft, 535 U.S. 274, 280 (2002)(observing that "essential property rights" include "the right to use the property"); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) ("Property rights in a physical thing have been described as the rights 'to possess, use, and dispose of it.'") (quoting United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945)); Crane v. Comm'r of Internal Revenue, 331 U.S. 1, 6 (1947) (observing that "ordinary, everyday" understanding of "property" includes "the aggregate of the owner's rights to control and dispose of [a physical] thing"); Dobbins v. City of Los Angeles, 195 U.S. 223, 236 (1904) (describing constitutional rights "to use and enjoy property"); Carpenter v. United States, 484 U.S. 19, 26-27 (1987) (holding that property under the mail and wire fraud statutes includes the 'right to exclusive use' of confidential business information).

Accordingly, federal courts have repeatedly held that "property" within the ambit of the Hobbs Act includes intangible rights to conduct one's business and to control it free from the wrongful use or threat of force, violence, or fear. See, e.g,, United States v. Gigante, 39 F. 3d 42, 45-46 (2d Cir. 1994); United States v. Lewis, 797 F.2d 358, 363-64 (7th Cir. 1986); United States v. Zemek, 634 F.2d 1159 (9th Cir. 1980); United States v. Santoni, 585 F.2d 667, 673 (4th Cir. 1978); United States v. Franks, 511 F.2d 25, 31-32 and n. 8 (6th Cir. 1975); United States v. Glasser, 443 F.2d 994, 1007 (2d Cir. 1971).

Leonard Caron, to induce Caron to stop attempting to take away any of the defendants' customers and to stop competing with the defendants in soliciting any business in Milford, Connecticut.

The defendants conceded that "rubbish removal accounts which are purchased and sold are probably property," but argued that "the right to solicit business" did not constitute "property." Tropiano, 418 F. 2d at 1075. The Second Circuit rejected this argument, stating:

> Obviously, Caron [the victim] had a right to solicit business from anyone in any area without any territorial restrictions by the [defendants] and only by the exercise of such a right could Caron obtain customers whose accounts were admittedly valuable. Some indication of the value of the right to solicit customers appears from the fact that when the C&A accounts were sold for $53,135, C&A's agreement not to solicit those customers was valued at an additional $15,000.

Id. at 1076.

Tropiano is distinguishable from Scheidler in that the defendants in Tropiano sought to "obtain" or "acquire" for themselves "property" from the victim -- i.e., "the right to solicit customers," -- and that "property" was "something of value. . . that [the defendants] could exercise, transfer or sell." The interpretation of "obtain" under Scheidler, therefore, was satisfied. In contrast, the defendants in Scheidler did not seek to obtain for themselves something of value from the plaintiffs' abortion clinics; rather they merely wanted to shut down the clinics and interfere with the clinics' business.

b. In United States v. Gotti, 459 F.3d 296, 320-26 (2d Cir. 2006), the Second Circuit held that Tropiano was still good law in light of the Scheidler decision, and that union members' rights guaranteed by the LMRDA constitute "property" within the ambit of the Hobbs Act. The Second Circuit also held that the defendants, members and associates of the LCN, "obtained"

union members' LMRDA rights when the defendants used extortionate means to cause "the relinquishment of the union members' LMRDA rights . . . in order to exercise those rights for themselves . . . in a way that would profit them financially." Gotti, 459 F.3d at 325.

The Second Circuit ruled that the indictment alleged facts which satisfied Scheidler's requirement that a defendant must obtain or seek to obtain property for himself or a third party. For example, the Second Circuit stated:

> [T]he indictment alleged that the defendants sought to obtain, and did obtain, the union members' LMRDA rights to free speech and democratic participation in union affairs as well as their LMRDA rights to loyal representation by their officers, agents, and other representatives. It further stated that the defendants sought to exercise those rights themselves, by telling various delegates whom to vote for in certain leadership positions, and by controlling various elected officials' performance of their union duties. We believe that these allegations satisfy our interpretation of Scheidler II.
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> . . .
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> Similarly, as to the MILA-related extortion counts, the indictment alleges that the defendants sought to obtain, and did obtain, the MILA participants' and beneficiaries' rights to have the MILA trustees contract with the service provider of prescription drugs of the trustees' choice, and to have MILA trustees and fiduciaries discharge their duties in MILA's best interest. The indictment further asserts that the defendants sought to exercise these rights for themselves by telling the MILA trustees which service provider to support, and thereby ensuring the selection of a Gambino-associated enterprise (GPP/VIP) that would pay kickbacks. Here, too, the allegation is that the defendants exercised the rights in question in order to profit themselves. Thus, the MILA-related Hobbs Act extortion counts satisfy the dictates of Scheidler II.

Gotti, 459 F.3d at 325-26. The Second Circuit also stated:

> [T]he indictment alleges that the defendants obtained Alayev's intangible property rights to make various business decisions (such as whether to keep illegal gambling machines on the premises) free from outside pressure. As the government aptly states in its brief, "[t]he defendants did not seek merely to 'shut down' Alayev's

> business but essentially made themselves his silent partners and exercised his rights to their own advantage." Because here the allegation is that the defendants sought to exercise for themselves Alayev's rights in a manner that would profit them, the Alayev Counts survive Scheidler II.
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> . . .
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> Finally, the Seagal Counts also satisfy the Scheidler II standard. Here it is alleged that the defendants sought to exercise for themselves Seagal's right to make his own business decisions, by threatening him with possible violence unless he worked with Jules Nasso again. Thus, here the defendants sought to exercise for themselves Seagal's intangible right to decide with whom to work, in order to secure profit for themselves. This constitutes Hobbs Act extortion under Scheidler II.

Id. at 327.

The Second Circuit also held that the district court's jury instructions satisfied the requirements of Scheidler. In that respect, the district court identified the alleged property that was the subject of the extortion charges, and instructed the jury, among other matters, that:

> [Y]ou should find the defendant guilty of extortion provided the government has proven that as a consequence thereof the defendant obtained money or something else of value from the victims that the defendant could exercise and transfer or sell.
>
> In other words, merely interfering and depriving someone of property is insufficient to constitute extortion. You have to be [sic] the obtaining of money or something else of value from the victims that the defendant could exercise, transfer or sell as well.
>
> . . .
>
> Before you can find the defendant guilty of extortion under these sub parts, you must find the government has proven that as a result of wrongfully inducing the victim to part with the property right identified in those sub parts, the defendant obtained money as [sic] something else of value from the victim that the defendant could exercise, transfer or sell. So, in other words, it is not enough just to discourage somebody or coerce somebody from not selling his business, you have to get something because of that type of activity.

Gotti, 459 F. 3d at 327-28.

OCRS agrees with the Second Circuit's analysis in Gotti. Moreover, the ruling of Gotti is supported by the legislative history to RICO and the Hobbs Act, which makes clear that Congress intended those statutes to provide new and expansive remedies to eliminate organized crime's corrupt control and influence over labor unions, which the LCN obtained through extortion. See Sections VIII(A)(1) and (2) and VIII(F)(1)(a) above.

IX

GOVERNMENT CIVIL RICO CASES NOT INVOLVING LABOR UNIONS

The United States has brought at least seventeen civil RICO cases seeking equitable relief that did not involve labor unions.

1. For example, in United States v. Philip Morris, Civ. No. 1:99 CV 02496 (filed September 22, 1999, D.D.C.), the United States brought a civil RICO suit against nine tobacco companies and two affiliated entities, alleging a pattern of mail and wire fraud predicate offenses from the early 1950's to the date the complaint was filed to defraud consumers of tobacco products through false and misleading information about, among other matters, the health effects of smoking, tobacco products' addictiveness and the targeting of underage consumers to buy tobacco products.

Following a nine month non-jury trial, the district court issued its 945-page final opinion. See United States v. Philip Morris USA, Inc., 449 F. Supp.2d 1 (D.D.C. 2006). Regarding liability, the district court found that the Government established the alleged enterprise and that each defendant was liable for a substantive RICO violation (18 U.S.C. § 1962(c)) and that each defendant, except for one defendant, was liable for conspiring to violate RICO (18 U.S.C. § 1962(d)). Id. at 851-52, 867-73, 901-907. The district court found that the Government proved an overarching scheme to defraud the public, stating:

> [O]ver the course of more than 50 years, Defendants lied, misrepresented, and deceived the American public, including smokers and the young people they avidly sought as "replacement smokers," about the devastating health effects of smoking and environmental tobacco smoke, they suppressed research, they destroyed documents, they manipulated the use of nicotine so as to increase and perpetuate addiction, they distorted the truth about low tar and light cigarettes so as to discourage smokers from

> quitting, and they abused the legal system in order to achieve their goal -- to make money with little, if any, regard for individual illness and suffering, soaring health costs, or the integrity of the legal system.
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> . . .
>
> In order to carry out this scheme, Defendants made the following false and fraudulent statements in a number of areas, including: (1) deceiving consumers into starting and continuing to buy and smoke cigarettes by misrepresenting and concealing the adverse health effects caused by smoking and exposure to environmental cigarette smoke, by maintaining that there was an "open question" as to whether smoking cigarettes causes disease and other adverse effects, despite the fact that Defendants knew otherwise, and by ensuring that their research, development, and marketing of cigarettes remained consistent with these core public positions (see Findings of Fact V(A)); (2) deceiving consumers into becoming or staying addicted to cigarettes by maintaining that neither smoking nor nicotine is addictive, despite the fact that Defendants knew these positions were false (see Findings of Fact V(B)); (3) deceiving consumers into becoming or staying addicted to cigarettes by manipulating the design of cigarettes and the delivery of nicotine to smokers, while at the same time denying that they engaged in such efforts (see Findings of Fact V(C)); (4) deceiving consumers, particularly parents and young people, by denying that they marketed to youth, while engaging in such marketing and advertising with the intent of addicting young people and enticing them to become lifelong smokers (see Findings of Fact V(F)); and (5) deceiving consumers through deceptive marketing and cigarette design modifications to exploit smokers' desire for less hazardous and "low tar" cigarettes which Defendants knew to be no safer than full-flavor cigarettes (see Findings of Fact V(G)).

Id. at 852-53.

The district court ordered various injunctive relief against all but three of the defendants,[304] including the following:

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[304] The district court ruled that remedies were not available against defendants The Liggett Group, Inc. ("Liggett"), The Council for Tobacco Research - U.S.A., Inc. ("CTR"), and the Tobacco Institute, Inc. ("TI"). See Philip Morris USA, Inc., 449 F.Supp. 2d at 915-19. The district court reasoned that corporate defendants CTR and TI had been dissolved and were no

(continued...)

(1) Finding that the defendants fraudulently marketed certain cigarettes as "low tar," "light," "mild" and similar terms as being less harmful than other "full flavor" cigarettes, id. at 923-24, the district court "prohibited [defendants] from using any descriptors indicating lower tar delivery -- including, but not limited to, "low tar," "light," "mild," "medium," and "ultra light" -- which create the false impression that such cigarettes are less harmful to smokers." Id. at 925.

(2) Finding that defendants made numerous false and deceptive public statements regarding smoking and health issues, the district court ordered defendants "to make corrective statements about addiction (that both nicotine and cigarette smoking are addictive); the adverse health effects of smoking (all the diseases which smoking has been proven to cause); the adverse health effects of exposure to ETS [Environmental Tobacco Smoke] (all diseases which exposure to ETS has been proven to cause); their manipulation of physical and chemical design of cigarettes (that Defendants do manipulate design of cigarettes in order to enhance the delivery of nicotine); and light and low tar cigarettes (that they are no less hazardous than full-flavor cigarettes)." Id. at 928; see also id. at 938-41.

(3) Defendants were required to "create and maintain document depositories and websites which provide the Government and the public with access to all industry documents disclosed in litigation from this date forward." Id. at 928. This requirement included: (a) making "public the documents [defendants] produce or use in future litigation or administrative actions", id. at 929; (b) maintaining previous depository obligations in other litigation (the Minnesota and Guildford Depositories) for an additional 15 years (id. at 930); (c) maintaining public websites

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[304](...continued)
longer able to continue their past RICO violations. See id. at 915-18. The district court also found that there was no reasonable likelihood of defendant Liggett's committing future violations because it had withdrawn from the RICO conspiracy. See id. at 906-07, 918-19.

for all documents which have been produced in litigation for fifteen years, id. at 930-31; (d) requiring defendants "to provide accurate and updated indices of all documents they are withholding on grounds of privilege or confidentiality" and "regularly-updated information concerning all waivers and losses of privilege and confidentiality." id. at 931; (e) to prevent defendants from youth marketing, requiring "Defendants to provide their disaggregated marketing data to the Government according to the same schedule on which they provide it to the FTC." Id. at 932; see also id. at 941-44.

(4) The district court also entered an injunction stating:

> Defendants will be ordered to refrain from engaging in any act of racketeering, as defined in 18 U.S.C. § 1961(1) relating in any way to manufacturing, marketing, promotion, health consequences or sale of cigarettes in the United States.
>
> Defendants will also be ordered not to participate in the management and/or control of any of the affairs of CTR, TI, CIAR, or any successor entities.
>
> Defendants will also be ordered not to reconstitute the form or function of CTR, TI, or CIAR.
>
> Finally, because this is a case involving fraudulent statements about the devastating consequences of smoking, Defendants will be prohibited from making, or causing to be made in any way, any material, false, misleading or deceptive statement or representation concerning cigarettes that is disseminated in the United States.

Id. at 932-33, 938.

The district court also required Defendants to pay costs pursuant to Rule 54, FED. R. CIV. P. Id. at 937.[305]

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[305] The district court refused to impose several other proposed remedies, including the appointment of court officers. See Philip Morris USA, Inc., 449 F. Supp.2d at 933-37. Appeals from the district court's decision by the defendants and the United States are pending before the (continued...)

2. In United States v. International Boxing Federation (IBF), Civ. No. 99-5442 (JWB) (filed November 22, 1999, D.N.J.), the United States brought a civil RICO lawsuit against the International Boxing Federation, United States Boxing Association ("USBA") and the Executive Committee of the International Boxing Federation ("IBF")/United States Boxing Association, as nominal defendants, and against Robert W. Lee, Sr., Robert W. Lee, Jr., Don William Brennan and Francisco Fernandez. The alleged enterprise was a group of entities associated in fact consisting of the USBA, the IBF non-profit, IBF for-profit and the IBF International, including its leadership, members and associates. The complaint alleged that the defendants falsely represented that the enterprise maintained fair and unbiased systems for ratings of boxers and, based on these false representations, the defendants obtained annual dues from the IBF - USBA memberships, registration fees from boxing promoters, sanction fees from boxers and their promoters and other contributions. However, in truth, the defendants solicited and accepted bribes from certain boxing promoters and managers and others in order to alter these ratings and to provide other favorable treatment to those who paid bribes.

The suit sought a permanent injunction and an order requiring the defendants to divest their interests in the enterprise and to disgorge all the proceeds of their violations. On January 12, 2000, the district court granted a preliminary injunction restraining the defendants from, among other matters, committing any act of racketeering, and the court appointed a monitor to conduct the legitimate business of the enterprise.

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[305](...continued)
United States Court of Appeals for the District of Columbia. See United States v. Philip Morris USA, Inc., Appeal Nos. 06-5267-5272.

Subsequently, the district court entered a Consent Decree permanently barring Robert W. Lee, Sr. and Robert W. Lee, Jr., from affecting the affairs of the IBF and any other boxing organization or entity. Whereupon, the IBF installed new leadership and worked with the IBF Monitor to eliminate corruption within the IBF.

On September 29 2004, the district court entered a Consent Decree that dissolved the IBF Monitorship, finding that "the IBF has substantially improved its internal financial and accounting controls and has instituted many reforms including a Code of Conduct, compliance with extant Congressional enactments and regulations including the implementation of a fair and honest rating system (with grievance rights for boxers), a corporate restructuring, regularly scheduled open annual meetings of members, Board of Directors' meetings, Director and Officer elections and updated its corporate documentation with new Articles of Incorporation and new By-Laws." Consent Decree at 3, United States v. Int'l Boxing Fed., Civ. No. 99 CV5442 (filed September 29, 2004 D.N.J.).

The district court retained jurisdiction over the parties and signatories to the Consent Decree which was binding on the "current and future officers and others holding positions of trust in the IBF, current and future employees, agents, representatives, members, committee members of the IBF and any and all persons in active concert or participation with any or all of them." Id. at 4.

The Consent Decree also provided that:

> [1] The IBF shall hereafter be operated exclusively as a not-for-profit entity under the laws of the State of New Jersey.
>
> [2] The IBF shall permanently maintain and enforce its Code of Conduct as well as its Internal Control Procedures in substantially the same form as they currently exist.

[3] The IBF shall promptly establish and maintain for a minimum of five (5) years from its establishment, an Independent Review Board (the "Board"). The purpose of the Board shall be to review complaints and conduct hearings whenever necessary regarding, (a) all matters arising under the IBF's Code of Conduct, and (b) all matters relating to compliance with the injunctive provisions of this Consent Decree. The Board shall be comprised of three individuals who are independent of the IBF (for example, persons who are not officers, Executive Board members, agents, employees, representatives and/or other persons holding positions of trust in the IBF). The IBF, upon prior notice to the United States, shall have the power to appoint persons to the Board, provided, that the United States shall have the power to veto any appointment to the Board. The Board shall have the right and power, inter alia, to impose discipline including removal, suspension or expulsion. The IBF shall be responsible to fund the activities of the Board, including providing reasonable compensation to is members. The Board or any member thereof shall have the power to refer matters to the United States Attorney for appropriate action. The Board shall also have the power to refer matters to the IBF for appropriate action. The Board shall provide the IBF and the United States a comprehensive written report of its activities at least once per year for the next three (3) years.

[4] The Board, the IBF, as well as its directors, officers, agents, employees, representatives, other persons holding positions of trust in the IBF or members of the IBF shall have the power to refer matters to the United States Attorney's Office for the District of New Jersey for appropriate action at any time.

Id. at 4-5.

The Consent Decree also permanently enjoined all persons bound by the Consent Decree from directly or indirectly:

a. committing any crime under the laws of the State of New Jersey and of the United States, including, but not limited to any crime listed in 18 U.S.C. § 1961(1);

b. soliciting, accepting, or attempting to accept any money, fee, compensation, commission, credit, gift, gratuity, and/or any other thing of value or of any kind whatsoever for any official action of the IBF, including, but not limited to, actions which have any direct or indirect relation to ranking of boxers;

c. soliciting, accepting, or attempting to accept any money, fee, compensation, commission, credit, gift, gratuity, and/or any other thing of value or of any kind whatsoever where such actions may directly or indirectly (i) be adverse to the interests of the IBF, or (ii) be contrary to the remedial objectives of this Consent Decree;

d. permitting any "barred person"[[306]]to exercise any control or influence, directly or indirectly, in any way or degree, in the conduct of the affairs of the IBF; and

e. obstructing or otherwise interfering, directly or indirectly, with the efforts of anyone effectuating or attempting to effectuate the terms of this Consent Decree.

Id. at 6.

The Consent Decree also provided that: (1) if any person bound by the Consent Decree violates it, "in addition to other sanctions or penalties, be subject to removal, suspension or expulsion from office and/or the IBF by the Court," and be subject to contempt; and (2) "Upon a showing to the Court pursuant to any application by the United States that probable cause exists to believe that: (a) the IBF's Independent Review Board (as described [above]) has ceased to function, is functioning ineffectively or is otherwise not functioning as set forth [above], (b) there

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[306] The Consent Decree provided that: "As used in this Consent Decree, a 'barred person' is: (a) Robert W. Lee, Sr., Robert W. Lee, Jr., Don Brennan and/or Francisco Fernandez, (b) any person prohibited from participating in the affairs of the IBF pursuant to or by operation of an Order in this matter or other court order, administrative order or statute, or (c) any person under disciplinary suspension or other action or order by any federal or state boxing commission or other similar authority, including authorities that may come into existence under the laws of the United States or any state." Id. at 7.

exists corruption in the IBF and/or (c) the remedial objectives of this Consent Decree are not being met, the Court may order such relief as is necessary and proper, including reinstatement of the Monitorship." Id. at 7-8.

3. Other civil RICO lawsuits brought by the United States to obtain equitable relief include suits to enjoin illegal gambling businesses,[307] to recover money obtained through defrauding the United States,[308] and to enjoin defendants from operating restaurants and to divest their interests in a restaurant (Umberto's Clam House) from which they skimmed proceeds.[309]

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[307] See: (1) United States v. Leonard L. Cappetto, Civ. No. 74-C-503 (filed February 22, 1974, N.D. Il.); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975); (2) United States v. Winstend, Civ. No. 76-C-2513 (filed July 1976, N.D.Il.); and (3) United States v. Lummi Indian Tribe, Civ. No. C83-94C (filed January 27, 1983, W.D. Wash.).

[308] See United States v. Larry D. Barnette, Civ. No. 85-0754-Civ-J-16 (filed May 16, 1985, M.D. Fla.); United States v. Barnette, 10 F.3d 1553 (11th Cir.), cert. denied, 513 U.S. 816 (1994).

[309] See United States v. Ianniello, Civ. No. 86 Civ. 1552 (LSH) filed February, 1986, S.D.N.Y.); United States v. Ianniello, 646 F. Supp. 1289 (S.D.N.Y. 1986), aff'd, 824 F.2d 203 (2d Cir. 1987).

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MISCELLANEOUS ISSUES

A. Prior or Parallel Criminal Proceeding

Although a defendant's prior criminal conviction for a RICO violation or a predicate racketeering offense is not required before a civil RICO action may be filed against a defendant,[310] Congress contemplated that the United States likely would bring civil RICO lawsuits against defendants following a defendant's conviction on related offenses or simultaneously with criminal prosecutions for related criminal conduct. In that regard, the Senate Report regarding RICO states that civil RICO was designed to provide new and powerful civil remedies to augment criminal remedies, especially where prior criminal prosecutions had not fully succeeded in eliminating corruption within an organization or enterprise. See, e.g., S. REP. No. 91-617 at 78-83. The Senate Report added that:

> Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal law approach of fine, imprisonment and forfeiture, or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity.

Id. at 79. See also cases cited n.289 in Section VIII(E)(3)(b) above.

Moreover, 18 U.S.C. § 1964(d) explicitly authorizes the Government to invoke collateral estoppel to prove its civil RICO charges by providing that a defendant's prior criminal conviction "shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States." See Section III(D) above. Therefore, Congress clearly contemplated that, under some circumstances, civil RICO charges would be

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[310] See Sedima, 479 U.S. at 488-93.

brought against a defendant following a defendant's conviction on a related criminal offense.

In accordance with the foregoing authority, the Government may bring either civil or criminal RICO actions, or both, against a defendant for the same or overlapping unlawful conduct. See, e.g., Dist. Council of N.Y. City and Vicinity, 778 F. Supp. at 763; United States v. Bonanno Organized Crime Family of La Cosa Nostra, 683 F. Supp. 1411, 1450 (E.D.N.Y. 1988); see also cases cited Section III(D) above.

B. Use of Court-Ordered Electronic Surveillance

Procedures for the interception and use of wire, oral or electronic communications (hereinafter "court-authorized electronic surveillance") are set forth in 18 U.S.C. §§ 2510-2522.[311] Court-authorized electronic surveillance is an extremely important source of evidence in both criminal and civil RICO cases brought by the United States. In that respect, 18 U.S.C. § 2516 empowers the Government to obtain court-authorized electronic surveillance when "such interception may provide or has provided evidence of" violations of the RICO statute ("Section 1963 (violations with respect to racketeer influenced and corrupt organizations")) and many criminal violations that are also predicate acts of racketeering under RICO (18 U.S.C. § 1961(1)).

Title 18, United States Code, Section 2517(1) and (2) provide as follows:

> (1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

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[311] A comprehensive discussion of the law governing electronic surveillance is beyond the scope of this Manual. Rather, this Section is limited to a brief discussion of the use of court-authorized electronic surveillance in Government civil RICO cases.

> (2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

Pursuant to these provisions, duly authorized Government attorneys and law enforcement officers[312] who are handling a civil RICO matter may, without a court-disclosure order, use evidence derived from court-authorized electronic surveillance and disclose such evidence "to another investigative or law enforcement officer" to the extent that such use or disclosure "is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure."[313]

However, such a duly authorized Government attorney or other law enforcement officer may not disclose evidence derived from such court-authorized electronic surveillance while giving testimony in a civil RICO proceeding without a court-order authorizing such disclosure. In that respect, 18 U.S.C. §§ 2517(3) and (5) provide as follows:

> (3) Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while

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[312] See 18 U.S.C. § 2516 which specifies the Government attorneys authorized to apply to the district court for an electronic surveillance order and which provides that such authorized interceptions may be made "by the Federal Bureau of Investigation, or a federal agency having responsibility for the investigation of the offense as to which the application is made." See also 18 U.S.C. § 2510 (7) which defines "Investigative or law enforcement officer."

[313] 18 U.S.C. § 2518(8)(a) requires the judge issuing an electronic surveillance order to seal the original recordings of intercepted conversations "[i]mmediately upon the expiration of the period of the order." However, that section also provides that "[d]uplicate recordings may be made for subsections (1) and (2) of Section 2517 of this chapter for investigations." See United States v. Maldonado-Rivera, 922 F.2d 934, 954 (2d Cir. 1990)("duplicate tapes need not be judicially sealed").

> giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.
>
> . . .
>
> (5) When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

First, Section 2517(3) of Title 18 authorizes the use of evidence derived from court-authorized electronic surveillance by an authorized Government official "while giving testimony under oath or affirmation **in any proceeding** held under the authority of the United States or of any state or political subdivision thereof," which includes a civil proceeding. (emphasis added). See, e.g., In Re Electronic Surveillance Evidence, 990 F.2d 1015, 1018-20 (8th Cir. 1993) (holding that 18 U.S.C. § 2517 authorizes Government officials to use evidence derived from court-authorized electronic surveillance in civil proceedings, but does not authorize pretrial disclosure of such evidence to private civil RICO litigants); Nat'l Broad. Co. v. United States Dept. of Justice, 735 F.2d 51, 53-55 (2d Cir. 1984) (same);[314] S. Rep. No. 91-617 at 161 (stating that "18 U.S.C. § 2517 [permits] evidence obtained through the interception of wire or oral

[314] But see In Re High Fructose Corn Syrup Antitrust Litig., 46 F. Supp.2d 819, 828-32 (C.D. Ill. 1999).

communications under court order to be employed in civil actions.")[315]

However, a disclosure order is required to disclose evidence obtained from court-ordered electronic surveillance while giving testimony in a civil RICO proceeding because 18 U.S.C. § 2516 authorizes electronic surveillance only to obtain evidence of criminal offenses specified in Section 2516, and not to obtain evidence of civil violations. Therefore, a civil RICO violation constitutes an offense "other than those specified in the order of authorization or approval" within the meaning of Section 2517(5) and a disclosure order is required.

Moreover, one court has held that private plaintiffs in a civil action were entitled to subpoena the Government to obtain tape recordings that were derived from court-authorized electronic surveillance which "were admitted into evidence and played in open court" on the rationale that "[o]nce the material has been [publicly] revealed, however, the purpose of Section 2517(3) ceases and the requirements of that section no longer govern." County of Oakland by Kuhn v. City of Detroit, 610 F. Supp. 364, 368 (E.D. Mich. 1984).

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[315] See United States v. Private Sanitation Indus. Ass'n, 811 F. Supp. 808, 815-17 (E.D.N.Y. 1992) (admitting evidence derived from court-authorized electronic surveillance in a Government civil RICO lawsuit). Moreover, courts have allowed evidence derived from lawful court-authorized electronic surveillance to be used in civil tax enforcement proceedings. See, e.g., Dickens v. United States, 671 F.2d 969 (6th Cir. 1982); Griffin v. United States, 588 F. 2d 521, 523-26 (5th Cir. 1979); Fleming v. United States, 547 F.2d 872, 873-75 (5th Cir. 1977); United States v. Iannelli, 477 F.2d 999, 1001 (3d Cir. 1973). See also Matter of Electronic Surveillance, 596 F. Supp. 991 (E.D. Mich. 1984) (allowing disclosure of evidence derived from court-authorized electronic surveillance to the Grievance Administrator of the Michigan Attorney Grievance Commission).

C. Federal Rule of Criminal Procedure 6(e)

1. A Government Attorney May Not Disclose "A Matter Occurring Before the Grand Jury" Unless It Falls Within An Exception Set Forth in Rule 6(e)(3)

Rule 6(e)(2)(B)(vi), FED. R. CRIM. P. prohibits "an attorney for the government" from disclosing "a matter occurring before the grand jury," unless such disclosure falls within one of the exceptions set forth in Rule (6)(e)(3). Rule 6(e) does not define "a matter occurring before the grand jury." Courts have noted that the phrase "a matter occurring before the grand jury" "encompasses 'not only what has occurred and what is occurring, but also what is likely to occur,' including 'the identities of witnesses or jurors, the substance of testimony as well as actual transcripts, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.'" In Re Sealed Case No. 99-3091, 192 F.3d 995, 1001 (D.C. Cir. 1999), quoting In Re Motions of Dow Jones & Co., 142 F.3d 496, 500 (D.C. Cir. 1998). Accord In Re Special Grand Jury 89-2, 450 F.3d 1159, 1175-77 (10th Cir. 2006).

However, courts have warned that the above-quoted phrase from Rule 6(e) should not be given an unduly broad reading, and that Rule 6(e) does not require a "veil of secrecy to be drawn over all matters occurring in the world that happen to be investigated by a grand jury." In Re Sealed Case No. 99-3091, 192 F.3d at 1001-02, quoting Securities & Exch. Comm. v. Dresser Indus., Inc., 628 F.2d 1368, 1382 (D.C. Cir. 1980)(en banc). The majority of courts that have considered the issue have held that Rule 6(e) does not per se prohibit disclosure of records subpoenaed by or presented to the grand jury which were created independently of the grand jury. In a leading case, United States v. Interstate Dress Carriers, Inc., 280 F.2d 52 (1960), the Second Circuit explained:

> [I]t is not the purpose of the Rule [6(e)]to foreclose from all future revelation to proper authorities the same information or documents which were presented to the grand jury. Thus, when testimony or data is sought for its own sake – for its intrinsic value in the furtherance of a lawful investigation – rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury.

Id. at 54.

The above-referenced rationale of the majority rule is especially true of normal business records that are routinely created independently of a grand jury investigation and maintained in the normal course of business.[316] However, the courts have not taken a uniform approach to this issue, and have indicated that in some circumstances disclosure of such records subpoenaed by or presented to the grand jury may be prohibited by Rule 6(e), in the absence of an appropriate

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[316] The following cases adopted the majority rule, finding that normal business records and other documents that were created independently of a grand jury investigation and were not sought to learn what took place before the grand jury were not protected from disclosure under Rule 6(e): First Circuit Cases: Capitol Indem. Corp. v. First Minn. Constr. Co., 405 F. Supp. 929, 930-31 (D. Ma. 1975); In Re Grand Jury Proceedings, 505 F. Supp. 978, 982 (D. Me. 1981); Second Circuit Cases: United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960); DiLeo v. Commissioner of IRS, 959 F.2d 16, 19-20 (2d Cir. 1992); Third Circuit Cases: In Re Grand Jury Matter, 640 F. Supp. 63, 65 (E.D. Pa. 1986); United States v. OMT Supermarket, Inc., 995 F. Supp. 526, 531-32 (E.D. Pa. 1998); In Re Grand Jury Investigation, 630 F.2d 996, 1000-01 (3d Cir. 1980); United States v. Chang, 47 Fed. Appx. 119, 121-22 (3d Cir. 2002); Fourth Circuit Cases: United States v. Reiners, 934 F. Supp. 721, 723-24 (E.D. Va. 1996); Sixth Circuit Cases: Matters of Grand Jury Investigation, (90-3-2), 748 F. Supp. 1188, 1208 (E.D. Mich. 1990); Rugiero v. United States Department of Justice, 257 F.3d 534, 549 (6th Cir. 2001); Seventh Circuit Cases: Dexia Credit Local v. Rogan, 395 F. Supp. 2d 709, 715-19 (N.D. Ill. 2005); United States v. Sandford, 589 F.2d 285, 290-91 (7th Cir. 1978); In the Matter of Special March 1981 Grand Jury, 753 F.2d 575, 577-79 (7th Cir. 1985); Ninth Circuit Cases: United States v. Dynavac, Inc., 6 F.3d 1407, 1411-14 (9th Cir. 1993); Kersting v. United States, 206 F.3d 817, 821 (9th Cir. 2000); Tenth Circuit Cases: United States ex rel. Woodard v. Tynan, 757 F.2d 1085, 1087-88 (10th Cir. 1985); District of Columbia Circuit Cases: SEC v. Dresser Indus., 628 F.2d 1368, 1382-83 (D.C. Cir. 1980)(en banc).

disclosure order.[317]

2. A Government Attorney Who Has Had Lawful Access to a Matter Occurring Before a Grand Jury May Use Such Matter in Handling a Civil RICO Action, But May Not Disclose Such Matter, Without a Court-Disclosure Order, to Another Person to Assist in Handling a Civil Action

It is not unusual for a Government attorney to participate in both a criminal prosecution and a related civil action, and hence the question arises whether and under what circumstances may a Government attorney use information or evidence that is protected from disclosure by Rule 6(e), FED. R. CRIM. P., in connection with a civil RICO investigation or lawsuit. In sum, a Government attorney who has had lawful access to matters protected from disclosure by Rule 6(e) may use such matters without a court-disclosure order in connection with a civil RICO investigation or lawsuit, but may not disclose such matter, without a court-disclosure order, to another person to assist in handling a civil RICO investigation or lawsuit.

In United States v. Sells Eng'r, Inc., 463 U.S. 418 (1983) ("Sells"), after a defendant pled guilty to participating in a conspiracy to obstruct the Internal Revenue Service ("IRS"), the Government moved under Rule 6(e) for disclosure of all grand jury materials relating to the case to attorneys in the Civil Division of the Justice Department and their staff assistants for use in preparing and conducting a possible civil suit against the defendant. The district court granted the Government's motion on the ground that Government attorneys in the Civil Division were

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[317] See, e.g., Fourth Circuit Cases: In Re Grand Jury Disclosure, 550 F. Supp. 1171, 1176-77 (E.D. Va. 1982); Sixth Circuit Cases: In Re Grand Jury Subpoenas, 454 F.3d 511, 522 (6th Cir. 2006); In Re Grand Jury Proceedings, 851 F.2d 860, 862-67 (6th Cir. 1988); FDIC v. Ernst & Whinney, 921 F.2d 83, 87 (6th Cir. 1990); Eighth Circuit Cases: In Re Milk Products Antitrust Litigation, 84 F. Supp. 2d 1016, 1026-27 (D. Minn. 1997), aff'd on other grounds, 195 F.3d 430 (8th Cir. 1999); In Re Grand Jury Proceedings Relative To Perl, 838 F.2d 304, 307 (8th Cir. 1988); Eleventh Circuit Cases: In Re May 6, 1997 Grand Jury, 76 F. Supp. 2d 1262, 1268-69 (M. D. Ala. 1999).

entitled to automatic disclosure as a matter of right without a court-disclosure order under Rule 6(e)(3)(A)(i), which authorized disclosure of a grand jury matter to "an attorney for the government for use in performing such attorney's duty." See Sells, 463 U.S. at 421-22, 426.

The Supreme Court rejected the Government's contention that all attorneys in the Justice Department qualify for automatic disclosure of grand jury materials under Rule 6(e)(3)(A)(i) regardless of the nature of the litigation in which they intend to use the materials. The Supreme Court stated:

> We hold that (A)(i) disclosure is limited to use by those attorneys who conduct the criminal matters to which the materials pertain. This conclusion is mandated by the general purposes and policies of grand jury secrecy, by the limited policy reasons why Government attorneys are granted access to grand jury materials for criminal use, and by the legislative history of Rule 6(e).

Sells, 463 U.S. at 427. The Supreme Court added that "Rule 6(e) was never intended to grant free access to grand jury materials to attorneys not working on the criminal matters to which the materials pertain." Id. at 429. Accordingly, the Supreme Court concluded:

> "Federal prosecutors" are given a free hand concerning use of grand jury materials, at least pursuant to their "duties relating to criminal law enforcement;" but disclosure of "grand jury-developed evidence for civil law enforcement purposes" requires a (C)(i) court order . . . . Congress did not intend that "attorneys for the government" should be permitted free civil use of grand jury materials.

Id. at 441-42.

Subsequently, in United States v. John Doe, Inc. I, 481 U.S. 102 (1987) (hereafter "John Doe, Inc. I"), the Supreme Court held that a Government attorney who had conducted a criminal anti-trust investigation before a grand jury could, without prior court-authorization, continue to utilize the evidence obtained by the grand jury in a subsequent civil anti-trust and False Claims

Act investigation. In John Doe, Inc. I, attorneys from the Anti-Trust Division of the Department of Justice conducted a grand jury investigation into alleged price fixing by three corporations. At the conclusion of the investigation, the attorneys concluded that, although there had been violations of the Sherman Anti-Trust Act, these violations were not sufficient to warrant criminal prosecution. Thereafter, without seeking a court order authorizing them to do so, the same attorneys reviewed the evidence they had developed in the grand jury for the purpose of determining whether a civil suit should be filed and took various steps pursuant thereto. In the course of their review of the grand jury evidence, the attorneys concluded that in addition to the Sherman Act violations, there were potential violations of the False Claims Act and other statutes. Therefore, they obtained court orders pursuant to Rule 6(e), authorizing the disclosure of the grand jury material to additional Anti-Trust Division Attorneys and to Civil Division Attorneys. The team of attorneys, including the attorneys who had conducted the grand jury investigation, thereafter prepared and filed a civil complaint against the three corporations and various individuals. Significantly, the complaint did not contain or refer to any of the grand jury materials. See John Doe, Inc. I, 481 U.S. at 104-110.

Upon the defendants' claim that the use of the evidence developed in the grand jury to prepare the civil case violated Rule 6(e), the Second Circuit held that review of the evidence by the attorneys who conducted the grand jury investigation for the purpose of determining whether a civil suit should be filed constituted a further "disclosure" of matters occurring before the grand jury under Rule 6(e) and that the Government had not made a sufficient showing of particularized need to warrant the additional disclosure to the new Anti-Trust and Civil Division attorneys. The Second Circuit therefore, held that the civil suit should be dismissed. United

States v. John Doe, Inc., 774 F.2d 34 (2d Cir. 1985).

In reversing the decision of the Second Circuit, the Supreme Court held that the Government's attorneys who had conducted the grand jury investigation could lawfully review and continue to use the evidence developed in the grand jury, provided the attorneys did not disclose any matter occurring before the grand jury to others not authorized by Rule 6(e) to have access to such evidence. The Supreme Court stated:

> Rule [6(e)] does not contain a prohibition against the continued use of information by attorneys who legitimately obtained access to the information through the grand jury investigation. The Court of Appeals' reasoning is unpersuasive because it stretches the plain meaning of the Rule's language much too far.

John Doe, Inc. I, 481 U.S. at 108.

The Supreme Court also rejected the argument that the Government attorneys, who had conducted the grand jury investigation, had violated Rule 6(e) by using the grand jury material in drafting the civil complaint, since the attorneys' consideration of the grand jury material did not involve any further disclosure of grand jury matters to others. Noting that the complaint did not refer to any grand jury material, the Supreme Court stated:

> A Government attorney may have a variety of uses for grand jury material in a planning stage, even thought the material will not be used, or even alluded to, in any filing or proceeding. In this vein, it is important to emphasize that the issue before us is only whether an attorney who was involved in a grand jury investigation (and is presumably familiar with the "matters occurring before the grand jury") may later review that information in a manner that does not involve any further disclosure to others.

John Doe, Inc. I, 481 U.S. at 110-11 (footnote omitted).

Thus, John Doe, Inc. I makes clear that a Government attorney who participated in a grand jury investigation may continue to review and consider grand jury materials for civil law

enforcement purposes. However, the Supreme Court emphasized that under "Sells [such attorney] could not disclose [grand jury] information to previously uninvolved attorneys from the Civil Division or the United States Attorney's office without a court order pursuant to Rule 6(e)(3)(C)(i)."[318] John Doe, Inc. I, 481 U.S. at 111.

Courts following Sells and John Doe, Inc. I, have allowed Government personnel to use lawfully obtained grand jury evidence and information in civil matters, without a court-disclosure order, provided that such use did not involve disclosure of grand jury matters to another person who did not have lawful access to such grand jury matters. For example, in DiLeo v. Commissioner of Internal Revenue, 959 F.2d 16, 21 (2d Cir. 1992), the Second Circuit held that a Special Agent of the Criminal Investigations Division of the IRS who had participated in a grand jury investigation leading to a criminal prosecution could also participate in a later trial before the Tax Court regarding the civil tax liability of the same defendants and assist attorneys for the Commissioner during that civil tax trial. The Second Circuit stated that the defendant's claim that the participation of the IRS Special Agent in the Tax Court proceeding violated Rule 6(e):

> is inconsistent with the principle that a government employee who has participated in a criminal prosecution may participate in the civil phase of the dispute without obtaining a court order to do so under Rule 6(e).
>
> . . .
>
> There is no evidence that [the IRS Special Agent] disclosed any Rule 6(e) information to counsel for the Commissioner. There was therefore nothing improper about his presence as a representative of the Commissioner at the trial.

DiLeo, 959 F.2d at 21.

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[318] Former Rule 6(e)(3)(C)(i) is set forth in Rule 6(e)(3)(E)(i) without material change.

In In Re of Grand Jury Subpoena of Rochon, 873 F.2d 170 (7th Cir. 1989), the Seventh Circuit held that the Attorney General, who was named as a defendant in his official capacity in a civil suit, could participate in a related civil rights grand jury investigation and could use the information lawfully disclosed to him in the course of the grand jury investigation in the defense of the civil suit so long as there was no disclosure to the Government's civil attorneys not otherwise lawfully entitled to have the information disclosed to them. In this regard, the Seventh Circuit stated:

> Nor do we believe that [the Attorney General's] participation in the grand jury investigation will inevitably result in a Rule 6(e) violation. Rule 6(e) prohibits those participating in a criminal investigation from disclosing grand jury information to others not authorized to receive it under the rule. . . . It does not prevent an attorney from using information that he or she legitimately obtained during a grand jury investi

873 F.2d at 175. See also In Re Grand Jury Sub. February 28, 2002, March 26, 2003 and October 4, 2004, 472 F.3d 990, 996-1000 (8th Cir. 2007) (holding that simultaneous work by a federal special agent, as lead agent in a grand jury investigation of a corporation and head of a related civil investigation into one of the corporation's companies, did not in itself violate Rule 6(e)); United States v. Archer-Daniels-Midland Co., 785 F.2d 206, 211-13 (8th Cir. 1986) (holding that assignment of Justice Department attorneys to a civil antitrust suit against two corporations after those attorneys participated in a grand jury investigation of the corporations and the attorneys' use of grand jury matters in the civil suit without first obtaining a court-disclosure order did not violate Rule 6(e), absent evidence that those attorneys disclosed a grand jury matter to someone not authorized to obtain such access).

Based on the foregoing analysis, OCRS concludes that under Rule 6(e)(3)(A)(i), a

Government attorney who has had lawful access to grand jury material protected from disclosure by Rule 6(e) may:

> (1) without a court-disclosure order continue to review and use such grand jury material for his own deliberative process in connection with a civil RICO investigation or lawsuit; and
>
> (2) without a court-disclosure order may disclose such grand jury material to an attorney for the Government to assist such attorney's duties in handling a criminal matter which pertains to the grand jury matter, but may not disclose such grand jury material to a Government attorney or other Government personnel to assist in a civil proceeding without a prior court-disclosure order.

Accordingly, any Government personnel participating in a civil RICO investigation or lawsuit who either did not participate in a related grand jury investigation or was not otherwise authorized to have access to such grand jury matters, should be shielded from such grand jury matters, unless a prior court-disclosure order is obtained.[319]

3. A District Court May Order Disclosure of a Grand Jury Matter Preliminary to or in Connection With a Judicial Proceeding

a. Rule 6(e)(3)(E)(i), provides as follows:

> (E) The court may authorize disclosure -- at a time, in a manner, and subject to any other conditions that it directs -- of a grand-jury matter: (i) preliminary to or in connection with a judicial proceeding.

In United States v. Baggot, 463 U.S. 476, 480-81 (1983), the Supreme Court held that an

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[319] In Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), the Supreme Court stated:

> [A] knowing violation of Rule 6 may be punished as a contempt of court. See Fed. R. Crim. Proc. 6(e)(2). In addition, the court may direct a prosecutor to show cause why he should not be disciplined and request the bar or the Department of Justice to initiate disciplinary proceedings against him. The court may also chastise the prosecutor in a published opinion.

Id. at 263. Accord McQueen v. Bullock, 907 F.2d 1544, 1551 & n.20 (5th Cir. 1990).

IRS investigation to determine a taxpayer's civil tax liability was not "preliminary to or in connection with a judicial proceeding" within the meaning of Rule 6(e). The Court explained:

> [T]he purpose of the audit is not to prepare for or conduct litigation, but to assess the amount of tax liability through administrative channels. Assuming, *arguendo*, that this audit will inevitably disclose a deficiency on Baggot's part . . . there is no particular reason why that must lead to litigation, at least from the IRS's point of view. The IRS's decision is largely self-executing, in the sense that it has independent legal force of its own, without requiring prior validation or enforcement by a court. The IRS need never go into court to assess and collect the amount owed; it is empowered to collect the tax by nonjudicial means (such as levy on property or salary, 26 U.S.C. §§ 6331, 6332), without having to prove to a court the validity of the underlying tax liability. Of course, the matter may end up in court if Baggot chooses to take it there, but that possibility does not negate the fact that the primary use to which the IRS proposes to put the materials it seeks is an extrajudicial one- - the assessment of a tax deficiency by the IRS.

Id. at 480-81 (footnote omitted).

By contrast, a Government civil RICO investigation is not a "self-executing," independent administrative proceeding, but rather is a preliminary step necessary to decide whether to file a civil RICO lawsuit, and hence falls within the scope of Rule 6(e)(3)(E)(i), and, therefore, a district court may issue a Rule 6(e) disclosure order in connection with a civil RICO investigation.[320] Moreover, Rule 6(e)(3)(E)(i) authorizes a district court to issue a disclosure order in connection with a filed civil RICO lawsuit since such a suit manifestly constitutes a "judicial proceeding" within the meaning of Rule 6(e)(3)(E)(i).[321]

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[320] See, e.g., John Doe, Inc. I, 481 U.S. at 111-117 (approving a 6(e) disclosure order to provide grand jury materials to Justice Department attorneys in the Civil Division to decide whether to proceed with a civil suit).

[321] See, e.g., Atlantic City Elec. Co. v. A.B. Chance Co., 313 F.2d 431, 434 (2d Cir. 1963); In Re Grand Jury Investigation, 55 F.3d 350, 353-55 (8th Cir. 1995); In Re Grand Jury

(continued...)

b. The Supreme Court requires "a strong showing of particularized need for grand jury materials before any disclosure will be permitted." Sells, 463 U.S. at 443 (collecting cases). In particular, the Supreme Court has ruled that:

> Parties seeking grand jury [material] under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.

Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979). Accord Sells, 463 U.S. at 443; United States v. Campbell, 294 F.3d 824, 827 (7th Cir. 2002)(the person seeking disclosure must demonstrate "a compelling need for the material"). The Supreme Court explained that:

> Such a showing must be made even when the grand jury whose transcripts are sought has concluded its operations. . . . For in considering the effects of disclosure on grand jury proceedings, the courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries. Persons called upon to testify will consider the likelihood that their testimony may one day be disclosed to outside parties. Fear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties. Concern as to the future consequences of frank and full testimony is heightened where the witness is an employee of a company under investigation. Thus, the interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities.

Douglas Oil Co., 441 U.S. at 222.

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[321](...continued)
Proceedings GJ-76-4 & GJ-75-3, 800 F.2d 1293 (4th Cir. 1986). See generally In Re North, 16 F.3d 1234, 1244 (D.C. Cir. 1994) ("A judicial proceeding [under Rule 6(e)] includes every proceeding of a judicial nature before a competent court or before a tribunal or officer clothed with judicial or quasi-judicial powers") (citations omitted).

Significantly, the Supreme Court has noted that "[t]he Douglas Oil standard is a highly flexible one" and "accommodates any relevant considerations, peculiar to Government movants, that weigh for or against disclosure in a given case." Sells, 463 U.S. at 445. For example, the Supreme Court explained that "a district court might reasonably consider that disclosure to Justice Department attorneys poses less risk of further leakage or improper use than would disclosure to private parties or the general public;" or "the district court may weigh the public interest, if any, served by disclosure to a governmental body. . . ." Sells, 463 U.S. at 445 (citation omitted). Moreover, in John Doe, Inc. I, 481 U.S. at 113, the Supreme Court sanctioned disclosure of grand jury materials to Justice Department attorneys in the Civil Division "to make a decision on whether to proceed with a civil action," where the disclosure "could have had the effect of saving the Government, the potential defendants, and witnesses the pains of costly and time-consuming depositions and interrogatories which might have later turned out to be wasted if the Government decided not to file a civil action after all."

Applying the foregoing standards, courts have authorized disclosure of grand jury materials to be used by Government attorneys and others in connection with civil proceedings. See, e.g., John Doe, Inc. I, 481 U.S. at 111-17; In Re Grand Jury Proceedings Relative to Perl, 838 F.2d 304, 306-08 (8th Cir. 1988); In Re Grand Jury Proceedings GJ-76-4 & GJ-75-3, 800 F.2d at 1298-1305; In Re of Petitions for Disclosure of Documents, 617 F. Supp. 630, 631-32 (S.D. Fla. 1985).

APPENDIX A

United States Attorneys' Manual Sections 9-110.010 to 9-110.400

9-110.000
ORGANIZED CRIME AND RACKETEERING

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9-110.010 Introduction

This chapter focuses on investigations and prosecutions involving RICO, (18 U.S.C. §§ 1961-1968), illegal gambling (18U.S.C. § 1511 and 1955), loansharking(18 U.S.C. § 891-896), violent crimes in aid of racketeering (18 U.S.C. § *1959),* and gambling ships (18 U.S.C. §§ 108 1-1083). The Organized Crime and Racketeering Section of the Criminal Division supervises prosecutions of each of these statutes. For an additional discussion of RICO, see "Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors," available from OCRS.

9-110.100 Racketeer Influenced and Corrupt Organizations (RICO)

On October 15, 1970, the Organized Crime Control Act of 1970 became law. Title IX of the Act is the Racketeer Influenced and Corrupt Organizations Statute (18 U.S.C. § § 1961-1968), commonly referred to as the "RICO" statute. The purpose of the RICO statute is "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S.Rep. No. 617, 91st Cong., 1st Sess. 76 (1969). However, the statute is sufficiently broad to encompass illegal activities relating to any enterprise affecting interstate or foreign commerce.

Section 1961(10) of Title 18 provides that the Attorney General may designate any department or agency to conduct investigations authorized by the RICO statute and such department or agency may use the investigative provisions of the statute or the investigative power of such department or agency otherwise conferred by law. Absent a specific designation by the Attorney General, jurisdiction to conduct investigations for violations of 18 U.S.C. § 1962 lies with the agency having jurisdiction over the violations constituting the pattern of racketeering activity listed in

18 U.S.C. § 1961.

9-110.101 Division Approval

No RICO criminal indictment or information or civil complaint shall be filed, and no civil investigative demand shall be issued, without the prior approval of the Criminal Division. *See* RICO Guidelines at USAM 9-110.200.

9-110.200 RICO Guidelines Preface

The decision to institute a federal criminal prosecution involves balancing society's interest in effective law enforcement against the consequences for the accused. Utilization of the RICO statute, more so than most other federal criminal sanctions, requires particularly careful and reasoned application, because, among other things, RICO incorporates certain state crimes. One purpose of these guidelines is to reemphasize the principle that the primary responsibility for enforcing state laws rests with the state concerned. Despite the broad statutory language of RICO and the legislative intent that the statute". . . shall be liberally construed to effectuate its remedial purpose," it is the policy of the Criminal Division that RICO be selectively and uniformly used. It is the purpose of these guidelines to make it clear that not every proposed RICO charge that meets the technical requirements of a RICO violation will be approved. Further, the Criminal Division will not approve "imaginative" prosecutions under RICO which are far afield from the congressional purpose of the RICO statute. A RICO count which merely duplicates the elements of proof of traditional Hobbs Act, Travel Act, mail fraud, wire fraud, gambling or controlled substances cases, will not be approved unless it serves some special RICO purpose. Only in exceptional circumstances will approval be granted when RICO is sought merely to serve some evidentiary purpose.

These guidelines provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

9-110.210 Authorization of RICO Prosecution --The Review Process

The review and approval function for all RICO matters has been centralized within the Organized Crime and Racketeering Section of the Criminal Division. To commence the review process, the *final* draft of the proposed indictment or information and a RICO prosecution memorandum shall be forwarded to the Organized Crime and Racketeering Section. Separate approval is required for superseding indictments or indictments based upon a previously approved information. Attorneys are encouraged to seek guidance from the Organized Crime and Racketeering Section by telephone prior to the time an investigation is undertaken and well before a final indictment and prosecution memorandum are submitted for review. Guidance on preparing the RICO prosecution memorandum is in the Criminal Resource Manual at 2071 et seq.

RICO reviews are handled on a first-in-first-out basis. Accordingly, the submitting attorney must allocate sufficient lead time to permit review, revision, conferences, and the scheduling of the grand jury. *Unless there is a backlog, 15 working days is usually sufficient.* The review process will

not be dispensed with because a grand jury, which is about to expire, has been scheduled to meet to return a RICO indictment. Therefore, submitting attorneys are cautioned to budget their time and to await receipt of approval before scheduling the presentation of the indictment to a grand jury.

If modifications in the indictment are required, they must be made by the submitting attorney before the indictment is returned by the grand jury. Once the modifications have been made and the indictment has been returned, a copy of the indictment filed with the clerk of the court shall be forwarded to Organized Crime and Racketeering Section. If, however, it is determined that the RICO count is inappropriate, the submitting attorney will be advised of the Section's disapproval of the proposed indictment. The submitting attorney may wish to redraft the indictment based upon the Section's review and submit a revised indictment and/or prosecution memorandum at a later date.

9-110.300 RICO Guidelines Policy

It is the purpose of these guidelines to centralize the RICO review and policy implementation functions in the section of the Criminal Division having supervisory responsibility for this statute.

9-110.310 Considerations Prior to Seeking Indictment

Except as hereafter provided, a government attorney should seek approval for a RICO charge only if one or more of the following requirements is present:

1. RICO is necessary to ensure that the indictment adequately reflects the nature and extent of the criminal conduct involved in a way that prosecution only on the underlying charges would not;
2. A RICO prosecution would provide the basis for an appropriate sentence under all the circumstances of the case in a way that prosecution only on the underlying charges would not;
3. A RICO charge could combine related offenses which would otherwise have to be prosecuted separately in different jurisdictions;
4. RICO is necessary for a successful prosecution of the government's case against the defendant or a codefendant;
5. Use of RICO would provide a reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct;
6. The case consists of violations of State law, but local law enforcement officials are unlikely or unable to successfully prosecute the case, in which the federal government has a significant interest;
7. The case consists of violations of State law, but involves prosecution of significant or government individuals, which may pose special problems for the local prosecutor.

The last two requirements reflect the principle that the prosecution of state crimes is primarily the responsibility of state authorities. RICO should be used to prosecute what are essentially violations of state law only if there is a compelling reason to do so. See also the Criminal Resource Manual at 2070.

9-110.320 Approval of Organized Crime and Racketeering Section Necessary

A RICO prosecution memorandum and draft indictment, felony information, civil complaint, or civil investigative demand shall be forwarded to the Organized Crime and Racketeering Section,

Criminal Division, The John C. Keeney Building, 1301 New York Avenue, NW, 7th Floor, Washington, DC 20005, *at least 15 working days prior to the anticipated date of the proposed filing or the seeking of an indictment from the grand jury.*

No criminal or civil prosecution or civil investigative demand shall be commenced or issued under the RICO statute without the prior approval of the Organized Crime and Racketeering Section, Criminal Division. Prior authorization from the Criminal Division to conduct a grand jury investigation based upon possible violations of 18 U.S.C. § 1962 is not required.

A RICO prosecution memorandum and draft pleading or civil investigative demand shall be forwarded to the Organized Crime and Racketeering Section. It is essential to the careful review which these factually and legally complex cases require that the attorney handling the case in the field not wait to submit the case until the grand jury or the statute of limitations is about to expire. Authorizations based on oral presentations will not be given. See the Criminal Resource Manual at 2071 et seq. for specific guidance.

These guidelines do not limit the authority of the Federal Bureau of Investigation to conduct investigations of suspected violations of RICO. The authority to conduct such investigations is governed by the FBI Guidelines on the Investigation of General Crimes. However, the factors identified here are the criteria by which the Department of Justice will determine whether to approve the proposed RICO. The fact that an investigation was authorized, or that substantial resources were committed to it, will not influence the Department in determining whether an indictment under the RICO statute is appropriate.

Use of RICO in a prosecution, like every other federal criminal statute, is also governed by the Principles of Federal Prosecution. *See* USAM 9-27.000, *et seq.* Inclusion of a RICO count in an indictment solely or even primarily to create a bargaining tool for later plea negotiations on lesser counts is not appropriate and would violate the Principles of Federal Prosecution.

9-110.330 Charging RICO Counts

A RICO charge where the predicate acts consist only of state offenses will not be approved except in the following circumstances:

A. Local law enforcement officials are unlikely to investigate and prosecute otherwise meritorious cases in which the Federal government has significant interest;

B. Significant organized crime involvement exists; or

C. The prosecution of significant political or governmental individuals may pose special problems for local prosecutors.

9-110.400 RICO Prosecution (Pros) Memorandum Format

A well written, carefully organized prosecution memorandum is the greatest guarantee that a RICO prosecution will be authorized quickly and efficiently. See the Criminal Resource Manual at 2071 *et seq.* for specific guidelines on drafting the RICO prosecution memorandum.

Once a RICO indictment has been approved by the Organized Crime and Racketeering Section and has been returned by the grand jury, a copy of a file-stamped copy of the indictment shall be provided to the Section. The Section shall also be notified in writing of any significant rulings which affect the RICO statute--for example, any ruling which results in a dismissal of a RICO count, or any ruling affecting or severing any aspect of the forfeiture provisions under RICO. In addition, copies of RICO motions, jury instructions and briefs filed by the United States Attorney's Office (USAO), as well as the defense, should be forwarded to the Organized Crime and Racketeering Section for retention in a central reference file. The government's briefs and motions will provide assistance to other USAOs handling similar RICO matters.

Once a verdict has been obtained, the USAO shall forward the following information to the Section for retention: (a) the verdict on each count of the indictment; (b) a copy of the judgment of forfeiture; (c) estimated value of the forfeiture; and (d) judgment and sentence(s) received by each RICO defendant.

1. TEAMSTERS LOCAL 560

A. CASE NAME:

United States v. Local 560 of the International Brotherhood of Teamsters, Chauffeurs Warehousemen, and Helpers of America (IBT), et al., Civil Action. No. 82-689, United States District Court for the District of New Jersey. Complaint filed March 9, 1982 and amended September 20, 1982.

B. DEFENDANTS:

The complaint named as "nominal" defendants Local 560 of the International Brotherhood of Teamsters, Chauffeurs Warehousemen, and Helpers of America (IBT) and its Welfare Fund and Severance Pay Fund, their officers, and five persons in their individual capacity. Five of the individual defendants formed the "Provenzano Group," allegedly an ongoing criminal confederation controlled by the Genovese LCN Family. The Provenzano Group included Genovese "made" member Anthony Provenzano, his brother Nunzio Provenzano, Thomas Andretta, Stephen Andretta, and Gabriel Briguglio, also an alleged member of the Genovese LCN. The seven remaining personal defendants, all members of the Local 560 Executive Board, were charged with aiding and abetting the Provenzano Group. The Executive Board consisted of President Salvatore Provenzano, Anthony Provenzano's brother; Vice-President Joseph Sheridan; Secretary-Treasurer Josephine Provenzano Septembre, Anthony Provenzano's daughter; Recording Secretary J.W. Dildine; and employee trustees, Thomas Reynolds, Michael Sciarra, and Stanley Jaronko.

C. SUMMARY OF THE COMPLAINT:

The complaint alleged that the RICO enterprise consisted of an association-in-fact comprised of the nominal defendants, Local 560, together with its Welfare and Pension Fund and its Severance Pay Plan (Local 560 Enterprise). The complaint also alleged that the Local 560

Enterprise had become "a captive labor organization," which, continuously since the 1950s, the Provenzano Group had infiltrated, dominated, and exploited through a pattern of racketeering that included murder, systematic extortion, bribery and fraud. By the use of actual and threatened force, violence and fear of economic and physical injury, the Provenzano Group, aided and abetted by incumbent and former members of Local 560's Executive Board, created within Local 560 a climate of intimidation, which induced its members to surrender valuable property--their rights to union democracy guaranteed by 29 U.S.C. §§ 157 and 411.[1]

Specifically, members of the Provenzano Group, headed by Anthony Provenzano, ordered the murders of political rivals in Local 560. The Provenzano Group with the concurrence of the Executive Board appointed known convicted felons, known murderers, and those with indictments pending, to positions of trust in Local 560 and allowed convicted felons and reputed members of organized crime to frequent Local 560. In addition, members of the Provenzano Group extorted money and property from local businesses in return for "labor peace," stole, converted, or embezzled Local 560 funds, schemed to commit mail fraud, voted unlawfully for an increased salary for Provenzano, took kickbacks in return for influencing the affairs of Local 560, and made or took loans and investments of Local 560 funds in return for labor peace. The Executive Board at the behest of the Provenzano Group unlawfully contributed Local 560 funds to the Provenzano and Sciarra defense funds. The complaint alleged that these acts, set forth in thirty-three predicate acts, violated 18 U.S.C. §§ 1962(b) and (c), and in addition, the defendants conspired to violate Section 1962(b) and (c), in violation of 18 U.S.C. § 1962(d).

D. RELIEF SOUGHT:

The Government sought to preliminarily enjoin the Provenzano Group from any dealings, direct or indirect, with the Local 560 Enterprise, its officers or employees and to remove the Local 560 Executive Board and replace it temporarily with one or more court-appointed trustees

[1] On September 20, 1982, the Government amended the original complaint to add additional similar predicate acts alleged to have created the climate of intimidation that induced the Local 560 members to surrender their rights to union democracy.

to discharge all duties and responsibilities of the Executive Board of Local 560. The Government also sought court-ordered supervised free elections to select a new Executive Board and to permanently enjoin the individual defendants and the Provenzano Group from any participation in the affairs of Local 560 or any other labor organization.

E. OUTCOME OF CASE:

1. Prior to trial, on June 15, 1982, the district court entered an order approving a consent decree between Anthony Provenzano and the United States. Anthony Provenzano was permanently enjoined from any form of association with any enterprise seeking to dominate, control, conduct, or otherwise influence the affairs of any labor organization or any employee benefit plan.

2. On September 15, 1982, a similar consent decree was approved between Nunzio Provenzano and the United States.

3. On January 14, 1983, Thomas Andretta entered into a similar consent decree.

4. Following a fifty-one day bench trial, the district court by an order entered March 16, 1984, enjoined Stephen Andretta and Gabriel Briguglio from any future dealings with Local 560, removed the Executive Board of Local 560 (Salvatore Provenzano, J.W. Dildine, Joseph Sheridan, Josephine Provenzano, Michael Sciarra, Stanley Jaronko, and Thomas Reynolds), who were found to have violated RICO, and appointed in its place a trustee to administer and oversee the affairs of Local 560 during a curative period, presumptively eighteen months, to be followed by a supervised election to restore union democracy to Local 560. The district court stayed its order granting injunctive relief pending appeal. See United States v. Local 560, (I.B.T.), 581 F. Supp. 279, 321, 337 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986).

In United States v. Local 560 of Intern. Broth. of Teamsters, 780 F.3d 267, 295-96 (3d Cir. 1986), cert. denied 476 U.S. 1140 (1986), the Third Circuit affirmed the district court's relief, stating that the power to appoint "a trustee to be in charge of Local 560 . . . falls within the

broad equitable powers granted to district courts under Section 1964(a)" (id. at 296 fn. 39), particularly the "broad remedial powers of 'divestiture' and 'reasonable restrictions' provided for under Section 1964." Id. at 295.

During the course of the trusteeship, the district court authorized the trustee, subject to review by the district court, to among other matters, administer the affairs of Local 560, negotiate contracts, hire and discharge employees and to investigate acts of wrongdoing within the union. See United States v. Local 560, et al., Civ. No. 82-689, Opinion and Order dated May 12, 1987; United States v. Local 560 (I.B.T.), 694 F.Supp. 1158, 1160-62, 1191-92 (D.N.J. 1988); United States v. Sciarra, 851 F.2d 621, 623-24, 632-33 (3d Cir. 1988).

5. On January 28, 1988, defendant Stanley Jaronko entered into a consent decree with the Government wherein he was permanently enjoined from any direct or indirect participation in or dealings with Local 560, its benefit plan, or any other I.B.T. local or affiliates of any I.B.T. locals. In addition, Jaronko was enjoined from any association with any member or associate of the Provenzano Group.

6. On August 11, 1989, Joseph Sheridan, a member of Local 560's Executive Board at the time the complaint was filed and who initially attempted to remain active in the affairs of Local 560, entered into a consent decree permanently enjoining him from holding any position within or otherwise endeavoring to influence Local 560 or any of it benefit plans.

7. In July 1988, twenty-five months into the trusteeship and prior to a trustee-supervised election, the Government sought additional equitable relief, a permanent bar to Michael Sciarra's participation in the affairs of Local 560, one of the two temporarily suspended Executive Board defendants still active in union politics. See United States v. Local 560 (I.B.T.) and Sciarra, 754 F. Supp. 395 (D.N.J. 1991). On March 27, 1991, the district court entered an unpublished final order of injunction, and denied the stay. Sciarra and Local 560 appealed the March 27, 1991, order. On May 13 1991, in an unpublished opinion, the Third Circuit denied defendants' motion to grant a stay.

8. On February 6, 1992, the district court signed a consent decree approving and implementing the terms of an interim settlement agreement reached between the Government and defendants Local 560 and its Executive Board, resolving motions filed by Local 560 on September 10, 1991, seeking dissolution of the trusteeship and the government's cross motion for additional equitable relief.

The Government's cross motion alleged that the Executive Board had abdicated its responsibilities since taking office in December 1988; that the Board had allowed former President Michael Sciarra to usurp its powers despite his twice adjudicated status as a coconspirator of the Genovese LCN Family; and that Michael Sciarra's de facto domination of the Local had eroded many of the remedial accomplishments of the trusteeship and threatened to return the union to racketeer domination.

The Government's proof demonstrated that the Local's business agent, long-time Sciarra associate Freddy Mezzina who controlled job allocations in construction, had given preferential treatment in job assignments to a Sciarra relative who had twenty-five drug-related arrests over a ten-year period. When the relative died of a drug overdose in February 1991, Mezzina pressured two major construction companies to falsify their records and to fraudulently certify that the deceased had worked for a requisite period, thereby enabling the widow to collect on a $20,000 union insurance policy.

The consent decree mandated a restructuring of the Executive Board that included the following provisions: (1) President Daniel Sciarra, who ran in the place of his brother Michael Sciarra after Michael Sciarra was enjoined by the district court from seeking elective office during the 1988 elections, was removed from his position as President and was permanently barred from holding any position higher than that of shop steward; (2) of three outgoing incumbents, one--Trustee James Bartolomeo--was selected by the incumbents to remain as a carryover officer for the reconstituted board; the two remaining vacancies were filled by the court-appointed trustee; (3) the position of President was to remain vacant until such time as the

district court ordered an election. In addition, the agreement empowered the district court, upon the motion of the trustees or the Government, to remove any member of the Executive Board for misconduct which threatens to undermine the remedial objectives of the trusteeship or otherwise discredits Local 560 under standards established by the IBT Independent Administrator.

The agreement also provided that Local 560 devise and implement a comprehensive plan for job referrals in the construction field to be reviewed by the Government and the court-appointed trustee. The agreement ordered that former business agent Freddy Mezzina, who resigned immediately prior to the signing of the agreement, was permanently barred from appointment to any position of trust within the union, and was replaced by a court-appointed officer to control the new construction referral system.

9. In January 1999, the court-appointed trustee issued a report recommending that the court-appointed trusteeship, which was imposed in 1987, be terminated. The report noted that in 1998, Local 560 members had elected an Executive Board who were not controlled by organized crime.

10. On February 25, 1999, the district court issued a Consent Decree stating that the objectives of the trusteeship had been substantially achieved and ordering the following matters:

a. The court trusteeship was terminated and all powers of the court-appointed trustee were restored to the officers and Executive Board of Local 560.

b. The district court retained jurisdiction over the subject matter and the parties.

c. All current and future officers, agents, employees, representatives, and persons holding positions of trust in Local 560 and all current and future members of Local 560 were permanently enjoined from committing any crime listed in 18 U.S.C. § 1961(1), knowingly associating with any member or associate of organized crime or with any barred person, and from knowingly permitting any member or associate of organized crime or

any barred person to exercise any control or influence, directly or indirectly, in the conduct of the affairs of Local 560.

d. Any person who violated the injunctive provisions of the Consent Decree were subject to sanctions, including removal, suspension and/or expulsion from office or the union.

e. The district court retained jurisdiction to modify the Consent Decree, and upon a showing of systematic corruption or organized crime influence in Local 560 to order any relief that was necessary and proper.

f. The Consent Decree was to remain in effect for four years.

F. LEADING COURT DECISIONS:

1. United States v. Local 560 (I.B.T.), 550 F. Supp. 511 (D.N.J. 1982).

The Government charged that I.B.T. Local 560 was a "captive labor organization" and sought to place Local 560 under a trusteeship, to divest individual defendants of their interests in the union, and to prohibit their future involvement in the union's affairs. Prior to trial, the district court dismissed the defendants' motion under Fed. R. Civ. P. 12 (b)(6) to dismiss the complaint for failure to state a claim.

The complaint alleged that defendant Anthony Provenzano and other defendants either associated with the Provenzano organized crime group (the Provenzano Group) or aided and abetted them, in violation of RICO, 18 U.S.C. § 1962(b). The complaint also charged the predicate offenses of murder and Hobbs Act extortion, 18 U.S.C. § 1951, as the pattern through which defendants unlawfully acquired and maintained a controlling interest in the "Local 560 Enterprise." The specific property alleged to have been extorted consisted of union members' rights guaranteed by 29 U.S.C. §§ 157 and 411 of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA). The defendants' acts, which allegedly created a climate of intimidation and thus induced the surrender of members' rights to union democracy, included several murders, the appointment of convicted felons and members of organized crime to important union positions, and the extortion by these officials of union funds.

The district court held that Section 411 rights to union democracy constituted "property" within the scope of 18 U.S.C. § 1951, which encompasses both tangible and intangible property rights. The district court also held that the extortion charges were not pre-empted by 29 U.S.C. §§ 530 and 610 on the ground that those labor law prohibitions were not the exclusive remedies for the alleged extortionate conduct. The court noted that RICO and the LMRDA were intended to supplement the remedies to reach such unlawful racketeering.

2. United States v. Local 560, I.B.T., 581 F. Supp. 279 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985), cert. denied, 476 U.S. 1141 (1986).

This lengthy decision constitutes the district court's findings of facts and conclusions of law following a fifty-one day bench trial on the Government's civil RICO claims.

The district court found that the Provenzano brothers (Anthony, Nunzio and Salvatore) and the Provenzano Group (Anthony & Nunzio Provenzano, Andrettas and Gabriel Briguglio) betrayed the membership of Local 560, and along with the remaining individual defendants, violated 18 U.S.C. §§ 1962(b), (c), and (d). The district court enjoined defendants Andretta and Briguglio from any future contacts of any kind with Local 560 and removed current members of Local 560's Executive Board found to have violated RICO in favor of a trusteeship. In that regard, the district court found it particularly significant that the members of the Executive Board aided and abetted the creation and maintanence of a climate of intimidation by knowingly appointing and reappointing associates of the Provenzano Group with criminal records and/or propensity for violence. The court ordered the trusteeship to continue as long as necessary, presumptively for a period of eighteen months, to bring about free supervised elections and to ensure during this time the protection of union funds. The court, however, stayed injunctive relief and deferred the naming of trustees pending appeal.

The district court concluded that "there is no basis for retaining either Local 560, the Funds or the Plan as a defendant in this action" because they were the victims of the individual defendants' actions. Id. at 537, However, the district court retained "Local 560 as a nominal defendant to effectuate the equitable relief heretofore specified and as may be ordered in the future." Id.

The district court's evidentiary and legal rulings included the following: (1) the Government's burden of proof is measured by a preponderance of the evidence standard because the defendants did not face criminal sanctions or significant deprivation of liberty or stigma, and the relief sought was equitable and remedial in nature, not punitive; (2) the business agent of Local 560 was a managing agent within the meaning of Fed. R. Civ. P. 32(a)(2) and also a conspirator, and therefore, his deposition was admissible under Fed. R. Evid. 801(d)(2)(D) and (E); (3) the RICO conspiracy agreement element does not require an agreement by each defendant to personally commit two predicate acts, but only a showing that the defendant agreed to the commission of two predicate acts by any of the conspirators and proof is sufficient, therefore, if it shows agreement through a defendant's aiding and abetting in at least two predicate offenses; (4) there is no overt act requirement under 18 U.S.C. § 1962(d); and (5) that conscious avoidance of knowledge, while knowing the consequences of such inaction, can satisfy the intent element under aiding and abetting, if the defendant had some interest in the successful accomplishment of the crime being committed.

3. United States v. Local 560 of International Brotherhood, 780 F.2d 267 (3d Cir. 1985), aff'g, 581 F. Supp. 279 (D.N.J. 1984).

The Third Circuit affirmed the district court's decision enjoining certain defendants from future contacts with Local 560 and removing current members of the Executive Board and dissolved the stay pending appeal of the above and made the following evidentiary rulings: (1) the district court abused its discretion by admitting into evidence certain newspaper and magazine articles, spanning a period of twenty years, and FBI testimony concerning a survey offered to prove that the Local 560 membership feared their union leadership, because the Government failed to establish that members of Local 560 actually read the articles in question (only one witness testified that he had ever read anything in the papers about the Provenzano Group), but found the error harmless in light of independent testimony to support the district judge's finding that the Provenzano Group and Executive Board had extorted LMRDA rights of a substantial number of Local 560 members; (2) the failure of the Government to establish a scientific basis for its proof and FBI "survey," consisting of interviews with Local 560 members known to be opposed to the Provenzano Group and purporting to show that several current and former Executive Board members had a reputation for violence and economic retribution, went

to its weight, not its admissibility; and (3) "preponderance of the evidence" is the standard of proof to be applied in a Government civil RICO action.

The Third Circuit further held that: union members' intangible property right to democratic participation in the affairs of the union is "property" within the meaning of the Hobbs Act, and that 29 U.S.C. § 530 is not the exclusive sanction for criminal violations of union member rights and that the criminal standard for aiding and abetting applies to government civil RICO charges. The Third Circuit also upheld the district court's ruling that the Executive Board defendants aided in extorting member's rights to union democracy by: (1) making certain appointments and reappointments of persons with criminal records or propensity for violence to union officers; (2) failing to remove certain appointees from office; (3) spending union assets for Anthony Provenzano; (4) permitting access to Local 560's offices by known or reputed criminals; and (5) being recklessly indifferent to the above-mentioned systematic misconduct by follow incumbent officers. Id. at 283.

The Third Circuit also held that the district court's injunction removing temporarily the Executive Board and replacing it with a trustee fell within the broad remedial powers of "divestiture" and "reasonable restrictions" permitted under Section 1962(a); Id. at 295-96 and n.39.

The Third Circuit also held at the district court correctly found the Provenzano Group to be a "person," and Local 560 the "enterprise" in which the Provenzano Group acquired an interest for purposes of Section 1962(b), and that under Section 1962(c), the named Provenzano Group defendants--as individuals--were "persons" and the Provenzano Group, as a separate entity, represented an "enterprise." The Third Circuit found that even though the district court took a somewhat different view than that presented in the complaint, the defendants had notice of this alternative theory, and it was litigated with the implied consent of the defendants. Furthermore, the Third Circuit reasoned that the complaint specifically charged that the Provenzano Group defendants "associated together in fact as an enterprise (the Provenzano Group) within the meaning of Section 1961," that ample evidence supported the district's court's factual conclusion that the Provenzano Group was an ongoing enterprise, that the district court's findings of individual and vicarious liability for acts of coconspiractors fully supported its ultimate holding that individual Provenzano Group associates ("persons" within the meaning of RICO) violated both Section 1962 (b) and (c), thereby obviating the need for the Third Circuit to rely on the finding of an ongoing Provenzano Group. Id. at 294-95.

The Third Circuit also concluded that the district court's findings of liability on the part of each Provenzano Group defendant supported liability under the Government's original theory--that is, Local 560 was the relevant enterprise--and there was no doubt that the district court found in substance that these individual defendants violated Section 1962(c) by conducting the affairs of Local 560, undoubtedly a Section 1961(4) enterprise, through a pattern of racketeering activity. The Third Circuit concluded that the term "Provenzano Group" was used by the district court as a simple designation for the collective defendants--a conspiracy of seven identifiable, culpable individuals--and was not intended to represent a "person" within the meaning of Section 1962(b) and these individuals, not the Provenzano Group as a separate entity, had been identified as "persons" under Section 1962(b). Id. at 294-95.

4. United States v. Sciarra, 851 F.2d 621 (3d Cir. 1988).

The Government sought information from Sciarra, Sheridan, and former defendant Stanley Jaronko, who were non-parties, regarding Local 560's operation, which the

Government believed would form the basis for additional relief to prevent future racketeering activities, domination and exploitation of Local 560.

The Third Circuit ruled as follows: (1) non-party witnesses may obtain appellate review of a discovery order without first being held in contempt if there is no underlying judicial action; (2) Sciarra and Sheridan were non-parties since they were no longer parties to the original action, no subsequent actions had been instituted against them, and the Government sought additional information related to continued racketeering activities in the union; (3) the ongoing maintenance and protection of the trusteeship remained an action for purposes of Rule 30(a), Fed.R.Civ.P. and that the Government remained a party within the meaning of the Rule to take subsequent investigative activities necessary to effectuate the objectives of the 1984 judgment; and (4) the RICO statute empowers district courts to compel non-parties to submit to depositions deemed necessary to protect and maintain the trusteeship--even in the absence of a criminal or civil proceeding.

The district court also addressed, apparently for the first time in any reported decision, whether 28 U.S.C. § 455 confers standing upon non-party witnesses who have not been adjudged in contempt to challenge the partiality of a federal judge. The court held that they lacked standing.

5. United States v. Local 560, I.B.T. v. Michael Sciarra, Joseph Sheridan, 694 F. Supp. 1158 (D.N.J.), aff'd, 865 F.2d 252 (3d Cir. 1988) (Table).

The United States attempted to modify and extend equitable relief of the original Judgment Order, entered March 16, 1984, by rejoining Michael Sciarra and Joseph Sheridan as party defendants and by enjoining them from further participation in the affairs of Local 560. The original order, in part, removed from office the entire Executive Board of Local 560, of which Sciarra and Sheridan were members, and imposed a trusteeship, but did not become effective until after the district court's order was affirmed and *certiorari* was denied. On June 23, 1986, two court-appointed trustees assumed the administration and management of Local 560. The Government alleged that in the time between the 1984 order, the May 1986 denial of *certiorari* by the Supreme Court, and the June 23, 1986 implementation of the trusteeship, Sciarra and Sheridan, in spite of the district court's orders, failed to renounce participation in the racketeering conspiracy and acted instead to perpetuate the control of the Genovese LCN Family over Local 560. Three taped recordings of conversations in November and December of 1984 between members of the Genovese LCN Family established that the group intended to maintain control over Local 560 during the pendency of the appeal, during the trusteeship, and thereafter. Of immediate concern was their plan to regain control of Local 560 in the November 1988 election of officers and to thereafter exercise control through Sciarra and Sheridan.

Preliminarily, the district court ruled that Sciarra and Sheridan, who were no longer parties to the original suit, could not be rejoined as the Government requested, but were subject to the Government's request by virtue of Fed. R. Civ. P. 15(a) and (d), permitting the Government to supplement and amend the complaint on the underlying action on the basis of new facts. The court enjoined Sciarra and Sheridan from running for union office in the forthcoming election until a hearing could be held to determine whether additional relief was required.

In addition, the district court ruled as follows: (1) the Government's request was not barred by the doctrines of res judicata or collateral estoppel; (2) 29 U.S.C. § 504 was not the exclusive means by which a court can bar a person from holding union office; (3) the depositions of Sciarra and Sheridan were not tainted by Judge Ackerman's disqualification and could be used

in the instant proceeding; and (4) the rule of United States v. McNally, 483 U.S. 350 (1987), should not be extended to Hobbs Act cases, thereby rejecting defendants' claim that McNally undermines the trusteeship, and holding that extortion of teamsters' rights to democratic participation in the union constituted a deprivation of union members' property rights covered by the Hobbs Act.

6. United States v. Local 560 (I.B.T.), 736 F. Supp. 601 (D.N.J. 1990), aff'd, 974 F.2d 315 (3d Cir. 1992).

In earlier phases of this litigation, the district court found at trial that Michael Sciarra, a member of Local 560's Executive Board, had violated RICO, and the court removed the entire Executive Board, including Sciarra, and imposed a trusteeship. In 1988, the court-appointed trustee scheduled an election for officers of Local 560 and its Executive Board. Following an evidentiary hearing, the district court granted the Government's motion for a preliminary injunction, enjoining Sciarra from running for office in that election and from holding any position of trust within Local 560 or its benefit plan system. The evidence adduced at the hearing established that Sciarra, through his position as business agent for Local 560, was asserting de facto control over the union, which was inconsistent with the purposes of the earlier injunction removing Sciarra from Local 560's Executive Board.

7. United States v. Local 560 (I.B.T.) and Michael Sciarra, 754 F. Supp. 395 (D.N.J. 1991), aff'd, 974 F.2d 315 (3d Cir. 1992).

The district court in United States v. Local 560 (I.B.T.), 694 F. Supp. 1158 (D.N.J. 1988), issued a Judgment Order on March 16, 1984, that removed the Executive Board including Michael Sciarra and barred Michael Sciarra and Joseph Sheridan, former officers and Executive Board members of Local 560, from running for office in upcoming court-supervised elections. However, the Teamsters for Liberty party circumvented the court's order by substituting as its candidates Sciarra's brother and Sheridan's nephew, who were elected to the Executive Board, as were its other candidates. Thereafter, the new Executive Board appointed Michael Sciarra and Joseph Sheridan to fill business agent positions. The district court denied the Government's initial application to have the two barred from any appointed position in Local 560, but directed the Trustee to continue monitoring the Union's management. Sheridan eventually resigned and agreed to no longer participate in the affairs of Local 560.

On February 6, 1990, the Government again moved to bar Sciarra from holding any position in the Union. After another hearing, the district court concluded that Sciarra had become the de facto President of Local 560 and permanently enjoined him from holding any position of trust with the union. The court also found that since the original order in 1984, the Genovese LCN Family had used Sciarra to regain control of Local 560 and that without Sciarra's removal, he would continue to control Local 560 on behalf of the Genovese LCN Family.

The district court also rejected Sciarra's argument that "to succeed the government must prove a new RICO offense based on conduct which occurred after" the district court's March 16, 1984, Judgment Order removing Michael Sciarra from the Executive Board. Id. at 403. The district court reasoned that "[t]his is not a new case, beginning with a clean slate. Rather, it is a facet of the original case. . . ." Id. In so ruling, the district court rejected Sciarra's claim that a permanent injunction prevented him from pursuing his only means of livelihood in violation of the Fifth Amendment, and found that under Section 1964 and United States v. Local 560, 780 F.2d 267 (3d 1985), such relief was proper and constitutional, and, the district court found that a permanent injunction was a necessary and reasonable restriction within the meaning of 18 U.S.C. § 1964(a).

8. United States v. Local 560 (I.B.T.), 974 F.2d 315 (3d Cir. 1992), aff'g, 754 F. Supp. 395 (D. N.J. 1991).

The Third Circuit's ruling included the following matters: (1) the evidence was sufficient to establish that Michael Sciarra was controlled by the Genovese LCN Family and to support the issuance of the injunction against Michael Sciarra that modified an earlier injunction, and that the government was not required to prove a new violation of 18 U.S.C. § 1962(c) that occurred after the entry of the March 1984 injunction; (2) the required burden of proof was a preponderance of the evidence; (3) Local 560 had standing to assert that the injunction violated its members' rights under the First Amendment and the LMRDA; (4) that the restrictions on union members' exercise of their First Amendment rights were justified by a compelling government interest in the eradication of organized crime from labor unions and that the injunction was sufficiently narrowly tailored to pass constitutional scrutiny; and (5) that the injunction did not violate union members' rights under the LMRDA.

2. LOCAL 6A, CEMENT AND CONCRETE WORKERS

A. CASE NAME:

United States v. Local 6A, Cement and Concrete Workers, Laborers International Union of North America (LIUNA), et al., Civil Action No. 86 Civ. 4819, United States District Court for the Southern District of New York. Complaint filed June 19, 1986, and amended complaints filed on July 21, 1986 and January 15, 1987, respectively.

B. DEFENDANTS:

The complaint named thirty-two defendants, separated into five different classifications. Two of the classes of defendants were labor union entities, LIUNA Local 6A (Local 6A) and the District Council of Cement and Concrete Workers (District Council), which consisted of four LIUNA local unions, Local 6A, Local 18A, Local 20, and Local 1175, all located in the New York City area. The next two classes of defendants were the respective Executive Boards of Local 6A and the District Council and their individual members numbering ten from Local 6A and twelve from the District Council. The final class of defendants was the Colombo Family of La Cosa Nostra (LCN) and four of its alleged members: Carmine Persico, the boss, Gennaro Langella, the acting boss while Persico was in prison, Dominic Montemarano, a capo, and Ralph Scopo, a member who was business manager of the District Council and, at various times, an employee of Local 6A.

C. SUMMARY OF THE COMPLAINT:

The alleged RICO enterprise consisted of an association-in-fact of Local 6A and the District Council.

The complaint alleged that the Colombo LCN Family exercised control over and influenced the decisions of the Executive Boards of Local 6A and the District Council, so as to make them captive labor organizations. The Colombo LCN Family allegedly used their control of these union entities to extort cash payments from construction companies based upon an

exploitation of the construction company owners' fear of economic harm resulting from threats of labor unrest.

The complaint set forth four claims for relief: two are based upon a claim that the defendants conducted the affairs of the enterprise through a pattern of racketeering activity, and a conspiracy to do so, in violation of 18 U.S.C. §§ 1962 (c) and (d). The alleged pattern of racketeering activity consisted of multiple acts of extortion, in violation of 18 U.S.C. § 1951 and some of the same conduct constituting Taft-Hartley violations, in violation of 29 U.S.C. § 186(b). Specifically, the first two claims for relief in the complaint alleged that the defendants extorted payments from various construction companies that ranged up to one percent or more of the amount of each concrete pouring contract. Pursuant to the scheme, defendants allegedly rigged the awarding of concrete pouring contracts and enforced the rules of the scheme by threatening disobedient contractors with labor problems, stoppage of concrete deliveries, and other punishment. The complaint also alleged several acts of embezzlement of labor union funds, in violation of 29 U.S.C. § 501 (c). Fourteen of the defendants, including all of the Colombo LCN Family defendants and ten of the individual members of the two Executive Boards, were charged with participating in this pattern of racketeering activity.

The other two claims for relief in the complaint were the obtaining of control of the enterprise through a pattern of racketeering activity and a conspiracy to do so, in violation of 18 U.S.C. §§ 1962 (b) and (d). The central claim was that the Colombo LCN Family defendants, aided and abetted by some of the union official defendants, violated the Hobbs Act, 18 U.S.C. § 1951, by extorting the members of Local 6A and the District Council of their rights to free speech and participation in union affairs as guaranteed by the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 411. The racketeering act based on this so-called intangible property right extortion theory specifically alleged an economic loss to the labor organizations constituting the enterprise and, therefore, its members. The alleged loss was a

severance payment of $200,000.00 (which was the entire corpus of the District Council's severance fund) to Ralph Scopo after he was indicted and resigned his positions in the union.

The complaint incorporated two indictments by reference, which were then pending in the United States District Court for the Southern District of New York. (United States v. Carmine Persico, et al., No 84 Cr. 809, the so-called "Colombo LCN Family case," and United States v. Anthony Salerno, et al., No. 85 Cr. 139 (RO), the so-called "Commission case.").

D. RELIEF SOUGHT:

The relief sought in this case included a demand for a preliminary injunction which would do the following: (1) enjoin the Colombo LCN Family defendants from participating in any way in the affairs of Local 6A or any affiliated organization, employee, officer, or benefit plan; (2) enjoin and restrain the Executive Board of Local 6A and its individual members from taking any action on behalf of the Local; (3) enjoin and restrain the Executive Board of the District Council and its individual members from taking any action on behalf of the District Council; (4) appoint a trustee, pendente lite, to discharge all of the duties of the Executive Board of Local 6A and the District Council; (5) enjoin and restrain the members, officers and employees of Local 6A, the District Council and of any affiliated benefit plan from taking any action which would interfere with the trustee in the discharge of his duties; (6) appoint one or more trustees, pendente lite, to administer any benefit plan found to have been improperly controlled or influenced by any of the individual defendants; and (7) to grant such other relief as may be necessary and proper in order to prevent, pendente lite, continuing violations of RICO with respect to Local 6A or the District Council.

The complaint also sought that following a report by the trustee, elections for officers and officials of Local 6A and the District Council be held, and that these elections be structured in such a way as to prevent intimidation of union members in the exercise of their rights.

The complaint further sought a permanent injunction barring all the individual defendants and all persons in active concert or participation with them from having anything to do with the

affairs of either Local 6A or the District Council, with any officer, agent, representative or employees of Local 6A, the District Council or any other labor organizations, about any matter which relates directly or indirectly to the affairs of Local 6A, the District Council or any other labor organization, and from owning, operating or participating in any way in, or profiting from, any concrete construction business in the Southern District of New York or elsewhere. Finally, the Government sought that the district court grant such other relief as it finds to be just and proper.

E. OUTCOME OF THE CASE:

1. On September 30, 1986, the district court granted the Government's request for a preliminary injunction as to those defendants charged in the Persico indictment. See opinion below in Section F (1).

2. On March 18, 1987, the Government and Local 6A and the District Council and their executive boards entered into a Consent Decree that included the following provisions: Various defendants were permanently enjoined from seeking or holding any position as an officer, agent, representative, employee or laborer of Local 6A, the District Council, LIUNA or any other local that is or becomes a part of LIUNA, from attending any meeting or voting in any election of the District Council, LIUNA or any of its constitutional locals, and from participating in the control, management, governance, administration, internal operations or affairs of the District Council, LIUNA or any of its constituent locals. Several defendants were permanently enjoined from engaging in some of the above listed activities. Several defendants were allowed to remain as officers of Local 6A and/or the District Council subject to the powers of the court-appointed trustees, described below.

The Consent Decree provided that the district court shall appoint a Trustee to oversee the operations of Local 6A and the District Council, whose authority included the following: (1) the authority, subject to review by the district court, to remove any officer, agent, representative or employee of Local 6A or the District Council for engaging in any act of

racketeering or malfeasance, knowingly associating with any member of the La Cosa Nostra or any other organized crime group, or for violating any provision of the Consent Decree; (2) subject to review by the district court, to veto any expenditure, or gift or contract that the Trustee reasonably believes constitutes an act of racketeering or malfeasance; (3) to review all other proposed actions by Local 6A and the District Council; (4) to have complete access to all the books and records of Local 6A and the District Council; (5) to issue reports to the district court and/or member of Local 6A and the District Council; (6) to hold new elections for officers of Local 6A and the District Council; and (7) and to employ personnel necessary to assist the Trustee to carry out the Trustee's duties.

The compensation and expenses of the Trustee were to be paid by Local 6A and the District Council.

3. On April 23, 1987, the district court entered summary judgement against the Colombo LCN family defendants, enjoining them from participating in any manner in the affairs of either Local 6A or the District Council.

F. <u>LEADING COURT DECISOINS:</u>

1. <u>United States v. Local 6A, Cement & Concrete Workers</u>, 663 F. Supp. 192 (S.D.N.Y. 1986).

The district court held that the Government did not impermissibly delay its request for preliminary relief even though a conviction upon which the request rested had been entered more than three years prior to the filing of the complaint because the case was virtually unprecedented and was unique. Second, the district court also held that there was no need for a hearing on the request for preliminary relief even though some facts were in dispute because the Government had demonstrated the need for expeditious action and had based its claim upon a prior criminal conviction and consequently those convicted defendants were collaterally estopped from challenging the acts underlying their convictions. The district court also noted that even though some of the defendants were not parties to that earlier criminal action, the court could rely on evidence produced in that criminal case in considering whether preliminary relief was warranted.

2. <u>United States v. Local 6A, Cement & Concrete Workers (Appeal of Madera)</u>, 832 F. Supp 674 (S.D.N.Y. 1993).

This case involved the appeal of an order of the Trustee appointed by the district court pursuant to the Consent Decree which suspended Thomas Madera as President of the District Council and trustee of the District Council fringe benefit funds based upon conduct occurring after the entry of the Consent Decree.

The Trustee found that Madera had committed three acts of "malfeasance," which justified Madera's temporary removal from his position. First, Madera had failed to report, or respond forthrightly to the Trustee's inquiry concerning an embezzlement of slightly more that $5,000.00 of fees paid by new union members by a clerical employee of the District Council. Madera had fired the clerical employee upon learning of the embezzlement, but had concealed the circumstances of the employee's departure from the District Council from the Trustee.

Second, the Trustee found that Madera had influenced the Board of Trustees to redirect money from the Legal Services Fund to an Equitable Retirement Investment Account (RIA) on which Madera's son received a commission. The Trustee had found that this constituted a party-in-interest transaction within the meaning of ERISA.

Third, Madera, without the approval of the District Council Executive Board, caused money from the dues escrow account maintained by the District Council to be invested in the RIA sold by Madera's son. The Trustee found that this was a wilful violation of the District Council constitution which commits such decisions to a vote of the Executive Board.

The district court ruled that these three acts of malfeasance violated Madera's duty of fair representation to the members of the union; and that both the Consent Decree and various provisions of law, including LMRDA and RICO, contemplate a means of immediate intervention in the operations of a labor organization where necessary to prevent the influence of racketeering in the affairs of the labor organization.

The district court also held, based on United States v. International Brotherhood of Teamsters, 970 F. 2d. 1132, 1137 (2d Cir. 1992), that the decision of the court-appointed Trustee is entitled to great deference. Applying this standard, the district court ruled that its review was limited to whether the determination of the Trustee was arbitrary and capricious.

The district court also noted that the Trustee had exercised proper restraint in allowing Madera to remain in office for a time after learning about the clerical embezzlement incident and by allowing Madera to run for union office on two occasions while the Trustee had Madera's conduct under investigation. The court said that a precipitous denial of a right to run for union office would constitute an infringement on the sovereignty of the members of the union. The court ruled that the doctrine of laches did not bar the Trustee's final action because no prejudice was shown to have affected Madera.

Finally, the district court upheld the ruling of the Trustee to allow Madera to apply to the court for reinstatement to union office six months after the entry of the decree. The court noted that after this opinion the Trustee's term had expired and the Trustee was relieved of all further duties.

3. BONANNO FAMILY CASE

A. CASE NAME:

United States v. The Bonanno Organized Crime Family of La Cosa Nostra, Philip Rastelli, et al. , No. CV-87-2974, United States District Court for the Eastern District of New York. Complaint filed August 25, 1987, Second Verified Complaint filed April 19, 1988, and Third Verified Complaint filed October 20, 1988.

B. DEFENDANTS:

The original and Second Verified Complaint named several groups of individuals as defendants in the civil RICO action, including the "Bonanno Organized Crime Family of La Cosa Nostra." In the Third Verified Complaint, the remaining defendants in the action consisted of: (1) alleged members of the Bonanno Organized Crime LCN Family including: Philip Rastelli (Boss of Bonanno Family), Joseph Massino (Capo), Anthony Spero (Consigliere), Louis Attanasio (Capo), Alfred Embarrato (Capo), Gabriel Infanti (Capo), Frank Lino (Capo), Nicholas Marangello (Capo), Anthony Riela (Soldier), Michael Sabella (Capo/Soldier), Anthony Graziano (Soldier/Made Member), Benjamin Ruggiero (Soldier/Made Member); and William Rodini (Associate of Bonanno/DeCavalcante LCN families; (2) Officers of the Executive Board of the International Brotherhood of Teamsters Local 814 Van Drivers, Packers and Furniture Handlers, Warehousemen's and Appliance Home Delivery union (Local 814) including: Ignatius Bracco (President), James Vincent Bracco (former President and alleged LCN associate), Vito Gentile (Secretary-Treasurer); and (3) Local 814 and various components of Local 814, the Executive Board, the Union Welfare Fund, Union Pension Fund and the Union Annuity Fund.

C. SUMMARY OF THE COMPLAINT:

The complaint alleged two enterprises: (1) the Bonanno Organized Crime Family and (2) an enterprise consisting of Local 814, its Executive Board, and its employee benefit funds.

The third complaint alleged a total of 327 racketeering acts[2], including the following: (1) six acts involving illegal gambling and three acts of narcotics distribution conducted by members and associates of the Bonanno LCN Family; (2) three acts involving, separately, trafficking in untaxed contraband cigarettes, theft from interstate shipments, and robbery by members and associates of the Bonanno LCN Family; and (3) numerous acts involving the collections of unlawful debts, using extortionate means to collect debts and other acts of extorting money from various persons and businesses by members and associates of the Bonanno LCN Family.

The complaint charged various officers and employees of Local 814 and its related benefit funds and members and associates of the Bonanno LCN Family with 209 racketeering acts that had been charged in an indictment against those defendants which led to their convictions on those charges.[3] Those racketeering acts involved charges that the LCN members and corrupt union officer defendants used their control over Local 814 to do the following: (1) extort payoffs from employers in the moving and storage industry in the New York City area in exchange for labor peace and relaxed enforcement of collective bargaining agreements, in violation of 18 U.S.C. § 1951 and 29 U.S.C. § 186(b)(1); (2) receive payoffs from employers to influence the decisions and operation of Local 814's benefit funds, in violation of 18 U.S.C. § 1954; (3) commit arson to induce employers to make payoffs and otherwise comply with the demands of the conspirators; and (4) to engage in an extortionate bid rigging scheme whereby various LCN members, corrupt employers and union officials fixed bids and eliminated competition for moving and storage contracts in the New York City area.

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[2] Indictments that corresponded to some of the alleged racketeering acts were attached to the complaint.

[3] Certified copies of that indictment and judgement and commitment orders were attached to the complaint. These convictions were affirmed in United States v. Rastelli, 870 F.2d 822 (2d Cir. 1989).

The complaint also charged that various LCN figures and union officer defendants conspired to murder and murdered persons to control labor activities and also obstructed justice through intimidating witnesses.

_____The complaint set forth seventeen claims for relief alleging that the defendants acted through various associated-in-fact enterprises, including the Bonanno Family Enterprise, in violation of 18 U.S.C.§§ 1962(a)(b) and (c) to cause Local 814 to be a captive labor organization through which the defendants could infiltrate, dominate, control and exploit labor organization and victimize the moving and storage industry.

D. RELIEF SOUGHT:

The relief sought in the complaint included requests for preliminary and permanent injunctions: (1) enjoining named defendants from participating in the conduct of the affairs of the Bonanno Family and from associating together for any business or commercial purpose; (2) enjoining individual defendants and Local 814 and its components from violating racketeering acts enumerated in 18 U.S.C.§ 1961, from participating in gambling illegal businesses, and from participating in extortionate credit transactions; (3) enjoining defendants from participating in any of the affairs of Local 814 and its welfare funds or any other labor organization; (4) that the district court retain jurisdiction over the Consent Decree and to oversee the affairs of Local 814 and its benefit funds; (5) that the district court supervise general elections run by court-appointed Trustees appointed pursuant to any Consent Decree; (6) enjoining defendants from transferring interest in certain businesses and appointing receivers to oversee certain businesses; (7) that the district court award monetary damages against named defendants; (8) that the district court order disgorgement of all defendants' proceeds of violations; (9) ordering divestiture of defendants' interests in certain properties acquired by various defendants with income and proceeds derived from racketeering activities and collections of unlawful debts; (10) ordering forfeiture of specified businesses, properties and legal entities to the United States; and (11) and ordering such

other relief as may be necessary and appropriate to prevent and restrain future violations, plus award the United States the costs of the suit and attorneys fees.

E. OUTCOME OF THE CASE:

1. On March 24, 1988, the treble damages claims by the Government and the suit against the Bonanno LCN family and many of the claims against its members were dismissed by the district court. See United States v. Bonanno Organized Crime Family of La Cosa Nostra, et al., 683 F. Supp 1411 (E.D.N.Y. 1988), aff'd, 879 F. 2d 20 (2d Cir. 1989).

2. On October 9, 1987, the district court entered a Consent Decree with respect to Local 814, its Executive Board and two members of the Executive Board. This Consent Decree generally granted injunctive relief against these defendants. The injunctive relief contained the following provisions: the immediate resignation of the entire Executive Board; and a five year ban on, involvement in the affairs of any labor union, except mere membership, for Ignatius Bracco, the President and Vito Gentile, the Vice President.

The Consent Decree designated a five member Interim Executive Board; directed an election of officers to be held no later that December 15, 1988, in which any qualified person other than Bracco and Gentile could stand as candidates; and, established a grievance committee to restore union democracy.

The Consent Decree also appointed a Trustee to oversee the affairs of Local 814 and granted him broad powers including the following:

a. To participate fully in the day-to-day activities, meetings and discussions of the Interim Executive Board and Interim Board of Trustees.

b. To have complete and unfettered access to all books, records, files accounts and correspondence of Local 814, the Local 814 Executive Board and Local 814 Funds.

c. In the event that any vote taken by the Interim Executive Board results in a tie, to cast the deciding vote.

d. In the event that the court-appointed Trustee discovers any evidence of corruption within Local 814, the Local 814 Executive Board or the Local 814 Funds, to petition the district court to grant to the court-appointed Trustee such additional powers as the court-appointed Trustee deems necessary to remove such corruption or to seek from the Court such remedies or relief the court-appointed Trustee deems necessary. For purposes of the Consent Decree "corruption" means bribery, embezzlement, extortion, loansharking, any criminal Taft-Hartley or Hobbs Act violations, bid rigging, or domination, control or influence by the Bonanno Organized Crime Family of La Cosa Nostra, any other Organized Crime Family or other organized crime element.

e. To petition the district court to enjoin any expenditure in excess of $5,000 upon a finding that such expenditure was arbitrary or capricious.

f. To obtain an accounting of the assets of Local 814 and the Local 814 Funds.

g. To seek recovery of any and all assets of Local 814 and the Local 814 Funds which may have been unlawfully misappropriated.

h. To withhold to the extent permitted by law the payment of any and all funds, salaries or benefits of whatever kind or description from any claimant who has defrauded or misappropriating assets of Local 814 or the Local 814 Funds.

i. To expend the funds of Local 814 and the Local 814 Funds for all expenses which are reasonable and necessary in order to implement this agreement.

j. To apply to the district court for such assistance as it deems necessary and appropriate to carry out the intent of this agreement.

k. To conduct a study of the job referral system utilized by Local 814 to determine whether job referrals are made under the Local 814 collective bargaining agreement and are made through the official referral hall.

l. To recommend to the Interim Executive Board the removal from his or her position of any officer, supervisor, agent, representative or employee of Local 814 or the Local 814 Funds upon a determination that such person has engaged in conduct which constitutes corruption or who is derelict in his or her duties as set forth in the Local 814 Constitution and Bylaws, provided that the employment status of current Local 814 employees will not be affected by this agreement other than in accordance with this provision. In the event that the Interim Executive Board does not approve the recommendation of removal, the court-appointed Trustee has the right to petition the district court for removal of such individual.

m. In the event that a vacancy occurs in the Interim Executive Board, to fill such vacancy from the recommendations made by the remaining Interim Executive Board member, if any.

n. To approve of the hiring of any business agent or employee of Local 814, which consent shall not be unreasonably withheld.

F. LEADING COURT DECISIONS:

1. United States v. Bonanno Oganized Crime Family of La Cosa Nostra, 119 F.R.D. 625 (E.D.N.Y. 1988).

The Government applied for review of a United States Magistrate's Order which granted a motion by the defendant Spero for a protective order to preclude production of Spero's income tax returns. The district court held that the Magistrate had committed clear error in holding Spero's tax returns to be protected from discovery because such a request had never been presented to the Magistrate. The court further ruled that even if such a request had been presented to the Magistrate, it should not have been granted because tax returns are subject to discovery even though judicial policy directs caution when ordering the production of such returns.

2. United States v. Bonanno Organized Crime Family of La Cosa Nostra, et al., 683 F. Supp. 1411 (E.D.N.Y. 1988), aff'd,879 F.2d 20 (2d Cir. 1989).

This opinion is the district court's ruling on the defendants' motions to dismiss the complaint, for a more definite statement, and to strike redundant, immaterial or scandalous matter.

The district court held the following: (1) that Teamsters Union Local 814, its Executive Board, and its funds collectively constituted an association-in-fact "enterprise" for purposes of a RICO suit; (2) that the allegations in a civil RICO complaint that individual and union defendants participated in the conduct of an organized crime family's affairs and that the organized crime family, along with the individual defendants, infiltrated and exploited the enterprise did not erroneously assert that the organized crime family fulfilled the role of a RICO "enterprise" and a "person" who had violated RICO; (3) that Rule 9(b), Fed.R.Civ.P., requiring that fraud be pleaded with particularity, did not apply to RICO claims based on predicate acts not "sounding" in fraud; (4) that broad allegations that each defendant had aided and abetted the commission of all of the predicate act were insufficient to satisfy RICO's requirement that at least two acts of racketeering per defendant be alleged; (5) that general references that a defendant was a member of an organized crime family was insufficient to attribute a predicate act to the defendant; (6) that general allegations that certain defendants had violated New York gambling laws was insufficient to plead a racketeering act where New York law included both felony and misdemeanor offenses; (7) that an allegation that a defendant had been convicted of violating 18 U.S.C. § 1951 was sufficient to plead a racketeering act; (8) that the court was entitled to draw adverse inferences from a defendant's assertion of his Fifth Amendment privilege; (9) that disgorgement was an available equitable remedy under civil RICO and that the purpose of "disgorgement" was to prevent unjust enrichment regardless of whether any victims would be entitled to damages; (10) that an organized crime family which existed only as an association in fact was not a "person" under RICO and hence could not be a RICO defendant; and; (11) that the United States lacked standing to sue for treble damages to its business or property under RICO; (12) allegation that a defendant was convicted of a specified offense set forth in attached exhibits of the indictment and judgement and commitment order was sufficient to plead a predicate act for a civil RICO claim; (13) motion to dismiss on grounds that injunctive relief was unconstitutional was premature prior to the Government's proof in the civil RICO action; (14) that the granting of injunction and other equitable relief did not necessarily render the appointment of a receiver unnecessary; (15) allegations that divestiture would deprive innocent third parties of their property interests were premature prior to establishing defendants' wrong doing at trial; and (16) the doctrine of laches does not apply to the Government's civil RICO suit seeking equitable relief such as injunctions and divestiture.

3. United States v. Bonanno Organized Crime Family La Cosa Nostra, 695 F. Supp. 1426 (E.D.N.Y. 1988).

This case involved the district court's ruling on the motion of various of the individual defendants to dismiss the second amended complaint as to them. The district court held: (1) that predicate acts which were alleged to have violated a statute which was enacted subsequent to the time the alleged conduct occurred did not constitute a "racketeering act" in a civil RICO suit; (2) that the civil four year statute of limitations and the doctrine of laches were inapplicable to the Government's equitable claims under RICO; (3) that venue was proper under the ends of justice standards set forth in 18 U.S.C. § 1965 (b); and, (4) that RICO's pattern requirement was satisfied by the allegation of at least two offenses of extortion.

4. United States v. Bonanno Organized Crime Family of La Cosa Nostra, 879 F. 2d 20 (2d Cir. 1989), aff'g, 683 F. Supp. 1411 (E.D.N.Y. 1988).

The court of appeals held that the United States was not a "person" entitled to sue for treble damages under the provisions of 18 U.S.C. § 1964 (c) and that the Bonanno LCN Family was not a "person" subject to suit under RICO.

4. FULTON FISH MARKET CASE

A. CASE NAME:

United States v. Local 359, United Seafood Workers, Smoked Fish and Cannery Union, United Food and Commercial Workers International Union, AFL-CIO, CLC, et al. Complaint No. 87 Civ. 7351 (TPG), United States District Court for the Southern District of New York. Complaint filed October 15, 1987, and amended on June 4, 1988.

B. DEFENDANTS:

The original complaint named several groups of defendants: (1) "union defendants"-i.e., Local 359, United Seafood Workers, Smoked Fish and Cannery Union, its Executive Board and certain officers of Local 359, including Anthony Cirillo, President and Dennis Faicco, Secretary-Treasurer; (2) the union welfare and pension funds-the Fulton Fish Market Welfare Fund and the Fulton Fish Market Pension Fund-and Anthony Cirillo and Dennis Faicco, in their capacities as trustees of those funds. Nina Andrew, Executive Administrator of the funds, was also named as a defendant; (3) the Genovese Organized Crime Family of La Cosa Nostra, and five members and 24 associates of the Genovese Crime Family, including Thomas Contaldo (allegedly a "capo" of the family), and the following four made soldiers, Carmine Romano, Colombo Saggese, Rosario Gange and Alfonso Malangone; and (4) the Fulton Market Employers Association and Associated Purveyors.

C. SUMMARY OF THE COMPLAINT:

The original complaint, filed on October 15, 1987, alleged that the RICO enterprise consisted of an association-in-fact comprised of "certain members of the Genovese LCN Family; the Genovese Family itself, acting through those members and associates; Local 359 and its Executive Board; and the businesses operating in or out of the Fulton Fish Market," which was referred to as the "Fulton Fish Market Enterprise." The complaint also alleged that the Genovese LCN Family had controlled the Fulton Fish Market Enterprise, and Local 359 since the 1930's and that commencing in the 1970's, Carmine Romano, an officer of Local 359, acted for the

Genovese LCN Family in controlling the Fulton Fish Market. Specifically, the complaint alleged that in 1981 Carmine Romano and Peter Romano were convicted of criminal RICO violations and given prison sentences, and that Local 359 was also convicted under RICO and was fined. The complaint alleged that, despite these criminal convictions, the influence of the Genovese LCN Family in the Fulton Fish Market continued, and that Vincent Romano succeeded his brother Carmine as the principal Genovese representative in the Market. The complaint contained various allegations of criminal activities by the Genovese LCN Family in the Fulton Fish Market-extortion, loansharking, gambling, and theft.

The complaint alleged that Local 359 is controlled by the Genovese LCN Family and that this union "is a vital part" of Genovese LCN Family's control of the Fulton Fish Market, since the union can be used to threaten employers with labor problems. It was also alleged that Anthony Cirillo was merely the "nominal" president of Local 359, and that he was handpicked by the Genovese LCN Family for this office, and that Vincent Romano was the actual head of Local 359.

Specifically, the original complaint alleged that: (1) the defendants extorted payments from businesses that used the Fulton Fish Market, including wholesalers in the Fulton Fish Market, retailers who purchased fish there and trucking firms that transported fish into the Fulton Fish Market; (2) the defendants stole merchandise from interstate shipments; (3) the defendants ran an illegal numbers gambling operation at the Fulton Fish Market; (4) the defendants through their control of Local 359 extorted payments in exchange for labor peace and relaxed enforcement of the terms of collective bargaining agreements; (5) the defendants made extortionate extensions of credit and used extortionate means to collect extensions of credit; (6) the defendant committed murder; and (7) the defendants deprived members of Local 359 of their property rights to free speech and democratic participation in internal union affairs through intimidation and threats.

On June 4, 1988, the Government filed an amended complaint directed solely against the union defendants-Local 359 and various officers, including Anthony Cirillo, President, and Dennis Faicco, Secretary-Treasurer. The amended complaint basically repeated the original complaint's allegations and alleged various types of criminal activity committed by Cirillo and Faicco, acting in conjunction with the Genovese LCN Family. The complaint also alleged that the union itself illegally received money, in violation of the Taft Hartley Act, (29 U.S.C.§1186) for which the union was convicted in 1981.

D. RELIEF SOUGHT:

The relief sought under the original complaint included the following: (1) enjoining various defendants from participating in the affairs of the Genovese LCN Family, Local 359 and its related Welfare and Pension Funds; (2) appointment of one or more trustees to discharge all duties and responsibilities of the Executive Board of Local 359; (3) enjoining officers and employees of Local 359 and its related Welfare and Pension Funds from interfering with the court-appointed trustees; (4) ordering the court-appointed trustees to conduct free elections of the officers and Executive Board of Local 359; (5) appointing an administrator to oversee the operation of the Fulton Fish Market and to prevent racketeering acts there; (6) enjoining the Genovese LCN Family and its members charged as defendants from participating in or having any dealings with Local 359, its officers and employees and its related Pension and Welfare Funds and the Fulton Fish Market; and (7) that the district court award the United States the costs of the suit and such other and further relief as may be necessary and appropriate.

The amended complaint requested, as did the original complaint, that certain officers of Local 359 be removed, that a Trustee be appointed for the union and that election of new officers be held sometime in the future.

E. OUTCOME OF THE CASE:

1. On December 1, 1987, the United States stipulated to dismiss the complaint as to the Welfare Fund, the Pension Fund and against Nina Andrew and Anthony Cirillo and Dennis Faicco in their capacity as trustees of the funds.

2. On April 15, 1988, a default judgment was entered against the Genovese LCN Family and three of its alleged members and associates, Thomas Contaldo, Colombo Saggese and Robert Gillio. These defendants were enjoined from having any dealings with Local 359 and from having any business dealings in the Fulton Fish Market or in any commercial seafood business in the Southern District of New York or elsewhere.

3. On April 15, 1988, 25 other individual defendants named as being connected with the Genovese LCN Family entered into a consent judgment which enjoined them from having dealings with Local 359, but did not enjoin them from engaging in business in the Fulton Fish Market. All those defendants were made subject to injunctive provisions forbidding extortion, gambling and loansharking, and also forbidding them from dealing with Local 359 in any illegal manner. The consent judgment provided for the appointment of an administrator for the Fulton Fish Market whose duty it is to ensure compliance with the consent judgment and the default judgment.

4. The action was dismissed as to the Fulton Market Employers Association and Associated Purveyors by order dated July 6, 1988, consented to by the Government.

5. On January 29, 1989, the district court dismissed the complaint against defendant Cirillo and Faicco.

6. On appeal November 15, 1989, the Second Circuit remanded the case for reconsideration on the Taft-Hartley charges and affirmed the dismissal of the complaint in other respects. (see Section F below).

7. On remand, the parties agreed by stipulation that when the Administrator's term is completed, the Government would dismiss the pending charges against Cirillo and Faico.

F. LEADING COURT DECISIONS:

1. United States v. Local 359, 705 F. Supp. 894 (S.D.N.Y.), aff'd in part and remanded in part, 889 F.2d 1232 (2d Cir. 1989).

This opinion constitutes the district court's findings of fact and conclusions of law following the non-jury trial of the union defendants, Anthony Cirillo, President of Local 359, and Dennis Faicco, Secretary-Treasurer of Local 359, who were the only remaining defendants. The district court found that "the Genovese Crime Family was at one time in control of Local 359." Id. at 900. However, the district court found insufficient evidence to support the wire fraud charges against Cirillo which were premised on telephone conversation between Cirillo and Vincent Romano, an employer, about the status of ongoing negotiations for a new collective bargaining agreement. The district court reasoned that neither Romano nor the Genovese LCN Family directed or influenced Cirillo in the negotiations, that the information conveyed to Romano and the Genovese Family was not confidential, and that the union members were not disadvantaged as a result of the disclosed information. Id. at 902-906.

The district court also dismissed the wire fraud charges based on Cirillo's alleged efforts to find a job at the Fulton Fish Market for Steve Melfi on the ground that there was no evidence that Cirillo played any role in obtaining the job for Melfi.

The district court further dismissed the Taft-Hartley racketeering acts (29 U.S.C. § 186(b)(1)) that alleged that Cirillo and Faicco, officers of Local 359, aided and abetted by the Genovese LCN Family, received payoffs from Fulton Fish Market employers of Local 359 members on the ground that there was no evidence that Cirillo and Faicco committed their unlawful acts on behalf of the Genovese LCN Family, or that the Genovese LCN Family was involved in these acts or received any of the funds Cirillo and Faicco obtained from the employers. Id. at 906-908.

The district court also found the evidence insufficient to support other extortion charges on a wide variety of grounds. Thus, the district court dismissed the RICO complaint against Cirillo and Faicco. Id. at 908-917.

2. United States v. Local 359, United Seafood Workers Union, 889 F.2d 1232 (2d Cir. 1989).

The Second Circuit affirmed the district court's dismissal of the RICO complaint against Cirillo and Faicco in all respects, except that it remanded for reconsideration the dismissal of the Taft-Hartley charges on the ground that the district court applied an erroneous legal standard. In that respect, the Second Circuit held that the Government was not required to prove that the Genovese LCN Family participated in, or benefited from, the Taft-Hartley offenses. The Second Circuit stated:

> We hold that Genovese involvement is irrelevant to the Taft-Hartley charges against Cirillo and Faicco. If Cirillo and Faicco committed multiple violations of the Taft-Hartley Act in conducting the union's affairs, they violated RICO whether or not the Genovese Family was involved . . .

> [W]e hold also that proof of a Taft-Hartley violation does not require a showing that the money unlawfully paid to Local 359 passed ultimately into the hands of the Genovese Family.

Id. at 1235-36

The court also stated that "we do not pass upon the ultimate question whether the injunctive relief requested by the Government should be granted". Id. at 1237.

3. United States v. Local 359 United Seafood Workers Union, 1991 WL 172962 (S.D.N.Y. August 27, 1991).

The district court granted the court-appointed Administrator's request for an order compelling several persons who were non-parties to provide testimony and to produce records on the ground that there was evidence that those non-parties were acting in concert with various defendants in activities which might constitute violations of the Consent Decree. The district court stated that "[i]t should be emphasized that the authority to appoint the Administrator emanated from the statute [RICO] not merely from the fact that certain defendants gave their consent."

4. United States v. Local 359 United Seafood Workers Union, 1991 WL 230613 (S.D.N.Y. October 24, 1991).

The district court denied several defendants' motion for an award of attorney's fees.

5. United States v. Local 359 United Seafood Workers Union, 1994 WL 38679 (S.D.N.Y. Feb. 4, 1994), aff'd,55 F.3d 64 (2d Cir. 1995).

The district court affirmed: (1) the findings of the court-appointed Administrator that several defendants violated the Consent Decree by conspiring to allocate unloading of deliveries among themselves and which companies could make deliveries to the Fulton Fish Market and (2) the imposition of fines ranging from $20,000 to $60,000.

6. United States v. Local 359 United Seafood Workers Union, 55 F.3d 64 (2d Cir. 1995).

The Second Circuit affirmed the imposition of sanctions in the above opinion, stating that "the factual findings of an administrator [appointed under a consent decree] are 'entitled to great deference'", and "that consent judgment called for district court to apply 'same standard of review applicable to review of final agency action under the Administrative Procedure Act.'" Id. at 68, *quoting*, United States v. IBT, 998 F.2d 120, 134 (2d Cir. 1993).

5. ROOFERS UNION CASE

A. CASE NAME:

United States v. Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, et al., Civil Action No. 87-7718, United States District Court for the Eastern District of Pennsylvania. Complaint filed December 2, 1987.

B. DEFENDANTS:

The complaint named fifteen defendants: two union entities and thirteen individual defendants. The two union entities were Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association (Local 30), and Residential Reroofers Local 30B, United Slate etc. (Local 30B), an affiliated labor organization. Local 30 and Local 30B are collectively referred to as "the Roofers Union." The individual defendants were all officers and/or employees of the Roofers Union.

C. SUMMARY OF THE COMPLAINT:

The complaint alleged that the enterprise consisted of the Roofers Union and its affiliated employee benefit plans. The complaint alleged that the defendants had participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity, and conspired to do so, in violation of 18 U.S.C. §§ 1962 (c) and (d), respectively. The complaint charged the defendants with fifteen violations of the Hobbs Act, 18 U.S.C. § 1951, which were allegedly committed by extorting employers into entering collective bargaining agreements with the Roofers Union and paying the defendant officers and employees. The extortion consisted of threats and acts of physical violence as well as threats of economic harm caused by labor unrest and threats of violence against persons doing business with non-union roofing companies.

The complaint also charged that the defendants collected extensions of credit by extortionate means, in violation of 18 U.S.C. § 894. The debtors primarily were contractors having collective bargaining relationships with the Roofers Union. These extortionate acts were also alleged to be violations of Pennsylvania law. Two of the defendants were charged with

derising a scheme to defraud an insurance company by filing a fraudulent claim on an automobile owned by the Roofers Union, in violation of 18 U.S.C. § 1341. Each of the individual defendants had been convicted in an earlier criminal RICO case alleging many of the same racketeering acts were are alleged in this civil case, and the complaint alleged that those defendants were collaterally estopped from contesting those charges.

Four Roofers Union officers, who were also trustees of affiliated employee benefit plans, were charged with accepting kickbacks from a law firm for retention by the union' s pre-paid legal services plan, in violation of 18 U.S.C. § 1954. These four officers also were accused in separate racketeering acts of embezzling money from this pre-paid legal services plan, in violation of 18 U.S.C. § 664.

The complaint also alleged that a wide ranging scheme to bribe public officials was carried on by the officers of the Roofers Union. Stephen Traitz, Jr., the Business Manager and principal officer of the Roofers Union, was charged with 46 separate violations of Pennsylvania laws relating to bribery by engaging in a scheme to bribe judges of the Philadelphia Court of Common Pleas. Other defendants were alleged to have participated in some of these bribes. Twenty additional Pennsylvania bribery violations were alleged to have been committed by Traitz and other officers of the Roofers Union.

D. <u>RELIEF SOUGHT:</u>

The Government sought injunctive relief that would do the following:

1. Enjoin and restrain the individual defendants, and all other persons in active concert or participation with them, from participating in any way in the affairs of the Roofers Union or any employee benefit plans with which the Roofers Union is affiliated or associated, from having any dealings, directly or indirectly, with any officer, agent, attorney or employee of the Roofers Union or its affiliated benefit plans or any other labor organization about any matter which relates directly or indirectly to the affairs of the Roofers Union, and from in any way participating

in, or profiting from, any roofing business in the Eastern District of Pennsylvania or elsewhere;

2. Enjoin and restrain the current Executive Board members and officers of the Roofers Union from taking or causing to be taken any action for or on behalf of nominal defendants Locals 30 and 30B;

3. Appoint one or more trustees, pendente lite, to discharge all duties and responsibilities of the officers and Executive Board of Local 30 and 30B, including but not limited to the following:

   a. To protect the rights of the members of Locals 30 and 30B, consistent with the provisions of Title 29 of the United States Code and the constitution and by-laws of Locals 30 and 30B;

   b. To administer and supervise the daily affairs of Locals 30 and 30B;

   c. To remove and/or appoint new employees and officials to oversee the administrative functions of Locals 30 and 30B, including but not limited to business agents, organizers, dispatchers and office personnel;

   d. To administer, conserve and obtain an accounting of the assets of Locals 30 and 30B, and any associated or affiliated employee benefit plans;

   e. To seek recovery of any and all assets of Locals 30 and 30B and any associated or affiliated employee benefit plans that may have been dissipated or otherwise misappropriated due to malfeasance, misfeasance or nonfeasance;

   f. To withhold the payment of any and all funds, salaries or benefits of whatever kind or description from any claimant who may have defrauded or seeks to defraud Locals 30 and 30B, or any associated or affiliated employee benefit plans or who otherwise has misappropriated or is about to misappropriate any assets thereof until the completion of the aforesaid

accounting and the resolution of any claims instituted against any individual or entity by or on behalf of Locals 30 and 30B, or any associated or affiliated employee benefit plan;

g. To retain legal counsel and to employ accountants, consultants and experts to assist in the proper discharge of the aforesaid duties;

h. To expend the funds of Locals 30 and 30B for all expenses which are reasonable and necessary in order to execute the mandate of the district court;

i. To apply to the district court for such assistance as may be necessary and appropriate in order to carry out the mandate of the district court; and

j. To furnish the district court with a complete report concerning the financial stability of Locals 30 and 30B, and associated or affiliated benefit plans as well as the status of the members' rights under 29 U.S.C. §§ 157 and 411 and their entitlements under the various collective bargaining agreements;

4. Enjoin and restrain the members, officers and employees of Locals 30 and 30B and the fiduciaries, employees and beneficiaries of any associated or affiliated employee benefit plan from any interference with the said trustee(s) in the execution of their duties as aforesaid;

5. Enjoin Locals 30 and 30B, and all elected or appointed officials thereof, from violating the provisions of 18 U.S.C. §§ 1962, 201, 894, 1951, 1954, and 664;

6. Grant the United States of America such further preliminary relief as may be necessary and proper in order to prevent, pendente lite, a continuation of the violations of 18 U.S.C. § 1962 involving control over and exploitation of Locals 30 and 30B by the individual defendants;

7. That, at an appropriate time following the submission and review of the Trustee(s)' report, the district court order the trustee(s), with such assistance from the Department of Labor and the Department of Justice as may be necessary or practicable, to conduct general elections to elect officers and an Executive Board of Locals 30 and 30B, respectively, said election to conform to the provisions of Title IV of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401, 481-484.

8. That, following the election, unless the pre-liminary injunction is extended upon a showing of good cause, the district court issue a permanent injunction prohibiting all of the defendants herein and all persons in active concert or participation with them from participating in or having any future dealings of any nature whatsoever, with any officer, agent, representative or employee of Locals 30 and 30B about any matter which relates directly or indirectly to the affairs of Locals 30 and 30B and from owning, operating or participating in any way in, or profiting from, any roofing business in the Eastern District of Pennsylvania or elsewhere; and

9. That the district court award the United States of America the costs of this suit, together with such other and further relief as may be necessary and appropriate to prevent of 18 U.S.C. § 1962.

E. OUTCOME OF THE CASE:

See Section F Below.

F. LEADING COURT DECISIONS:

1. United States v. Local 30, United Slate, Tile and Composition Roofers, 686 F. Supp. 1139, 1162-1174 (E.D. Pa. 1988).

Following an evidentiary hearing, the district court found that the defendants had violated RICO and imposed a " Decreeship" over the Roofers Union that included the following equitable relief over the defendants' objections:

(1) The district court barred defendants who violated RICO "from the roofing industry within the jurisdiction of Local 30/30B." Id. at 1162.

(2) The district court appointed a Chief Liaison Officer "who will serve as the principal enforcement officer of all provisions of the Decree" Id. at 1171 and "will have the authority, upon application and approval of [the District] Court, to hire such assistants and support services as will be needed to fulfill his responsibilities under the Decree." Id. at 1169.

(3) The district court ordered an audit of all accounts of Local 30/30B and any affiliated entity by a designee of the Court. Id. at 1169, 1172.

(4) The district court barred all defendants found to have violated RICO "from holding, occupying, or controlling any position of leadership or influences in respect to any matter within the jurisdiction of Local 30/30B or any of its affiliated entities" and "from engaging in employment in the roofing or related construction industries, in any capacity, within the geographical area of the jurisdiction of Local 30/30B." Id. at 1171.

(5) The district court ordered that Local 30/30B develop with the appropriate employer representative groups an industry-wide grievance/arbitration procedure for resolving contractual disputes between the union and employers, subject to the court's approval. Id. at 1172-73.

(6) The district court ordered that all face-to-face collective bargaining agreement negotiations take place under the supervision of the Court Liaison Officer. Id. at 1172-73.

(7) The district court prohibited any collective bargaining agreement from taking effect until it was approved by the Court Liaison Officer. Id. at 1173.

(8) The district court established "direct control of all matters within the jurisdiction of the union that require the expenditure of any funds of the Union or any affiliated entity for the transfer of any of its assets" and enjoined defendants "from transferring any funds, property, or interests in any assets of any kind of Local 30/30B or any of its affiliated entities, except in the ordinary course of business without the express written consent of the court." Id. at 1172.

(9) The district court ordered that the "Court Liaison Officer shall have the right, without prior notice, to have access to any records, wherever located, at the offices, locations and other property of Local 30/30B or any affiliated entity" and to copy such records. Id. at 1173.

(10) The district court required the union to "provide written notice to the court of all meetings, proceedings, or decisions providing for nominations and/or elections for offices or positions within Local 301/30B, or any affiliated entity." Id. at 1173.

(11) The district court prohibited the union and any affiliated entity and the individual defendants "in respect to any member within the jurisdiction of Local 30/30B, or any affiliated entity, from intimidating, inflicting violence, fear, or threats of personal or property damage upon any person, corporation or entity, or attempting to do so." Id. at 1174.

(12) The district court retained jurisdiction of all matters relating to the union and any affiliated entity and ordered that "[a]ll costs incurred in the administration of the Decreeship shall be borne by Local 30/30B and, where appropriate, its affiliated entities." Id.

2. United States v. Local 30, United Slate Tile and Composition Roofers, 871 F.2d 401, 404-09 (3d Cir. 1989).

The Third Circuit affirmed this equitable relief, noting that "the District Court converted the preliminary injunction into a 'final decree.'" The Third Circuit concluded that the relief granted was authorized by 18 U.S.C. § 1964(a), and that the district court did not abuse its discretion in imposing a decreeship against the Roofers Union and deciding that the ordered relief was necessary to eliminate and prevent corruption in the union. Id. at 404-09.

The court of appeals stated that under Section 1964 of RICO, [t]he district court is empowered not only to restrain but also to prevent future violations of § 1962 by ordering reorganization or even dissolution of any enterprise, as long as the court makes due provision for the rights of innocent parties." Id. at 407. The court of appeals also explained that the intrusive relief was necessary because the evidence "supports the district court's finding that the removal of the thirteen individual defendants would not have eliminated that corrupt influence from the Roofers Union." Id. at 407. Finally, the court of appeals noted that the evidence showed "that the newly elected officials are long time associates and allies of the thirteen individual defendants in this case, which indicates that corrupt influences continue to exist within the Union. . . . . [Consequently] the district court properly found a likelihood of wrongful acts continuing into the future." Id. at 409.

6. THE JOHN LONG CASE

A. CASE NAME:

United States v. John F. Long and John S. Mahoney, Complaint No. 88 Civ. 3289, United States District Court for the Southern District of New York. Complaint filed in May, 1988.

B. DEFENDANTS:

There were two defendants in this case, John F. Long, who was the Secretary-Treasurer of Local 804, International Brotherhood of Teamsters, etc. (Local 804, I.B.T.), and John S. Mahoney, who was Secretary-Treasurer of Local 808, I.B.T.

C. SUMMARY OF THE COMPLAINT:

This case alleged that the RICO enterprise was a group of individuals associated-in-fact, including the two defendants, Jesse David Hyman, Vincent Joseph Rotondo, and others. Jesse David Hyman was a dentist who had entered the business of administering pension funds associated with labor unions and had set up a company, Penvest, Inc. Rotondo was Hyman's partner in Penvest and a member of the DeCavalcante LCN Family.

The complaint alleged two claims for relief: that the defendants participated, and conspired to participate, in the affairs of the alleged enterprise through a pattern of racketeering activity. The alleged pattern of racketeering activity was the same as alleged in a parallel criminal case (Indictment No. S 87 Cr. 943 (DNE)), and consisted of a series of racketeering acts including one ERISA embezzlement, in violation of 18 U.S.C. § 664, three ERISA kickbacks, in violation of 18 USC §1954, three labor briberies, in violation of 29 U.S.C. § 186(b), one extortion affecting interstate commerce, in violation of 18 U.S.C. § 1951, one commercial bribery, in violation of New York Law, and two obstructions of justice, in violation of 18 U.S.C. § 1503. The racketeering acts were committed in connection with the purchase of benefit plan services from Penvest.

D. RELIEF SOUGHT:

The complaint requested three areas of relief: (1) that the district court permanently restrain and enjoin the defendants from having any involvement whatsoever in the affairs of their respective I.B.T. local unions; (2) that the district court enter an order requiring the defendants to disgorge all of the proceeds of their criminal activity; and (3) that the district court award costs to the United States.

E. OUTCOME OF THE CASE:

1. As stated above, this case was based on the parallel criminal case against both defendants. See Indictment No. S 87 Cr. 943 (DNE). In United States v. Long, 917 F. 2d 691 (2d Cir. 1990), the convictions obtained in that criminal case were reversed for erroneous jury instructions and admission of improper expert testimony.

2. In 1992, the defendant John S. Mahoney agreed to be permanently barred from involvement in union activities as he was ordered by the court-appointed Independent Administrator in the Government's civil RICO case against the International Brotherhood of Teamsters Union (IBT). (see Case Summary number 7 below in Appendix B). Therefore, this matter was dismissed as to Mahoney.

3. In 1983, the court-appointed Independent Administrator in the Government's civil RICO case against the IBT (see Case Summary number 7 below in Appendix B) permanently barred defendant John Long from membership in the Teamsters Union activities. The United States District Court for the Southern District of New York upheld Long's expulsion from union affairs. See Long v. Carberry, 1994 WL 163712 (S.D.N.Y. April 28, 1994); Long v. Carberry, 151 F.R.D. 240 (S.D.N.Y. Oct. 13, 1993). In light of Long's expulsion from union activities, this case was dismissed against him.

F. LEADING COURT DECISIONS:

None.

7. INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION CASE

A. CASE NAME:

United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al., Complaint No. 88 Civ. 4486 (DNE), United States District Court for the Southern District of New York. Complaint filed June 28, 1988. (IBT Case).

B. DEFENDANTS:

The complaint charged several groups of defendants:

1. The IBT International Union - - The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (IBT) and its constituent parts. The IBT had approximately 1.7 million members.

2. The Commission of La Cosa Nostra (LCN) which consisted of the Bosses and/or Acting Bosses of the five New York City La Cosa Nostra Families (Genovese, Gambino, Colombo, Bonanno and Lucchese), and various LCN members. The alleged LCN defendants included the following:

(1) Anthony Salerno - Consigliere, Acting Boss and the Boss of the Genovese Family;

(2) Matthew Ianniello - Capo in the Genovese Family;

(3) Anthony Provenzano - Capo in the Genovese Family;

(4) Nunzio Provenzano - Member of the Genovese Family;

(5) Anthony Corallo - Boss of the Lucchese Family;

(6) Salvatore Santoro - Underboss of the Lucchese Family;

(7) Christopher Furnari - Consigliere of the Lucchese Family;

(8) Frank Manzo - Capo in the Lucchese Family;

(9) Carmine Persico - Boss of the Colombo Family;

(10) Gennaro Langella - Underboss and Acting Boss of the Colombo Family;

(11) Nicholas Marangello - Underboss of the Bonanno Family;

(12) Joseph Massino - Acting Boss and/or Capo in the Bonanno Family;

(13) Anthony Ficarotta - Member of the Genovese Family;

(14) Eugene Boffa, Sr. - Associate of the Bufalino Family;

(15) Francis Sheeran - Associate of the Bufalino Family;

(16) Milton Rockman - Associate of the Genovese Family;

(17) John Tronolone - Associate of the Genovese Family;

(18) Joseph John Aiuppa - Boss of the Chicago Family;

(19) John Phillip Cerone - Underboss of the Chicago Family;

(20) Joseph Lombardo - Capo in the Chicago Family;

(21) Angelo LaPietra - Capo in the Chicago Family;

(22) Frank Balistrieri - Boss of the Milwaukee Family;

(23) Carl Angelo DeLuna - Underboss of the Kansas City Family;

(24) Carl Civella - Capo in the Kansas City Family;

(25) Anthony Thomas Civella - Capo in the Kansas City Family;

3. The General Executive Board of the IBT, which included the General President Jackie Presser, the General Secretary-Treasurer, and sixteen Vice Presidents. These officials were sued in both their individual and official capacities.

The complaint charged a total of forty-five individual defendants.

C. SUMMARY OF THE COMPLAINT:

The complaint alleged that the RICO enterprise consisted of an association-in-fact of "the Teamsters International Union and various of its Area Conferences, Joint Councils, Locals and Benefit Funds." (The Teamsters International Enterprise). Complaint at ¶ 53. The complaint also alleged four claims for relief: that the defendants acquired and maintained an interest in the Teamsters International Enterprise through a pattern of racketeering activity, and conspired to do so, in violation of 18 U.S.C. §§ 1962 (b) and 1962 (d), respectively, and that the defendants

participated in the affairs of the Teamsters International Enterprise through a pattern of racketeering activity and conspired to do so, in violation of 18 U.S.C. §§ 1962 (c) and (d), respectively. Id. at ¶¶ 54-113.

The complaint also alleged that from the 1950's to the filing of the complaint, La Cosa Nostra infiltrated, dominated, exploited and controlled the IBT through a pattern of racketeering activity and used the IBT and various of its affiliated entities to conduct racketeering activity throughout the nation. The complaint alleged that the pattern of racketeering activity included LCN's control of the IBT through: (1) fraudulent intervention in the elections of Roy Williams and Jackie Presser as General Presidents of the IBT; (2) murder, violence and fear to intimidate union membership (at least 20 murders of Teamster officers or members, including numerous persons who agreed to testify against corrupt LCN figures and union officials, including James Hoffa, former President of the IBT, numerous beatings and threats of death against others); and (3) fraudulent obtaining of property from the union's membership, including money and union members' rights to free speech and democratic participation in internal union affairs, as guaranteed by 29 U.S.C. §§ 411, 501(a), 1104 and 1106. Id. at ¶¶ 56-111.

Paragraphs 3-52 of the complaint described the defendants, including; the various entities of the IBT; La Cosa Nostra (describing the Commission which serves as the national ruling council of the LCN, the headquarters of each of the families from New York to Los Angeles and the LCN's method of operation); the LCN defendants, their position within each respective LCN Family and a synopsis of their criminal convictions; and each union defendant and the position they held in the IBT, as well as their criminal history, if any. The complaint also included a chronological history of how the LCN gained control of the IBT.

The complaint incorporated allegations from twelve criminal indictments which resulted in the convictions of various defendants affiliated with La Cosa Nostra and the IBT for various crimes involving the IBT.

As part of the alleged pattern of racketeering, the complaint alleged that from 1975 to 1988, the General Executive Board of the IBT defrauded the IBT of money and property in the form of union jobs, wages, employee benefits and benefit funds by permitting the LCN to control the leadership of the IBT, knowing it was for the economic benefit of the LCN. These acts and failures to act included the following allegations: (1) LCN influence assisted Jackie Presser and Roy Williams in becoming President of the IBT; (2) IBT Trustees relinquished authority over investment decisions to LCN controlled officers; (3) IBT Presidents steered $62.5 million Teamster Central States Pension Fund loans to an LCN backed corporation for the purchase of two Las Vegas Casinos; (4) IBT officers schemed to bribe a United States Senator to influence his actions regarding trucking deregulation; and (5) IBT officers promoted an LCN labor-leasing scheme.

The complaint, in addition, alleged that numerous acts of racketeering were committed by Jackie Presser. For example, from 1972-1976, Presser tried to prevent the criminal prosecution of the IBT General President in exchange for $10,000, and in 1975, Presser offered to pay Roy Williams in exchange for his support of a proposed loan in connection with the Tropicana Casino and Hotel in Las Vegas Nevada. During 1975-1976, Presser demanded payment of money or other things of value in the amount of $1,000, 000 in connection with the transfer of ownership of the Front Row Theater in Cleveland.

The complaint also alleged that from 1975-1984, former IBT International Vice President Salvatore Provenzano received kickbacks and defrauded various Teamster benefit funds of money and property.

The complaint also incorporated allegations from the civil RICO action, United States v. Local 560 of the IBT, Civ. No. 82-689 (District of New Jersey).[4] In that case, defendants Anthony Provenzano and Nunzio Provenzano, both members of the Genovese LCN Family, entered into consent judgments which permanently barred them from further contact with any

[4] See Civil RICO case summary number one above in Appendix B.

labor organization and ordered defendant Salvatore Provenzano removed as President of IBT Local 560. In addition, the complaint cited evidence collected by the President's Commission on Organized Crime of La Cosa Nostra's exploitation of the IBT. Among other findings, that Report described the IBT as the union "most controlled" by organized crime, stating that the leaders of the IBT "have been firmly under the influence of organized crime since the 1950's and that 'for decades organized crime has exercised substantial influence over the international union, primarily through the office of the president.'" Id. at ¶ 115.

D. RELIEF SOUGHT:

The complaint sought the following preliminary relief: (1) enjoining the named LCN defendants from participating, directly or indirectly, in the affairs of the IBT or any other labor organization; (2) immediately requiring current IBT General Executive Board members to preserve all union records, to take no action to alter or destroy union records, and to deposit and maintain any payments to IBT entities and benefit funds under their control in appropriate accounts; (3) appointing one or more court liaison officers pendente lite to discharge the duties of the IBT President and Executive Board to prevent racketeering activity within the IBT, and to review certain actions of the IBT General Executive Board during the pendency of the action; and (4) enjoining and restraining IBT officials from interfering in any way with the duties of court liaison officers and from committing any racketeering act or associating with any LCN figure during the pendency of the action. Id. at pp. 104-409.

The complaint also sought the following permanent injunction: (1) prohibiting the LCN defendants, and all other persons in active concert or participation with them, from participating in the affairs of the IBT or any other labor organization; (2) prohibiting the named union defendants, their successors in office, and all persons in active concert or participation with them, from committing any act of racketeering, as defined in 18 U.S.C. § 1961 (1); (3) prohibiting the union defendants found to have violated 18 U.S.C. § 1962 from participating in the affairs of the IBT or any other labor organization about any matter which relates to the affairs of the IBT or

any other labor organization; (4) ordering a new general election for the IBT General Executive Board, to be conducted by a court-appointed Trustee; (5) ordering disgorgement of all proceeds defendants derived from their RICO violations; (6) authorizing the trustees to discharge, as the trustees deem necessary, any of the duties of the General Executive Board (other than negotiating and entering into collective bargaining agreements or participating in the affairs of any IBT political action committee) until such time as free and fair elections of new union officers were held; and (7) awarding costs to the United States and any further relief as may be necessary and proper. Id. at pp. 111-13.

E. OUTCOME OF THE CASE:

1. On March 13, 1989, the scheduled trial date, the IBT and the union officer defendants agreed to a settlement proposal, and on March 14, 1989, the district court entered a Consent Decree which included the following provisions:

a. Certain union defendants, and any other or future IBT General Executive Board member, officer, representative, member and employee of the IBT were permanently enjoined from: (a) committing any act of racketeering activity, as defined in 18 U.S.C. § 1961; (b) knowingly associating with any member or associate of the LCN, any other criminal group, or any person otherwise enjoined from participating in union affairs; and (c) obstructing or otherwise interfering with the work of the court-appointed officers or the Independent Review Board.

b. Various changes were made in the IBT Constitution, including requiring elections for the IBT General President and other International Officers to be by direct rank-and-file secret balloting.

c. The Consent Decree required a new election in 1991 for all IBT International Officers, and established three-court appointed officers, whose duties would terminate after the certification of the 1991 election results by the newly created Elections Officer.

d. The Consent Decree gave power to three court-appointed officers to oversee certain aspects of the affairs of the IBT: an Investigations Officer, an Elections Officer, and an Independent Administrator. The Investigations Officer was to investigate corruption and prosecute charges against alleged offenders. The Elections Officer was to supervise the 1991 election of IBT officers. The Administrator was to oversee the actions of the other two officers and to resolve disputes arising from their activities. The Administrator was authorized to make "any application to the [District] Court that the Administrator deems warranted" in order to have the court interpret the Consent Order and facilitate its implementation. The other parties to the Consent Decree were also allowed to make such applications as well.

The Consent Decree also provided, "This Court [the United States District Court for the Southern District of New York] shall have exclusive jurisdiction to decide any and all issues relating to the Administrator's actions or authority pursuant to this order."[5]

e. The Consent Decree also authorized the court-appointed Administrator to veto union expenditures, contracts and appointments that the Administrator reasonably believed would constitute an act of racketeering activity or facilitated organized crime influence in the union; and authorized the Investigations Officer to, among other matters, examine the books and records of the IBT and its affiliates, take sworn statements, and to attend meetings of the IBT's General Executive Board. See United States v. International Bhd. of Teamsters, 803 F. Supp. 761, 767-68 (S.D.N.Y. 1992).

f. The Consent Decree also included the following procedures:

When the Investigations Officer files charges, the following procedures shall be observed:

(a) the Investigations Officer shall serve written specific charges upon the person charged;

[5] For summaries of the Consent Decree, see United States v. International Bhd. of Teamsters, 899 F.2d 143, 145 (2d Cir. 1990); United States v. International Bhd. of Teamsters, 905 F.2d 610, 613 (2d Cir. 1990).

(b) the person charged shall have at least thirty (30) days prior to hearing to prepare his or her defense;

(c) a fair and impartial hearing shall be conducted before the Administrator;

(d) the person charged may be represented by an IBT member at the hearing; and

(e) the hearing shall be conducted under the rules and procedures generally applicable to labor arbitration hearings.

The administrator shall preside at hearings in such cases and decide such cases using a 'just cause' standard. The Investigations Officer shall present evidence at such hearings. As to decisions of the IBT General Executive Board on disciplinary charges and trusteeship proceedings during the Administrator's tenure, the Administrator shall review all such decisions, with the right to affirm, modify or reverse such decisions and, with respect to trusteeship proceedings, to exercise the authority granted above in this paragraph. Any decision of the Administrator shall be final and binding, subject to the Court's review as provided herein. For a period of up to fourteen (14) days after the Administrator's decision, any person charged or entity placed in trusteeship adversely affected by the decision shall have the right to seek review by this Court of the Administrator's decision. The Administrator shall also have the right to establish and disseminate new guidelines for investigation and discipline of corruption within the IBT. All of the above actions of the Administrator and Investigations Officer shall be in compliance with applicable Federal laws and regulations.

See United States v. International Bhd. of Teamsters, Civil Action No. 88-CIV.4486. (Order entered March 14, 1989) at pp. 6-7, 9-10.[6]

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[6] On October 17, 1989, defendant Frank Balistrieri entered into a consent judgment permanently enjoining him from any dealing with any employee, representative, or agent of the IBT or any local union, joint council, benefit fund or any matter which related to the IBT or its affiliated entities.

Joseph Lambardo, midway through his trial, offered to settle the case by agreeing to pay the IBT $250,00. In addition he was permanently enjoined from any association or participation in affairs of the IBT.

Default judgments were entered against the other LCN defendants. Those judgments basically provided that the defendants permanently enjoined from committing any act of racketeering, associating with any member of any organized crime family and from participating, in any way, in the affairs of the IBT.

2. On October 13, 1992, an Independent Review Board (IRB), consisting of three members, replaced the three court-appointed officers; the Government and the IBT each selected one member and those two members selected a third member.

The IRB had a Chief Investigator, who was the court-appointed Investigations Officer during the first stage of the IBT consent decree. To investigate allegations of misconduct, the Chief Investigator supervised a staff of independent investigators comprised of attorneys and retired law enforcement officers.

The IRB issued a written report containing its findings regarding alleged misconduct and its recommended sanctions, if any, to the IBT organization having jurisdiction over the matter. Within 90 days, the IBT organization was required to report its disciplinary action or its reasons for declining action, or it may refer the matter back to the IRB for adjudication. If the IRB finds that the action taken is inadequate, the IRB must take its objections known to the IBT entity, the IBT General President and the IBT General Executive Board (GEB). If the IBT entity has not taken or proposed corrective action within 10 days thereafter, the IRB may recommend further remedies or convene a de novo evidentiary hearing of its own with notice to the affected parties and prepare a written decision of disciplinary action which the GEB must implement. The IRB may also modify or reverse a disciplinary or trusteeship decision of the GEB.

The IRB's decisions and settlement agreements are submitted to the supervising district court for approval and entry as court orders. Under the IRB's rules and procedures, the IRB, or any individual member, may seek a court order directing the IRB to exercise its authority when one or more of the other members have "failed or refused to conduct a hearing, issue a decision, cause a needed vote, or otherwise act as required" by the IRB's rules. See IRB Rules and Procedures (Applications) reprinted at United States v. IBT (IRB Rules), 803 F. Supp. 761, 768-69, 800-805 (S.D.N.Y. 1992).

Courts have upheld a wide variety of actions of the IBT court-appointed officers and the IRB pursuant to the Consent Decree, including ordering and supervising union elections, restrictions on union actions and other activities, and disciplining and/or removing over 600 union members and officers for violations of the Consent Decree.[7]

The enforcement phase of the Teamsters civil RICO case, which began in 1989, is ongoing under the supervision of the United States District Court for the Southern District of New York.

F. LEADING COURT DECISIONS:

F. Supp Cases

1. United States v. International Bhd. of Teamsters, 697 F. Supp. 710 (S.D.N.Y. 1988).

The union sought re-assignment of the civil RICO IBT case to a different judge after Judge Edelstein had ruled that the civil case was related to a criminal RICO case involving IBT officials.

The district court ruled that designation of the case was consistent with the local rules and that the local rules were promulgated for internal management of the Court's caseload. The court further found that the Government had complied with the Local Rules by noting the relationship between the cases and the decision to accept the case was for the court alone to make, and that the Local Rules provided no substantive rights to the parties.

The union also filed a counter-claim charging that the conduct of the Government leading up to the filing of this action violated the Fifth Amendment due process clause; and sought expedited discovery, an evidentiary hearing, and a preliminary injunction against the prosecution of the instant action before this court and further, that prosecution in this court would create the appearance of impropriety.

The district court rejected the counter-claim, stating that the case cited by the Union related to prosecutorial misconduct and was inapposite when the Local Rules were followed and the judge accepted the case.

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[7] See, e.g., the following decisions that are all entitled United States v. International Bhd. of Teamsters: 19 F.3d 816 (2d Cir. 1994); 18 F.3d 183 (2d Cir. 1994); 12 F.3d 360 (2d Cir. 1990); 998 F.2d 120 (2d Cir. 1990); 981 F.2d 1363 (2d Cir. 1992); 978 F.2d 68 (2d Cir. 1992); 941 F.2d 1292 (2d Cir. 1994); 931 F.2d 177 (2d Cir. 1991); 905 F.2d 610 (2d Cir. 1990); 899 F.2d 143 (2d Cir. 1990); 842 F. Supp. 1550 (S.D.N.Y. 1994); 808 F. Supp. 279 (S.D.N.Y. 1992); 803 F. Supp. 761 (S.D.N.Y. 1992); 782 F. Supp. 243 (S.D.N.Y. 1992); 765 F. Supp. 1206 (S.D.N.Y. 1991); 764 F. Supp. 797 (S.D.N.Y. 1991); 761 F. Supp. 315 (S.D.N.Y. 1991); 728 F. Supp. 1032 (S.D.N.Y. 1990).

2. United States v. International Bhd. of Teamsters, 708 F.Supp. 1388 (S.D.N.Y 1989).

Defendants moved to dismiss the civil RICO complaint filed by the Government. The defendants alleged a violation of their First Amendment rights in that the complaint intermingled protected activity with properly proscribed activity; pre-emption of RICO by federal labor laws; and insufficiency of the RICO allegations. The defendants also filed a motion to join indispensable parties (subordinate Teamster entities); and a motion to transfer venue based upon convenience (bulk of documents were located in Washington, D.C.). The Government filed motions for default judgment; summary judgment; to amend the complaint; and for an order striking the jury demands of the defendants.

The district court rejected the defendants' motions, holding that the complaint sought only to proscribe alleged violations of RICO, which are not protected by the First Amendment. The court also held that the exclusivity provisions of federal labor laws (29 U.S.C. § 482) applied only to the union membership and not to the Government. The district court ruled that Congress did not intend provisions of the NLRA, 29 U.S.C. § 157, to preclude application of RICO to corrupt labor unions. The defendants' motions to join indispensable parties and to change venue were rejected by the court as unnecessary. The court further held that the allegations were sufficient to support the RICO claim, and that Fed. R. Civ. P. 9(b) does not apply to RICO claims not sounding in fraud. The district court further held that the Hobbs Act, 18 U.S.C. § 1951, covers deprivation of union members' rights to union democracy protected by the LMRDA. Regarding the RICO elements, the district court held that the complaint adequately alleged a pattern of racketeering activity, the roles of the defendants, and the enterprise.

The district court also held that it was proper to name IBT's General Executive Board (GEB) as a nominal defendant "for the purpose of effectuating any possible relief," and that union had leave to renew its request to dismiss against the GEB if "it becomes clear that the GEB is not a proper defendant because it is in fact not a person under 18 U.S.C. § 1961 (3)." Id. at 1402.

Further, the court held that neither statute of limitations nor the doctrine of laches applied to Government civil RICO actions to enforce public policy. The district court also held that nationwide service of process satisfied due process requirements and that disgorgement was an available remedy to the Government under civil RICO.

The district court rejected the Government's motion for summary judgment holding that although collateral estoppel barred some defendants from contesting racketeering acts for which they were convicted, material issues of fact remained to be proved, particularly the enterprise, and that racketeering acts were committed in furtherance of that enterprise; and that these acts formed a pattern of racketeering. The court held that the Government was entitled to amend the complaint to add examples of continuing violations. The court also held that defendants were not entitled to a trial by jury since the RICO complaint sought equitable, not legal, relief.

3. United States v. International Bhd. of Teamsters, 723 F. Supp. 203 (S.D.N.Y. 1989), aff'd and modified, 931 F.2d 177 (2d. Cir. 1991).

The Independent Administrator (IA) submitted an application to the district court seeking clarification of Paragraph 12(d) of the Consent Decree, regarding delineation of the scope of the duties of the Elections Officer. The IBT filed a "Cross Application" asking the district court to limit the Elections Officer to monitoring activities; *i.e.*, supervising the

distribution of materials, overseeing the ballot process and certifying the election results. Furthermore, the IBT refused to pay for activities by the Elections Officers which the IBT considered ultra-vires.

The district court found that the Consent Decree gave the Elections Officer the authority to intervene in, and coordinate, the entire electoral process, up to and including promulgation of electoral rules and procedures for nomination, election, and certification of all elections. Further, the court held that the IBT would create a $100,000 general operating account for the purpose of making funds available to Elections Officer and three support staff, consultant and public relations firm.

4. United States v. International Bhd. of Teamsters, 725 F. Supp. 162 (S.D.N.Y. 1989), aff'd, 905 F.2d 610 (2d Cir. 1990).

The district court held that the provision of the IBT's constitution that bars disciplining elective officers for activities occurring prior to their current terms, "which were not known generally" by the membership, did not preclude the Independent Administrator (IA) from disciplining Friedman and Hughes for the acts on which they were convicted. The district court held that Hughes was bound by the Consent Decree even though he was neither a signatory of the Consent Decree nor a party to the original RICO suit because: (1) IBT defendants represented Hughes' interests; and (2) the purposes of the RICO suit, to eliminate union corruption, are in the interest of the IBT membership, including Hughes.

The district court also ruled that under the Consent Decree, the actions of the court-appointed officers are not bound by the statute of limitations, and that the defendants were collaterally estopped from contesting the disciplinary charges since they were convicted of those charges. The district court also denied Friedman's and Hughes' motion for a preliminary injunction to prevent the IA from hearing the charges against them.

5. United States v. International Bhd. of Teamsters, 726 F. Supp 943 (S.D.N.Y. 1989), aff'd and rev'd in part, 899 F.2d 143 (2d Cir. 1990).

Daniel Ligurotis, a defendant in the original IBT suit, informed a membership meeting of Local 705, that he intended to file a lawsuit, in Chicago, to curb the power of the Elections Officer stating "we're not getting a fair shake in New York" and that if the case is removed from Chicago by New York, "I'm going to drop the suit".

The district court exercised its power under the All Writs Act, 28 U.S.C. § 1651, requiring all participants in Chicago lawsuit to refrain from further action except to enter a voluntary dismissal. The district court further held Ligurotis in contempt, on the ground that he violated the Consent Decree by interfering with the work of the court-appointed officers. The district court found that all necessary elements were proven by clear and convincing evidence. The district court stated that the Consent Decree was clear and unambiguous, and vested the Southern District of New York with "exclusive jurisdiction to decide any and all issues relating to the IA's actions or authority pursuant to this order." 726 F. Supp, at 946. The Court added that Ligurotis had signed the Decree, and that the contempt order was properly designed to urge compliance with Court's order.

6. United States v. International Bhd. of Teamsters, 728 F. Supp. 924 (S.D.N.Y. 1989).

Friedman and Hughes, union officials, sought a stay of rulings by the Independent Administrator that they had brought reproach upon the union by knowingly associating with LCN members and by their convictions for embezzlement, while their appeal of the criminal convictions were pending.

The district court denied the stay, holding that Friedman and Hughes had failed to show the likelihood that they would succeed on the merits; failed to show irreparable injury absent a stay; failed to show that the issuance of a stay would substantially injure other parties interested in the proceedings; and, finally, failed to show where the public interest in granting a stay lies.

7. United States v. International Bhd. of Teamsters, 728 F. Supp. 1032 (S.D.N.Y.), aff'd. 907 F.2d 277 (2d Cir. 1990).

The Government sought to have the district court enjoin all lawsuits arising under the Consent Decree filed in any forum other than the Southern District of New York since the Consent Decree vested exclusive jurisdiction in such matters in the Southern District of New York. The district court, acting pursuant to the All Writs Act, 28 U.S.C. §1651, so enjoined all subsequent litigation. More than 350 subordinate IBT entities opposed this injunction.

The district court found that the special circumstances of the litigation supported the injunction and that it could enjoin subordinate entities, not party to the underlying action, and that personal jurisdiction was not necessary because the IBT adequately represented interests of subordinates entities such as locals.

8. United States v. International Bhd. of Teamsters, In Re: Application VIII by the Independent Administrator, 735 F. Supp. 502 (S.D.N.Y. 1990).

The IBT refused to publish the names of members facing disciplinary hearings in the Teamsters' monthly magazine as part of the Independent Administrator's (IA) monthly report. The IA sought to require the IBT to publish the monthly report without editorial changes, unless pre-approved by the district court. The district court held that the IA was permitted to publish the names of members facing disciplinary hearings unless the union could prove that the material was inappropriate. The district court also ordered that all court orders published in the magazine would be published without editorial changes.

9. United States v. International Bhd. of Teamsters, In Re: Application IX by Independent Administrator, 735 F. Supp 519 (S.D.N.Y. 1990).

Members of the union objected to the Independent Administrator's interpretation of a provisions of the Consent Decree which empowered the Investigations Officer (IO) to take sworn statements in furtherance of his access to information about the IBT, arguing that they were not bound by the Consent Decree and that the IO should be required to issue notices of reasonable cause which detail the areas of inquiry.

The district court rejected the members' objection that they were not bound by the Consent Decree and held that the pertinent provision of the Consent Decree required no notice to members prior to in person interviews and sworn statements. The district court refused

to imply such notice, accepting the IO's comparison of such statements to the streamlined procedures in arbitration.

10. Cozza v. Lacey, 740 F. Supp. 285 (S.D.N.Y. 1990).

The district court denied the motion of Cozza, a member of the General Executive Board of IBT and a signatory to the Consent Decree, for a preliminary injunction prohibiting, inter alia, the Independent Administrator from hearing disciplinary charges against him, alleging that he knowingly associated with organized crime members. The district court stated that at this juncture any alleged harm to Cozza was speculative, and he has a right to review the IA's decisions; therefore he could not demonstrate the requisite irreparable harm.

11. Joint Council 73 v. International Bhd. of Teamsters, 741 F. Supp. 491 (S.D.N.Y. 1990).

The district court held that the disciplinary provisions of a Consent Decree between the Government and the parent union, the IBT, were binding on the entire union, including subordinate entities, which were not parties to the underlying suit.

12. United States v. International Bhd. of Teamsters, In Re: Application X by the Independent Administrator, 742 F. Supp. 94 (S.D.N.Y. 1990), aff'd as modified, 931 F.2d 177 (2d Cir. 1991).

The Independent Administrator (IA) presented the district court with a final set of election rules for review. The district court held that the rules were properly promulgated with respect to Paragraph F. 12(1) of the Consent Decree. The International Brotherhood of Teamsters (IBT) objected to the IA's authority to promulgate the rules and specifically objected to the rules which set the formula for the number of alternate delegates that each local must elect as being contradictory to the IBT constitution. Citing that without this rule some locals would be disenfranchised, the court upheld the action of the Independent Administrator.

The IBT further objected to the rule requiring each local to submit a local union plan to the Elections Officer as beyond the scope of the Consent Decree. The district court found such a rule to be within the authority of the Elections Officer to supervise the election. Further, the IBT objected to the Elections Officer's intention to conduct all phases of the election of any local not submitting a plan. The district court found that the Elections Officer's authority extended to all phases of the election in order to present fraud or abuse of any kind.

The district court also upheld the Elections Officer's promulgation of rules ordering that accredited candidates for office could publish their campaign literature in union magazine and accredited candidates for office were entitled to a limited release of membership lists for their campaign purposes.

13. United States v. International Bhd. of Teamsters, In Re: Application VII by the Independent Administrator, 743 F. Supp. 155 (S.D.N.Y.), aff'd, 905 F. 2d 610 (2d Cir. 1990).

Friedman and Hughes, IBT officials, sought a preliminary injunction against the decision of the Independent Administrator (IA), finding that they had brought reproach on the Union by associating with known organized crime figures and for conduct which formed the basis for a criminal conviction of embezzlement.

The district court held that the standard of review for the determinations by the Independent Administrator is abuse of discretion. Applying this standard, the court up held the IA acted reasonably in his determination and in ruling that and that Friedman and Hughes' affirmative defense that the criminal conduct was known to the general membership did not shield them from the IA's decision. The court further denied a stay of the imposition of the bar from union activities pending the outcome of Friedman and Hughes' appeal of their criminal convictions, but allowed for the possibility of modification if the appellate court reversed their convictions.

The district court further held that the phrase "bring reproach upon the union" was not void for vagueness and did not require definition by the IBT's GEB.

The district court further held that the remedies available to a charged official is to petition the IA for a listing of particularized charges and, if no relief is afforded, then one may appeal such convictions to the district court.

The district court further found that the IA properly applied the collateral estoppel doctrine (see 725 F. Supp. at 167), finding that the instant civil suit alleged the same conduct on which he had previously been convicted in a criminal case, and therefore the IA properly refused to allow Friedman to introduce evidence to contest the crimes underlying his conviction. The court noted that the IA did not deprive Friedman of the opportunity to raise whatever defenses he could have raised in his criminal trial.

14. United States v. International Bhd. of Teamsters, In Re: Application XIII by the Independent Administrator, 745 F. Supp 189 (S.D.N.Y. 1990).

Independent Administrator (IA) sought review of his opinion that the Investigations Officer had sustained his burden of demonstrating that there was just cause to find that IBT officers Cirino Salerno and William Cutolo breached their duties under the IBT constitution by associating with organized crime figures, and should be given lifetime suspensions from the IBT.

The district court affirmed the opinion of the IA. Salerno did not contest the findings of the IA, but argued that his subsequent resignation from the union mooted the penalties and findings of the IA. The district court held that Salerno's registration would not prevent his subsequent return to the union at a later date and therefore the penalties and findings were appropriate. Cutolo argued that the IA did not have jurisdiction over him and that the evidence was insufficient against him. The district court dismissed these arguments as vacuous.

15. United States v. International Bhd. of Teamsters, In Re: Application XII by the Independent Administrator, 745 F. Supp. 908 (S.D.N.Y. 1990), aff'd. 941 F.2d 1292 (2d Cir. 1991).

This case involved the review of Independent Administrator's (IA) decision on disciplinary charges against Dominic Senese, Joseph Talerico, and James Cozzo, suspending them for life from the IBT. Senese was banned for bringing reproach on the union by his association with known LCN members; Talerico was banned for refusing to testify before a grand jury; Cozzo was banned for being a member of the LCN.

The district court held that the IA had sustained his burden of establishing "just cause" for finding the charges proved and resulting sanction of lifetime ban. The district court

also held that the lifetime ban did not violate the First Amendment because it served a compelling interest in keeping the IBT free from the influence of organized crime.

The district court also held that the IA has jurisdiction over the parties because the consent decree is binding on non-signatory members of the IBT.

Senese and Talerico also raised a due process claim, claiming they did not have notice that association with LCN would subject them to discipline and, further, that it was a violation of due process to step up disciplinary enforcement after a period of laxity. The district court rejected this argument, holding that the IA was not a state actor and that therefore due process is not implicated, and in any event there was no due process violation because the Consent Decree did not establish new standards of conduct and; that it defies logic to think association with LCN members would not bring reproach on the union. Id. at 913.

The district court further held that reliable hearsay is admissible in the disciplinary hearing because the Consent Decree establishes the rules and procedures generally applicable to labor relation arbitration hearings and at such arbitration hearings hearsay evidence, if reliable, is admissible. Specifically, the district court upheld admission of hearsay information supplied to FBI Agents, and deposition testimony, and physical surveillance. Further, the court upheld the testimony of an FBI Agent as an expert on organized crime. Id. at 914-15.

The district court further held that because the Consent Decree set the standard of admissibility as that in labor arbitration and because pleas of nolo contendere are admissible in labor arbitration such pleas are therefore admissible in disciplinary hearings.

The court found the penalty of lifetime suspension from the IBT imposed by the IA was not arbitrary and capricious, did not violate the LMRDA, and was well within the power of the IA to impose.

16. United States v. International Bhd. of Teamsters, 750 F. Supp. 129 (S.D.N.Y. 1990).

The district court held that a union member did not establish irreparable harm and therefore was not entitled to a preliminary injunction to enjoin a union's delegate election due to the alleged fact that a special meeting ordered by the IA was beyond the scope of election rules.

17. United States v. International Bhd. of Teamsters, In Re: Application XVI of Independent Administrator, 753 F.Supp. 1181 (S.D.N.Y. 1990), aff'd, 941 F.2d 1292 (2d Cir. 1991).

Dominic Senese, ex-member and officer of IBT, argued that supplemental decisions of Independent Administrator (IA), barring post-expulsion payments into benefit plans on Senese's behalf, was arbitrary and capricious and beyond the authority of the Consent Decree.

The district court found that the IA's actions were subject to a review using the arbitrary and capricious standard; that the IA had the authority to bar future payments into the benefit plans; and it was not arbitrary and capricious for the IA to permit payments out of plans where the payments are based upon a constitution made prior to expulsion.

18. United States v. International Bhd. of Teamsters, In Re: Application XIV of the Independent Administration, 754 F. Supp. 333 (S.D.N.Y. 1990).

Mario Salvatore, Secretary Treasurer of IBT Local 191, appealed the Independent Administrator's (IA) decision regarding a disciplinary hearing finding that Salvatore brought reproach on the Local by embezzling monies from the Health and Insurance Plan and that he violated his membership oath by his embezzlement. The IA dismissed the first charge as unproved, but found as to the second charge, that the Investigations Officer had shown just cause that the charge had been proved.

Salvatore argued that the decision of the IA was arbitrary and capricious because: (1) the wrong standard was applied; (2) the evidence failed to establish the charge; (3) charge II was barred by collateral estoppel; (4) the same charge was barred because the membership knew of the allegations; (5) the penalty was unduly harsh; and (6) Salvatore was not bound by the Consent Decree.

The district court held that the evidence was sufficient to show fraudulent intent to deprive the union of funds; that circumstantial evidence is appropriate in internal union disciplinary hearings; that it is proper to draw negative inferences from union officers' failure to act upon an affirmative duty; and that suspension from union office and membership was an appropriate sanction. The district court also found that charge II was not barred by the doctrines of res judicata and collateral estoppel because the General President of the IBT conducted a trusteeship hearing involving Local 191. The court reasoned that the defenses of collateral estoppel and res judicata unavailable to Salvatore since the IA was not a party to the trusteeship proceeding nor in privity with the General President.

19. United States v. International Bhd. of Teamsters, In Re: Application XV of Independent Administrator, 761 F. Supp. 315 (S.D.N.Y. 1991).

The IBT challenged the Independent Administrator's (IA) veto of Jack B. Yager's appointment to the IBT's General Executive Board. The IA's veto was based upon his determination that such an appointment would further an act of racketeering activity and contribute, directly or indirectly, to the association of the union with LCN.

The district court found the decision of IA's to be fully supported by the evidence that Yeager aided and abetted extortion of union members' LMRDA rights, and that the standard of review is whether the IA's decision was reasonable and not arbitrary or capricious.

20. United States v. International Bhd. of Teamsters, 764 F. Supp. 787 (S.D.N.Y. 1991), rev'd, 940 F.2d 648 (2d Cir. 1991) (Table).

The voluntary IBT Consent Decree provided for changes to the electoral and disciplinary provisions of the IBT Constitution. A three-step election process was established by the Consent Decree. This action involved consideration of paragraph K.16 of the Consent Decree, two motions to intervene, and the legal status of the vote of IBT delegates at the upcoming IBT convention.

Paragraph K.16 allowed the district court to "entertain any future applications" that included interpretations of the Consent Decree. The district court held that K.16 permitted the court to consider prospective matters which could threaten the intent of the decree.

The district court denied the motions to intervene by two groups of IBT members because neither group had demonstrated that its interest in the instant matter is not adequately represented by the existing parties. The Government wanted a determination of IBT's obligation if, at the convention the delegates voted against the Consent Decree's provisions for direct rank and file election of International Officers. The district court found that the changes to IBT's Constitution were valid, and the IBT cannot undercut it, and membership could not veto IBT's settlement at least with regard to the provision for elections. The district court also held that the Consent Decree was binding on the membership without the approval at the convention. The district court also enjoined IBT from taking any action attempting to change the function of the nominating convention unless such action was expressly authorized in the Consent Decree.

21. United States v. International Bhd. of Teamsters, In Re: Application XXIII of the Independent Administrator, 764 F. Supp. 797 (S.D.N.Y. 1991), aff'd 956 F.2d 1161 (2d Cir. 1992) (Table).

Theodore Cozza, ninth Vice President of the IBT's GEB, appealed Independent Administrator's (IA) disciplinary findings that he brought reproach upon the union by knowing association with LCN members. Cozza alleged that he was denied pretrial discovery; the charge was unspecific; the charge violates his First and Fifth Amendment rights; and the membership generally knew of his association with those individuals.

The district court upheld the findings of the IA, stating that the Consent Decree did not provide a right to pre-hearing discovery; that the charge was sufficiently specific; there was no violation of First Amendment rights since the union may sanction itself in order to eliminate corruption. The district court also ruled that there is no state action, which is necessary to the constitutional argument, because "Cozza is being disciplined by the [IA] as a stand in for the IBT General President." (764 F. Supp. at 801). The court also ruled that there was no violation of due process rights since the IA could, from the length and nature of defendant's association with LCN members, properly assume that the defendant knew them to be LCN members, and he was not being punished for past conduct.

The district court further held that the IA is not limited by any statute of limitation; contrary to Cozza's application of a two-year statute of limitation based on Pennsylvania's law.

22. United States v. International Bhd. of Teamsters, In Re: Application XX by the Teamsters Administration, 765 F. Supp. 1206 (S.D.N.Y. 1991).

A printing contract was awarded to the printing firm of the IBT's General President's son-in-law. The Independent Administrator (IA) vetoed further expenditures to that printing firm. The IBT General President attempted to intervene in the IA's action.

The district court held that the IBT General President could not intervene because his desire to rebut a factual finding that damaged his personal reputation did not implicate a federal statute nor had he demonstrated any property interest in the action.

The district court further held that the union membership's right to self governance was extortable property under the Hobbs Act, and that the extortion of these rights may constitute a racketeering act under RICO. Additionally, the court held that the aiding and abetting the extortion of the members' rights under LMRDA can constitute an act of racketeering. The IA acted properly to bar further expenditures, which would constitute

racketeering activity. The district court stated that the fiduciary duty under LMRDA is heightened for union officers, particularly the President of the nation's largest labor union.

23. United States v. International Bhd. of Teamsters, In Re: Application XXI by the Independent Administrator, 775 F. Supp 90 (S.D.N.Y. 1991), aff'd in part rev'd in part, 948 F.2d 1278 (2d Cir. 1991) (Table).

Union official, George Vitale, appealed the Independent Administrator's (IA) determination that five disciplinary charges had been proved against Vitale. Vitale contended that the IA failed to provide a full, fair and impartial hearing; that his prior felony convictions do not bring reproach on the union; that there was no evidence in the record that Vitale violated § 16(c) of Local 283's bylaws; that there is no evidence to support a finding of embezzlement; and that Vitale did not violate his fiduciary duty by filing incorrect annual reports.

The district court held that the IA provided a full, fair and impartial hearing; that the prior felonies involving embezzlement do bring reproach upon the union; and that the IA's actions do not amount to double jeopardy or reveal any evidence of bias. The district court further held that the record revealed evidence of Vitale's fraudulent intent to embezzle from the union in that he failed to disclose to either the local or the International that both were paying his FICA tax and in ordering a new Lincoln Town car before leaving office.

Vitale raised the affirmative defense that what is generally known by union member about an individual before they elect that individual to office cannot be later held against that individual. The district court held that this affirmative defense is available only if the membership has "conclusive knowledge" and the individual asserting the defense must acknowledge guilt. The district court found that the IA was correct in finding that Vitale did not provide evidence supporting conclusive knowledge.

Vitale also argued that his convictions were too remote in time to be used against him in his disciplinary hearing, and relied upon Federal Rule of Evidence 609(b) which bars the introduction of convictions more than 10 years old for the purpose of attacking the credibility of a defendant unless the court determines it should be entered in the interest of justice and only if it is of probative value. Further, Vitale argued that the IA is barred, by the doctrine of laches, from bringing charges for conduct the union has been aware of and never acted on.

The district court rejected these arguments, stating that the Consent Decree removed any statute of limitation issues specifically to allow the IA to rely on past criminal acts in bringing disciplinary charges. The district court held that to allow the defendant to succeed on the doctrine of laches defense would effectively eviscerate the disciplinary provisions of the Consent Decree by shielding corrupt officials from discipline.

24. United States v. International Bhd. of Teamsters, In Re: Application XXXVII of the 2nd Administration, 777 F. Supp. 1123 (S.D.N.Y. 1991).

Union members McNeil and Morris allegedly participated in a scheme to defraud IBT Local 707 of money and property by granting unauthorized raises to themselves and other members of the Local's Executive Board, and the two had allegedly defrauded the Local of in excess of $60,000 by giving money and automobiles to departing officials.

The Independent Administrator (IA) found that the charges against McNeil and Morris were proved and suspended them from IBT membership for 5 years on the first charge and a concurrent 5 year suspension for the second charge. The IA also prohibited: (1) anyone

from paying into the health and pension funds on behalf of Morris or McNeil; (2) the payment of legal fees for McNeil and Morris by the Locals; and (3) McNeil and Morris from receiving retirement gifts or automobiles. Morris and McNeil appealed the decision.

The district court found that the officers were bound by the Consent Decree and that the evidence fully supported the decision of the IA. The district court also rejected the claim that the disciplinary charges violated the Double Jeopardy Clause of the Constitution, stating that the Court of Appeals previously held that the actions of the IA does not constitute "state action."

25. United States v. International Bhd. of Teamsters, In Re: Application L of Independent Administrator, 777 F. Supp. 1127 (S.D.N.Y.), aff'd, 956 F.2d 1161 (2d Cir. 1991) (Table).

A Union officer, Thomas Cozza, petitioned the district court to set aside the decision of the Independent Administrator (IA) permanently banning him from IBT involvement because of his association with known members of organized crime.

In finding Cozza to have knowingly associated with members of organized crime, the IA relied upon the statements of an FBI agent which incorporated government surveillance, reports of state commissions, court records of criminal convictions, wire intercepts, press reports, surveillance and videotapes of Cozza in present of LCN members, and the testimony of Cozza's son and members of International Brotherhood of Teamsters Local 211. The district court upheld the IA's decision, rejecting Cozza's proffered newly discovered evidence.

26. United States v. International Bhd. of Teamsters, In Re: Application XXXVIII of the Independent Administrator 777 F. Supp 1130 (S.D.N.Y. 1991), aff'd, 964 F.2d 1308 (2d Cir. 1992).

The Independent Administrator (IA), relying upon evidence which included hearsay statements, found that a union member knowingly associated with Philadelphia LCN Boss Nicodemo Scarfo, and permanently barred him from the IBT and its activities.

The district court refuse to upset the IA's assessment of the union member's credibility vis a vis the credibility of the FBI Agent's signed statement, which was corroborated by criminal associates of Scarfo. The district court found that hearsay evidence, if reliable, was permissible in such a proceeding, especially where the charge against the member specifically identified the person connected to organized crime and the time frame of the association with the organized crime figure.

27. United States v. International Bhd. of Teamsters, In Re: Application XLV of the Independent Administrator, 777 F. Supp. 1133 (S.D.N.Y. 1991), aff'd, 970 F.2d 1132 (2d Cir. 1992).

International Brotherhood of Teamsters member and Secretary - Treasurer of Local 473, Carmen E. Parise, challenged the Independent Administrator's (IA) decision regarding disciplinary charges against him for bringing reproach upon the IBT and violating his membership oath by threatening a union member with economic and physical harm and by refusing to answer, under oath, questions regarding corruption in the local.

The district court found the IA's actions to be fully supported by the evidence. Parise had pled guilty to the criminal charge and the court found that he was collaterally estopped from contesting that charge in the disciplinary hearing. The district court rejected Parise's

argument that the second charge, for refusing to answer questions under oath, violated his Fifth Amendment rights, stating that the IA's decision to discipline Parise does not constitute state action.

28. United States v. International Bhd. of Teamsters, In Re: Application LX of the Independent Administrator, 782 F. Supp. 238 (S.D.N.Y. 1992).

The Independent Administrator (IA) permanently barred several former IBT officers from the IBT for knowingly associating with organized crime figures.

The district court found that the evidence was sufficient to support the IA's finding that the former officers knowingly associated with, and tolerated the presence of a member of organized crime, and further found that the IA's reliance upon hearsay statements, including those made by FBI Agents, was appropriate in a disciplinary hearing, especially when the FBI Agent was available for cross-examination.

29. United States v. International Bhd. of Teamsters, In Re: Application LXVI of the Independent Administrator, 782 F. Supp. 243 (S.D.N.Y. 1992).

The ballots for election of IBT Local 707 officers were mailed to union members and contained the names of candidates who were suspended, due to their knowing association with organized crime members. The IA ordered a rerun election because of the inclusion of the suspended members names on the original ballots. After the rerun election, the suspended incumbents refused to relinquish control of Local 707 to the newly elected officers while the appeal of the IA's action was pending.

The district court held that: (1) the incumbent officers must relinquish control regardless of pending protest; (2) the IA had the power to order the rerun election due to the Consent Decree; and (3) this power was not affected by any provision of Labor Management Reporting and Disclosure Act of 1959, 29 USC § 482(b), establishing exclusive procedures for challenging elections.

30. United States. v. International Bhd. of Teamsters, In Re: Application LVIII of Independent Administrator, 782 F. Supp. 256 (S.D.N.Y. 1992).

The court held that IA's disciplinary sanction was supported by evidence; specifically corroboration by two union employees, photographs of the beaten member, and admission by Cherilla that his version of the incident did not correspond with member's injury. The court further held that ex parte depositions and hearsay evidence were sufficient to support the charge.

31. United States v. International Bhd. of Teamsters, In Re: Application of LXIV of the Independent Administrator, 787 F. Supp. 345 (S.D.N.Y. 1992), aff'd and vacated in part, 978 F.2d 68 (2d Cir. 1992).

The Independent Administrator (IA) found that charges against three officers of Local 100, involving assault and embezzlement, were proved by Investigations Officer. The district court held that the action taken by the IA was not state action for due process purposes, and under a deferential standard of review, reliable hearsay may be considered in proving the charges in a disciplinary hearing. The district court also ruled that acquittal on criminal charges did not preclude disciplinary action for the same conduct premised upon a lesser standard of proof.

32. United States v. International Bhd. of Teamsters, In Re: Application LXVII of the Independent Administrator, 791 F. Supp 421 (S.D.N.Y 1992).

John M. Trivizeno, President and Business Representative of IBT Local 398, appealed a decision of the Independent Administrator (IA) to permanently bar him from union activities for knowingly associating with LCN members. Trivizeno argued that he was denied a fair and impartial hearing in violation of due process; that the decision of IA was arbitrary and capricious; and that the penalty imposed was too severe.

The district court held that the action of IA did not involve state action and therefore no constitutional issues arose. Further, the court held that the IA's decision was based upon sufficient evidence and that the penalty, permanent banishment from union, was reasonable in light of the purpose of the Consent Decree to rid the IBT of the pervasive, and destructive influence of organized crime.

33. United States v. International Bhd. of Teamsters, In Re: Application LXXII of Independent Administrator, 792 F. Supp. 1346 (S.D.N.Y.), aff'd, 981 F.2d 1362 (2d Cir. 1992).

Robert Samsone, President of IBT Local Union 682, appealed the disciplinary decision of Independent Administrator that he brought reproach upon the union, and violated his membership oath, by not fully investigating an allegation of Vice President Parrino's ties to the LCN.

The district court found that the evidence established a duty, incumbent upon all officers of the union, to actively campaign against the influence of organized crime and that failure to employ all necessary means to verify or rebuke allegations is a gross abdication of that responsibility. The district court held that permanent debarment from union offices was not too severe a remedy.

34. United States v. International Bhd. of Teamsters, In Re: Application LXXIII of the Independent Administrator, 803 F. Supp. 740 (S.D.N.Y. 1992).

The President Patrick Crapanzano and Vice President Louis Lanza of an IBT Local appealed their permanent bar from membership in the IBT imposed by Independent Administrator (IA) for their failure to fully investigate allegations that the local president's father and brother had LCN ties.

The district court held that the finding of the IA was supported by the evidence, was not arbitrary and capricious and was therefore entitled to great deference.

35. United States v. International Bhd. of Teamsters, 803 F. Supp. 758 (S.D.N.Y. 1992), aff'd, 990 F.2d 623 (2d Cir. 1993) (Table).

Consolidated, an employer, sought to have the district court impose the decision of the IA in order to preclude a suit by employee Walker challenging his discharge. Walker claimed that Consolidated fired him in a retaliation for political activity; that he was not properly represented during his grievance; and that the board which decided against him acted in retaliation of his political views.

The district court held that the employer was erroneously attempting to view Walker's filing of a lawsuit for wrongful discharge as an attempt to "challenge the decision of the

Independent Administrator." The district court rejected this contention, finding that Walker did not file his action seeking protection of, or relief from, the Election Rules promulgated by the IA. Walker filed his suit under section 301(a) of the LMRA, 29 U.S.C. §185(a), which is separate and distinct from the Election Rules. Therefore, the district court rejected the application of the employer.

36. United States v. International Bhd. of Teamsters, 803 F. Supp. 761 (S.D.N.Y. 1992), aff'd and rev'd in part, 998 F.2d 1101 (2d Cir. 1993).

The Government sought an order approving certain proposed rules and procedures promulgated by the Independent Review Board (IRB) in order to govern its operation, which rules were an exhibit to the district court's opinion. The Government contended that the proposed rules were necessary for effective and efficient operation and to implement the express terms of the Consent Decree, and that the proposed rules were drawn from the terms of the Consent Decree and the IBT Constitution, as amended.

The IBT opposed the proposed rules, arguing that the Consent Decree authorized the IRB, not the Government, to promulgate rules for the IRB's operation; that the adoption of any rule for IRB operation, regardless of its content, was an impermissible alteration of the parties' agreement and was inconsistent with the purpose and structure of the Consent Decree.

The IBT further argued that the Government had waived its rights to promulgate proposed rules when, in the process of incorporating the Consent Decree into the IBT Constitution, it failed to raise these issues; that the adoption of rules for IRB operation violated federal labor policy favoring Government non-intervention in union affairs; that the democratic election of a new IBT Administration dedicated to eradicating corruption obviated the need for the Government's proposed rules; and, finally, that the proposed rules imposed excessive monetary costs on the IBT.

Several of the proposed rules are based on the premise that an individual IRB member may take action without the approval of a majority of the IRB. The IBT objected to these rules, arguing that the Consent Decree required any decision of the IRB to be made by majority vote. The district court pointed out that the IBT was confusing "action" with a "decision" as in a disciplinary matter.

Other rules granted the IRB broad investigatory power including taking depositions under oath, auditing or examining books of any IBT affiliated entity, receiving notice of and having the right to attend all meetings of any IBT affiliated entity, and establishing a toll-free telephone service to receive reports of corruption.

Dismissing the IBT's argument that the parties did not intend to grant the IRB such power, the district court noted that the IBT Constitution does not enumerate the investigative powers of the General President and General Secretary - Treasurer. The court further stated that the Consent Decree expressly and unambiguously provided that the IRB shall have the investigatory and disciplinary authority of the General President and General Secretary - Treasurer.

Section K of the proposed rules allows the IRB to require action on the part of "IBT Entities," as well as seeking a court order, to implement its decisions. The IBT objected stating that only the GEB can be required to implement IRB decisions. The district court stated that the Consent Decree requires the GEB to implement its decisions and it would be absurd to suggest that an IBT affiliate, while bound by the decision and required to take all action

b. The Consent Decree granted the court-appointed Monitor with all of the powers, privileges and immunities of a person appointed pursuant to Rule 66, Fed. R. Civ. P. and which are customary for court appointed officers performing similar assignments, including the following powers to:

(1) Investigate, audit and review all aspects of Local 54 and its affiliated benefit plans (which shall include the Local 54 Severance Fund) and report periodically or when otherwise requested by the District Court on such matters to the District Court and the signatory entities;

(2) Appoint, discharge or reassign personnel of Local 54 for good cause shown. Discharges shall be upon notice with an opportunity to be heard by the Monitor and will thereafter be subject to review by the United States District Court on the same basis of review (record review) as would be available on review of a final agency decision under the Administrative Procedure Act, 5 U.S.C. § 501 *et seq.*;

(3) Hold exclusive authority (which he/she may delegate) to control all disbursements of Local 54 monies, all Local 54 purchases, all Local 54 assets, until the lawful election of the secretary-treasurer by union-wide election as described in paragraph 13 herein, after which time the Monitor shall hold the authority to review and approve all disbursements;

(4) File such lawsuits as are deemed necessary to recover monies or otherwise advance the interests of Local 54;

(5) Review and terminate, after non-binding consultation with the Executive Board, contracts with vendors or service providers to Local 54 and enter into or terminate all leases for real and personal property;

(6) Review all collective bargaining agreements, the processing of grievances, and other trade union matters, and disapprove such action or inaction that (i) has been undertaken or withheld in violation of the Constitution or By-laws of the union, or (ii) is contrary to law, or (iii) constitutes an act of racketeering as defined by 18 U.S.C. § 1961;

(7) Request the United States Attorney or any agency of the United States to provide legal, audit and investigative personnel to assist in the execution of the Monitor's duties, such assistance to be at the expense of the United States and not chargeable to either Local 54 or its affiliated benefit funds;

(8) Subject to the approval of the District Court, retain legal, accounting or other support, where necessary and consistent with the Monitor's duties as set forth herein, and to utilize the funds of Local 54 to pay for such services;

(9) Request the United States Attorney to seek relief from any court to protect or advance the interests of Local 54 and/or its benefit funds and to perform such acts as are necessary to effectuate such goals.

b. The Consent Decree granted the court-appointed Monitor with all of the powers, privileges and immunities of a person appointed pursuant to Rule 66, Fed. R. Civ. P. and which are customary for court appointed officers performing similar assignments, including the following powers to:

(1) Investigate, audit and review all aspects of Local 54 and its affiliated benefit plans (which shall include the Local 54 Severance Fund) and report periodically or when otherwise requested by the District Court on such matters to the District Court and the signatory entities;

(2) Appoint, discharge or reassign personnel of Local 54 for good cause shown. Discharges shall be upon notice with an opportunity to be heard by the Monitor and will thereafter be subject to review by the United States District Court on the same basis of review (record review) as would be available on review of a final agency decision under the Administrative Procedure Act, 5 U.S.C. § 501 *et seq.*;

(3) Hold exclusive authority (which he/she may delegate) to control all disbursements of Local 54 monies, all Local 54 purchases, all Local 54 assets, until the lawful election of the secretary-treasurer by union-wide election as described in paragraph 13 herein, after which time the Monitor shall hold the authority to review and approve all disbursements;

(4) File such lawsuits as are deemed necessary to recover monies or otherwise advance the interests of Local 54;

(5) Review and terminate, after non-binding consultation with the Executive Board, contracts with vendors or service providers to Local 54 and enter into or terminate all leases for real and personal property;

(6) Review all collective bargaining agreements, the processing of grievances, and other trade union matters, and disapprove such action or inaction that (i) has been undertaken or withheld in violation of the Constitution or By-laws of the union, or (ii) is contrary to law, or (iii) constitutes an act of racketeering as defined by 18 U.S.C. § 1961;

(7) Request the United States Attorney or any agency of the United States to provide legal, audit and investigative personnel to assist in the execution of the Monitor's duties, such assistance to be at the expense of the United States and not chargeable to either Local 54 or its affiliated benefit funds;

(8) Subject to the approval of the District Court, retain legal, accounting or other support, where necessary and consistent with the Monitor's duties as set forth herein, and to utilize the funds of Local 54 to pay for such services;

(9) Request the United States Attorney to seek relief from any court to protect or advance the interests of Local 54 and/or its benefit funds and to perform such acts as are necessary to effectuate such goals.

4. During 1992, the court appointed Monitor, pursuant to election rules which he had promulgated with the approval of the district court, disallowed the candidacy of three persons who were found to be closely allied with the Local 54 administration which had been removed. In a November 30, 1992, order the district court upheld the ruling of court appointed Monitor.

5. A court-supervised election of officers was held on January 26, 1993, and the interim President chosen in the immediate period following the entry of the consent decree was elected President of the Local.

F. LEADING COURT DECISIONS:

1. United Sates v. Henley, 1992 WL 684356 (D.N.J. Dec. 3, 1992), aff'd, 6 F. 3d 780 (3d Cir. 1993) (Table).

The district court upheld the court-appointed Monitor's decision to disallow the candidacies of three candidates who had been found to be too closely allied with the administration which had been removed by the Consent Decree. In reaching his conclusion, the District Judge ruled that the Monitor's decision would be upheld if it was supported by "substantial evidence" in the record, taken as a whole. In applying this standard, the district court rejected the Government's position that the ruling of the Monitor must be upheld unless the ruling was "arbitrary and capricious"; and he also rejected the disqualified candidates' claim that they were entitled to a full review in "an adversarial setting, complete with cross-examination and subpoena powers."

In disallowing the candidacies of two candidates, Renzi and his running mate, DeRose, the district court found that there was substantial evidence that Renzi and DeRose were selected by the ousted defendants, alleged LCN figures Ralph Natale and Albert Daidone. The district court held that New Jersey State police surveillances of lengthy meetings which messengers for Natale and Daidone had with Renzi and DeRose, the fact that Renzi was Natale's cousin, and the fact that Renzi lied to the monitor about the length and nature of the meetings constituted substantial evidence warranting the disallowance of their candidacies.

With respect to Edward McBride, a candidate for President of Local 54, the district court held that evidence of McBride's past associations with Natale, Daidone, officials of Local 30 of the Roofers' Union and other organized crime figures constituted substantial evidence warranting the disallowance of his candidacy, even though there was no evidence of current association with organized crime.

14. LOCAL 100 OF HEREIU

A. CASE NAME:

United States v. Amodeo and Local 100 of Hotel Employees & Restaurant Employees International Union AFL-CIO (Local 100 and HEREIU) et al., 92 CV 7744 (RPP), United States District Court for the Southern District of New York. Complaint Filed October 23, 1992.

B. DEFENDANTS:

The complaint named as defendants, Local 100 of the Hotel Employees & Restaurant Employees International Union, Anthony R. "Chick" Amodeo, Sr., President and Business Manager of Local 100, and Anthony R. "Tony" Amodeo, Jr., Vice-President of Local 100. The complaint also named the Hotel Employees & Restaurant Employees International Union (HEREIU) as a nominal defendant.

C. SUMMARY OF COMPLAINT:

The complaint alleged that from its creation in 1983 until October 1992, Local 100, which represents workers employed in New York City's restaurant industry, had been infiltrated by corrupt individuals and organized crime figures, who had conducted the affairs of the union through a pattern of racketeering activity, exploited their control over Local 100 for personal gain, and had systematically traded the rights of Local 100's members for illegal payoffs. In particular, the complaint alleged that before the 1986 convictions and imprisonment of Colombo LCN Boss Carmine Persico, Sr., and John R. "Jackie" DeRoss, a Colombo capo and soldier who served as First Vice President of Local 100 since 1983, the LCN's control over Local 100 was shared between the Colombo and the Gambino LCN Families. When Persico and DeRoss began serving their federal prison terms, Colombo Family control over Local 100 began to erode, and the Gambino LCN assumed control of Local 100. At the time the complaint was filed, the Amodeos allegedly reported directly to Thomas Gambino, an alleged capo and soldier in the Gambino LCN Family, who reported directly to Gambino then LCN Family Boss John Gotti.

Both Amodeos allegedly used their positions as officers of Local 100 to control the union on the behalf of the Gambino LCN Family.

The complaint also alleged that since 1983, the officers of Local 100 had taken bribes from employers, converted collective bargaining agreements into tools of extortion, have failed to enforce the rights of union members, and had taken bribes from union members. As result of the corruption, extortion, and intimidation, Local 100 had been defrauded, its members deprived of their rights, and its membership reduced from 25,000 to 5000 union members.

The alleged RICO enterprise consisted of an association-in-fact comprised of Local 100 and its officers, employees, and associates, which was referred to as the "Local 100 Enterprise."

The complaint alleged four claims for relief: (1) and (2) that the defendant officers of Local 100 knowingly acquired and maintained an interest in and control over the Local 100 Enterprise through a pattern of racketeering activity and conspired to do so, in violation of 18 U.S.C. §§ 1962 (b) and 1962 (d), respectively; and (3) and (4) that the defendant officers of Local 100 did conduct and participate in the conduct of the affairs of the Local 100 Enterprise through a pattern of racketeering activity, and conspired to do so, in violation of 18 U.S.C. §§ 1962 (c) and (d), respectively.

The complaint alleged that the defendant officers of Local 100 together with LCN figures committed a pattern of racketeering activity in support of these four claims for relief. The alleged pattern included twelve racketeering acts involving extortion of restaurant employers, bribery and prohibited payments to labor officials, in violation of 29 U.S.C. § 186 (b)(1), New York Penal Law Section 180.25, and 18 U.S.C. §§ 1951 and 2.

The complaint also alleged five predicate acts of extortion of union members' rights, in that the defendant officers, together with the Colombo and Gambino LCN Families, deprived the union membership of their rights under 29 U.S.C. §§ 501(a) and 411 to loyal representation, free speech and democratic participation in internal union affairs, all in violation of 18 U.S.C. § 1951.

The complaint also alleged that "[e]ach of the officers of Local 100 has aided and abetted each of the racketeering acts set forth . . . that occurred during his or her tenure, by, at a minimum, knowingly refusing to take any action to redress that racketeering act."

D. RELIEF SOUGHT:

1. Preliminary Relief:

a. The relief sought included a preliminary injunction barring defendants Amodeo, Sr., and Amodeo, Jr., and their associates from any participation in the affairs of Local 100 or any other labor organization and from owning, operating, or being employed by any business employing Local 100 members. The complaint also sought to bar the Amodeos and their associates from committing any acts of racketeering and from associating with members of the LCN or other organized crime groups.

b. In addition, the complaint sought the appointment of a court officer, pendente lite, to oversee the daily affairs of Local 100, including review of collective bargaining agreements, contracts, changes in the constitution or bylaws of Local 100; and to supervise the discipline of corrupt officers, agents, employees, or union members. The complaint also sought to preliminarily enjoin the union's officers and membership from interfering with the court officer in the execution of his duties and to grant the government any other preliminary relief necessary to prevent further RICO violation involving criminal control over and exploitation of Local 100.

2. Permanent Relief:

a. The government sought to permanently bar the Amodeos and all other persons in active concert or participation with them, from any participation in the affairs of Local 100 or any other labor organization or any participation in any business dealings with officers or employees of Local 100 or any other labor organization about any matter which relates to the affairs of Local 100 or any other labor organization, from committing any acts of racketeering as

defined in 18 U.S.C. § 1961; and from associating with any member of LCN or other organized crime members.

b. The complaint also sought other relief: court-ordered and supervised general elections; appointment of a Trustee to investigate corruption and ensure democratic elections; a judgment declaring that Local 100 had been controlled and exploited by the LCN; an order directing that Local 100 bear costs of the court-appointed officers and that the district court award any other relief necessary to prevent resumption of LCN control over Local 100. The complaint also sought to permanently enjoin the Amodeos and others associated with Local 100 from interfering with the trustee or court-appointed officer in the execution of his duties.

F. <u>OUTCOME OF THE CASE:</u>

Simultaneously with the filing of the complaint, a Consent Decree, dated October 23, 1992, was filed that was agreed upon by all the defendants. The Consent Decree included the following provisions:

1. The district court appointed a "Court Officer" to investigate corruption and oversee the actions of a court-appointed Trustee for Local 100 as described below in paragraph 2.

The court-appointed Trustee's authority included the powers:

a. To administer, supervise and conduct the daily affairs of Local 100;

b. To appoint new officers, business agents, executive board members, trustees, delegates, shop stewards, administrative and/or clerical employees, professional and technical advisors who will perform administrative and operational functions of Local 100 and the Local 100 Executive Board;

c. To remove, pursuant to the HEREIU Constitution, any Local 100 officer, business agent, executive board member, trustee, delegate, shop steward, administrative and/or clerical employee, any professional and/or technical advisors and/or advisory committees;

d. To retain legal counsel and to employ accountants, consultants, experts and other necessary personnel to assist the Trustee in the discharge of his duties;

e. To remedy any corruption identified by the Court Officer to have been committed concerning Local 100, and to protect the rights of

the members of Local 100, consistent with the provisions of Title 29 of the United States Code, the HEREIU Constitution, the By-Laws of Local 100 and the Consent Decree;

f. To assist the Court Officer in the investigation of corruption and abuse within Local 100;

g. To negotiate collective bargaining agreements or other contracts, or to designate persons to handle such negotiations on behalf of Local 100 with any employer or employer organization, or any representative of such employer or employer organization or such other entities or firm having contractual relations with Local 100.

h. To administer and supervise Local 100's operations with respect to the HEREIU Funds;

i. To review or direct the review of all current and past books, records, files, accounts and correspondence of Local 100 and the Executive Board; and to do so without prior notice to any current or former Local 100 officers, the Executive Board or any agents thereof;

j. To administer, conserve and obtain an accounting of the assets and liabilities of Local 100;

k. To seek recovery of any and all assets of Local 100 that may have been dissipated or otherwise misappropriated;

l. To withhold, to the extent permitted by law, the payment of any and all funds, salaries, fees or benefits of whatever kind or description from ay individual or entity who or which has misappropriated, or is about to misappropriate any assets of Local 100, until the completion of the accounting described above and the resolution of any and all claims instituted against any individual or entity by or on behalf of Local 100 and the Executive Board;

m. To conduct shop steward elections, by secret ballot, within ten (10) months of the Trustee's appointment by this court;

n. To direct and supervise the election of new officers, executive board members, trustees and delegates prior to the termination of his trusteeship.

o. To conduct or cause to be conducted an educational program for the membership of Local 100 relating, but not limited to, collective bargaining and union democracy; and

p. To apply to the court for such assistance as may be necessary and appropriate to carry out the powers conferred by HEREIU upon the Trustee.

q. To furnish the district court and the United States Attorney for the Southern District of New York with a complete report every three months.

3. The Trustee was to remain in office for eighteen months or until the election of new officers, executive board members, trustees and delegates, whichever date is later. Upon the application on notice by HEREIU or the Government, the District Court may extend the trusteeship as the Court finds necessary.

4. The powers, rights and responsibilities of the Court Officer included the powers:

a. To investigate alleged corruption by any present of former Local 100 officers, business agents, executive board members, trustees, delegates, clerical employees, administrative employees, or professional and/or technical advisors;

b. To investigate alleged misconduct by an employer or potential employer, including such employer's officers, shockholders, employees, agents, professional and/or technical advisors and consultants, presently or formerly under collective bargaining agreement with Local 100;

c. To supervise, direct and assist the Trustee in recovering any and all assets of Local 100 of which Local 100 may have been wrongfully deprived;

d. To supervise, direct and assist the Trustee in recovering any and all assets of Local 100, which may have been wrongfully diverted, including membership dues and fees; and to supervise, direct and assist the funds in recovering contributions owed by any employer of the members of Local 100;

e. To review all current and past books, records, files, accounts and correspondence of Local 100 and the Executive Board for the time period beginning 1982 and continuing up to and including the date of this Order, upon three (3) days prior notice to the Trustee;

f. To review all current and past books, records, files, accounts and correspondence for the time period beginning 1986 and continuing up to and including the date of this Order and for a longer period if deemed necessary by the Court Officer, of any employer presently or formerly under collective bargaining agreement with Local 100;

g. To subpoena witnesses and documents;

h. To take testimony formally or informally, on the record under oath before a court reporter or otherwise as the circumstances may require in the Court Officer's sole discretion;

i. To retain legal counsel and to employ accountants, consultants, experts and other necessary personnel to assist the Court Officer in the discharge of her duties;

j. To request the assistance of federal and local law enforcement authorities, without charge to the trusteeship, in effecting the powers, rights and responsibilities enumerated herein and accomplishing the mandate of ending corruption and abuse within Local 100;

k. To refer possible violations of criminal law to federal or local law enforcement authorities as appropriate;

l. To apply to the district court for such assistance as may be necessary an appropriate to carry out the powers conferred upon the Court Officer; and

m. To investigate and oversee any actions taken by the Trustee pursuant to the Consent Decree in the sole discretion of the Court Officer.

5. The Consent Decree also provided that the Court Officer and his/her designee(s) shall, in addition to the powers and duties enumerated in the Consent Decree, have all of the powers, privileges and immunities of a person appointed pursuant to Rule 66, Fed. R. Civ. P. and which are customary for court-appointed offices performing similar assignments. Such powers may be modified by the United States District Court to achieve the purposes of the action herein, including but not limited to the protection of members' rights and the assets of the Local and its affiliated benefit plans.

6. The Consent Decree also entered a permanent injunction, enjoining:

a. Defendants Anthony R. Amodeo, Sr. and Anthony R. Amodeo, Jr. from participating in any way in the affairs of Local 100, or any other local union affiliated with HEREIU, and from having any dealings, directly or indirectly, with any officer or employee of Local 100 or any other local union affiliated with HEREIU about any matter which relates directly or indirectly to the affairs of HEREIU, and from owning, operating, or being employed by, any business which employs HEREIU members;

b. The current officers of Local 100 and their representatives and successors from associating with Anthony R. Amodeo, Sr., Anthony R. Amodeo, Jr., and with any member or associate of any organized crime group.

G. LEADING COURT DECISIONS:

1. United States v. Amodeo, 44 F.3d 141 (2d Cir. 1995).

Pursuant to the common law right of access, the district court released to the public a modified version of a sealed investigative report that had been filed with the district court. The Court Officer appointed pursuant to the Consent Decree filed in this civil RICO case had redacted and edited the investigative report. A subject of the investigative report argued that the report did not qualify as a judicial record and its public release violated the subject's privacy rights.

On appeal, the Second Circuit held that the investigative report constituted a judicial document subject to the right of public access because the report, which recounted the Court Officer's investigation to eliminate corruption within Local 100, was "relevant to the performance of the judicial function and useful in the judicial process." Id. at 145. However, the Second Circuit remanded the matter to the district court so that the district court, rather than the Court Officer, could "make its own redactions, supported by specific findings, after a careful review of all claims for and against access." Id. at 147.

15. TEAMSTERS LOCAL 282

A. CASE NAME:

United States v. Local 282 of the International Brotherhood of Teamsters, Executive Board of Local 282, Robert Sasso, Michael Carbone, Michael Bourgal, John Prbeyahn, and Joseph Matarazzo, No. CV-94-2919 (Platt, C.J.), United States District Court for the Eastern District of New York. Complaint filed June 21, 1994.

B DEFENDANTS:

The complaint named as defendants Local 282 of the International Brotherhood of Teamsters Union (IBT); the Local's Executive Board; and the Local's former officers Robert Sasso (formerly President, Vice-President, Secretary-Treasurer and Business Agent); Michael Carbone (formerly Secretary-Treasurer and Business Agent); Michael Bourgal (formerly President, Vice-President, Secretary-Treasurer and Business Agent); John Probeyahn (formerly Vice-President, Secretary-Treasurer and Business Agent); John Matarazzo (formerly Business Agent).

C. SUMMARY OF THE COMPLAINT:

The complaint alleged that for more than 25 years the Gambino LCN Family, including its leaders Paul Castellano, John Gotti and Salvatore Gravano, had corruptly infiltrated and controlled Local 282 of the IBT. The alleged enterprise consisted of an association-in-fact comprised of Local 282 and "co-racketeers" Paul Castellano, John Gotti, Salvatore Gravano and other persons associated with the Gambino LCN Family. The complaint also alleged that the defendants conspired to participate in the affairs of the alleged enterprise through a pattern of over 40 racketeering acts, in violation of 18 U.S.C. §§ 1962 (c) and (d).

In particular, the complaint alleged that the defendants, in conjunction with the Gambino LCN Family, demanded and accepted illegal payments from companies falling within the jurisdiction of Local 282. The complaint alleged that the defendants used fear of physical or economic harm, in exchange for allowing work without a labor agreement, lax enforcement of

collective bargaining agreements, and the absence of labor unrest. The complaint charged separate racketeering acts relating to the various companies that were victimized by this extortion/illegal payoff scheme. The complaint also alleged that defendants Sasso and Carbone were associates of the Gambino LCN Family, and through Sasso, Carbone and others, the LCN used Local 282 to extort and obtain payment from companies in the concrete industry. The extortion included demands for cash payments of $100,000 for the "privilege" of opening a concrete plant, and the payment to the Gambino LCN family of $3.00 per yard of concrete poured by various companies for the "right" to do business. These monies were shared with Local 282 officials such as Sasso and Carbone. All five individual defendants named in this civil RICO complaint previously pleaded guilty to criminal charges involving these allegations.

The complaint further charged that from the late 1970s to the complaint's filing date, Sasso, Carbone, and the Local 282's Executive Board extorted Local 282's members' rights to participate in internal union democracy in violation of 18 U.S.C. § 1951.

D. RELIEF SOUGHT:

The relief sought included the following:

1. An injunction enjoining:

a. Defendants Local 282, its current and future Executive Board; its officers, agents, foremen, stewards and members, now and in the future, from violating any provision of 18 U.S.C. § 1961 *et seq.*, and from having any dealings or interactions, directly or indirectly, with the individual defendants, relating to the business of Local 282, and from associating with any person who is a member or associated with the Gambino LCN Family or any other organized crime family;

b. The individual defendants from participating in any way in the affairs of Local 282, and from having any dealings, directly or indirectly, with any officer, agent, former steward and member of Local 282.

2. That the district court appoint a Trustee to assume control of and direct all operations of Local 282 until such time as all racketeering or organized crime influence is removed from Local 282, including, but not limited to, the powers to remove and appoint employees and officials, negotiate and handle collective bargaining agreements and handle the finances of Local 282, and to conduct elections for officers of Local 282's Executive Board.

3. That the district court order the defendants to disgorge all proceeds that they received from their alleged racketeering activities; with such proceeds to be awarded as restitution to victims and any remaining funds be awarded to the United States.

E. OUTCOME OF THE CASE:

On March 22, 1995, an agreed upon Consent Decree was entered that included the following relief:

1. The IBT Trustee to be appointed by the district court, Local 282, and all of its current and future officers, agents, representatives, employees, and members were enjoined from:

   a. engaging in conduct which constitutes or furthers an act of racketeering activity, as enumerated or defined in 18 U.S.C. § 1961;

   b. knowingly associating with any member, associate, or other individual involved with an organized criminal group, or knowingly associating with any person enjoined from participating in union affairs;

   c. obstructing the work of the Corruption Officer to be appointed by the district court or the implementation of any other relief that may be imposed in this case.

As used herein, the term "knowingly associating" shall have the same meaning as that ascribed to it in the context of the consent decree in United States v. IBT (Application XII), 745 F. Supp. 908, 917-18 (S.D.N.Y. 1990), aff'd, 941 F.2d 1292 (2d Cir. 1991).

2. The district court would appoint a Trustee for Local 282 with the powers, rights and responsibilities of an IBT-appointed trustee of a Teamsters Local as set forth in the provisions of the IBT Constitution, as well as the powers, among other matters to:

   a. organize non-union shops;

   b. negotiate collective bargaining agreements;

c. maintain the books, records, files and accounts of Local 282;

d. administer, invest, sell and conserve the assets of Local 282;

e. enter and terminate contracts or leases, and to buy and sell property on behalf of Local 282;

f. adjust grievances and arbitrate such matters as he or she deems appropriate on behalf of Local 282 and the members it represents;

g. hire, appoint, retain, remove and discharge members of Local 282's Executive Board, officers, business agents, stewards, trustees of benefit plans, advisory committees, employees, lawyers, accountants and consultants, in accordance with the powers of a trustee provided for in Article VI, Section 5 of the IBT Constitution and with other applicable law;

h. submit all reports required under the Labor- Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (LMRDA), providing copies to the Corruption Officer and the United States Attorney's Office.

i. submit a report every six months to the IBT General President, the Corruption Officer and the United States Attorney's Office regarding the affairs and transactions of Local 282;

j. take such other action, including discipline of members, as the IBT Trustee deems necessary for the promotion and preservation of Local 282 and its members' interests;

3. The district court would appoint a Corruption Office for Local 282, whose powers included the following:

a. to investigate corruption within Local 282;

b. to interview any Local 282 officer, administrator, organizer, business agent, employee, shop steward, negotiator, trustee or member or the IBT

Trustee, about any matter within the jurisdiction of his/her powers and duties, and to gain entrance to, inspect and investigate, without advance notice or permission, any job site, depot, building or office at which members of Local 282 are working;

c. to the same extent that the IBT Trustee or Local 282 is entitled under applicable laws or agreements, to obtain access to any records, or to investigate or interview any persons under the control of an employer who employs employees represented by Local 282, including but not limited to access to such records or persons relating to contributions made by employers to pension or other benefit plans in which Local 282 members participate, relating to any matter within the jurisdiction of his/her powers and duties;

d. to take testimony informally or formally on the record before a court reporter or otherwise as the circumstances may require in his/her sole discretion about any matter within the jurisdiction of his/her powers and duties;

e. to hire, appoint, retain and discharge accountants, consultants, investigators, and any other personnel necessary to assist in the proper discharge of his/her powers and duties.

f. to receive notice of and observe any negotiations between employers and Local 282 of a collective bargaining agreement or amendments or modifications thereto, only if the Corruption Officer has specific reason to believe that an act of corruption as defined herein has occurred during negotiations of a collective bargaining agreement and deems his/her attendance at such negotiations is necessary to investigate such act of corruption or prevent other acts of corruption from occurring;

g. to remove officers, business agents, stewards, or employees of Local 282, or to seek the expulsion of members of Local 282 for just cause arising from any corruption under the following procedures:

(i) The Corruption Officer's decisions as to removal under this subsection shall be final and binding and shall take effect immediately. Only the IBT Trustee may appeal such removal to the District Court by letter within fourteen days of receipt of the Corruption Officer's decision.

(ii) In any appeal pursuant to subparagraph (i) above, the Corruption Officer's decision will be upheld unless it is an abuse of discretion or is not supported by substantial evidence. Such evidence may include hearsay.

(iii) Any actions of the Corruption Officer pursuant to this subparagraph shall be reviewable exclusively by the District Court and are not subject to arbitration or other challenge under the IBT Constitution or the Local 282 By-Laws in accordance with applicable law.

h. to review any proposed appointments by the IBT Trustee of certain officers, business agents, stewards, and other employees of Local 282, as follows:

(i) The Corruption Officer's decisions as to rejections of proposed appointments under this subsection shall be final and binding and shall take effect immediately. Only the IBT Trustee may appeal such rejection to the District Court by letter within fourteen days of receipt of the Corruption Officer's decision.

(ii) In any appeal pursuant to subparagraph (i) above, the Corruption Officer's decision will be upheld unless it is an abuse of discretion or is not supported by substantial evidence. Such evidence may include hearsay.

(iii) Any actions of the Corruption Officer pursuant to this subparagraph shall be reviewable exclusively by this Court and are not subject to arbitration or other challenge under the IBT Constitution or the Local 282 By-Laws, in accordance with applicable law.

i. to receive the assistance of federal, state, and local law enforcement authorities in carrying out his duties;

j. to refer possible violations of law to federal, state, or local law enforcement authorities;

k. to have full, complete and unfettered access to all books, records, files, accounts, and correspondence of Local 282, its Executive Board, officers, IBT Trustee, and any benefit plans in which members of Local 282 participate (to the same extent that Local 282 or the IBT Trustee has such access);

l. to receive notice and a written agenda or description of the proposed subject matter (if such a written agenda or description is created) of and to attend every scheduled meeting of Local 282's Executive Board, a committee of its Executive Board, or of Local 282's general membership.

m. to request and obtain oral or written reports regarding any matter concerning Local 282 from the IBT Trustee, about any matter within the jurisdiction of the Corruption Officer's powers and duties;

n. to review all expenditures made by, or obligations incurred by, the IBT Trustee, Local 282 or any other person or entity authorized to make such expenditure or incur such obligation on behalf of Local 282, and to the same extent as the IBT Trustee or Local 282 is empowered to do so, to void and recover any expenditure or obligation that constitutes or furthers act of Corruption;

o. to review all collective bargaining agreements, contracts and leases, entered into by Local 282, the IBT Trustee, or any other person or entity authorized to enter into such agreement, contract or lease on behalf of Local 282, and to the same extent as the IBT Trustee or Local 282 is

empowered to do so, to disaffirm any contract prior to its ratification that constitutes or furthers an act of corruption as defined herein;

p. to review all decisions by the IBT Trustee to hire an independent contractor, including but not limited to attorneys, accountants, brokers, to perform services or provide goods on behalf of Local 282, and to reject any such decision that constitutes or furthers an act of Corruption as defined herein;

q. to the same extent that the IBT Trustee or Local 282 is authorized to do so, to seek recovery of any and all assets of Local 282 that may have been dissipated or otherwise misappropriated in the past;

r. to submit periodic reports of its activity;

s. to oversee and monitor any elections held by Local 282 for any acts consisting of or furthering act of corruption, and to certify the results of any election as being free of any acts of corruption.

F. LEADING COURT DECISIONS:

1. United States v. Local 282 of the International Brotherhood of Teamsters, 13 F. Supp. 2d 401 (E.D.N.Y. 1988), aff'd in part, and vacated and remanded in part, 215 F.3d 283 (2d. Cir. 2000).

Based on Robert Sasso's guilty plea to a RICO conspiracy charge, the district court granted the Government's motion for summary judgment in its civil RICO action "to the extent of finding Sasso liable in that he 'conspired with the other individual defendants and members of organized crime to conduct the affairs of defendant Local 282 of the International Brotherhood of Teamsters as an enterprise through a pattern of labor racketeering activities, including acts of extortion and illegal receipt of money from employers, from the late 1970's through 1991 in violation of 18 U.S.C. § 1962 (c)'." Id. at 402. The district court also permanently enjoined Sasso from: (1) "owning, operating, or working for any business in the construction, demolition, or excavation industries or part of the trucking industry which was engaged in construction, demolition, or excavation"; (2) "working in any capacity for any person or business doing business with the construction, demolition, or excavation industries, and from associating for any commercial purpose with any member or associate of organized crime"; and (3) "from visiting the work sites of the International Brotherhood of Teamsters and, with limited exceptions, communicating with any person at these sites." Id. at 402.

The district court also ordered Sasso to pay 15% of the costs of a monitorship (i.e., $136,000) that the district court had imposed over Local 282 pursuant to a Consent Decree. In so ruling, the district court stated:

> The broad discretion in fashioning remedies granted by section 1964(a) affords this Court the power to order Sasso to fund the monitorship which the Consent Judgment created. Ordering Sasso to fund the monitorship does not violate the restraints on district courts' powers under § 1964(a) emphasized in [*United States v. Carson*, 52 F. 3d 1173 (2d Cir. 1995)]. In *Carson*, the Second Circuit warned that district courts have the power to "'prevent and restrain' *future* conduct" but not the power to "punish *past* conduct." *Carson*, 52 F.3d at 1182 (emphasis in original). The Second Circuit held that the *Carson* district court overstepped its jurisdiction by ordering Carson to disgorge profits he illicitly acquired eight years before the launch of the civil suit. *Id.* at 1182. Carson's profits were garnered "too far in the past to be part of an effort to 'prevent' and 'restrain future conduct'." *Id.* (emphasis in original).
>
> Here, in contrast, the plaintiff does not request that Sasso disgorge profits. Rather, plaintiff only moves the Court to order Sasso to contribute to the funding of the monitorship. As Judge Glasser noted, funding a monitorship furthers the prevention and the restraint of future illegal conduct. *See Private Sanitation Indus. Ass'n.*, 914 F. Supp. at 901, *surpra*. Here, there is no question that additional funding for the Local 282 monitorship will help prevent the illegal conduct Sasso fostered at Local 282. Indeed, the monitorship in this case was created for the express purpose of eradicating the possibility of future labor racketeering by Local 282 officials. Additionally, funding the monitorship will further prevent future illegal conduct by Sasso. Sasso will be deterred from engaging in labor racketeering because a fully funded monitorship is difficult to evade.

Id. at 403.

2. United States v. Sasso, 215 F.3d 283 (2d Cir. 2000).

On appeal of the above-referenced opinion, the Second Circuit held that the district court's order requiring Sasso to fund a portion of the costs of the court-imposed Monitorship of Local 282 fill within the district court's broad equitable powers under 18 U.S.C. § 1964. The Second Circuit distinguished its earlier opinion in United States v. Carson, 52 F.3d 1173 (2d Cir. 1995), stating:

> In *Carson*, we dealt with a disgorgement order, not with an order of contribution to the funding of a monitorship; and we reversed only to the extent that the sums ordered disgorged were not meant for the prevention of future RICO violations. Our remand plainly allowed an order requiring the payment of any amounts that were "intended soley to prevent and restrain future RICO violations." 52 F.3d at 1182 (internal quotation marks omitted).
>
> In the present case, we deal with an order for Sasso's payment of money into a fund that plainly is to be used to prevent further violations of section 1962.

Id. at 291.

The Second Circuit also rejected Sasso's argument "that ordering contribution from him is inappropriate because he has now been enjoined from engaging in the pertinent activities, thereby preventing him from committing any future RICO offense." Id. at 291. The Second Circuit explained:

> First, there was evidence from the Corruption Officer that Sasso, while imprisoned following his RICO conviction, had hundreds of communications with persons associated with organized crime, persons associated with Local 282, persons whose businesses were within the Local's jurisdiction, and persons who had previously made illegal payments to corrupt Local officials. That evidence easily demonstrates that there can be no effective monitorship without attention to Sasso's own current activities. Sasso's suggestion that such attention is unnecessary because he has been enjoined rings hollow in light of his postconviction conduct and in light of the pattern of concealment previously engaged in by the individual defendants, which included clandestine meetings, surreptitious money transfers, and lying under oath. Second, even if Sasso himself had not continued to have suspicious contacts with the persons described above, it would be well within the court's equity powers to conclude that Sasso, having engaged in conduct that corrupted the union, should bear part of the cost of eliminating that corruption.

Id. at 291.

The Second Circuit remanded the matter to the district court to make appropriate findings as to "how it arrived at 15 percent as Sasso's appropriate share of the [monitorship] expenses." Id. at 292.

3. United States v. Sasso, 230 F. Supp. 2d 275 (E.D.N.Y. 2001).

On remand from the Second Circuit, the district court weighed the role of Sasso in comparison to that of the other individuals who were responsible for corruption in Local 282, and concluded that Sasso should pay 20% of the costs for the original monitorship period ($181,000).

16. MASON TENDERS DISTRICT COUNCIL OF GREATER NEW YORK

A. CASE NAME:

United States and Robert B. Reich, Secretary of the United States Department of Labor v. Mason Tenders District Council of Greater New York, et al., Complaint No. 94 Civ 6487, United States District Court for the Southern District of New York. Complaint filed September 8, 1994.

B. DEFENDANTS:

Mason Tenders District Council of Greater New York (District Councilor MTDC),

Executive Board of the Mason Tenders District Council of Greater New York,
James Lupo, President of the District Council, Union Trustee to the Trust Funds,
Christopher Suriano, Executive Board Member,
Salvatore Lanza, Secretary/Treasurer,
Michael Pagano, Jr., Business Manager, Union Trustee to the Trust Funds,
Brian J. Loiacono, Recording Secretary,
Mason Tenders District Council Pension Fund,
Mason Tenders District Council Welfare Fund,
Mason Tenders District Council Annuity Fund,
Mason Tenders District Council Asbestos Training Fund,
Mason Tenders District Council Industry Fund,
Mason Tenders District Council Legal Services Fund,
Mason Tenders District Council Vacation Fund,

James Messera (alleged Capo in the Genovese LCN Family), Ernest M. Muscarella, Richard Kelly, Anthony Zotollo, Joseph Fater, Baldo Mule, Ronald Miceli, Louis Casciano, Albert Soussi, Carmine Mandragona, Anthony Lanza a/k/a "Nino," Thomas Fitzgerald, Medical Diagnostic Testing, Inc., Wilfred L. Davis, Arthur M. Blau, Onofrio Macchio a/k/a "Malfie," Michael Capra a/k/a "Mikey Cap" (alleged soldier in the Luchese LCN Family), Peter Vario a/k/a "Jocko" (alleged solider in the Luchese LCN Family), Michael Labarbara, Jr. a/k/a "Big Mike" (alleged soldier in the Luchese LCN Family), Paul J. O'Brien and Shelly M. Lipsett.

Of the Defendants, the following Defendants were named only as "nominal" defendants, whose participation was necessary for complicate and effective relief in this action: the District Council and its various Trust Funds, Salvatore Lanza, Brian Loiacomo, Paul O'Brian and Shelly Lipsett. The following Defendants were alleged associates of the Genovese LCN Family:

Richard Kelly, Baldo Mule, Ronald Miceli, Louis Casciano, Albert Soussi, Carime Mandragona, Anthony Lanza, and Onofrio Macchio.

C. SUMMARY OF THE COMPLAINT:

The Mason Tenders District Council, which is a component of Laborers' International Union of North America (LIUNA), consisted of twelve local unions in the New York area whose members included laborers, bricklayers, masonry and asbestos removal workers. Each union local provided a delegate to the District Council, with these delegates electing District Council officers and members of its Executive Board. The District Council engaged in collective bargaining on behalf of the members of the local unions, and administered seven multi-million dollar trust funds established for the benefit of union members.

The alleged association-in-fact enterprise consisted of the District Council and its associated Trust Funds. The complaint alleged that, acting through the individuals named as defendants, the Luchese, Gambino and Genovese LCN Families, particularly the Genovese Family, corruptly controlled the District Council and its constituent unions and associated Trust Funds, and dictated the composition of the District Council's leadership. In particular, the complaint alleged that the LCN Families exerted such control through extortion, inducing District Council and union officials to breach their fiduciary duties, engaging in kickbacks from service providers, illegal payoffs to union officials and other forms of labor racketeering. The complaint also alleged that virtually all of the individually-named defendants had previously been convicted of RICO violations arising from the same course of conducts alleged in the complaint.

The complaint alleged twelve claims for relief. Claims one and two alleged that from the 1980's to the filing of the complaint, the individual defendants Messera, Muscarella, Kelly, Lupo, Mule, Suriano, Pagano, Capra, Vario, LaBarbara, Macchio, Casciano, Soussi, Mandragona, Miceli, Fater, Davis, Blau, and Lanza, acquired and maintained an interest in the alleged

enterprise through a pattern of racketeering activity and conspired to do so, in violation of 18 U.S.C. §§ 1962(b) and (d). The alleged pattern of 110 racketeering acts (RA) were as follows:

RA #1 — purchase of certain Brooklyn real properties for $3.4 million with monies embezzled from the union pension fund

RA #2 — money laundering to conceal the improper purchase of the Brooklyn real properties

RA #3 — fraudulent use of employee benefit funds to make a $15.8 million loan to an LCN associate

RA #4 — purchase of a Brooklyn real property for $24 million with monies embezzled from the union pension fund

RA #5-57 — illegal receipt of benefits by District Council members, officers, and employees

RA #58-108 — illegal offers and promises to give money and other things of value to influence the operation of employee benefit plans

RA #109 — purchase of a Florida residential property for $1.45 million using monies embezzled from the employee benefit fund

RA #110 — receipt of kickbacks by union officials

Similarly, these same acts were incorporated into the third and fourth claims for relief, alleging that the same defendants conducted the alleged enterprise's affairs through the same pattern of racketeering activity, and conspired to do so, in violation of 18 U.S.C. §§ 1962 (c) and (d).

The complaint also stated eight claims for relief under ERISA, 29 U.S.C. §§ 1105 and 1106, for acts involving misuse of the employee funds and the receipt of improper benefits by union officers in carrying out the racketeering acts enumerated in the complaint.

D. <u>RELIEF SOUGHT</u>:

The Government requested relief, that would do the following, among other matters:

1. That the district court issue a permanent injunction that would enjoin certain defendants from:

a. having any future dealings of any nature whatsoever with:

(1) any officer, agent, member, delegate, representative, trustee or employee of the District Council or the Trust Funds;

(2) any officer, agent, member, delegate, representative, or employee of any of the District Council's constituent Locals; or

(3) any officer, agent, member, delegate, representative, or employee of any other labor organization or employee of any other labor organization or employee benefit plan concerning any aspect of the operation or administration of such labor organization or employee benefit plan;

b. owning, operating, or being employed by, or a consultant to, any business which employs members of the constituent Locals of the District Council;

c. committing any act of racketeering as defined in 18 U.S.C. § 1961 and any violation of ERISA;

d. participating in any way in the affairs or the District Council, its constituent Locals, the Trust Funds, or any other labor organization or employee benefit plan; and

e. owning, operating, or being employed by, or a consultant to, any business that employs members of the constituent Locals of the District Council.

2. That the district court enjoin and restrain any defendant and any officer, agent, member, delegate, representative, trustee or employee of the District Council, its constituent Locals or the Trust Funds from knowingly associating with any member or associate of La Cosa Nostra or persons in active concert or participation with any member or associate of La Cosa Nostra.

3. That following a determination of liability under RICO, the district court order that a new secret ballot, rank and file general election be held among the members of the constituent Locals of the District Council directly to elect the officers of the District Council, with all components of such election to be conducted by one or more Trustees to be appointed by

the court, and that until such elections are held a Trustee be appointed to administer the District Council.

4. That the district court order all defendants found to have violated 18 U.S.C. § 1962 to disgorge all proceeds and benefits derived from such violations.

5. That the defendants bear the costs of the court-appointed Trustee and the costs of this suit;

6. That the district court remove certain defendants from, and bar them from holding, certain positions in the District Council and its affiliated Trust Funds.

E. OUTCOME OF THE CASE:

1. December 1994 Consent Decree. On December 27, 1994, the United States and the defendants Mason Tenders District Council and its Executive Board and affiliated Trust Funds entered into a Consent Decree, approved by the district court, which found that the evidence adduced by the United States in its motion for partial summary judgment established that the alleged enterprise had been conducted through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962. See United States v. Mason Tenders District Council of Greater New York, 1994 WL 742637 (S.D.N.Y. Dec. 27, 1994). This Consent Decree included the following provisions:

a. PERMANENT INJUNCTIONS. All current and future officers, agents, representatives, employees, and members of the MTDC and of its constituent locals were permanently enjoined:

(1) from committing any act of racketeering, as defined in 18 U.S.C. § 1961;

(2) from knowingly associating with any member or associate of any La Cosa Nostra crime family or any other criminal group, or with any person prohibited from participating in union affairs; and

(3) from obstructing or otherwise interfering with the work of the court-appointed officers described herein or with the purposes of this Consent Decree.

As used herein, the term 'knowingly associating' shall have the meaning ascribed to it in the context of the adjudication, by the Second Circuit, of disputes under the consent decree in United States v. Int'l Brotherhood of Teamsters, 88 Civ. 4486 (DNE) (S.D.N.Y.), as of the date of the entry to this Consent Decree.

b. THE MONITOR: The district court shall appoint a Monitor, who shall have the following powers:

(1) Jurisdiction. The Monitor's jurisdiction is to ensure compliance with the injunctions, and with union constitutions, to impose sanctions for violation of those injunctions, constitutions (any such individual violation is referred to as a 'proscribed act'), and to exercise oversight and litigation authority.

(2) Oversight Authority. The Monitor shall have review and oversight authority with respect to the following matters and shall, if necessary, prescribe procedures under which such matters shall be presented to the Monitor for review:

(a) The Monitor shall have the authority to review all expenditures and investments of the MTDC and to veto or require the lawful representatives of the MTDC or the Trustees of the MTDC trust funds to rescind any expenditure or investment that: (i) constitutes or furthers an act of racketeering as defined in 18 U.S.C. § 1961; or (ii) furthers or contributes to the association, directly or indirectly, of any member, employee, or agent of the

MTDC, or any of the members or employees of the MTDC's constituent locals, with any element of organized crime; (iii) is contrary to or violates labor law or ERISA; or (iv) is inconsistent with the purposes of the Consent Decree.

(b) The Monitor shall have the authority to review all contracts or proposed contracts on behalf of the MTDC (except for collective bargaining agreements and any decision to strike) and to require the lawful representatives of the District Council or the Trustees of the MTDC to rescind any contract or prevent the MTDC from entering into any proposed contract that: (i) constitutes or furthers an act of racketeering as defined in 18 U.S.C. § 1961; (ii) furthers or contributes to the association, directly or indirectly, of any member, employee, or agent of the MTDC, or any of the members or employees of the MTDC'e constituent locals, with any element of organized crime; (iii) is contrary to or violates labor law or ERISA ; or (iv) is inconsistent with the purposes of this Consent Decree.

(c) The Monitor shall have the authority to review all proposed appointments to: (1) MTDC office or employment, including any proposed replacement of the LIUNA Trustee or Deputy Trustee or their designee(s) to the District Council; and (2) all proposed appointments to any office or employment with any constituent local of the MTDC, and to veto any proposed appointment that: (i) constitutes or

furthers an act of racketeering as defined in 18 U.S.C. § 1961; (ii) furthers or contributes to the association, directly or indirectly, of any member, employee, or agent of the MTDC, or any of the members or employees of the MTDC's constituent locals, with any element of organized crime; (iii) is contrary to or violates labor law or ERISA; or (iv) is inconsistent with the purposes of this Consent Decree.

(d) The Monitor shall have the authority to challenge the implementation of any proposed change to the Constitution of the MTDC that: (i) constitutes or furthers an act of racketeering as defined in 18 U.S.C. S 1961; (ii) furthers or contributes to the association, directly or indirectly, of any member, employee, or agent of the MTDC, or any of the members or employees of the MTDC's constituent locals, with any element of organized crime; (iii) is contrary to or violates labor law or ERISA; or (iv) is inconsistent with the purposes of this Consent Decree. During the pendency of such challenge, such change shall not be implemented at the MTDC.

(e) The Monitor shall have the authority to call meetings of the MTDC.

(3) Access to Information. The Monitor shall have complete and unfettered access to, and the right to make copies of, all books, records, accounts, correspondence, files, and other documents of the MTDC, its constituent local unions and their officers, except

for personal documents of such officers that do not concern the affairs of the MTDC or any investigation or charge against the officer within the Monitor's jurisdiction.

(a) The Monitor shall have the right to take and compel the sworn statement or sworn oral deposition of any officer, agent, representative, employee, or member of the MTDC or any of its constituent local unions concerning any matter within the Monitor's authority under this Consent Decree, provided that the person to be examined receives reasonable advance notice of the deposition, and may be represented by legal counsel of his or her own choice, or by a member of the MTDC, at any such deposition.

(b) The Monitor shall have the right to compel an accounting of the assets of the MTDC.

(4) Litigation Authority. The Monitor shall have the right to authorize the initiation of civil actions on behalf of the MTDC to recover damages incurred by the MTDC arising from any actions within the Court-Appointed Officers' jurisdiction as defined in this Consent Decree.

(5) Disciplinary Authority. The Monitor shall have all the rights and powers of the MTDC and any of its members or officers, including, without limitation, the powers set forth in the Uniform District Council Constitution of LIUNA and the Uniform Local Constitution of LIUNA with respect to discipline, and shall have the right to fine, suspend and expel members, officers, agents, representatives and employees as set forth below.

(6) Elections. The Monitor is empowered to supervise all phases of the rank and file, secret ballot election of the Executive Board of the MTDC.

(7) Review of the Monitor's Decisions. Any decision of the Monitor shall be final and binding, subject only to the court's review as provided herein:

(a) Should the District Council's lawful representatives wish to challenge the Monitor's decision to suspend the operation of the Constitution of the MTDC, the lawful representatives, within ten calendar days of the Monitor's decision, shall have the burden of challenging before this Court any aspect of the Monitor's decision concerning any proposed suspension of the Constitution.

(b) In reviewing decisions of the Monitor, the court shall apply the same standard of review applicable to review of final federal agency action under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*

(c) The decisions of this court with respect to the decisions of the Monitor shall be final and subject to appeal only as follows: any appellant who is unsuccessful in reversing the Court's decision shall be obligated to pay all reasonable attorneys' fees and costs incurred by the Monitor and/or Investigations Officer in connection with opposing the appeal. Accordingly, each such appellant shall be required to post a bond prior to prosecuting an appeal in an amount satisfactory to the Court, the Monitor and/or the Investigations Officer, in accordance with Rule 7 of the Federal Rules of Appellate Procedure.

(8) Reports to the Court. The Monitor may report to the court whenever the Monitor deems fit but, in any event, shall file a written report not less frequently than every six months regarding the Monitor's activities.

(9) Applications. The Monitor may make any application to the court, upon reasonable notice to the MTDC and the Government, for such assistance as may be necessary and appropriate to implement this Consent Decree.

c. THE INVESTIGATIONS OFFICER: The district court shall appoint an Investigations Officer, who shall have the following powers, rights, and responsibilities:

(1) Duties. The duty of the Investigations Officer is to investigate and to prosecute any proscribed acts that either have occurred since January 1, 1982, or occur in the future at any time prior to the expiration of the Consent Decree, and to propose appropriate sanctions for such conduct. Notwithstanding this limitations period, any proscribed act involving membership in or knowingly associating with La Cosa Nostra or any other criminal group shall be subject to investigation by the Investigations Officer regardless of when such offense occurred.

(2) Jurisdiction. The Investigations Officer's authority shall extend to: (i) officers, agents, employees, representatives or members of the MTDC for any matter constituting an offense under any applicable law or union bylaw or constitution; and (ii) officers, agents, employees, representatives or members of the MTDC or of its constituent locals with respect to enforcing the terms of the permanent injunctions set forth above.

(3) Disciplinary Authority. The Investigations Officer shall have all the rights and powers of the MTDC and any of its constituent locals and any of its members or officers, including, without

limitation, the powers set forth in the Uniform District Council Constitution of LIUNA, and the Uniform Local Constitution of LIUNA with respect to investigation, and shall have the right to propose that the Monitor impose fines upon, and/or suspend or expel members, officers, agents, representatives and employees as set forth below.

(4) Powers.

(a) Records. To carry out his duties, the Investigations Officer shall have complete and unfettered access to, and the right to make copies of, all books, records, accounts, correspondence, files, and other documents of the MTDC, its constituent local unions and their officers, agents and employees, except for personal documents of such officers, agents and employees that do not concern the affairs of the MTDC or any investigation or charge against the officer within the Investigations Officer's jurisdiction.

(b) Testimony. To carry out his duties, the Investigations Officer shall have the right to take and compel the sworn statement or sworn oral deposition of any officer, agent, employee, or member of the MTDC or its constituent local unions concerning any matter within the Investigations Officer's jurisdiction under this Consent Decree, provided that the person to be examined receives reasonable advance notice of the deposition, and ray be represented by legal counsel of his or her own choice, or by a member of the MTDC, at any such deposition.

(c) Litigation Authority. The Investigations Officer shall have the right and the responsibility to recommend to the Monitor that civil actions be initiated on behalf of the MTDC to recover damages incurred by the MTDC arising from any actions within the Court-Appointed Officers' jurisdiction as set forth above.

(5) Hiring Authority. The court-appointed officers, upon consultation with the lawful representatives of the MTDC, shall have the authority to employ legal counsel, accountants, consultants, investigators, experts and any other personnel, subject to reasonable limits, necessary to assist in the proper discharge of the court-appointed officers' duties. The court-appointed officers also shall have the authority to designate persons of their choosing to act on their behalf in performing any of their duties as outlined in this Consent Decree.

(a) Compensation and Expenses. The compensation and expenses of the court-appointed officers, and of any persons hired under their authority, shall be paid by the MTDC.

d. DISCIPLINARY HEARING PROCEDURES:

(1) Initiation of a Charge. Upon detecting and investigating proscribed act(s) as authorized above, the Investigations Officer shall file disciplinary charges with the Monitor against those persons who allegedly committed such act(s). The Investigations Officer shall initiate such a charge under this Consent Decree by sending a written notice of the specified charge(s) by first class mail to the last known address of the person charged. Such a charge shall state

that a decision upholding the charge may result in disciplinary action, including possible expulsion from the union.

(2) Hearing Before the Monitor.

(a) If the person charged fails to file with the Monitor an objection to the charge within 20 days after the mailing of the charge, the Investigations Officer shall present the charge to the Monitor, and the Monitor shall issue a decision adjudging the person charged in default and adopting the charge as filed by the Investigations Officer. If the person charged fails to object to the charge, the person charged waives his right to any further review of the Monitor's decision to impose disciplinary action.

(b) Any person wishing to contest the charge must file his objection with the Monitor, with a copy to the Investigations Officer, within 20 days after the mailing of the charge. The Monitor will then schedule and initiate a fair and impartial hearing on the charge(s) within 45 days of the objection. At the hearing, the Investigations Officer and the person charged may present evidence in a written and/or oral form. The Monitor shall conduct the disciplinary hearings in conformity with the rules and procedures generally applicable to labor arbitrations.

(3) Decision of the Monitor.

(a) Upon the conclusion of the hearing, or upon default by the person so charged, the Monitor shall issue a decision on the merits of the charge. That decision shall be issued no later

than 90 days after the conclusion of the hearing. The Monitor shall decide such charges according to the 'just cause' standard.

(b) Upon the Monitor's determination that the person charged has committed any proscribed act, the Monitor shall discipline the person charged (disciplinary decision). The Monitor's disciplinary decision shall be effective immediately upon issuance. The Monitor's disciplinary decision shall be final and binding, subject only to the court's review as provided herein. All discipline imposed under this Consent Decree, whether upon consent or by decision of the Monitor, shall be so ordered by the district court.

(c) For a period of up to ten calendar days after mailing of the Monitor's disciplinary decision concerning a disciplinary charge, any person aggrieved by the disciplinary decision (with the exception of any person who fails to contest the charge) shall have the right to seek review in district court. The decisions of the district court with respect to the disciplinary decisions of the Monitor shall be final and subject to appeal only as follows: any disciplined individual who is unsuccessful in reversing district court's decision on appeal shall be obligated to pay all reasonable attorneys' fees and costs incurred by the Monitor and/or Investigations Officer in connection with opposing the appeal.

e. MTDC EXECUTIVE BOARD ELECTIONS.

(1) In light of the history of LCN domination of the MTDC and corruption of its electoral processes, the MTDC Constitution shall be deemed suspended, and is hereby suspended, so that the election of the Executive Board of the MTDC - - which was scheduled for August 1995 - - may hereinafter be conducted by secret ballot and directly by the rank and file members of the constituent locals of the MTDC.

(2) February 1999 Supplemental Consent Decree. On February 5, 1999, the district court entered a Supplemental Consent Decree wherein the district court found that the court-appointed officers had made excellent progress toward eliminating corruption within the alleged enterprise. Accordingly, the district court terminated the terms of the Monitor and Investigations Officers under the original Consent Decree effective January 17, 1999, except that the Monitor and Investigations Officers were to continue and complete their reporting responsibilities and any disciplinary and review matters initiated before the end of their terms.

(a) The district court also appointed a Review Monitor for a term of 36 months to review certain operations of the District Council, including the following authority to:

(i) request and receive periodic reports and other information regarding, among other matters, the District Council, its constituent locals and related benefit funds;

(ii) receive information regarding violations of the initial consent decree or the permanent injunction;

(iii) review proposed dissolutions, additions, or mergers of constituent local unions and to seek an order from the District Court to veto such actions under specified circumstances;

(iv) review certain transactions involving District Council funds;

(v) review certain appointments to MTDC affiliated benefit funds;

(vi) supervise all aspects of elections for officer positions of the District Council and its constituent locals.

(b) The Supplemental Consent Decree also continued the previously issued permanent injunction, except that the prohibition on obstructing the work of the court-appointed officers was amended to apply to the work of the newly created position "Review Monitor."

(c) The Supplemental Consent Decree also provided that "[u]pon a reasonable belief that the MTDC is being operated in a manner inconsistent with the purposes of the original Consent Decree, (such purposes being applicable to all entities comprising the District Council), the Review Monitor shall have the right to apply to the Court: (i) to seek a restoration of court-ordered supervision by the Monitor and/or Investigations Officer as set forth in the

Original Consent Decree, or some other form of court-ordered supervision as the Review Monitor may deem appropriate, or (ii) for such other court orders as necessary to further the purposes of the Original Consent Decree."

F. LEADING COURT DECISIONS:

1. United States v. Mason Tenders District Council, 1994 WL 742637 (S.D.N.Y. Dec 27, 1994).

This order contains the Judgment and the Consent Decree entered December 27, 1994, described above.

2. United States v. Mason Tenders District Council, 909 F. Supp. 882 (S.D.N.Y. 1995), and 909 F. Supp. 891 (S.D.N.Y. 1995).

In 909 F. Supp. 882, the district court granted the government's motion for partial summary judgment on liability against defendants James Lupo and Joseph Fater on claims V and VII, which charged them with ERISA violations for breaches of their fiduciary duties arising from the District Council's pension and welfare Fund's purchases of certain properties.

In 909 F. Supp. 891, the district court held that under 29 U.S.C. § 1109 (a), which provides for personal liability for losses to employee benefit plans resulting from a breach of fiduciary duties, defendant Fater was liable for $600,000 in damages for losses on one property, and that both defendants were jointly and severally liable for $16,535,000 for losses on another property, plus prejudgment interest.

3. Investigators Officer v. Lupo, 1995 WL 614428 (S.D.N.Y. Oct. 13, 1995).

In this order, the district court entered a default judgment against James Lupo for accepting illegal kickbacks from service providers to District Council Trust Funds. Accordingly, the district court expelled Lupo from the District Council and its constituent locals and permanently banned him from membership in, association with, or employment by the District Council and any of its affiliated unions or trust funds.

4. United States v. Mason Tenders District Council, 1995 WL 679245 (S.D.N.Y. Nov. 15, 1995).

The Government sought permanent injunctive relief against individual defendants Casciano, LaBarbara, Mandragona, Messera, Soussi, and Vario (the Individual Defendants), seeking to limit their involvement in organized crime, union affairs, and the construction and asbestos removal industries. Each of these defendants was at one time an official of the Mason Tenders District Council, the Trust Funds, or a constituent local union. Between 1989 and 1992, each had pled guilty to various racketeering charges. At the time the Government's proposed injunctions were submitted, all of the Individual Defendants either had been recently released from prison for those offenses or were pending imminent release. The district court rejected the Individual Defendants argument that their guilty plea agreements precluded any relief in this action, noting that "[t]he RICO statute specifically contemplates simultaneous criminals and civil liability for the identical acts of a single defendant." Id. at * 21. The district court also rejected

defendant Vario's argument that the conditions of his supervised release subjected him to conditions that made the injunctive relief unnecessary.

The Government's proposed injunction sought various restraints on the activities of the Individual Defendants, barring them from any further racketeering activity, all contacts with LCN members, all association with labor unions or the trust funds, all commercial activities involving the District Council or its unions, and involvement in the construction and asbestos removal industries. Several defendants filed various objections to the breadth and scope of these proposed restraints, asserting that the terms of the requested relief were vague and overbroad and violated their First Amendment rights. However, the district court ruled that under United States v. Carson, 52 F.3d 1173 (2d Cir. 1995), and other Government civil RICO cases, the court's authority to fashion equitable relief in order to accomplish RICO's purposes was very broad. In particular, the district court enjoined the defendants from:

(1) committing any act of racketeering as defined in 18 U.S.C. § 1961;

(2) knowingly associating for commercial purposes, directly or indirectly, with any member or associate of organized crime, with any defendant in this action, with any member of the MTDC or its constituent locals, or with any owner, officer, agent, or employee of any business employing members of LIUNA, the MTDC, or the MTDC's constituent local unions;

(3) visiting any social jobs, where commercial activities are discussed, or known to be frequented by members or associates of organized crime;

(4) participating in any way in the affairs of, or continuing as a member of, or having any dealings, directly or indirectly, with any labor organization or employee benefit fund, including, without limitations, any entity or employee benefit fund affiliated with LIUNA, the MTDC, or an MTDC constituent local, provided that nothing in this judgment shall prohibit any one of the six Individual Defendants from: (a) making application for or receiving a pension from the MTDC Pension Fund, or from communicating with the MTDC Pension Fund concerning these pension payments; (b) permitting any business not employing members of LIUNA, the MTDC, or the MTDC constituent local unions, which business employs any one of the six Individual Defendants, from deducting money from his wages and from remitting such money to a labor organization not affiliated with LIUNA, the MTDC, or any MTDC constituent local; or (c) seeking and receiving benefits provided for by a collective bargaining agreement binding on any business not employing members of LIUNA, the MTDC, or the MTDC constituent local unions, which business employs any one of the six Individual Defendants, or provided for by an ERISA-protected employee benefit plan established by that business;

(5) knowingly associating for any commercial purpose, directly or indirectly, with any officer, agent, delegate, representative, shop steward, or employee of any labor organization or employee

benefit fund, including, without limitation, any labor organization or employee benefit fund affiliated with LIUNA, the MTDC, and the MTDC constituent locals;

(6) owning, operating, having any interest in or control of, doing business with, or having any commercial dealings, directly or indirectly, with any entity that employs members of LIUNA or the MTDC, including, but not limited to, such entities in the construction or asbestos removal industries.

However, the district court refused to impose a blanket prohibition barring the Individual Defendants from operating any construction or asbestos removal business.

5. United States v. Mason Tenders District Council, 1996 WL 22360 (S.D.N.Y. Jan. 19, 1996).

Pursuant to the district court's grant of injunctive relief in the previous decision, the Government advised the district court of a conflict between injunctive provisions. Specifically, as noted by the Government, the court's decision to permit the defendants to operate construction or asbestos removal businesses while barring them from all contacts with the District Council or LIUNA would effectively permit the defendants to insulate their businesses from unionization. The district court, therefore, modified its earlier decision by entering an injunction permitting the defendants to operate such businesses, but prohibiting them from any commercial dealings with any entity employing members of the District Council or LIUNA.

6. Investigations Officer v. Lanza, 1996 WL 514871 (S.D.N.Y. Sept. 10, 1996).

The district court upheld charges against defendant Salvatore Lanza for engaging in conduct prohibited by the Consent Decree, including for knowingly associating with organized crime persons that occurred before the Consent Decree's injunction against such conduct. The district court explained that the general rule that injunctions ordinarily have only prospective effect did not apply to the Consent Decree because consent of the parties enables the court approving a consent decree to exceed the scope of the relief that it might have awarded absent the parties' consent.

The district court expelled Lanza from the District Council and LIUNA Local 30 and permanently banned him from membership in, association with, or employment by the District Council and any affiliated union or trust fund.

7. United States v. Mason Tenders District Council, 1997 WL 340993 (S.D.N.Y. June 20, 1997) and 1997 WL 345036 (S.D.N.Y. June 20, 1997).

The district court upheld the Monitor's decision to disqualify persons as potential candidates for President and Vice-President of Local 66 of the District Council.

8. United States v. Mason Tenders District Council, 1997 WL 698188 (S.D.N.Y. Nov. 7, 1997).

After a hearing on charges brought by the Investigations Officer, the Monitor barred defendant LaBarbara from any association with the District Council, its unions or its trust funds, and imposed a fine of $10,000. LaBarbara appealed. The district court sustained the

Monitor's findings that LaBarbara had engaged in racketeering activities involving extortion, interfered with union business, and knowingly associated with LCN members and associates.

9. United States v. Mason Tenders District Council, 1998 WL 23214 (S.D.N.Y. Jan. 13, 1998).

Defendant Vario received a union severance package of $35,769.50 three weeks before he was convicted of labor racketeering. The Investigations Officer subsequently charged Vario with three acts of accepting labor payoffs in violation of the Consent Decree. When Vario failed to contest the charges, the Monitor declared Vario in default, expelled Vario from the District Council and its constituent locals, permanently barred him from association with the District Council, and fined him $53,769.50 payable to Vario's former local union. After a hearing challenging the default and the imposition of the fine, the Monitor affirmed the penalties. Vario appealed, claiming that the there was no evidence that he received the severance package by collusion and that his sentence on the labor racketeering conviction, which included confinement and a fine, precluded the Monitor's action. The district court sustained the Monitor's findings that even absent any collusion, Vario's receipt of the severance package was "unconscionable" in light of Vario's conviction. The district court also held that the fine, payable to the union and not the United States, properly compensates the union for the losses Vario caused it.

10. United States v. Mason Tenders District Council, 1998 WL 23217 (Jan. 13, 1998).

The district court upheld the Monitor's suspension of a union member's shop steward certification for twenty-four months for engaging in conduct prohibited by the Consent Decree.

11. United States v. Mason Tenders District Council, 2000 WL 307250 (S.D.N.Y. March 27, 2000) and 2000 WL 328755 (S.D.N.Y. March 28, 2000).

The district court upheld the Monitor's decision finding that various union officers breached their fiduciary duties by failing to investigate organized crime's corrupt influence over the union and to take any remedial action, and permanently barring the officers from holding union office in the Mason Tenders District Council or any of its affiliated local unions or entities.

12. United States v. Mason Tenders District Council, 205 F. Supp. 2d 183 (S.D.N.Y. 2002).

The district court granted the Mason Tenders District Council's motion for a preliminary injunction to enjoin an independent local union, Local 116, from soliciting or trying to represent Teamster - represented workers, and from contacting District Council members and soliciting them to join Local 116. The district court explained that Local 116 was controlled by members of the International Brotherhood of Teamsters Union (IBT) who were expelled from the IBT and enjoined under the IBT Consent Decree, and therefore "this preliminary injunction is necessary and appropriate to enforce this Court's previous order enjoining all [District Council] members from associating with anyone who is barred from participating in union affairs." Id. at 190.

17. LABORERS' INTERNATIONAL UNION OF NORTH AMERICA (LIUNA)

A. CASE NAME:

United States v. Laborers' International Union of North America, et al., settled February 13, 1995 before the complaint was filed. The case would have been brought in the United States District Court for the Northern District of Illinois.

B PROPOSED DEFENDANTS:

The draft complaint[15] proposed three categories of defendants:

1. The Union defendant -- the Laborers' International Union of North America (LIUNA), which is an international union that represents a variety of general laborers, including masons' helpers, general construction laborers, pipeline laborers, watchmen, asbestos removers, pavers, stone cutters and mail handlers. At the time of settlement, LIUNA had approximately 700,000 rank and file members and included eleven regional offices covering the United States, 60 district councils and approximately 820 local unions throughout the United States and Canada;

2. Twenty-eight individual defendants, including various current and former LIUNA officers and alleged members and associates of La Cosa Nostra (LCN) Families throughout the United States;

3. Nominal defendants - - various members of LIUNA's General Executive Board (GEB) and the General Counsel of LIUNA were named as "nominal" defendants in their official capacities for the purpose of properly effectuating the relief requested in this case, but were not named in their individual capacities as alleged violators of RICO 18 U.S.C. § 1962 (¶¶ 11-14).

The draft complaint also specified numerous co-conspirators, not named as defendants, including various alleged members and associates of the LCN (¶ 13).

[15] Available at www.thelaborers.net.

C. SUMMARY OF THE DRAFT COMPLAINT:

1. The draft complaint alleged that the RICO enterprise consisted of "LIUNA together with its regional offices, subordinate district councils and local unions, and affiliated employee welfare benefit and employee pension benefit plans." (¶ 16). The draft complaint alleged four claims for relief: claims (1) and (2), that from at least the late 1960's up to the date of the complaint, the defendants acquired and maintained control of the alleged enterprise through a pattern of racketeering activity, and conspired to do so, in violation of 18 U.S.C. §§ 1962 (b) and (d); claims (3) and (4), that during the same time period, the defendants participated in the affairs of the alleged enterprise through a pattern of racketeering activity, and conspired to do so, in violation of 18 U.S.C. §§ 1962 (c) and (d) (¶¶ 17-27).

The draft complaint alleged that the defendants used the following means and methods to carry out their alleged RICO violations: (1) various LCN members and associates, acting with corrupt LIUNA officers and members, corruptly controlled the selection of numerous LIUNA officers, including four consecutive General Presidents of LIUNA from 1926 to 1995 (¶ 19 (a)); (2) the LCN used violence, including murder, to perpetuate its control of LIUNA and to intimidate the rank and file membership of LIUNA (¶ 19 (b)); (3) the defendants repeatedly approved the appointment of persons with known criminal histories or organized crime ties to union offices and union employment and allowed corrupt union officials to remain in office (¶ 19 (c)); (4) to perpetuate their control of LIUNA, the defendants used LIUNA election procedures, imposed trusteeships over locals to prevent opposition and manipulated hiring halls to gain employment for union members loyal to them and to deny employment to others to deter opposition (¶ 19 (d)); and (5) the defendants relied on nepotism and cronyism in the selection of union officials and hiring of employees (¶ 19 (e)).

The draft complaint also alleged that various LIUNA officials failed to satisfy their ethical and fiduciary obligations to LIUNA and its members by assisting the above described corruption and by failing to take adequate measures to investigate and discipline

corrupt union officials and to eliminate and address such corruption (¶ 48).

2. The draft complaint (¶¶ 28-78) further alleged that the defendants committed a pattern of 110 racketeering acts to carry out their alleged RICO violations, including the following: (1) various defendants obtained and conspired obtain "property" from the membership of LIUNA through extortions, including money and the rights of union members to free speech and democratic participation in internal union affairs as guaranteed by the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 411, 481 (e), 501 (a), 1104 and 1106, all in violation of 18 U.S.C. § 1951; (2) various defendants received and conspired to receive numerous kickbacks with intent to be influenced with respect to their actions and decisions relating to various pension, health and welfare funds, in violation of 18 U.S.C. § 1954; (3) various defendants received and conspired to receive illegal payoffs from employers, in violation of 29 U.S.C. § 186 (b) and (d); (4) various defendants extorted money from construction companies and other employers in exchange for labor peace and other benefits, in violation of 18 U.S.C. § 1951; (5) various defendants committed murder and conspiracy to murder, in violation of state laws; (6) various defendants embezzled, stole and unlawfully converted union related benefit funds, in violation of 18 U.S.C. § 664; and (7) various defendants sought to obtain money through fraud, in violation of 18 U.S.C. §§ 1341 and 1346.

The draft complaint also alleged that various defendants were previously convicted of many of these racketeering acts, and hence they were collaterally estopped from denying the essential allegations underlying those racketeering acts (¶¶ 28-78).

D. <u>RELIEF SOUGHT</u>:

The relief sought in the draft complaint included the following:

1. That the district court issue a permanent injunction to do the following:

a. Enjoin various officers of LIUNA and their successors as officers, employees, and agents of LIUNA, and all persons acting in active concert with them, from committing any acts of racketeering, as defined in 18 U.S.C. § 1961 (1), or from associating,

directly or indirectly, with any member or associate of the LCN, or any other persons in active concert with members or associates of the LCN;

b. Enjoin any defendant named in the complaint who was found to have violated 18 U.S.C. § 1962, from participating in any way, either directly or indirectly, in the affairs of LIUNA or any of its affiliated bodies or subordinate district councils or local unions or other subordinate entity, or any other labor organization, and from being employed in a position which has among its duties dealing with any labor organization, and from owning, operating or being employed in any business or other organization which employs members of LIUNA or any of its subordinate organizations, or subsidiary organizations, and such organizations' affiliated employee benefit plans and any entity providing benefit plans services to such employee benefit plans or any other related entities.

2. That following a trial on the merits the district court issue a decree providing for the following:

a. Amending the LIUNA Constitution to establish procedures to provide that the General President, General Secretary-Treasurer and all other members of the Board are elected through a process of direct election by the rank and file membership of LIUNA;

b. Directing that new general elections be held to select a new General President, a new General Secretary-Treasurer and new International Vice-President, under the supervision and direction of an independent court-appointed officer, in such a manner as will ensure that the election is not vulnerable to intimidation or coercion of those LIUNA members found to be eligible to vote in the election;

c. Amending the LIUNA Constitution to provide for a method of operating the hiring hall procedures used by LIUNA Local Unions to find work for LIUNA members in such a fashion to prevent any LIUNA official at any level of LIUNA from operating the hiring hall in a discriminatory manner or in any manner which tends to intimidate the rank and file membership of LIUNA from exercising their individual rights as provided by LMRDA and other

provisions of law; and

d. Amending the LIUNA Constitution so as to establish procedures to ensure that the imposition of trusteeships on subordinate LIUNA entities and the creation of district councils within LIUNA are not used in any manner to intimidate the rank and file membership of LIUNA from exercising their individual rights as provided by LMRDA and other provisions of law.

3. That following a trial on the merits, the district court appoint independent Court Liaison Officer(s) to discharge the duties of LIUNA's President and/or its General Executive Board which relates to disciplining corrupt or dishonest officers, including the powers to conduct investigations to find corrupt and dishonest LIUNA officials and to impose those sanctions appropriate to ensure that LCN and criminal control of LIUNA is removed and to ensure that the rights of the membership of LIUNA under Title 29 are protected and preserved and to discharge any of the other duties of the Board of LIUNA (other than negotiating and entering into collective bargaining agreements, participating in the affairs of any LIUNA-related political action committee, or participating in the process related to the resolution of employee grievances) when the court-appointed officer deems it necessary to fulfill his duty to protect the rights of the membership of LIUNA and to prevent corruption and infiltration by the LCN or any other criminal group.

4. That following a trial on the merits, such independent court officers as the district court deems sufficient to achieve the objectives of this suit remain in office until the court determines that such officers are no longer necessary to achieve the objectives of this action.

5. That the district court provide in its Order that the fees and expenses of such officers as the court deems necessary are paid out of the funds of LIUNA.

6. That the district court enjoin and restrain the defendants who are named only as officials of LIUNA, pursuant to Rule 19 of the Federal Rules of Civil Procedure, and their successors as officials of LIUNA, and any of its members, agents, employees, officers, Regional

Offices, District Councils, Local Unions, and affiliated employee benefit funds or training funds from interfering in any manner whatsoever with any officer(s) appointed by the court pursuant to this law suit in the execution of those powers given to such officers by the court.

7. That the district court order that all of the individual defendants who are found to have violated 18 U.S.C. § 1962 (d) to disgorge all proceeds derived from such violations, with such proceeds to be applied for the benefit of the rank and file members of LIUNA, who are victims of those violations, with the remainder to be paid to cover the expenses of any officer appointed by the district court pursuant to this law suit or distributed as the court finds are in the interests of equity and justice.

8. That the district court issue a judgment declaring that LIUNA has been controlled and exploited by the LCN through multiple violations of 18 U.S.C. § 1962.

9. That the district court award the United States the costs of this suit together with such other and further relief as may be necessary and appropriate to prevent and restrain further violations of 18 U.S.C. § 1962, and to end the LCN's control over the exploitation of LIUNA.

E. OUTCOME OF THE CASE:

1. **Initial Settlement Agreement** –

In late 1994, the United States served LIUNA with its draft complaint, and settlement discussions ensued. On February 13, 1995, the Department of Justice (DOJ) entered into an agreement with LIUNA in which DOJ agreed to refrain from filing a civil RICO lawsuit against LIUNA and which allowed LIUNA an opportunity, without court supervision and court-appointed officers, to implement an Internal Reform Program to eliminate corruption within LIUNA. LIUNA's Internal Reform Program is described below. The Initial Settlement Agreement provided that if after 90 days "the Assistant Attorney General for the Criminal Division determines, in her sole discretion, that the imposition of a consent decree is necessary or desirable, after having given LIUNA an opportunity to have a meeting to be heard, the parties agree to the filing of the attached complaint and entry and implementation of the attached

consent decree."

The attached Consent Decree provided for, among other matters: (1) a permanent injunction against LIUNA officers, representatives and members from committing any act of racketeering and other misconduct; (2) court-appointed officers to investigate, prosecute, and discipline LIUNA officers, representatives, employees and members for misconduct; (3) adoption of procedures to conduct investigations and adjudication of disciplinary charges; (4) various reforms in LIUNA's Job Referral Rules and financial practices; and (5) union election reforms. DOJ also agreed to assist LIUNA's reform efforts.

2. **Renewal Agreements** –

On January 14, 1998, and January 4, 1999, DOJ and LIUNA entered into renewal agreements that made slight changes to the Initial Settlement Agreement.

3. **Final Settlement Agreement** –

On January 18, 2000, DOJ and LIUNA entered into a Final Settlement Agreement whereby DOJ gave up its rights to impose an agreed upon Consent Decree and to have court-appointed officers to implement reform and to investigate and remove corrupt LIUNA officers, employees and members. Many of the provisions in the agreed upon Consent Decree became moot in light of the success and adopted reforms of LIUNA's Internal Reform Program summarized below. The Final Settlement Agreement guaranteed that LIUNA would continue its Reform Programs for a substantial period. LIUNA agreed to the following principal matters:

a. LIUNA shall not prior to the 2006 LIUNA General Convention make any "material change" to LIUNA's Internal Reform Program without prior approval of the United States. Therefore, in substance, LIUNA agreed to retain its Ethical Practices Code, Disciplinary Procedures, and Reform Team officers.

b. LIUNA's General Executive Board (GEB) would continue to support the Internal Reform Program through the 2006 General Convention.

c. LIUNA agreed to retain an independent Elections Officer to run LIUNA's 2001 and 2006 International Elections and LIUNA agreed to provide the Elections Officer with a budget of $4.4 million to supervise the 2001 International Election.

d. If the United States concluded that LIUNA had materially breached the Final Settlement Agreement, the United States may seek judicial enforcement of the Agreement before the United States District Court for the Northern District of Illinois that is presiding over the existing civil RICO Consent Decree in the Chicago District Council case. To expedite any such litigation, LIUNA agreed that the only issues to be adjudicated were whether LIUNA materially complied with its obligations under the Agreement, or whether any proposed change to its Internal Reform is a "material change" within the meaning of the Agreement.

e. Through 2006, the United States would continue to assist and monitor LIUNA's Internal Reform Program, and to that end representatives of LIUNA would continue to meet periodically with, and provide information to, representatives of the United States.

4. **LIUNA Accomplishments 1995-October 2006** -

From February 1995 to October 2006, when the final Settlement Agreement ended, the following reforms and matters were accomplished pursuant to the Settlement Agreements:

a. **Ethical Practices Code** - LIUNA adopted an Ethical Practices Code modeled on codes proposed by the A.F.L.-C.I.O. in the late 1950's and adopted by the United Auto Workers Union. The code imposed standards of conduct for all financial practices relating to the handling of union, benefit and pension funds, the award and administration of contracts, conflicts of interest and similar issues. The code also prohibited LIUNA officers, representatives, employees and members from engaging in "barred conduct."[16]

[16] "Barred Conduct" was defined as: (a) committing any act of racketeering as defined in 18 U.S.C. § 1961(1); (b) knowingly associating with any member or associate of the LCN; (c) knowingly permitting any member or associate of the LCN to exercise control or influence over LIUNA; or (d) obstructing or interfering with the Reform Team's enforcement of the Ethical Practices Code. The GEB Attorney, described below, was also authorized to seek disciplinary (continued...)

b. **Reform Team** - LIUNA created four new positions to carry out its internal reform program:

(1) he Inspector General to investigate alleged violations of the Ethical Practices Code. LIUNA hired Douglas Gow, a retired former Associate Deputy Director of the FBI, to be the Inspector General, who in turn hired or retained approximately 40 former FBI and Department of Labor agents and other former law enforcement officals to assist him;

(2) the GEB Attorney to investigate and prosecute violations of the Ethical Practices Code. LIUNA retained an independent attorney, Robert D. Luskin, a former Special Counsel to the Chief of the Organized Crime and Racketeering Section, and an attorney in Washington, D.C. to be the GEB Attorney. In turn, Mr. Luskin hired or retained other independent attorneys to assist him;

(3) the Independent Hearing Officer, Peter F. Vaira, formerly United States Attorney in Philadelphia, and Organized Crime Strike Force Chief in Philadelphia and Chicago, to preside over and decide all cases brought by the GEB attorney; and

(4) the Appellate Officer, attorney Neil Eggleston, a former AUSA in the Southern District of New York and a partner in Howry & Simon, to hear and decide appeals from the decisions of the Independent Hearing Officer.

c. **Removal of Officers, Employees and Members for Corruption**- 351 individuals (161of whom have ties to organized crime) had left LIUNA either because of expulsion resulting from disciplinary charges or because of retirement or resignation, rather than submit to the disciplinary process. All the LIUNA officers and employees who were alleged to be corrupt individuals by the United States in its 1994 draft RICO complaint had left or were removed from LIUNA, including its former President Arthur A. Coia, who pled guilty to mail fraud charges,[17] and three International Vice-Presidents: John Serpico, Samuel Caivano and Peter

[16](...continued)
sanctions against any officer, agent, representative, employee, or member of LIUNA or its constituent entities for committing any federal or state felony, whether or not related to union affairs, or any federal or state misdemeanor violation involving the conduct of the affairs of a labor union or employee pension or welfare benefit plan, and may suspend such persons upon indictment pending resolution of the disciplinary charges.

[17] On January 31, 2000, Arthur A. Coia pleaded guilty to a one count information alleging that he executed a scheme to defraud the State of Rhode Island and the Town of Barrington,
(continued...)

Fosco.

d. **Election Reform** - LIUNA amended its constitution to provide for direct election through secret ballot by rank and file members of all of its international officers, including its General President, and General Secretary Treasurer and all 13 International Vice-Presidents, which in 1996 resulted in the first contested election for LIUNA's presidency in LIUNA history. In 1996, LIUNA appointed an independent Elections Officer who supervised the election of LIUNA's international officers.

e. **Imposition of Trusteeships and Supervision** - In addition to the disciplinary process, LIUNA imposed 48 trusteeships and 46 "supervisions" on various locals and subordinate entities, which resulted in the removal of 434 officers and implementation of more efficient management measures. LIUNA also agreed to court-appointed officers in three cases to eliminate corruption: (1) The Mason Tenders District Council in New York City; (2) The Chicago District Council; and (3) Local 210 in Buffalo, New York.[18]

f. **Hiring Hall Reform** - In 1996, LIUNA implemented hiring hall reform to eliminate corruption and favoritism and to ensure that out of work union members would be dispatched for work on a fair and objective basis. These reforms were enforced by LIUNA's Inspector General's and GEB Attorney.

g. **Miscellaneous Reforms** - LIUNA also implemented other financial reforms to eliminate mismanagement and corruption.

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[17](...continued)
Rhode Island of taxes owed on several automobiles. See United States v. Coia, Information No. 00-10024-GA0 (D. Mass. January 27, 2000). Pursuant to a guilty plea agreement, Mr. Coia agreed to, among other matters, "remain retired from LIUNA as General President Emertius. . . and [was] barred, whether within or outside LIUNA, from any service as a consultant or advisor (as those terms are used and defined for purposes of 29 U.S.C. § 504) to LIUNA or any of its affiliated or subordinate entities, or in any capacity from any decision making authority concerning or over, or control over LIUNA or any of its affiliated or subordinate entities."

[18] See case summaries numbers 6, 19 and 20, in App. B at 40-42, 208-228.

5. **DOJ's Assistance** –

Throughout the period of these Settlement Agreements, DOJ closely monitored LIUNA's reform efforts through regular meetings and discussions, insisted upon various reforms and provided information and evidence to enable LIUNA's reform team to eliminate corruption.

6. **Continuation of LIUNA's Reform Efforts** –

Although the Final Settlement Agreement formally ended in October 2006, LIUNA has maintained its above-described reform program and is continuing its efforts to eliminate corruption, and DOJ continues to assist LIUNA's reform efforts.

F. LEADING COURT DECISIONS:

1. Serpico v. Laborers' International Union of North America, 97 F.3d 995 (7th Cir. 1996).

Two former LIUNA officials and five LIUNA locals sued LIUNA, contending that the decisions of LIUNA's General Executive Board (GEB) to establish a disciplinary code and to suspend officers in response to the Department of Justice's informing LIUNA of its intent to file a civil RICO suit against LIUNA and others violated Title I of the Labor-Management Reporting and Disclosure Act (LMRDA) 29 U.S.C. §§ 411-15 because LIUNA's GEB acted without a vote of the union's membership. The Seventh Circuit rejected this claim, concluding that the LMRDA "does not require any particular subject to be put to a referendum; it says only that when voting occurs every union member has equal rights to take part." 971 F. 3d at 998.

The Seventh Circuit also ruled that LIUNA's GEB's action was authorized by Article VIII § 2(b) of LIUNA's constitution, which empowers the GEB to amend LIUNA's constitution and to "exercise legislative power, when in its opinion, it deems it necessary to conform to or comply with the law; or when, in its judgment, the exercise of such power is deemed necessary, proper and appropriate in an emergency." Id. at 997. The Seventh Circuit explained that "[t]he word 'necessary' in a constitution does not mean 'essential'; it means expedient to the task at hand." Id. at 997. Under that understanding of the term, the Seventh Circuit concluded that "reasonable and honest interpreters could have concluded that the steps the [GEB] took were necessary to avoid a RICO complaint, which given the dire consequences of a receivership could have been deemed an emergency." Id. at 999.

2. Laborers' International Union of North America v. Caruso, 197 F.3d 1195 (7th Cir. 1999).

Pursuant to LIUNA's Internal Reform Program, LIUNA imposed a trusteeship over LIUNA's Chicago District Council (CDC) to eliminate organized crime's corrupt influence and control over the CDC. Following an evidentiary hearing, LIUNA's Independent Hearing Officer (IHO) concluded that "a trusteeship of the CDC was necessary to expel the influence of organized crime, restore democratic process and otherwise carry out the legitimate business of the Unions." Id. at 1197. LIUNA's Appellate Officer (AO) ruled that the IHO's opinion was not appealable under the Ethics and Disciplinary Procedure (EDP) established by LIUNA "because it

concerned a trusteeship only and imposed no 'discipline' on any of the defendants", which would have been appealable. Id. at 1197.

However, the CDC refused to permit LIUNA to impose the trusteeship and denied LIUNA's appointed trustee access to the CDC facilities. LIUNA and its trustee for the CDC sued in federal district court, seeking a restraining order barring the CDC and its former officers from interfering with the trusteeship. The district court granted the plaintiffs' motion for summary judgment and issued the requested restraining order.

On appeal, the CDC contended that: (1) the IHO's "evident partiality" deprived the CDC of a fair and impartial hearing; (2) LIUNA's "patently unreasonable" interpretation of its Constitution and the EDP deprived the CDC of an intraunion appeal; and (3) LIUNA's "bad faith" and "unclean hands" precluded summary judgment.

The Seventh Circuit refused to consider the first two contentions because the CDC did not raise them in its response to the motion for summary judgment. The Seventh Circuit rejected the CDC's third claim as "meritless", stating:

> In *Serpico*, 97 F.3d at 999, this court upheld LIUNA's agreement with the government stating that "we, too, think that reasonable and honest interpreters could have concluded that the steps the Board took were necessary to avoid a RICO complaint, which given the dire consequences of a receivership could have been deemed an emergency." The CDC's attempts to characterize its new challenges to the EDP as challenges to how the EDP is implemented do not alter the fact that the EDP was appropriately enacted and we are not aware of any compelling reason that warrants concluding that LIUNA's efforts to establish a trusteeship over the CDC was in bad faith.

197 F.3d at 1197-98.

18. HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION (HEREIU)

A. CASE NAME:

United States v. Hotel Employees and Restaurant Employees International Union and the General Executive Board of the Hotel Employees and Restaurant Employees International Union, Civil Action No. 95-4595 (GEB), United States District Court for the District of New Jersey. Complaint filed September 5, 1995.

B. DEFENDANTS:

The complaint named two defendants: (1) In order to "fully effectuate the relief sought" by the civil RICO suit, the complaint named the Hotel Employees and Restaurant Employees International Union (HEREIU) as a nominal defendant. The HEREIU was defined as including its various "constituent entities," including HEREIU Districts, District Councils, and local unions located throughout the United States. (2) The complaint also named as a defendant the General Executive Board (GEB) of the HEREIU, which consisted of its current and former members, including the General President of the HEREIU, who served as Chairman of the General Executive Board, the General Secretary Treasurer, the General Vice President, the Director of Organization, 14 District Vice Presidents, and 10 Vice Presidents at large. At the time of the filing of the complaint, the General President was Edward T. Hanley.

C. SUMMARY OF THE COMPLAINT:

The complaint alleged that the RICO enterprise consisted of an association-in-fact (HEREIU enterprise), which was comprised of "the HEREIU (including its constituent entities), the Defendant General Executive Board, and the officers, employees and associates of the HEREIU." The complaint alleged that since in or about 1970 and continuing to the filing date of the complaint, the defendant GEB, acting with known and unknown members and associates of organized crime, had conspired to conduct and participate, directly and indirectly, in the conduct of the affairs of the HEREIU enterprise through a pattern of racketeering activity, in violation of

18 U.S.C. § 1962 (d). Pursuant to the authority of United States v. Glecier, 923 F.2d 496 (7th Cir. 1991), the complaint did not allege specific racketeering acts. Rather, the complaint alleged that the pattern of racketeering activity consisted of: (1) multiple acts of extortion indictable under the Hobbs Act, 18 U.S.C. § 1951; (2) multiple acts of embezzlement and theft of union funds indictable under 29 U.S.C. § 501(c); and (3) multiple acts of wilfully receiving prohibited employer payments indictable under 29 U.S.C. § 186 (b)(1) and (d).

The complaint specifically alleged that as part of the conspiracy GEB, acting with members and associates of organized crime, had obtained and attempted to obtain property in the form of the right of the HEREIU's rank and file union members to the loyal and responsible representation by their officers, agents, and representatives as guaranteed by 29 U.S.C. § 501(a), and to free speech and democratic participation in union affairs, as guaranteed by 29 U.S.C. § 411. The complaint alleged that such property had been obtained by the defendant General Executive Board with the consent of such union members having been induced by the wrongful use of actual and threatened force, violence and fear, including fear of physical and economic harm, in violation of 18 U.S.C. § 1951.

The complaint also specifically alleged that the GEB had fostered a climate of intimidation created by members and associates of organized crime and also had violated its duty to provide loyal and responsible representation to the union members of the HEREIU by, among other things, failing to enforce the HEREIU constitution; failing to investigate charges of corruption within the HEREIU and its constituent entities; failing to redress proven instances of fraudulent practices and illegal organized crime control; and appointing to office and permitting to remain in office corrupt officials and organized crime figures. The complaint alleged that the GEB had engaged in such activity despite notice of corruption and the influence and control of organized crime within the HEREIU through published reports, public investigations, and multiple criminal and civil charges against the officers and employees of HEREIU and its constituent entities.

The complaint further alleged that as part of the conspiracy, the GEB, acting with officers and agents of the HEREIU's constituent entities and members and associates of organized crime, had embezzled, stolen, and willfully converted the property of the HEREIU (including its constituent entities) by approving and permitting improper expenditures and loans of HEREIU funds to various persons, which expenditures and loans were not in the interest and not for the benefit of the HEREIU and its union membership, resulting in the diminution of HEREIU assets, and by knowingly refusing and failing to exercise the GEB's investigatory and disciplinary authority to redress such corrupt activity within the HEREIU, in violation of 29 U.S.C. § 501(c).

Also, as part of the alleged conspiracy, the GEB, acting with the officers and employees of the HEREIU and of various constituent entities and members and associates of organized crime, was charged with having requested, demanded, received, accepted and agreed to receive and accept payments of money and other things of value from various employers, and persons acting in the interest of employers, in violation of 29 U.S.C. § 186. Finally, the complaint alleged that the GEB had aided and abetted officers and employees of the HEREIU and its constituent entities and members and associates of organized crime to request, demand, receive and accept unlawful payments of money and other things of value from the such employers by knowingly refusing and failing to investigate and redress such conduct, in violation of 29 U.S.C. § 186(b)(1) and (d) and 18 U.S.C. § 2.

D. <u>RELIEF SOUGHT</u>:

1. The Government sought to permanently enjoin all current and future officers, agents, employees, representatives, and persons holding positions of trust in the HEREIU and its constituent entities, and all current and future members of the HEREIU and its constituent entities, from:

   a. committing any crime listed in 18 U.S.C. § 1961(1);

   b. knowingly associating with any member or associate of any criminal group or with any barred person;

c. knowingly permitting any member or associate of any criminal group or any barred person to exercise any control or influence, directly or indirectly, in any way or degree, in the conduct of the affairs of the HEREIU and its constituent entities; and

d. obstructing or otherwise interfering, directly or indirectly, with the efforts of anyone effectuating or attempting to effectuate the relief ordered or attempting to prevent any criminal groups or barred person from exercising influence on the conduct of the affairs of the HEREIU and its constituent entities.

A "barred person" was expressly defined in the complaint as: (a) "any member or associate of any organized crime family or other criminal group, or (b) any person prohibited from participating in union affairs pursuant to or by operation of the injunction or other court order or statute."

2. The complaint also requested that the district court appoint a Monitor, funded by the HEREIU, with investigatory, review and disciplinary powers, including the authority to review and approve candidates for elective and appointive office in the HEREIU and its constituent entities; to disapprove the hiring, appointment, reassignment or discharge of any person or business entity by the HEREIU or its constituent entities; to disapprove or terminate any contract (including, but not limited to, contracts with service providers or vendors), lease, or other obligation of the HEREIU or its constituent entities; and to impose disciplinary sanctions on union members and any officer, representative, agent, employee or person holding a position of trust in the HEREIU and its constituent entities. The disciplinary sanctions could be based on engaging in actions or inactions which violated any of the injunctive prohibitions ordered by the district court, violated any criminal law involving the operation of a labor organization or employee benefit plan, or which furthered the direct or indirect influence of any organized crime group or the threat of such influence.

E. OUTCOME OF CASE:

1. September 5, 1995 Consent Decree:

On September 5, 1995, the Government and the HEREIU filed a Consent Decree simultaneously with the complaint following negotiations by representatives of the HEREIU, the United States Attorney's Office for the District of New Jersey and the Organized Crime and Racketeering Section (OCRS). The HEREIU also consented to consolidation of the case with the prior civil RICO action in United States v. Edward T. Hanley, et al., Civil Action No. 90-5017 (GEB) (D. N.J.), then pending before United States District Court Judge Garrett E. Brown, Jr.

Without any express or implied admission of liability or fault by the defendants as to the matters alleged in the complaint, the parties acknowledged in the Consent Decree that historically the HEREIU and its constituent entities "had suffered from an externally induced corruption problem" and that the remedial objective of the Consent Decree was that the HEREIU and its constituent entities be free from the direct or indirect influence of any organized crime group or the threat of such influence then and in the future.

a. Injunctive Prohibitions

All current and future officers, agents, employees, representatives, and persons holding positions of trust in the HEREIU and its constituent entities as well as all current and future members of the HEREIU and its constituent entities were permanently enjoined from:

1. committing any crime listed in 18 U.S.C. § 1961(1);
2. knowingly associating with any member or associate of any criminal group or with any barred person;
3. knowingly permitting any member or associate of any criminal group or any barred person to exercise any control or influence, directly or indirectly, in any way or degree, in the conduct of the affairs of the HEREIU and its constituent entities; and
4. from obstructing or otherwise interfering, directly or indirectly, with the efforts of anyone effectuating or attempting to effectuate the terms of this Consent Decree or in attempting to prevent any criminal groups or barred person from exercising influence on the conduct of the affairs of the HEREIU and its constituent entities.

As used in the Consent Decree, the term "knowingly associating" meant that: (a) an enjoined party knows or should know that the person with whom he or she is associating is a member or associate of any criminal group or is a barred person; and (b) the association is more than fleeting.

And as used in the Consent Decree a "barred person" was defined as: "any member or associate of any organized crime family or other criminal group, or any person prohibited from participating in union affairs pursuant to or by operation of this Consent Decree or

other court order or statute."

b. Court-Appointed Monitor

The district court appointed a Monitor for a 4 year term, subject to extensions. The Monitor's powers included the following:

1. General Powers

a. To investigate, audit and review all aspects of the HEREIU and its constituent entities to advance the remedial objective of this action. These powers shall include the power of the Monitor to conduct investigatory interviews and sworn depositions to advance the remedial objective of this action;

b. To request the United States Attorney or any agency of the United States to provide legal, audit and investigative personnel to assist in the execution of the Monitor's duties;

c. To retain legal, investigative, accounting and other support personnel at the HEREIU's expense and delegate any of his/her powers or duties to such persons, where, in the Monitor's discretion, such personnel and delegation are necessary to execute the Monitor's duties as set forth herein;

d. To attend all HEREIU Executive Board meetings and HEREIU committee meetings (with the exception of bargaining committee meetings);

e. To refer matters to the HEREIU or the United States Attorney for appropriate action;

f. To perform all such functions and duties not specifically enumerated herein in order to fulfill his/her duties as Monitor.

2. **Review Authority**

Whenever the Monitor reasonably believes that any of the following actions, proposed actions, or omissions to act (a) may violate the injunctive prohibitions of this Consent Decree, (b) may constitute any crime involving labor organizations or employee benefit plans, or (c) may further the direct or indirect influence of any organized crime group or the threat of such influence now or in the future, he or she has the power to:

i. disapprove the hiring, appointment, reassignment or discharge of any person or business entity by the HEREIU or its constituent entities; and

ii. disapprove or terminate any contract (including, but not limited to, contracts with service providers or vendors) lease, or other obligation of the HEREIU or its constituent entities.[19]

The HEREIU had a right to appeal any such decision to the district court.

3. **Disciplinary Powers**

a. The Monitor had the right and power to remove, suspend, expel, fine or forfeit the benefits (with the exception of vested employee retirement benefits subject to title I of the Employee Retirement Income Security Act -- 29 U.S.C. § 1001, *et seq.*) of any officer, representative, agent, employee or person holding a position of trust in the HEREIU and its constituent entities or member of HEREIU

[19] ¶ 20 of the Consent Decree required the HEREIU to inform the Monitor of "expenditures or proposed expenditures in excess of $10,000." In practice, the Monitor reviewed only such expenditures in excess of $10,000.

when such person engages or has engaged in actions or inactions which (i) violate the injunctive prohibitions of this Consent Decree, (ii) violate any criminal law involving the operation of a labor organization or employee benefit plan, or (iii) further the direct or indirect influence of any organized crime group or the threat of such influence now or in the future.

b. Disciplinary Procedure. In order to discharge disciplinary duties under this decree, the Monitor shall have the same rights and authority as the HEREIU General President, the HEREIU GEB, and any other officer, agent, employee, or representative of the HEREIU as well as the full authority derived from any and all provisions of law. When exercising his/her disciplinary rights and powers, the Monitor shall afford the subject of the potential disciplinary action written notice of the charge(s) against him/her and an opportunity to be heard. The Monitor shall conduct any hearing on any disciplinary charges, render the final decision regarding whether discipline is appropriate and impose the particular discipline. The charged party shall have 20 days to answer the charges against him/her and may be represented by counsel at any hearing conducted by the Monitor. Any hearing shall be conducted under the rules and procedures generally applicable in labor arbitration proceedings and decisions shall be made using a "just cause" standard. In conducting any hearing, the

Monitor shall have the right and power:

i. to administer oaths. All testimony and other evidence shall be subject to penalties of perjury to the same extent as if such evidence was submitted directly to the district court;

ii. to examine witnesses or conduct depositions;

iii. to receive evidence. The Monitor may receive evidence withheld from the charged party and the public which contains or constitutes sensitive information provided by a law enforcement agency, and can choose what weight, if any, to give such evidence, but in no case shall the identity of a confidential source of law enforcement information be required to be disclosed; and

iv. to issue subpoenas requiring the attendance and presentation of testimony of any person and/or the production of documentary or other evidence. In the case of contumacy or failure to obey a subpoena issued under this Paragraph, the Monitor may: (i) impose discipline upon the person in accordance with this Consent Decree; and/or (ii) seek an order from the Court requiring the person to testify or to produce documentary or other evidence.

c. Appeal of Disciplinary Action. Any discipline imposed by the Monitor shall be final and binding, subject to review by the district court. A person disciplined by the Monitor may obtain review of the Monitor's decision regarding such discipline by filing a written appeal of such decision with the Court within thirty (30) days of such decision by the Monitor. The Monitor's decision, all papers or other material relied upon by the Monitor and the papers filed or issued pursuant to this appeal procedure shall constitute the exclusive record for review. The Monitor's decisions pursuant to this Paragraph shall be reviewed by the district court, if necessary, under the substantial evidence standard

set forth in 5 U.S.C. § 706(2)(E). Materials considered by the Monitor but withheld from the appellant and the public which contain sensitive information provided by a law enforcement agency shall be submitted to the district court for ex parte, in camera consideration and shall remain sealed. The person disciplined by the Monitor may appeal the Monitor's decision regarding the discipline imposed against him/her and any decision by the Monitor regarding discipline imposed against a person which is not appealed in accordance with this Paragraph may not be appealed or otherwise challenged. HEREIU or the United States may seek the district court's review of the Monitor's decision not to impose discipline.

4. **The Public Review Board**

The Consent Decree further provided that the HEREIU would create a three-member Public Review Board (PRB) within the HEREIU to enforce an Ethical Practices Code (EPC) attached to the Consent Decree. The PRB and EPC were to be presented to the HEREIU Convention in 1996 for incorporation within the HEREIU Constitution. If these steps were taken by the HEREIU, the Consent Decree further provided that the Monitor would become a member of the PRB and his independent disciplinary authority would expire within 6 months of the date when the PRB became effective, or not later than March 5, 1997. All new matters arising after the Monitor's appointment to the PRB would be jointly investigated and pursued by the Monitor and the two other

members of the PRB whose were required to be persons of "national prominence" and whose chairman must be a person "with extensive federal prosecutorial experience." The parties agreed that the initial two members would be former Illinois Governor James Thompson and Roman Catholic Archbishop James Keleher.

5. **Election Procedures**

The Monitor was authorized to review proposed candidates for union elective offices. Accordingly, in the event the Monitor discovered information which may indicate that a candidate's election (a) violates or would violate the injunctive prohibitions of the Consent Decree, including permitting a barred person to serve; or (b) is or would be any crime involving labor organizations or employee benefit plans; or (c) furthers or would further the direct or indirect influence of any organized crime group or the threat of such influence now or in the future, the Monitor was authorized to disallow the particular nomination or election of the individual. A person disallowed by the Monitor pursuant to the above paragraph was allowed to appeal the Monitor's action by filing a written appeal of such action with the Monitor within twenty (20) days of such action by the Monitor. The Monitor shall issue to the appellant a written decision regarding the appeal within twenty (20) days after he/she receives such appeal. The Monitor's decision, all papers or other material relied upon by the Monitor and the papers filed or issued pursuant to this appeal procedure constitute the exclusive record for review. The Monitor's decisions pursuant to this Paragraph was to be reviewed by the

district court, if necessary, under the substantial evidence standard set forth in 5 U.S.C. § 706 (2)(E). Materials considered by the Monitor but withheld from the appellant and the public which contain sensitive information provided by a law enforcement agency were to be submitted under seal to the district court for ex parte, in camera consideration. A person disallowed by the Monitor was authorized to appeal the Monitor's decision regarding his/her candidacy and any decision by the Monitor regarding a person's candidacy which was not appealed in accordance with this paragraph could not be appealed or otherwise challenged. HEREIU or the United States was authorized to seek the court's review of the Monitor's decision not to disallow a person to seek or obtain elected office.

6. **Reports**

The Monitor was required to provide the district court, the Government and the HEREIU with written progress reports every six months.

2. **Actions Following the September 5, 1995 Consent Decree:**

On September 9, 1996, the HEREIU PRB became effective pursuant to action of the HEREIU Convention held during July 1996.

On December 31, 1996, the Monitor filed his second report with the district court advising that in addition to sanctioning various union officials, he had removed convicted felon and former Congressman Dan Rostenkowski from HEREIU employment as a union negotiator.

On February 25, 1997, in an unpublished order, the district court approved the Monitor's request, supported by the United States and not opposed by the HEREIU, that the Monitor's independent disciplinary authority be extended from March 5, 1997, for 12 months

and that the Monitor be appointed as a member of the HEREIU PRB following March 5, 1998. The district court found that the United States had demonstrated probable cause to believe that corruption and organized crime continued to exist with the HEREIU and its constituent entities.

On April 15, 1997, the district court filed an order denying motions to quash the Monitor's subpoenas with respect to records held by Frank Ervolino and other officers of HEREIU Local 4 in Buffalo, New York. The district court ruled that the Monitor had authority under the Consent Decree to issue subpoenas in any federal judicial district without prior application to the district court and that the district court had the authority to resolve all challenges to such subpoenas, regardless of where the subpoenas were served, under the All Writs Act, 28 U.S.C. § 1651. When Ervolino continued to pursue his motion to quash in the Western District of New York, the Government sought an order to show cause why the motion should not be dismissed.

On April 24, 1997, the district court directed Ervolino and others Local 4 officials to dismiss their motions to quash or litigate them in the District of New Jersey in hearings which the movants ignored.

On May 27, 1997, the district court filed an unpublished memorandum opinion denying the motions to quash and ruling that the HEREIU Consent Decree did not violate the separation of powers doctrine within the United States Constitution. Ervolino and the other Local 4 officials had argued that as a judicial officer the Monitor had improperly undertaken to conduct factual investigations and make prosecutorial decisions of behalf of the Executive Branch of the United States. The district court held that the Monitor was not engaged in governmental action and was in fact the creature of the Consent Decree's agreement between the parties. The district court specifically ruled that the Monitor was appointed and paid by the HEREIU and that although the Monitor's disciplinary actions may be appealed to the court, "neither the Monitor nor the [Monitor-selected] Investigations Officer are empowered to act on behalf of the government or on behalf of the court." Memorandum Opinion at 4 in United States

v. HEREIU, et al., Civ. No. 95-4596(GEB) (D.N.J.) (filed May 27, 1997). The district court also concluded that the HEREIU GEB members had the authority to bind all officers and employees of the HEREIU and its constituent entities by agreeing to the Consent Decree which effectively gave the Monitor unfettered access to such officials and the constituent entities' records. Id. at 5.

Reasserting the court's authority under the All Writs Act, the district court also concluded that because Ervolino and the other Local 4 officials had declined to participate in its hearings on the motions to quash, it would deny the motions. Finally, the district court held that subpoenas issued pursuant to 18 U.S.C. § 1965(c) were proper because the civil RICO action was still pending, despite the Consent Decree's settlement of any contested litigation between the parties, and that the subpoenas had been properly made returnable in the Western District of New York for the convenience of the movants even though the subpoenas could have been made returnable in the District of New Jersey as required by section 1965(c). Id. at 5-6, n.3.

On March 5, 1998, Kurt Muellenberg, the court-appointed Monitor, became a member of the PRB. However, Muellenberg retained his independent disciplinary powers, including subpoena authority, for all investigations pending prior to that date.

On May 18, 1998, in response to allegations of having abused union funds, General President Edward Hanley publicly announced that he had agreed with the Monitor to retire in July 1998 from all positions within the HEREIU and as a trustee of the HEREIU Pension and Welfare Plans in July 1999. Hanley's agreement with the Monitor also called for limited restitution to the union and an agreement not to seek recoupment of legal expenses from the HEREIU.

On August 25, 1998, the Monitor filed his fourth and final report as Monitor with independent disciplinary powers. The Monitor reported that he had reviewed more than1064 candidates for union elections, approved 64 elections, and postponed or invalidated 3 elections; and had charged 34 HEREIU officials with disciplinary infractions of which 10, including 2 former General Executive Board members, involved knowing association with organized crime

figures. All 34 individuals were removed from, or agreed to vacate, their union positions on a temporary or permanent basis. One of these officials, Frank Ervolino, had also been a President of the Laundry Workers International Union. Former General President Edward Hanley had agreed to resign without formal disciplinary charges. The Monitor also included in his report 47 recommendations made to the HEREIU with respect to financial and operational reforms of the union. For example, such recommended reforms included the preparation of a written, annual budget; limiting union-paid perquisites for union consultants and retired union officials; hiring full-time auditors; and maintaining a data base of persons removed from other unions for organized crime association or corruption.

On July 21, 1999, the Subcommittee on Employer-Employee Relations of the Committee on Education and the Workforce, United States House of Representatives, held hearings under the chairmanship of Representative John Boehner concerning the HEREIU and the civil RICO action. Newly appointed HEREIU General President John Wilhelm testified that 44 of the 47 recommendations had been implemented and that implementation of the other three was in progress.

On December 5, 2000, following a joint application to the district court for dismissal of the civil RICO action, the district court entered a Final Order of Dismissal in which the parties agreed that the objectives of the Consent Decree had been substantially achieved, but that the HEREIU and its constituent entities should continue to be free from the influence of organized crime and other corrupting elements. For that purpose, the Final Order provided that the defendants would permanently maintain the PRB and the Ethical Practices Code in substantially the same forms as they then existed and that the United States would have the right to nominate and veto any candidate to fill the former Monitor's position on the PRB until December 5, 2006. Moreover, during that six-year period, the PRB was required to give due deference to recommendations of the former Monitor or his successor in regard to the selection of investigators and prosecutors before the PRB of alleged corruption or influence of criminal

groups within the HEREIU.

The Final Order also required that all current and future members and officials of the HEREIU continued to be enjoined by any permanent injunction or order of the court, including the injunctive prohibitions formerly contained in the Consent Decree and incorporated into the Final Order. Moreover, the Final Order confirmed the district court's continuing jurisdiction over the HEREIU and its constituent entities and expressly provided that violation of the district court's orders could result in the court's imposition of "remedies beyond fines and incarceration for contempt when such remedies are warranted." The Final Order also expressly provided that the district court may order such relief as "necessary and proper" in the event that the United States demonstrates by clear and convincing evidence that the PRB had ceased to function or function effectively, or that systemic corruption or organized crime influence existed in the HEREIU or its constitutent entities. This last provision was intended by the parties to include a revival of the court-approved Monitorship, if necessary, without commencement of a new civil RICO action and was accompanied by an express provision that the record of all prior proceedings in the case or other matters involving the HEREIU would be admissible in the event that an application was made to the court pursuant to the Final Order.

On November 6, 2002, the district court granted the PRB's petition for preliminary injunction and an order to show cause why a lawsuit filed by former officials of HEREIU Local 5 in Anthony A. Rutledge, Jr., et al. v. John Wilhelm, et al., 02-CV-5926 (D. HI.), should not be dismissed in the District of Hawaii and plaintiffs enjoined from challenging the authority of the PRB in courts outside the District of New Jersey. Plaintiffs sought to compel the PRB to prosecute and adjudicate alleged unethical practices by officials of Local 5 who had defeated plaintiffs' slate of candidates. Following the order to show cause, plaintiffs transferred their lawsuit to the District of New Jersey before Judge Brown.

On May 20, 2003, in an unpublished opinion, the district court dismissed the plaintiffs' claim for relief on the grounds that the Consent Decree had vested the PRB with

"exclusive jurisdiction and discretion in deciding whether the HEREIU Code of Ethical Practices and Bylaws have been violated by Union representatives and executives." The court further found that because the PRB's decisions to investigate were not judicially reviewable, the court could not compel the PRB to act. Plaintiffs appealed the district court's decision, but the parties agreed to dismiss the appeal without judicial action. Order of Dismissal of Appeal in Rutledge v. Wilhelm, No. 03-2825 (3d Cir.) (filed 2/2/2004).

On August 23, 2004, the district court approved an Amended Final Order of Dismissal which recognized that the HEREIU had formally merged in July 2004 with the former UNITE Union and that the HEREIU PRB had ceased to function when the Convention of the merged UNITE HERE union had approved a reorganized PRB and revised Ethical Practices Code for the merged union. The Amended Final Order effectively recognized that all provisions of the Final Order of Dismissal would continue in force in regard to the international union of the UNITE HERE, the former HEREIU local unions, and any local UNITE union which had merged with a former HEREIU local union until December 5, 2006. After that date all components of the UNITE HERE, including former UNITE local unions which had never been parties to the civil RICO action, would become subject to the disciplinary sanctions of the reorganized PRB. The PRB was also expanded to include an additional member chosen by the union.

Between March 6, 1998, and December 6, 2006, the PRB commenced disciplinary actions against 25 individuals which resulted in a lifetime bar of 16 individuals from either membership in or other association with the union or both; the suspension of 7 individuals from service as an officer, employee or consultant for lesser periods; and 1 dismissal of charges. One disciplinary action remained pending in 2007.

F. LEADING COURT DECISIONS:

1. Agathos v. Muellenberg, 932 F. Supp. 636 (D. N.J. 1996).

In this decision, the district court dismissed an action to enjoin the court-appointed Monitor's disciplinary charges against the plaintiff as pre-mature because the court lacked subject matter jurisdiction to review disciplinary charges prior to their adjudication by the Monitor under the express terms of the September 5, 1995, Consent Decree. Following a detailed

review of the Consent Decree's procedure by which the Monitor was authorized to commence and dispose of disciplinary actions against union officials and members, the district court noted that the doctrine of exhaustion of administrative remedies is not limited to litigation involving agencies created by Congress, but limit a court's jurisdiction where the requirement of administrative exhaustion is explicitly set forth in a court-approved settlement. 932 F.Supp. at 638 and n. 1 (citing in part an unpublished decision in United States v. International Bhd. of Teamsters et al., Civ. No. 88-4486 (DNE), 1993 WL 33605 (S.D.N.Y. 1993)) (other citations omitted). The district court did not reach plaintiff's argument that the HEREIU Consent Decree did not endow the Monitor with authority to sanction HEREIU officials for past conduct prior to the filing of the Consent Decree on September 5, 1995.

2. United States v. Hotel Employees and Restaurant Employees, Int'l Union, 974 F. Supp. 411 (D. N.J.1997).

The court-appointed Monitor found that John Agathos, Sr., President of HEREIU Local 69 and a trustee of its benefit funds, violated the September 5, 1995, Consent Decree by misconduct that occurred both before and after the Consent Decree was entered, including knowingly associating with members of the Genovese LCN Family and committing extortion and embezzlement of HEREIU Local 69 funds. The Monitor permanently barred Agathos "from membership, office, employment, and any other position of trust, in the HERIEU and any of its constituent entities, including, but not limited to, Local 66 and Local 69 Funds." 974 F. Supp. at 414.

The district court upheld the Monitor's disciplinary action, and rejected each of Agathos' challenges. The court concluded that: (1) Kurt Muellenberg had been in fact appointed by the court as Monitor on September 5, 1995, contrary to Agathos' meritless assertion that Muellenberg was not appointed until January 1997 when the court signed a nunc pro tunc order permitting Muellenberg to receive copies of court documents as a party to the litigation; (2) although the Consent Decree had expressly exempted the HEREIU international Pension and Welfare Benefit Funds from the Monitor's jurisdiction, the Consent Decree's definition of HEREIU "constituent entities" was sufficiently inclusive to give the Monitor authority over local union employee benefit plans; (3) the Monitor possessed the authority to discipline union officials and members for wrongful conduct committed prior to the date of the Consent Decree because its disciplinary provisions provided that the Monitor may remove or otherwise discipline an offender who "engages or has engaged in actions or inactions" that violate the injunctive provisions of the Consent Decree or any criminal law involving the operation of a labor organization or employee benefit plan; and (4) Agathos' claim that the Monitor had improperly denied him the right to argue jurisdictional defenses before being subpoened to testify and participate in the disciplinary hearing about the substantive charges was rendered moot by the court's decision that Agathos' jurisdictional defenses lacked merit.

19. CHICAGO DISTRICT COUNCIL OF LIUNA

A. CASE NAME:

United States of America, and Laboreres' International Union of North America by and Through Robert Luskin, in his official capacity as General Executive Board Attorney v. Construction & General Laborers' District Council of Chicago and Vicinity, Civil No. 99-C-5229, United States District Court for the Northern District of Illinois. Complaint filed August 11, 1999.

B. DEFENDANTS:

The sole defendant was the Construction & General Laborers' District Council of Chicago and Vicinity (Chicago Laborer's District Council or CLDC), which is a subordinate labor organization of the Laborers' International Union of North America (LIUNA) and then consisted of and oversaw the operation of 21 constituent LIUNA local unions in the Chicago metropolitan area. The complaint also alleged that numerous members and associates of the Chicago La Cosa Nostra Family (LCN or the Outfit) were coconspirators not named as defendants.

C. SUMMARY OF THE COMPLAINT:

The complaint alleged that the RICO enterprise consisted of an association-in-fact comprised of the Chicago Laborer's District Council and its constituent local unions and affiliated employee benefit funds. The complaint also alleged that for decades the Chicago LCN Family had corruptly controlled and influenced the alleged enterprise, including through controlling the selection of the General Presidents of LIUNA and officers of the CLDC, and corrupt suppression of dissent within the CLDC and its constituent local unions.

The complaint alleged two claims for relief: that from the mid-1970's to the date the complaint was filed, the defendant conspired with the named coconspirators and others to: (1) acquire and maintain control of the alleged Enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. §§ 1962(b) and (d), and (2) participate in the affairs of the alleged

Enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. §§ 1962(c) and (d).

Pursuant to the authority of United States v. Glecier, 923 F.2d 496 (7th Cir. 1991), the complaint did not allege specific racketeering acts; rather, the complaint alleged that the pattern of racketeering activity consisted of multiple acts of extortion indictable under the Hobbs Act, 18 U.S.C. § 1951, and also alleged the manner and means as well as numerous overt acts in furtherance of the two alleged conspiracies. In particular, the complaint alleged that through the wrongful use of actual and threatened, force, violence and fear of physical and economic injury, the CLDC and its coconspirators obtained and conspired to obtain property from the delegates of the CLDC and the membership of its twenty-one constituent local unions consisting of: (1) the right of union members to run for and hold office and to support the candidates of their choices, as guaranteed by 29 U.S.C. § 481(e); (2) the right of union members to free speech and democratic participation in internal union affairs, as guaranteed by 29 U.S.C. § 411; (3) the right of union members to loyal and faithful representation by their union officers and other representatives, as guaranteed by 29 U.S.C. § 501 (a); and (4) the right of union members to loyal and responsible representation by the fiduciaries of employee welfare and pension benefit plans, as guaranteed by 29 U.S.C. §§ 1104 and 1106.

The complaint also noted that in 1998, LIUNA imposed a Trusteeship over the CLDC to eliminate the LCN's corrupt influence over the CLDC. However, the reforms initiated through the Trusteeship and LIUNA's other remedial actions were not sufficient by themselves to eliminate the extensive corruption that permeated the CLDC.[20] Therefore, LIUNA, through its General Executive Board Attorney, joined in this action to enable the United States to obtain equitable relief to eliminate the LCN's corrupt influence and control over the CLDC.

[20] In 1995, LIUNA entered into oversight agreement with the United States. As part of this agreement, LIUNA adopted an Ethical Practices Code (EPC), designed to eliminate corruption from LIUNA and its affiliated entities, and an Ethics and Disciplinary Procedure, which created an independent structure consisting of a General Executive Board (GEB) Attorney and LIUNA's Inspector General to investigate and prosecute potential violations of the EPC and an Independent Hearing Officer and an Appellate Officer to adjudicate these charges. See LIUNA Case Summary number 17 above in Appendix B.

D. RELIEF SOUGHT:

The United States requested that the district court grant preliminary and injunctive relief that would:

1. Enjoin and restrain all current and future officers, representatives, members and employees of the CLDC and its affiliated entities and all persons acting in concert with them from committing any acts of racketeering, as defined in 18 U.S.C. § 1961(1), and from knowingly associating, directly or indirectly, with any members or associates of the Chicago Outfit or any other LCN family;
2. Appoint court liaison officers, pendente lite to run and administer the affairs of the CLDC, to conduct investigations of LCN and other corrupt activity, to institute removal actions of any individuals associated in any way with the CLDC or its affiliated entities, to appoint trustees to any of the funds affiliated with the CLDC, to restore democratic processes within the CLDC, and to review practices or procedures of the CLDC and to petition the district court for an order altering any such practice or procedure when the court liaison officers deem it necessary to protect the rights of the members of locals affiliated with the CLDC consistent with the provisions of Title 29 of the United States Code and the LIUNA Constitutions, and to take other reasonable and appropriate action to prevent the perpetuation of LCN or other criminal influence in the affairs of the CLDC or any of its affiliated entities and funds;
3. Enjoin and restrain anyone affiliated with the Chicago Laborers' District Council and any entity associated with the CLDC in any way from any interference with the court liaison officers in the execution of their duties as court liaison officers;
4. Provide that the expenses of the court liaison officers be paid out of the funds of the Chicago Laborers' District Council and its affiliated locals;

5. Award the United States the costs of this suit together with such other and further relief as may be necessary and appropriate to prevent and restrain further violations of 18 U.S.C. § 1962 and to end organized crime's control over the CLDC.

E. OUTCOME OF THE CASE:

1. On August 31, 1999, the district court entered an agreed upon Consent Decree between the United States and the defendant CLDC that included the following equitable relief:

a. Permanent Injunctions: All current and future officers, agents, representatives, employees and members of CLDC and its affiliated entities were permanently enjoined:

(1) from committing any act which is defined as an act of racketeering as defined in 18 U.S.C. § 1961(1);

(2) from knowingly associating with any member or associate of the LCN or with any person barred from union affairs;

(3) from knowingly permitting any member or associate of the LCN or barred person to exercise any control or influence, directly or indirectly, in the conduct of the affairs of the CLDC and its affiliated entities except in the circumstances set forth in this Consent Decree; and

(4) from obstructing or otherwise interfering, directly or indirectly, in any way or degree, with the work of anyone who is appointed under this Decree, or working under their direction and control, or from interfering with the efforts of any officer, attorney, or employee of the CLDC and its affiliated entities in effectuating the terms of this Decree.

b. LIUNA Internal Reform Officials: Pursuant to the LIUNA Ethics and Disciplinary Procedure which was implemented as part of LIUNA's internal reform program, the GEB Attorney and the LIUNA Inspector General have been given the power by the General Executive Board of LIUNA to initiate and conduct investigations to remove organized crime and

all other criminal elements as a source of influence in the affairs of LIUNA. The Monitor appointed pursuant to this Decree may designate the GEB Attorney or the Inspector General to act on his behalf to investigate and prosecute charges under this Decree whenever it is reasonable or efficient to do so. Whenever the GEB Attorney or Inspector General acts pursuant to a delegation of authority by the Monitor, he shall have all the authority granted by this Decree to the Monitor. When a case is formally referred by the Monitor for investigation or prosecution, the GEB Attorney shall file a written report on the status of the investigation/prosecution with the Monitor and shall also provide a copy to the United States. Notwithstanding any delegation to investigate or prosecute, no charge may be brought under this Decree without the consent and approval of the Monitor. The Monitor must also approve of the disposition or settlement of any charge brought pursuant to his authority.

c. The Monitor: The District Court appointed a Monitor to investigate and oversee the investigation and prosecution of charges arising under this Decree in order to remove organized crime and all other criminal elements as a source of influence in the affairs of the CLDC and its affiliated entities.

(1) Powers: The Monitor shall have the right and power to conduct and oversee the discharge of those duties which relate to investigating and disciplining officers, agents, representatives, employees, and members of the CLDC and its affiliated entities for the purposes of complying with this Consent Decree and fulfilling its mandate. The Monitor shall also rule on the eligibility to run for and hold office in the CLDC.

(2) Reporting Requirements: On a quarterly basis, the Monitor shall file a written status report with the District Court regarding the actions he has taken toward achieving the objectives and purposes of this Consent Decree.

(3) Delegation of Authority: The Monitor may delegate any of his authority under this Decree to persons selected by him, in his discretion, for their skill and experience in the investigation and prosecution of organized crime corruption. In accordance with paragraph 2, above, the Monitor may: delegate his authority to the GEB Attorney, the Inspector General or their staff, where it is reasonable and efficient. No disciplinary charges may be brought or settled, or any subpoena issued, without the approval of the Monitor. This approval authority may not be delegated.

(4) Disciplinary Powers: The Monitor, either directly or through his delegees, shall have independent authority to investigate the operations of the CLDC or any of its affiliated entities and to initiate disciplinary charges against any officer, agent, representative, employee or member of the CLDC or any of its affiliated entities. In connection with these activities, the authority of the Monitor under this Consent Decree includes the same authority to initiate and conduct investigations and to initiate prosecutions as the GEB Attorney and Inspector General have under the LIUNA Ethical Practices Code, the LIUNA Ethics and Disciplinary Procedure, the Amended Job Referral Rules, and any other provision of the LIUNA Constitutions. Charges may also be brought for a violation of the injunctions adopted under this Consent Decree. Charges may be brought by the Monitor for any conduct, regardless of whether it occurred before or after the entry of this Consent Decree. The Monitor also has authority to apply to the Adjudications Officer for an order barring the CLDC and its affiliated entities from employing, contracting with, or purchasing goods or services from any individual or entity that has engaged in conduct that would subject it to discipline if it were a member or employee of the

CLDC or its affiliated entities. Such conduct shall expressly include, but is not limited to, the refusal to cooperate in an investigation undertaken under the authority of the Monitor.

(5) Investigative Powers: The authority of the Monitor includes the same rights and powers to initiate investigations, conduct investigations and prefer charges as the GEB Attorney and the Inspector General as set forth above, including:

(a) The Monitor shall have the discretion to refer allegations of misconduct by any officer, agent, representative, employee, or member of LIUNA or its affiliated entities to the GEB Attorney and to the United States.

(b) The Monitor shall have the discretion to assume jurisdiction over any matter referred by the GEB Attorney or Inspector General that relates to any officer, employee, or member of the CLDC or its affiliated entities.

(c) The Monitor shall have the authority pursuant to 18 U.S.C. § 1965(b), to issue subpoenas from this Court under this case name and number to any person or entity for the purpose of compelling testimony and requiring the production of books, papers, records or other tangible objects at hearings conducted by the Adjudications Officer, appointed pursuant to this Decree.

(6) Review and Qualification of Candidates: The Monitor, after consulting with the Trustee/Supervisor, the GEB Attorney, the LIUNA Inspector General, and the United States shall have the authority to disqualify any prospective candidate for union office based upon a determination that the candidate's service in office would: (i) constitute or further an act of racketeering, as defined in 18 U.S.C. § 1961; (ii) further or contribute to the association, directly or indirectly, of any member, employee, or agent of the CLDC with any element of organized crime; (iii) be contrary to or constitute a violation of labor law or ERISA; or (iv) be inconsistent with the purposes of this Consent Decree. The Monitor may also disqualify a candidate if he or she fails to meet the qualifications set forth in Article

VI, Section 1 of the LIUNA Uniform District Council Constitution. Any decision of the Monitor to disqualify a candidate shall be subject to review by the District Court pursuant to the standards set forth below.

(7) Access to Information: The Monitor or his delegee shall have the unfettered right to attend all executive board or general membership meetings of the CLDC, and to examine and copy all books and records of the CLDC and its affiliated entities; conduct interviews; receive and share information from law enforcement entities or any other component of the United States Government to the extent permitted by law; take sworn testimony; and compel attendance at depositions and hearings. In addition, the Monitor shall have all rights and tools available to him under the Federal Rules of Civil Procedure.

(8) Staff: The Monitor shall have the authority to employ such personnel as are reasonably necessary to assist in the proper discharge of the duties imposed by this Consent Decree.

(9) Term: The term of the Monitor shall be for two years from the time of his appointment subject to the right of any party to petition the Court for a finding that the presence of the Monitor is necessary for a longer period to achieve the purposes of this decree.

d. The Adjudications Officer: The District Court appointed an Adjudications Officer to conduct hearings relating to charges brought pursuant to this Consent Decree, and granted him the following powers, rights and responsibilities:

(1) Hearing Procedures: At any hearing conducted by the Adjudications Officer, the following procedures shall apply:

(a) Hearings before the Adjudications Officer shall be initiated by the filing of a written specific charge by the Monitor which shall be served upon the charged party;

(b) The charged party shall have at least 30 days prior to the hearing to prepare a defense. The Adjudications Officer shall endeavor to conduct the hearing within 60 days after the filing of charges;

(c) The party charged may be represented by counsel at the hearing;

(d) A fair and impartial hearing shall be conducted before the Adjudications Officer in accordance with the LIUNA Ethics and Disciplinary Procedure;

(e) The hearing shall be conducted under the rules and procedures generally applicable in labor arbitration proceedings and decisions shall be made using a "just cause" standard. Legal standards and interpretations of LIUNA's Constitutions and Ethics and Disciplinary Procedure shall be consistent with LIUNA's internal governing law as construed by LIUNA's Appellate Officer and LIUNA's Independent Hearing Officer;

(f) The Adjudications Officer shall have the authority pursuant to 18 U.S.C. § 1965(b), to issue subpoenas from this Court under this case name and number to any person or entity for the purpose of compelling testimony and requiring the production of books, papers, rcords or other tangible objects at hearings conducted by the Adjudications Officer;

(g) The Adjudications Officer may require any component of LIUNA, or its affiliated entities, including the CLDC, or any officer, agent, representative, member or employee of LIUNA or any of its affiliated entities to produce any book, paper, document, record, or other tangible object for use in any hearing conducted by the Adjudications Officer;

(h) All testimony and other evidence shall be received by the Adjudications Officer under oath and shall be subject to the penalties of perjury to the same extent as if such evidence was submitted directly to the Court. The Monitor bears the burden of proving his charges by a preponderance the evidence. The Adjudications Officer may review, consider and rely upon evidence presented in camera;

(i) If any person who is the subject of an application for imposition of discipline, refuses to testify or to provide evidence before the Adjudications Officer on the basis of his privilege against self-incrimination, discipline may be imposed by the Adjudications Officer on such person for that reason alone, consistent with the Code of Ethics of the American Federation of Labor-Congress of Industrial Organizations, as adopted by LIUNA in 1958. Also, failure to testify or provide evidence in the absence of a valid claim of privilege may be the basis for discipline. Any person so refusing to testify or provide evidence before the Adjudications Officer may also be subject to punishment for contempt of court upon application to the Court by the Adjudications Officer;

(j) At any hearing before the Adjudications Officer, the Adjudications Officer may receive and consider, attaching such weight as he deems appropriate, the sworn testimony of any law enforcement officer regarding information given to a law enforcement agency by a reliable confidential source of information. In no instance shall such officer be required to reveal the identity of the confidential source of information;

(k) Any discipline imposed by the Adjudications Officer, or other decision of the Adjudications Officer, shall be final and binding on the parties to the hearing subject to review by the Court pursuant to the standards set forth below;

(l) Copies of all decisions, opinions and rulings shall be made available to the Court, the GEB Attorney, the Trustee/Supervisor, and attorneys for the United States.

(2) Appeals of Adjudication Officer's Decisions: Any decision of the Adjudications Officer shall be final and binding, subject to review by the District Court. For a period of up to fourteen (14) calendar days after the mailing of the Adjudications Officer's decision, any party to this decree, or any person, party, or entity aggrieved by the decision shall have the right to seek review in the District Court, which shall have the right to hear all claims arising from decisions by the Adjudications Officer.

(3) Court Enforcement: The Monitor, the GEB Attorney, the United States, the Adjudications Officer, or the Trustee/Supervisor may apply to the District Court for any orders necessary or appropriate to implement this Consent Decree.

(4) Staff: The Adjudications Officer shall have the authority to employ such personnel as are reasonably necessary to assist in the proper discharge of the duties imposed by this Consent Decree.

(5) Term of Office: The term of the Adjudications Officer shall be for two years from the date of appointment subject to the right of any party to petition the Court for a finding that the presence of an Adjudications Officer is necessary for a longer period to achieve the purposes of this

decree. However, the Adjudications Officer shall retain his authority to resolve to completion all charges filed by the Monitor on or before the date on which the Adjudication Officer's term would otherwise end.

e. The Trustee/Supervisor: The District Court appointed a Trustee/Supervisor to administer the daily operations of the CLDC. His powers included, but were not limited to, all powers granted to a Trustee/Supervisor under the respective provisions of Article IX, section 7 of the LIUNA International Union Constitution. The Trustee also had the duty to establish election rules and procedures, and to call for and run elections for the CLDC pursuant to the approval of the District Court. The Trustee was to schedule an election of officers as early as six months, but in no event later than 12 months, after the entry of the Consent Decree. The Trustee was to promulgate rules and procedures for the election. The Trustee was authorized to resolve disputes relating to the election with the exception of issues relating to candidate eligibility, which shall be resolved by the Monitor prior to the scheduling of an election date. The Trustee was also to certify the results of the election for the officers of the CLDC to the Court. After the election, the Trustee had his title changed to Supervisor and had the duty to supervise the actions of the elected officers of the CLDC to assure that the goals of this Consent Decree are fulfilled. The Trustee/Supervisor also had the right to hire appropriate staff to discharge his duties under this decree and to seek court orders necessary or appropriate to enforce this Consent Decree.

The term of the Trustee/Supervisor was for two years from the date of his appointment by the District Court subject to the right of any party to petition the Court for a finding that the presence of a Trustee/Supervisor is necessary for a longer period to achieve the purposes of this decree.

f. The United States: The United States had the right to intervene in any matter or to appeal any decision arising out of this Consent Decree. The United States, in its discretion, was authorized to assist the GEB Attorney, the Inspector General and the court-authorized officers in the performance of their duties. The United States was authorized to appeal decisions of the

Adjudications Officer to the Court. The United States may, if requested, also agree to represent any party or entity before the District Court concerning any matter arising out of the subject of this decree.

2. The court-appointed Monitor supervised the nomination and election of Chicago District Council Officers, initiated various financial reforms and disciplined several union members for misconduct. The Monitor also reached a settlement agreement with Joseph Lombardo Jr., son of the reputed Boss of the Chicago LCN Family, whereby Lombardo Jr. agreed, among other matters, to be permanently barred from membership in, employment with, or contracting with LIUNA, any of its affiliated locals, and any of its affiliated funds.

F. LEADING COURT DECISIONS:

None.

20. LIUNA LOCAL 210 (BUFFALO)

A. CASE NAME:

United States of America, and Laborers International Union of North America by and through Robert D. Luskin, in his official capacity as General Executive Board Attorney v. Laborers Local 210 of the Laborers International Union of North America, AFL-CIO. Civil Case No. 99 CV-0915A, United States District Court for the Western District of New York. Complaint filed November 18, 1999.

B. DEFENDANTS:

The sole defendant is Laborers' International Union of North America (LIUNA) Local 210 located in Buffalo, New York.

C. SUMMARY OF THE COMPLAINT:

The 114-page complaint alleges two distinct claims for relief: (1) a conspiracy from the early 1970's to the date of filing of the complaint among Local 210, its officers, agents, and employees, and various uncharged, specified La Cosa Nostra (LCN) members and associates, to acquire and maintain an interest in and control of Local 210 through a pattern of racketeering activity, in violation of 18 U.S.C. §§ 1962(b) and(d); (2) a conspiracy among Local 210 and the same persons to conduct the affairs of the alleged enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. §§ 1962(c) and(d).

The alleged enterprise for the first claim for relief was an association-in-fact consisting of LIUNA Local 210 and its affiliated employee benefit funds (¶162, p. 86). The charged enterprise for the second claim for relief was an association in fact consisting of LIUNA Local 210, its officers, agents, and employees, and uncharged LCN members and associates of the LCN (¶ 175, p. 92-93). The complaint futher alleged that the Buffalo LCN Family exercised corrupt control and influence over Local 210 since the early 1970's.

The alleged pattern of racketeering activity consisted of multiple Taft Hartley violations (29 U.S.C. §§ 186 (b)(1) and (d)) for receipt of kickbacks by union representatives and multiple

Hobbs Act violations (18 U.S.C. § 1951) for extorting union members' property rights to democratic participation in union affairs as guaranteed by 29 U.S.C. §§ 411 and 481 (e) and 501(a). The complaint incorporated by reference various indictments and judgments of convictions for various named, but uncharged, co-conspirators.

The complaint also set forth that LIUNA had adopted internal reform procedures designed to eliminate corruption from LIUNA and its constituent local unions and affiliated entities. Pursuant to LIUNA's internal reform program, Local 210 had been placed into trusteeship by LIUNA, and over 20 members, employees, officers or agents of Local 210 were removed from Local 210 for corruption (see ¶¶16 through 44, pp. 19-37). However, the complaint also alleged that the trusteeship had been insufficient to completely rid Local 210 of the influence of organized crime.

This case is only the second time a union has joined with the United States as co-plaintiffs in a RICO lawsuit to rid a union of LCN related corruption. Under the complaint, only the United States sought injunctive and other equitable relief.

D. RELIEF SOUGHT:

The complaint sought the following relief: (a) a permanent injunction against Local 210 officers, officials and employees, and trustees appointed to Local 210 affiliated funds, and all persons acting in concert with them from committing any act of racketeering as defined in 18 U.S.C. § 1961(1), and from associating with any member or associate of the LCN; (b) appointment of a Court Liaison Officer to run and administer the affairs of Local 210 and conduct investigations and take other measures to eliminate corruption and to restore union democracy; (c) an order enjoining any one affiliated with Local 210 and any entity associated with Local 210 from interference with the court liaison officer's execution of his duties; (d) an order that Local 210 pay the expenses of the Court Liaison Officer; and (e) an order awarding costs to United States, and any further relief as may be necessary and appropriate to prevent future violations of RICO and to end organized crime's control over Local 210.

E. OUTCOME OF THE CASE:

1. On the date that the complaint was filed, the parties also filed an agreed upon Consent Decree which would grant the sought relief. The proposed Consent Decree granted the Court Liaison Officer with the authority to: (1) review major expenditures of Local 210; (2) review all contracts of Local 210; (3) review and approve in advance all appointments to office in Local 210; (4) convene membership meetings when necessary; (5) review proposed litigative actions; (6) have access to all union records and information; (7) refer to the General Executive Board (GEB) any disciplinary matters; and (8) review all candidates seeking elective office within Local 210.

2. On December 10, 1999, the parties filed a modified Consent Decree that eliminated LIUNA as a co-plaintiff after the District Court expressed concerns as to whether LIUNA was a proper plaintiff to the action.

3. In an order entered January 24, 2000, the district court approved of and entered the proposed modified Consent Decree and denied motions to intervene by several members of Local 210. The Consent Decree included the following provisions.

a. All current and future officers, agents and representatives, employees and members of Local 210 were permanently enjoined from:

(1) Committing any act which is defined as an act of racketeering as defined in 18 U.S.C. § 1961(1);

(2) Knowingly associating with any member or associate of the LCN or with any "barred person" (i.e., any member or associate of an LCN Family or any person prohibited from participating in union affairs);

(3) Knowingly permitting any member or associate of the LCN or barred person to exercise any control or influence, directly or indirectly in the conduct of the affairs of Local 210 and its affiliated entities; and

(4) Obstructing or otherwise interfering, directly or indirectly, in any way or degree, with the work of anyone who is appointed under this decree, or working under their direction and control, or from interfering with the efforts of any officer, attorney, or employee of Local 210 and in effectuating the terms of this decree.

b. The district court would appoint a Liaison Officer for a term of sixty (60) months with the authority, among other matters, to:

(1) review all expenditures and investments of Local 210 that equal or exceed five thousand dollars ($5,000.00) in cash or value to any one person or entity in a twelve (12) month period and shall have the power to veto or require the lawful representatives of Local 210 to rescind any such expenditure or investment that: (i) constitutes or furthers an act of racketeering as defined in 18 U.S.C. § 1961; (ii) furthers or contributes to the association, directly or indirectly, of any member, employee, or agent of Local 210 with any element of organized crime; (iii) is contrary to or violates federal law; or (iv) is inconsistent with the LIUNA International Union Constitution, Ethical Practices Code, Ethics and Disciplinary Procedure, or the Uniform Local Union Constitution;

(2) review all contracts, or proposed contracts, on behalf of Local 210, except for collective bargaining agreements and any decisions to strike, and to require the lawful representatives of Local 210 to rescind any contract or prevent Local 210 from entering into any proposed contract that: (i) constitutes or furthers an act of racketeering as defined in 18 U.S.C. § 1961; (ii) furthers or contributes to the association, directly or indirectly, of any member or employee or agent of Local 210 with any element of organized crime; (iii) is contrary to or violates federal law or (iv) is inconsistent with the LIUNA International Union Constitution, Ethical Practices Code, Ethics and Disciplinary Procedure, or the Uniform Local Union Constitution;

(3) review, and approve in advance, all proposed appointments to Local 210 office or employment including: the replacement of the Trustee of Local 210 and the selection of any Local 210 agents or employees, including but not limited to candidates for the positions of Business Agent, Field Representative, or Organizer; the selection of shop stewards; and the selection of any trustee representing Local 210 on any employee benefit plan affiliated with Local 210. Further, the Liaison Officer shall have the authority to veto any such proposed appointment that: (i) constitutes or furthers an act of racketeering as defined in 18 U.S.C. § 1961; (ii) furthers or contributes to the association, directly or indirectly, of any member, employee, or agent of Local 210 with any element of organized crime; or (iii) is contrary to or violates federal law;

(4) review proposed decisions of the lawful representatives of Local 210 regarding the conduct of litigation, including decisions to commence civil actions, to forego such litigation, or to resolve pending or prospective suits through settlement. The Liaison Officer shall have the power to veto any such litigation decision that: (i) constitutes or furthers an act of racketeering as defined in 18 U.S.C. § 1961; (ii) furthers or contributes to the association,

directly or indirectly, of any member, employee, or agent of Local 210 with any element of organized crime; (iii) is contrary to or violates federal law; or (iv) is inconsistent with the LIUNA International Union Constitution, Ethical Practices Code, Ethics Disciplinary Procedure, or the Uniform Local Union Constitution;

(5) apply to the district court to take any and all other actions that are necessary to perform his responsibilities under, and that effectuate the "Purposes" of, this Consent Decree;

(6) attend every regularly scheduled meeting by Local 210's representatives personally or through or along with his appointed representatives;

(7) have complete and unfettered access to read and inspect, and the right to make copies of, all financial records, books, records, accounts, correspondence, files and any other documents of Local 210 or its lawful representatives without regard to the amount of any financial transactions;

(8) direct that the trustees representing Local 210 on such funds use all their lawful powers to provide the Liaison Officer with prompt, complete, and unfettered access to read and inspect, and the opportunity to make copies of, all financial records, books, records, accounts correspondence, files, and any other documents of any or all benefit funds affiliated with Local 210, or of any trustees or agents of such benefit funds, and to request permission of the entire Board of Trustees to attend any meeting of the Board;

(9) compel an accounting of the assets of Local 210;

(10) have the authority pursuant to 18 U.S.C. § 1965, to issue subpoenas from the District Court for the purpose of compelling testimony and requiring the production of books, papers, records or other tangible objects to effectuate the "Purposes" of this consent Decree;

(11) refer all prospective disciplinary proceedings to the LIUNA Inspector General or the LIUNA GEB Attorney for action consistent with the LIUNA Ethics and Disciplinary Procedure. The Liaison Officer shall have the authority to receive and grant requests from the Inspector General and the GEE Attorney for assistance in investigating or prosecuting disciplinary actions;

(12) determine when it would be feasible to conduct fair, untained and uncoercive elections for Local 210 officers and to supervise and certify or to retain another person to supervise, and certify such union elections. Any candidate for Local 210 office was required to obtain the Liaison Officer's prior approval to run for office;

(13) file with the District Court periodic reports of his activities at least every six months, and was authorized to seeks assistance in

carrying out his duties from the District Court and the United States;

c. The Consent Decree also provided that:

(1) any decision in any matter of the Liaison Officer shall be final and binding, subject only to the District Court's review, under the same standard of review applicable to review of final federal agency action under the Administrative Procedural Act, 5 U.S.C. § 706(2);

(2) the costs of the Court Liaison Officer, including the expenses of anyone hired by the Liaison Officer, were to be paid by Local 210;

4. During his term of office, the Liaison Officer supervised and certified fair and untainted elections for Local 210 officers, initiated training for union members and officers, implemented accounting and other financial reforms and assisted LIUNA's Inspector General and GEB Attorney to discipline union members and officials for misconduct.

5. In an order filed January 27, 2006, the district court found that the remedial objectives of the 2000 Consent Decree had been substantially achieved, and, therefore, the District Court terminated the term of the Court-Appointed Liaison Officer and dissolved the position.

6. The district court also entered a permanent injunction, providing that:

(a) All current and future officers, agents, employees, representatives, and persons holding positions of trust in Laborers' Local 210, as well as all current and future members of Laborers' Local 210, were permanently enjoined:

(1) from committing any crime listed in 18 U.S.C. § 1961 (1);

(2) from knowingly associating with any member or associate of organized crime or with any barred person;

(3) from knowingly permitting any member or associate of organized crime or any barred person to exercise any control or influence, directly or indirectly, in any way or degree, in the conduct of the affairs of Laborers' Local 210 or its affiliated entities.

As used in the Order, the term "knowingly associating" shall be governed by the definition contained in the 2000 Consent Decree and means that: (a) an enjoined party knew or should have known that the person with whom he or she was associating is a barred person; and (b) the association was more than fleeting or casual;

and (c) the association related directly or indirectly to the affairs of the union.[21]

As used in this Order, a "barred person" is: (a) any member or associate of any La Cosa Nostra crime family or other criminal group, or (b) any person prohibited from participating in union affairs.

(4) from participating, directly or indirectly, in any way of degree, in the conduct of the affairs of Laborers' Local 210 or its affiliated entities if the participant has been prohibited from participation in the affairs of another union.

b. The district court's Order also provided, in part, that:

(1) Any person who violates the injunctive provisions of this Order, shall, in addition to any other sanctions or penalties, be subject to removal, suspension and/or expulsion from office or the union by the Court. In addition, the Court may forfeit the benefits of such violator (with the exception of vested employee retirement benefits subject to Title I of the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq.) which such violator holds by reason of his position, membership or employment in Laborers Local 210.

(2) Upon a showing to the Court by the United States of America by a good and sufficient demonstration that there is systemic corruption in Laborers' Local 210, or organized crime influence in Laborers' Local 210, or upon any officer or person holding a position of trust in Laborers' Local 210, the Court may order such relief as in necessary and proper, including but not limited to reappointing the Court Appointed Liaison Officer, with such powers and authority

[21] The Order also provides that nothing in this paragraph shall preclude:

(a) an enjoined party from meeting or communicating with a barred person who is an employer to discuss the negotiation, execution, or management of a collective bargaining agreement, or a labor dispute, when the enjoined party represents, seeks to represent, or would admit to membership the employees of that employer;

(b) an enjoined party from meeting or communicating with a barred person who is a representative of a labor organization to discuss legitimate union matters;

(c) an enjoined party from meeting or communicating with an officer, employee, or member of LIUNA and its affiliated entities; and

(d) an enjoined party from meeting or communicating with a relation by blood or marriage for solely social purposes, provided that in all such instances, reasonable prior notice of such meeting or communication is furnished to the Business Manager of Laborers' Local 210 or, if prior notice is not practicable, such notice is provided within seven days following the meeting or communication. As used in this Paragraph, the term "relative" shall mean lineal descendant, step child, ancestor, sibling, or spouse or child of a lineal descendant, step child, ancestor, or sibling.

as the Court determines is necessary, granting the United States of America the authority to issue subpoenas and take depositions and other relief regarding the continuation, scope or modification of this Order.

(3) The District Court shall retain exclusive jurisdiction over the parties of this Order and the original consent decree in order to enforce and implement the terms and provisions of this order and the original consent decree. This Order is binding on all current and future officers, members, employees and persons holding positions of trust in Laborers' Local 210 and its affiliated entities.

F. LEADING COURT DECISIONS:

None

21. HEREIU LOCAL 69

A. CASE NAME:

United States v. Local 69 of the Hotel Employees and Restaurant Employees International Union, Civil Action No. 02-1733 (GEB), United States District Court for the District of New Jersey. Complaint filed April 17, 2002.

B. DEFENDANTS:

The complaint named Local 69 of the Hotel Employees and Restaurant Employees International Union (HEREIU) as the only defendant (Local 69).

C. SUMMARY OF THE COMPLAINT:

The complaint (p. 3) alleged that the enterprise was an association-in-fact comprised of "Local 69 and its affiliated entities; the officers, employees and associates of Local 69 and its affiliated entities; and three persons who are known to the United States." The complaint (p. 3) stated that:

> The term "affiliated entities" as utilized in this Complaint shall include, but not be limited to, any employee pension or welfare benefit plan in which members of Local 69 participate and in which representatives of Local 69 serve in a fiduciary capacity (such as the Local 4-69 Health and Welfare Fund and the Local 4-69 Pension Fund); any business organization in which Local 69 has a financial interest; any labor-management cooperation committee and any other local labor organization within the HEREIU in which members of Local 69 participate.

The complaint alleged one cause of action - that from approximately 1983 to the date the complaint was filed, the defendant, acting through its officers and Executive Board, conspired with members and associates of organized crime and others to participate in the affairs of the alleged enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962 (d).

Pursuant to the authority of United States v. Glecier, 923 F.2d 496 (7th Cir. 1991), the complaint did not allege specific racketeering acts; rather, the complaint alleged that the pattern of racketeering activity consisted of multiple acts indictable under 29 U.S.C. §§ 186 (b) and 501 (c) and 18 U.S.C. §§ 664 and 1951.

The complaint also alleged that the defendant Local 69 and its co-conspirators used the following manner and means to carry out the alleged conspiracy:

(1) the defendant Local 69, acting through its officers and Executive Board, together with members and associates of organized crime, aided and abetted officers and persons employed by Local 69 to embezzle, steal, and unlawfully and willfully abstract and convert to their own use and to the use of others, moneys, funds, property, and other assets of the Local 69 by, among other matters, approving and permitting unauthorized expenditures and loans of Local 69 funds to various persons, which expenditures and loans were not in the interest and not for the benefit of Local 69 and its membership, resulting in the diminution of Local 69 assets, in violation 29 U.S.C. § 501 (c);

(2) the defendant, acting through its Executive Board, unlawfully and willfully did request, demand, receive, accept and agree to receive and accept on behalf of officers and employees of Local 69 the payment, loan and delivery of money and other things of value from employers, and persons acting in the interest of employers, which employed Local 69 members and persons who were represented and would have been admitted to membership in Local 69, in violation of 29 U.S. C. §§ 186 (b)(1) and (d);

(3) the defendant, acting through its officers and Executive Board, together with members and associates of the Genovese Crime Family, conspired to extort money from employers;

(4) the defendant, acting through its officers and Executive Board, together with members and associates of organized crime, conspired to extort property in the form of the right of Local 69's members to free speech and democratic participation in their union's affairs, as guaranteed by 29 U.S.C. §§ 411 and 481;

(5) the defendant, acting through its officers and Executive Board, together with members and associates of organized crime, did unlawfully and willfully embezzle, steal and convert, unlawfully and willfully cause to be embezzled, stolen and converted, to the use of

others, the moneys, funds, securities, credits, property and other assets of employee welfare benefit plans subject to title I of the Employee Retirement Income Security Act, and of funds connected with such plans, in violation of 18 U.S.C. § 664; and

(6) the defendant, acting through its officers and Executive Board, fostered a climate of intimidation and also violated its duty to provide loyal and responsible representation to the members of the Local 69 by, among other things, failing to enforce the HEREIU constitution, the Local 69 by-laws and other authorities; failing to investigate charges of corruption within Local 69 and its affiliated entities; failing to redress proven instances of corrupt practices and illegal organized crime control; and appointing to office and permitting to remain in office corrupt officials and organized crime associates. The defendant did so despite notice of corruption and the influence of organized crime within Local 69 through, inter alia, published reports, decisions in the context of United States v. HEREIU, Civil Action No. 95- 4595 (GEB) and multiple criminal charges against the officers and employees of Local 69 and its affiliated entities.

D. RELIEF SOUGHT:

1. The Government sought to permanently enjoin all current and future officers, agents, employees, representatives, and members of and persons holding positions of trust in Local 69 and its affiliated entities (other than representatives of employees), and any and all persons in active concert or participation with any or all of them from:

a. committing any crime listed in 18 U.S.C. § 1961(1);

b. knowingly associating with any member or associate of any criminal group or with any barred person;

c. knowingly permitting any member or associate of any criminal group or any barred person to exercise any control or influence, directly or indirectly, in any way or degree, in the conduct of the affairs of Local 69 and its affiliated entities; and

d. obstructing or otherwise interfering, directly or indirectly, with the efforts of anyone effectuating or attempting to effectuate the relief ordered or attempting to prevent any criminal groups or barred person from exercising influence on the conduct of the affairs of Local 69 and its affiliated entities.

A "barred person" was expressly defined in the complaint as: (a) "any member or associate of any organized crime family or other criminal group, or (b) any person prohibited from participating in union affairs pursuant to or by operation of the injunction or other court order or statute, or a disciplinary disposition or agreement by the HEREIU's Public Review Board."

2. The complaint also requested that the district court appoint a Monitor, funded by Local 69, with investigatory, review and disciplinary powers, including the authority to investigate, audit, and review all aspects of Local 69 and its affiliated entities; to oversee and monitor all affairs of Local 69, including its elections; to review, oversee and otherwise take action upon all collective bargaining agreements; to review and approve candidates for elective and appointive office in Local 69; to disapprove the hiring, appointment, reassignment or discharge of any Local 69 officers and others holding positions of trust in Local 69; to disapprove or terminate any contract (including, but not limited to, contracts with service providers or vendors), lease, or other obligation of Local 69; and to impose disciplinary sanctions on union members and any officer, representative, agent, employee or person holding a position of trust in Local 69 and its affiliated entities for violating the proposed injunction or other misconduct.

F. OUTCOME OF THE CASE:

1. The April 17, 2002 Consent Decree:

On April 17, 2002, the same day that complaint was filed, the district court entered a Consent Decree agreed to by the Government and the defendant Local 69. This Consent Decree included the following provisions:

a. Injunctive Prohibitions:

All current and future officers, agents, employees, representatives, members of and persons holding positions of trust in Local 69 or its affiliated entities (other than representatives of employers) and any and all persons in active concert or participation with any or all of them, were permanently restrained and enjoined from directly or indirectly:

(1) committing any crime listed in 18 U.S.C. § 1961(1);

(2) knowingly associating with any member or associate of any criminal group or with any barred person;

(3) knowingly permitting any member or associate of any criminal group or any barred person to exercise any control or influence, directly or indirectly, in any way or degree, in the conduct of the affairs of Local 69 and its affiliated entities; and

(4) obstructing or otherwise interfering, directly or indirectly, with the efforts of anyone effectuating or attempting to effectuate the terms of this Consent Decree or in attempting to prevent any criminal groups or barred person from exercising influence on the conduct of the affairs of the Local 69 and its affiliated entities.

As used in this Consent Decree, the term "knowingly associating" shall mean that: (a) an enjoined party knows or should know that the person with whom he or she is associating is a member or associate of any criminal group or is a barred person; and (b) the association is more than fleeting.

As used in this Consent Decree a "barred person" is: (a) any member or associate of any organized crime family or other criminal group, or (b) any person prohibited from participating in the affairs of any union pursuant to or by operation of this Consent Decree, other court order or statute, and/or a disciplinary disposition or agreement by the HEREIU's Public Review Board.

b. Court-Appointed Monitor:

The district court appointed a Monitor with the powers, rights and authority of all officers and other persons holding positions of trust in Local 69 including the powers, rights and authority of the Local 69 President, the Executive Board of Local 69 and the union's other committees, the union trustees on Local 69's pension and health and welfare funds and any other officer, agent, employee or representative of Local 69. Accordingly, the Monitor was authorized to:

(1) oversee, approve or disapprove of all disbursements and distributions of Local 69 funds and other assets, purchases and financial obligations of Local 69;

(2) approve or disapprove of the hiring, appointment, discharge or reassignment of Local 69 officers and others holding positions of trust in Local 69, employees, agents, representatives, commissioners and committee members of Local 69;

(3) carry on and supervise the legitimate activities of Local 69;

(4) hold (or designate the persons who hold) the positions currently held by Local 69 representatives in Local 69's affiliated entities; and

(5) review, oversee and otherwise take action upon all collective bargaining agreements, the processing of grievances, grievance awards, or other matters involving employers with whom Local 69 deals or seeks to deal;

(6) investigate, audit and review all aspects of Local 69 and its affiliated entities. These powers shall include the power of the Monitor to conduct investigatory interviews and sworn depositions;

(7) issue subpoenas and serve such subpoenas in this or any other judicial district pursuant to 18 U.S.C. § 1965 (c) without the need for prior application to the district court. Such subpoenas shall be issued only for good cause if the individuals reside in another district at a place more than one hundred miles from the district court;

(8) initiate charges or disallow nominations or elections of persons in accordance with this Consent Decree;

(9) refer matters to the Public Review Board of the HEREIU for disciplinary action or, in the alternative, exercise the disciplinary authority and powers described in this Consent Decree over any person described in Paragraph (1) above;

(10) refer any matter to the United States Attorney for appropriate action or request the United States Attorney or any agency of the United States to provide legal, audit and investigative personnel to assist in the execution of the Monitor's duties;

(11) retain legal, investigative, accounting and other support personnel at Local 69's expense;

(12) attend any and all meetings of Local 69 and its affiliated entities, including, but not limited to, meetings of the Local 69 Executive Board, the membership, committees, negotiation meetings or grievance proceedings regarding Local 69 members involving employers with whom Local 69 deals or seeks to deal and meetings of employee benefit plans in which Local 69 members participate;

(13) enter into, disapprove or terminate any contract (including, but not limited to, contracts with service providers or vendors), lease, or other obligation of Local 69 or any of Local 69's affiliated entities for which representatives of Local 69 otherwise have authority to enter into, disapprove or terminate;

(14) oversee and monitor all affairs of Local 69, including, but not limited to, any Local 69 elections;

(15) act to preclude actions or inactions that violate the law or otherwise are inimical to the remedial objectives of this Consent Decree;

(16) perform all such functions and duties not specifically enumerated herein in order to fulfill his/her duties as Monitor; and

(17) delegate any of his/her powers or duties to any other person (s).

c. Disciplinary Procedures:

When exercising his disciplinary rights and powers, the Monitor shall afford the subject of the potential disciplinary action written notice of the charge(s) against him/her and an opportunity to be heard. The Monitor shall conduct any hearing on any disciplinary charges, render the final decision regarding whether discipline is appropriate and impose the particular discipline. The charged party shall have 20 days to answer the charges against him/her and may be represented by counsel at any hearing conducted by the Monitor. Any hearing shall be conducted under the rules and procedures generally applicable in labor arbitration proceedings and decisions shall be made using a preponderance of the evidence standard. In conducting any hearing, the Monitor shall have the right and power:

(1) to administer oaths. All testimony and other evidence shall be subject to penalties of perjury to the same extent as if such evidence was submitted directly to the district court;

(2) to examine witnesses or conduct depositions;

(3) to receive evidence. The Monitor may receive and consider ex parte evidence withheld from the charged party and the public which contains or constitutes sensitive information provided by a law enforcement agency, and can choose what weight, if any, to give such evidence, but in no case shall the identity of a confidential source of law enforcement information be required to be disclosed; and

(4) to issue subpoenas requiring the attendance and presentation of testimony of any person and/or the production of documentary or other evidence. Witnesses shall be paid the same fee and milage allowances which are paid subpoenaed witnesses in the courts of the United States and such payments shall be made by Local 69. In the case of contumacy or failure to obey a subpoena issued under this Paragraph, the Monitor may: (i) impose discipline upon the person in accordance with this Consent Decree; and/or (ii) seek an order from the district court requiring the person to testify or to produce documentary or other evidence.

(5) Appeal of Disciplinary Action. Any discipline imposed by the Monitor shall be final and binding, subject to review by the district court. A person disciplined by the Monitor may obtain review of the Monitor's decision regarding such discipline by filing a written appeal of such decision with the Court within twenty (20) days of such decision by the Monitor. The Monitor's decision, all papers or other material relied upon by the Monitor and the papers filed or issued pursuant to this appeal procedure shall constitute the exclusive record for review. The Monitor's decisions pursuant to this Paragraph shall be reviewed by the district court, if necessary, under the substantial evidence standard set forth in 5 U.S.C. § 706(2) (E). Materials considered by the Monitor but withheld from the appellant and the public which contain sensitive information provided by a law enforcement agency shall be submitted to the district court for ex parte, in camera consideration and shall remain sealed. Only the person disciplined by the Monitor may appeal the Monitor's decision regarding the discipline imposed against him/her and any decision by the Monitor regarding discipline imposed against a person which is not appealed in accordance with this Paragraph may not be appealed or otherwise challenged. The United States may seek the district court's review of the Monitor's decision not to impose discipline.

d. Election Procedures:

The Monitor was given broad powers to administer, conduct and supervise the nomination and election of Local 69 officers, including the following:

(1) to apply to the district court to set aside election results that were tainted by any unfairness or impropriety;

(2) to disallow any nomination or election of any person, subject to review by the district court, when the Monitor determines that there is probable cause to believe that a person's election may violate: the injunctive provisions of the Consent Decree, any other order of the district court, HEREIU's Ethical Practices Code, Constitution or Local 69 by-laws, any criminal law involving the operation of a labor organization or employee benefit plan, or may be inimical to the remedial objectives of this lawsuit;

e. **Miscellaneous Provisions:**

(1) The Monitor was given unfettered access to, and the right to make copies of, all records or documents of officials, agents, employees, and members of Local 69 and its affiliated entities.

(2) The Monitor was required to report to the district court at least ever 6 months or when requested by the court regarding the progress of Local 69 and its affiliated entities in achieving the remedial objectives of this Consent Decree.

(3) The term of the Monitor would expire four years from the date the Consent Decree was entered.

(4) The Consent Decree also provided that the Monitor, the United States or the HEREIU may make application to the district court to modify or enforce this Consent Decree and the court may grant such relief as may be equitable and just, having due regard for the purposes of the underlying litigation, the remedial purposes of this Consent Decree and the circumstances at the time of the application.

(5) The district court retained jurisdiction over the parties and signatories to the Consent Decree and the subject matter of the litigation in order to implement the terms of the Consent Decree.

(6) Pursuant to the All Writs Act, 28 U.S.C. § 1651, all parties and non-parties to the Consent Decree were permanently restrained and enjoined from litigating any and all issues relating to the Consent Decree or arising from the interpretation or application of the Consent Decree in any court or forum in any jurisdiction except the United States District Court for the District of New Jersey. Such issues relating to the Consent Decree include, but are not limited to, challenges to actions of the Monitor and/or his delegates and challenges to issuance of or compliance with subpoenas.

2. **Achievements of the Monitor:**

During the four-year term as the court-appointed Monitor of Local 69, the Monitor (Kurt Muellenberg, formerly Chief of the Organized Crime and Racketeering Section) also functioned as the government-appointed member of the HEREIU Public Review Board (PRB), the disciplinary body established by Local 69's parent union pursuant to its own civil RICO consent decree. (See App. B at 190-208). This enabled the international parent union to bear the costs of the Monitorship of Local 69 which had been largely bankrupted by corruption. In these capacities, the Monitor oversaw the ongoing PRB disciplinary investigation of Local 69

officials who had continued to permit Local 69 and its benefit plans to be corruptly influenced by John N. Agathos, the former president of Local 69 who had been expelled by court-appointed officers from both the HEREIU and the Teamsters union for knowing association with organized criminal groups and other offenses. In June 2002, Agathos' successor agreed to a lifetime debarment from office, employment or membership in any HEREIU-affiliated union or benefit plan in order to resolve disciplinary charges that he had knowingly associated with organized crime elements and embezzled union monies. Based on this investigation, the successor was subsequently convicted in 2004 of embezzling $100,000 from Local 69 and $30,000 from Local 69's health benefit plan and sentenced to imprisonment and restitution in United States v. David Feeback, Criminal No. 04-559 (WJM) (D. N.J.). The PRB also permanently barred another Local 69 and benefit plan official from the HEREIU for knowing association with Agathos.

In accordance with the terms of the consent decree, the Monitor deputized the parent union's trustee who had been appointed to supervise the day-to-day affairs of Local 69 shortly before the civil RICO action was filed. An earlier internal union trusteeship from 1996 to 1997 had failed to end corruption at Local 69. The 2002 deputation had the effect of suspending the LMRDA's limitation on the presumptive term of the union trusteeship to 18 months. Because of the poor financial status of Local 69 and its historic domination by the Agathos group, which had failed to hold any officer elections between 1983 and 1997 and had continued to dominate bargaining units like those at Giants Stadium and the Meadowlands Sports Complex where the best jobs and gratuities were awarded to Agathos family and friends, the Monitor recommended in 2006 that Local 69 be dissolved and its membership merged into other local unions. Local 69's 3200 members were thereafter merged into three different UNITE HERE local unions, including former HEREIU Local 100 which had also been the subject of a prior civil RICO trusteeship. The participants of the Local 69 health plan were transferred to international union health plans and the pension liabilities to former Local 69 members were transferred from the Local 69 pension plan to the UNITE National Retirement Fund.

Local 69 officials had also attempted to award $558,000 in prohibited severance payments from Local 69 and its health plan to Agathos and Agathos' son, a former Local 69 officer and plan administrator who had also been expelled from the HEREIU in earlier disciplinary proceedings by the HEREIU Monitor. When the Monitor discovered that the Local 69 health plan had awarded a service provider contract without competitive bidding to an entity owned by Agathos' personal physician, the Monitor provided the information to the United States Department of Labor, which sued the service provider and the plan trustees in 2004, seeking disgorgement and recovery of more than $2 million worth of excessive compensation paid to the service provider, in Chao v. Feeback, et al., Civil Action No. 04-cv-4804 (DMC-MF) (D.N.J). The civil RICO action continued after the Monitor's term expired in April 2006 because of litigation issues surrounding the Department of Labor's action with respect to the former Local 69 health plan.

G. LEADING COURT DECISIONS:

None

22. UNITED STATES v. LIBORIO BELLOMO, ET AL. (ILA)

A. CASE NAME:

United States of America v. Liborio Bellomo, et al., Civil Case No. CV-03-1683, United States District Court for the Eastern District of New York. Complaint filed April 7, 2003.

B. DEFENDANTS:

Liborio Bellomo, Thomas Cafaro, Pasquale Falcetti, Andrew Gigante, Ernest Muscarella, Michael Ragusa, Charles Tuzzo.

C. SUMMARY OF THE COMPLAINT:

The 12-page complaint alleged one cause of action--a "Glecier" (United States v. Glecier, 923 F. 2d 496 (7th Cir. 1991)), conspiracy to violate RICO through a pattern of racketeering activity consisting of multiple acts indictable under the following statutes: 18 U.S.C. § 1951 (extortion); 18 U.S.C. §§ 1341 and 1346 (mail fraud); 18 U.S.C. § 1956 (money laundering); 18 U.S.C. § 1512 (Witness Tampering); 18 U.S.C. § 1952 (interstate travel in aid of racketeering); 18 U.S.C. § 1955 (gambling); 15 U.S.C. §§ 78 (b) and 78 ff (fraud in the sale of securities); and New York Penal Law §§ 180.15 and 20.00 (bribery), all in violation of 18 U.S.C. § 1962(d).

The charged enterprise was a group of individuals and entities associated-in-fact, consisting of the International Longshoremen's Association, AFL-CIO (ILA), "including its Locals operating in the New York Metropolitan area, northern New Jersey, and Miami, Florida, and their officers, employees, agents and other representatives, and the ILA's affiliated employee benefit plans, along with the members and associates of the Genovese Family, and others known and unknown." Complaint at 7.

The defendants are alleged members and associates of the Genovese LCN Family as follows: Muscarella was a capo and acting boss; Bellomo was the acting boss from 1988 to 1996; Tuzzo was a capo; Falcetti and Ragusa were soldiers; and Cafaro and Gigante were associates. The complaint alleged that Vincent Gigante was the boss of the Genovese Family and was an uncharged co-conspirator.

The complaint also alleged that since 1987 to the filing of the complaint, the defendants and others sought to control the "Waterfront" in the Ports of New York, New Jersey and Miami, Florida and businesses and unions operating in those ports. Id. at 10. A RICO indictment against the defendants was attached as an exhibit to the complaint. See United States v. Bellomo, et al., No. CR-02-140 (E.D.N.Y.). That indictment alleged that the defendants engaged in racketeering activity, including conspiracies to extort money from owners and representatives of businesses operating in the Ports of New York, New Jersey and Miami, Florida and from ILA union members. Complaint at 8-9.

D. RELIEF SOUGHT:

The complaint sought the following relief:

1. A permanent injunction enjoining defendants from: (a) violating or aiding and abetting the violation of, or conspiring to violate, any of the provisions of U.S.C. §§ 1961, et seq; (b) engaging in any commercial activity involving, or connected with, the Waterfront and the Florida Ports, the businesses and unions operating on the Waterfront and at the Florida Ports, and from engaging in any activity whatsoever involving, or connected with, the International Longshoremen's Association; (c) having any legal or beneficial interest, direct or indirect, in any business or any entity related to, or connected with, the Waterfront and/or the Florida Ports, including but not limited to, any ownership, partnership, landlord/tenant, employment, managerial, and/or financial interest; membership in, or holding any position or office in, any labor union as definded in 29 U.S.C. §§ 402 (i) and(j); and (d) having any involvement in the administration or management of any pension, health, welfare or benefit plan or fund established or maintained by an employee organization;

2. An order directing that each defendant divest himself of any legal or beneficial interest which he holds, direct or indirect, in any business or entity involved in or connected with the Waterfront or the Florida Ports, including but not limited to, any ownership, partnership, landlord/tenant, employment, managerial, and/or financial interest.

3. Such other and further relief as the district court may deem necessary and appropriate. Complaint at 11-12.

E. <u>OUTCOME OF THE CASE</u>:

1. On the date the complaint was filed, April 7, 2003, the defendants pleaded guilty to RICO and other charges in the above referenced indictment and agreed to enter into a Consent Decree settling the civil RICO suit.

2. On May 27, 2003, the district court entered the Consent Decree, granting the requested relief and several additional matters; except, the Court did not enjoin the defendants from committing a RICO violation. Specifically, all the defendants were permanently enjoined from:

a. engaging in any activity whatsoever involving, or connected with, ILA, any of its Locals or other constituent labor organization;

b. engaging in any commercial activity whatsoever involving, or connected with, the Port of Miami and Port Everglades in Florida, and all businesses and unions involved in commerce in these ports;

c. engaging in any commercial activity whatsoever involving, or connected with, the Port of New York and New Jersey and all businesses and unions involved in commerce in the ports;

d. membership in, or holding any position or office in, any labor union as that term is defined in 29 U.S.C. §§ 402 (i) and (j);

e. engaging in any activity whatsoever involving, or connected with, any of the following unions and their constituent labor organizations: The International Carpenters Union; The International Brotherhood of Teamsters; Local 32BJ of the Building Services Workers Union, Service Employees International Union; The Laborers' International Union of North America; or the Mason Tenders' District Council of Greater New York;

f. having any involvement in the administration or management of any pension, health, welfare or benefit plan or fund established or maintained by an employee organization subject to and in accordance with Title 1 of ERISA;

g. having legal or beneficial interest, direct and indirect, including but not limited to, any ownership, partnership, landlord/tenant, employment, managerial, and/or financial interest, in any business or entity related to, or connected with the Port of New York and New Jersey, or the Port of Miami and Port Everglades in Florida, and were ordered to divest themselves of any such interests;

h. Obstructing the implementation of any other relief that may be imposed by the District Court.

G. LEADING COURT DECISIONS:

None.

23. INTERNATIONAL LONGSHOREMEN'S ASS'N (ILA)

A. CASE NAME:

United States v. International Longshoremen's Association, AFL-CIO, et al., Civil No. 05-CV-3212 (ILG), United States District Court for the Eastern District of New York. Complaint filed July 6, 2005.

B. DEFENDANTS:

The Complaint named six categories of defendants:

1. The International Longshoremen's Association, AFL-CIO (ILA), which is a national labor union that represents longshoremen and other laborers working at ports throughout the United States. The ILA was named as a "nominal defendant," *i.e.*, a defendant whose participation is necessary to effect the full relief sought in this action;

2. ILA officer defendants: (a) John Bowers, President; Robert E. Gleason, Secretary-Treasurer; Albert Cernadas, Executive Vice-President and also President of ILA Local 1235; Harold J. Daggett, Assistant General Organizer and also President of ILA Local 1804-1; Arthur Coffey, Vice President; Benny Holland, Jr., General-Vice President; and Gerald Owens, General Organizer. Holland and Owens were named as nominal defendants in their official capacities as fiduciaries whose participation is necessary to effect the full relief sought. The other five officers were named as defendants in their individual capacities; and (b) twenty-four (24) Vice-Presidents of the ILA were also named as nominal defendants in their official capacities as fiduciaries;

3. MILA defendants: (a) Defendant Management – International Longshoremen's Association Managed Health Care Trust Fund (MILA) was named as a nominal defendant and (b) the MILA Board, comprised of union and employer representatives, was named as a nominal defendant;

4. Alleged La Cosa Nostra (LCN) defendants: Peter Gotti, Anthony Ciccone and Jerome Brancato, allegedly the Boss, Captain and Soldier of the Gambino LCN Family,

respectively; and James Cashin, a former ILA official and allegedly an associate of the Genovese LCN Family;

5. METRO – defendant Metro Marine Contractors' Association (METRO), an association of employers who employ ILA members on the Waterfront, was named as a nominal defendant;

6. METRO – ILA Fund defendants: The complaint also named as nominal defendants several benefit funds that were established pursuant to collective bargaining agreements for the benefit of Union Members ILA Locals 1804-1 and 1814.

The complaint also alleged that numerous persons who were members or associates of the Genovese or Gambino LCN Families were co-conspirators, but were not named as defendants.

C. SUMMARY OF THE COMPLAINT:

The complaint alleged that the RICO enterprise consisted of a group of individuals and entities associated-in- fact referred to as the Waterfront Enterprise and was comprised of "the ILA and certain of its subordinate components, namely, the Atlantic Coast District, the South Atlantic & Gulf Coast District, Locals 1, 824, 1235, 1588, 1804-1, 1814, 1922, 1922-1, and 2062; certain current and former ILA officials; certain welfare benefit and pension benefit funds managed for the benefit of ILA members, namely, MILA, and METRO-ILA Funds, the ILA Local 1922 Health and Welfare Fund, the ILA-Employers Southeast Florida Ports Welfare Fund; certain businesses operating on or about the Waterfront, namely METRO; certain members and associates of the Genovese and Gambino crime families; and certain businesses operating in the Port of Miami."

For purposes of the complaint, the term "Waterfront" was defined as the Port of New York and New Jersey and all businesses and unions involved in commerce in the Port, whether located on Port property or not.

The complaint alleged that since the late 1950's, the Gambino and Genovese LCN Families had shared corrupt control over labor unions and businesses at commercial shipping terminals on the Waterfront and the Port of Miami through actual and threatened force, violence and fear. In particular, the complaint noted that several published government reports, including a 1986 Report of the President's Commission on Organized Crime and a 1984 Report of the U.S. Senate Permanent Subcommittee on Investigations, had concluded that organized crime had exercised corrupt control over the Waterfront for many years.

The complaint also detailed numerous prosecutions of LCN figures and ILA officials involving their Waterfront activities. For example, the complaint noted that from 1977 to 1981, 129 persons connected to the Waterfront were indicted, and 110 were convicted, including 52 union officials, several of whom were LCN members and associates. The complaint also attached indictments then pending against several ILA officials as well as other indictments that recently had resulted in convictions of several ILA officials and LCN figures.

Moreover, the complaint noted that the Government had brought prior civil RICO lawsuits against components of the ILA that resulted in Consent Decrees. The complaint alleged that notwithstanding these prior prosecutions and civil RICO suit against ILA officials and LCN figures, the LCN still exercised corrupt control over the Waterfront Enterprise, and therefore, further equitable relief was needed to eliminate corruption from the Waterfront Enterprise.

The complaint alleged two claims for relief. The first claim for relief alleged that from 1995 to the date the complaint was filed, defendants John Bowers, Robert F. Gleason, Albert Cernadas, Harold J. Daggett, Arthur Coffey, Peter Gotti, Anthony Ciccone, Jermoe Brancato and James Cashen, conducted the affairs of the Waterfront Enterprise through a pattern of racketeering activity, consisting of multiple acts of extortion (18 U.S.C. § 1951), mail and wire fraud (18 U.S.C. §§ 1341, 1343, and 1346) and money laundering (18 U.S.C. § 1956). The complaint alleged this conspiracy under the authority of United States v. Glecier, 923 F.2d 496 (7th Cir. 1991), and hence did not allege the specific acts of racketeering. However, the

complaint alleged that various defendants were convicted of RICO substantive and conspiracy charges and other offenses and were collaterally estopped from denying the essential allegations of those offenses. Copies of those indictments and verdicts of conviction were attached to the complaint. The complaint also alleged the modus operandi of the various racketeering activities that were the objectives of the conspiracy, including the principal actors, the time period of significant events and evidentiary details as to how the racketeering activity was carried out.

For example, the complaint alleged facts showing that: (1) between 1999 and 2000, the Gambino and Genovese LCN Families conspired to rig the elections of high ranking positions in the ILA; (2) between October 1, 1996 through September 30, 2001, various defendants and members and associates of the Genovese and Gambino LCN Families conspired to rig MILA health care benefit contracts for longshoremen on the Atlantic and Gulf Coasts; and (3) between 1995 and 1998, various defendants and members and associates of the Genovese LCN Family conspired to receive kickbacks in exchange for awarding a contract to be an investment advisor to the METRO-Funds and other contracts, and during the period 1994 to 2001, various defendants extorted money from businesses operating on the Waterfront through various schemes.

The second claim for relief alleged that from 1995 to the date the complaint was filed, the same defendants named under the first claim for relief conspired to acquire or maintain an interest in, or control of, the Waterfront Enterprise through the same pattern of racketeering activity alleged under the first claim for relief.

D. RELIEF SOUGHT:

1. That the district court issue an order, enjoining and restraining any Defendant found to have violated 18 U.S.C. § 1962 from:

   a. committing any act of racketeering activity, as defined in 18 U.S.C. § 1961(1);

   b. participating in any way in the affairs of the ILA or any of its subordinate labor organizations; from having any dealings, directly or indirectly, with the ILA or any of its subordinate labor organizations; and from having any

dealings, directly or indirectly, with any officer, agent, employee or representative of the ILA or any of its subordinate labor organizations relating to the affairs of the lILA or any of its subordinate labor organizations;

c. participating in any way in the affairs of any ILA-affiliated pension or welfare plan; from having any dealings, directly or indirectly, with any ILA-affiliated pension or welfare plan; and from having any dealings, directly or indirectly, with any trustee, officer, agent, fiduciary, representative, administrator or employee of any ILA-affiliated pension or welfare plan relating to the affairs of the plan;

d. occupying a position of trust within the meaning of 29 U.S.C. § *501* in any labor organization, as that term is defined in 29 U.S.C. § 402 (i) and (j);

e. having any involvement in the administration or management of any pension or welfare plan subject to Title I of ERISA, 29 U.S.C. § 1001, et seq.;

f. knowingly associating, directly or indirectly, with any member of any criminal group, including any LCN family, or any persons associated with or otherwise in active concert or participation with any criminal group, including any LCN family; and from knowingly permitting any member or associate of the LCN, or other criminal group or person barred from participating in any labor organization or pension or welfare plan as defined herein, to exercise any control or influence, directly or indirectly, in any way of degree, in the conduct of the affairs of the ILA and its subordinate labor organizations;

g. participating in any way in the affairs of, investing in or acquiring an interest in, or otherwise having any dealings with, directly or indirectly, the Waterfront Enterprise or any entity that is part of the Waterfront Enterprise; and

h. obstructing, or otherwise interfering with, the duties of any officer appointed by the court in this action, including any Court Appointed Officer(s) or person appointed by a Court-Appointed Officer.

2. That the district court issue an order removing and enjoining Defendants John Bowers, Robert E. Gleason, Albert Cernadas, Harold J. Daggett and Arthur Coffey from holding:

a. membership, or any office or position, in the ILA or any of its subordinate labor organizations; and
b. any office or position with any ILA-affiliated pension or welfare plan.

3. That the district court issue an order enjoining the nominal Defendants, including, but not limited to the ILA, MILA, the MILA Board, the METRO-ILA Funds, the Boards of Trustees of the METROILA Funds, and METRO, and their officers, agents, servants, employees,

and attorneys, and those persons in active concert or participation with them from:

a. committing any act of racketeering activity, as defined in 18 U.S.C. § 1961(1);

b. knowingly associating, directly or indirectly, with any member of any criminal group, including any LCN family, or any persons associated with or otherwise in active concert or participation with any criminal group, including any LCN family; and from knowingly permitting any member or associate of the LCN, or other criminal group or person barred from participating in any labor organization or pension or welfare plan as defined herein, to exercise any control or influence, directly or indirectly, in any way or degree, in the conduct of the affairs of the ILA and its subordinate labor organizations; and

c. obstructing, or otherwise interfering with, the duties of any officer appointed by the Court in this action, including any Court-Appointed Officer(s) or person appointed by a Court-Appointed Officer(s).

4. That the district court order that new elections for the ILA Executive Council be conducted and that such elections be run by a Court-Appointed Officer(s) in accordance with rules to be established by the Court-Appointed Officer(s), and also order that the election costs be borne by the ILA and conducted at such time and in such a manner as to ensure that the election processes are not vulnerable to intimidation or other improper influences, but rather reflect the decision of the union members who are found to be eligible to vote.

5. That until such time as free and fair elections can be held pursuant to the preceding paragraph, the Court-Appointed Officer(s) for the ILA be empowered to prevent racketeering activity and to discharge any of the duties and responsibilities of the ILA Executive Council (other than negotiating and entering into collective bargaining agreements) when the Court-Appointed Officer(s) deems it necessary to protect the rights of the members of the ILA and its subordinate labor organizations.

6. That a Court-Appointed Officer(s) shall be appointed to oversee the operations of the ILA, MILA, the MILA Board, the METRO-ILA Funds, and the Boards of Trustees of the METRO-ILA Funds until such time as these entities are free from corruption, domination, control, and LCN infiltration, and such Court-Appointed Officer(s) shall institute and implement such procedures and to have such powers as are necessary to prevent acts of racketeering activity,

including authority to:

a. review and reject the proposed actions of the Executive Council of the ILA insofar as they relate to expenditures of union funds, appointments to union office, contracts or proposed contracts other than collective bargaining agreements, or changes in the ILA Constitution, and to petition the district court for an order restraining any such proposed action or to obtain any other appropriate relief which is reasonably necessary to protect the rights of ILA members;

b. review and reject the proposed actions of the MILA Board insofar as they relate to expenditures of MILA funds, hiring of employees, contracts and proposed contracts, or changes in the MILA Agreement and Declaration of Trust or other organizing or governing documents, and to petition the district court for an order restraining any such proposed action or obtain any other appropriate relief which is reasonably necessary to protect the rights of MILA beneficiaries;

c. review and reject the proposed actions of the Boards of Trustees of the METROILA Funds insofar as they relate to expenditures of funds, hiring of employees, contracts and proposed contracts, or changes in the Funds' Agreements and Declarations of Trust or other organizing or governing documents, and to petition the district court for an order restraining any such proposed action or obtain any other appropriate relief which is reasonably necessary to protect the rights of the beneficiaries of the METRO-ILA Funds; and

d. apply to the district court for such orders and other relief as may be necessary and appropriate in order to carry out the mandate of the court.

7. That the district court enjoin and restrain the Defendants from interfering or obstructing in any way with the execution of the duties of the aforesaid Court-Appointed Officer(s).

8. That the district court order all of the individual Defendants who are found to have violated 18 U.S.C. § 1962 to disgorge the proceeds of those violations and that such proceeds to be distributed to the victims of those violations and used to fund costs incurred by the Court-Appointed Officer(s).

9. That the district court issue a judgment declaring that the Waterfront Enterprise, the ILA, MILA, MILA Board, the METRO-ILA Funds, the Boards of Trustees of the METRO-ILA Funds and METRO have been controlled and exploited by LCN members and associates through violation of 18 U.S.C. § 1962.

10. That the costs of all officers appointed by the Court pursuant to preliminary or permanent injunctive relief be borne by the respective Defendant(s), including the nominal defendants, who are hereby jointly and severally liable for such costs.

11. That the district court award the United States of America the costs of this suit, together with such other and further relief as may be necessary and appropriate to prevent and restrain future violations of 18 U.S.C. § 1962 and to end LCN control over, and exploitation of, the Waterfront Enterprise.

E. <u>OUTCOME OF THE CASE</u>:

1. On September 22, 2005, a Consent Decree between the United States and defendant Albert Cerandes was entered, which included the following provisions:

a. Cernadas agreed to resign from any position of trust he holds with the ILA, from membership in the ILA, and from the board of trustees or from any other office or position he holds with any ILA-affiliated employee pension benefit plan or employee welfare benefit plan;

b. Pursuant to 18 U.S.C. § 1964 (a), Cernadas was permanently enjoined from:

(1) engaging in conduct which constitutes or furthers an act of racketeering activity, as enumerated or defined in 18 U.S.C. § 1961 (1);

(2) knowingly associating, directly or indirectly, with any member or associate of any criminal group, including any LCN family, or any persons associated with or otherwise in active concert or participation with any criminal group, including any LCN family; and from knowingly permitting any LCN member or associate, or member or associate of any other criminal group, or person barred from participating in any labor organization or employee pension benefit plan or employee welfare benefit plan as defined herein, to exercise any control or influence, directly or indirectly, in any way or degree, in the conduct of the affairs of the ILA, except that nothing in the Consent Judgment and Decree shall preclude Cernadas from meeting or communicating with a relative by blood or marriage solely for social purposes;

(3) participating in any way in the affairs of, investing in or acquiring an interest in, or otherwise having any dealings with, directly or indirectly, the Waterfront Enterprise or any entity that is part of the Waterfront Enterprise;

(4) (a) participating in any way in the affairs of the ILA, including, but not limited to (i) holding any position of trust in the ILA, (ii) having membership in the ILA, (iii) being employed by the ILA, or acting as an ILA agent, representative, consultant or service provider, and (iv) attending any event sponsored by or for the ILA; (b) having any dealings, directly or indirectly, with the ILA, including, but not limited to, employment by, or acting as an agent, representative, consultant or service provider for, any person or entity that does business with the ILA; and (c) having any dealings, directly or indirectly, with any officer, employee, agent, or representative of the ILA relating to the affairs of the ILA;

(5) (a) participating in any way in the affairs of any labor organization, including, but not limited to: (i) holding any position of trust in any labor organization, (ii) having membership in any labor organization, and (iii) being employed by any labor organization, or acting as an agent, representative, consultant or service provider for any labor organization; (b) having any dealings, directly or indirectly, with any labor organization, including, but not limited to, employment by, or acting as an agent, representative, consultant or service provider for, any person or entity that does business with a labor organization; and (c) having any dealings, directly or indirectly, with any officer, employee, agent, or representative of any labor organization relating to the affairs of the labor organization;

(6) (a) participating in any way in the administration or management of the ILA-affiliated employee pension benefit or employee welfare benefit plan or any other such plan affiliate with a labor organization including, but not limited to, being employed by any ILA-affiliated employee pension benefit or employee welfare benefit plan, or acting as an agent, representative, consultant or service provider for any ILA-affiliated employee pension benefit or employee welfare benefit plan; (b) having any dealings, directly or indirectly, with any ILA-

affiliated employee pension benefit or employee welfare benefit plan including, but not limited to, being employed by or acting as an agent or representative, consultant or service provider for any person or entity that does business with any ILA-affiliated employee pension benefit or employee welfare benefit plan; and (c) from having any dealings, directly or indirectly, with any trustee, officer, administrator, employee, fiduciary, agent, representative, consultant or service provider of any ILA-affiliated employee pension benefit plan or employee welfare benefit plan relating to the affairs of the plan;

(7) obstructing or otherwise interfering, directly or indirectly, with the efforts of anyone effectuating, or attempting to effectuate, the terms of this Consent Judgment and Decree, including any officer appointed by the district court;

(8) obstructing the implementation of any other relief that may be imposed by the district court.

c. Cernadas was ordered to divest himself of any and all legal or beneficial interests, direct and indirect, including but not limited to, any ownership, partnership, landlord/tenant, employment, managerial, and/or financial interest, that he has or may have in any business or entity related to, or connected with, the Waterfront Enterprise.

2. On April 24, 2006, a Consent Decree between the United States and defendant Peter Gotti was entered, which included the following provisions:

a. Pursuant to 18 U.S.C. § 1964(a), Gotti was permanently enjoined from:

(1) engaging in conduct which constitutes or furthers an act of racketeering activity, as enumerated or defined in 18 U.S.C. § 1961(1);

(2) knowingly associating, directly or indirectly, with any member or associate of any criminal group, including any LCN family, or any persons associated with or otherwise in active concert or participation with any criminal group, including any LCN family; and from knowingly permitting any LCN member or associate, or member or associate of any other criminal group, or person barred from participating in any labor organization or employee

pension benefit plan or employee welfare benefit plan as defined herein, to exercise any control or influence, directly or indirectly, in any way or degree, in the conduct of the affairs of the ILA. Nothing in this Consent Judgment and Decree shall preclude Gotti from meeting or communicating with a relative by blood or marriage solely for social purposes;

(3) participating in any way in the affairs of, investing in or acquiring an interest in, or otherwise having any dealings with, directly or indirectly, the Waterfront Enterprise or any entity that is part of the Waterfront Enterprise;

(4) (a) participating in any way in the affairs of the ILA, including, but not limited to (i) holding any position of trust in the ILA, (ii) having membership in the ILA, (iii) being employed by the ILA, or acting as an ILA agent, representative, consultant or service provider, and (iv) attending any event sponsored by or for the ILA; (b) having any dealings, directly or indirectly, with the ILA, including, but not limited to, employment by, or acting as an agent, representative, consultant or service provider for, arty person or entity that does business with the ILA; and (c) having any dealings, directly or indirectly, with any officer, employee, agent, or representative of the ILA relating to the affairs of the ILA;

(5) (a) participating in any way in the affairs of any labor organization, including, but not limited to (i) holding any position of trust in any labor organization, (ii) having membership in any labor organization, and (iii) being employed by any labor organization, or acting as an agent, representative, consultant or service provider for any labor organization; (b) having any dealings, directly or indirectly, with any labor organization, including, but not limited to, employment by, or acting as an agent, representative, consultant or service provider for, any person or entity that does business with a labor organization; and (c) having any dealings, directly or indirectly, with any officer, employee, agent, or representative of any labor organization relating to the affairs of the labor organization;

(6) (a) participating in any way in the administration or management of any ILA-affiliated employee pension benefit or employee welfare benefit plan including, but

not limited to, being employed by any ILA-affiliated employee pension benefit or employee welfare benefit plan, or acting as an agent, representative, const1tant or service provider for any ILA-affiliated employee pension benefit or employee welfarebenefit plan; (b) having any dealings, directly or indirectly, with any ILA-affiliated employee pension benefit or employee welfare benefit plan including, but not limited to, being employed by or acting as an agent or representative, consultant or service provider for any person or entity that does business with any ILA-affiliated employee pension benefit or employee welfare benefit plan; and (c) from having any dealings, directly or indirectly, with any trustee, officer, Administrator, employee, fiduciary, agent, representative, consultant or service provider of any ILA--affiliated employee pension benefit plan or employee welfare benefit plan relating to the affairs of the plan;

(7) (a) participating in any way in the administration or management of any employee pension benefit or employee welfare benefit plan including, but not limited to, being employed by any employee pension benefit or employee welfare benefit plan, or acting as an agent, representative, consultant or service provider for any employee pension benefit or employee welfare benefit plan; (b) having any dealings, directly or indirectly, with any employee pension benefit or employee welfare benefit plan including, but not limited to, being employed by or acting as an agent or representative, consultant or service provider for any person or entity that does business with any employee pension benefit or employee welfare benefit plan; and (c) from having any dealings, directly or indirectly, with any trustee, officer, administrator, employee, fiduciary, agent, representative, consultant or service provider of any employee pension benefit plan or employee welfare benefit plan relating to the affairs of the plan;

(8) obstructing or otherwise interfering, directly or indirectly, with the efforts of anyone effectuating, or attempting to effectuate, the terms of this Consent Judgment and Decree, Including any officer appointed by the district court;

(9) obstructing the implementation of any other relief that may be imposed by the district court.

Gotti was ordered to divest himself of any and all legal or beneficial interests, direct and indirect, including but not limited to, any ownership, partnership, landlord/tenant, employment, managerial, and/or financial interest, that he has or may have in any business or entity related to, or connected with, the Waterfront Enterprise.

3. As of this writing, the case is pending against the other defendants.