**No. ______**

IN THE

# Supreme Court of the United States

WHEELER K. NEFF,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

The questions presented are:

1. Does a misrepresentation about the true identity of the owner of a business during settlement negotiations to resolve a civil lawsuit constitute a scheme to defraud the litigant of money or property in violation of the mail and wire fraud statutes?

2. Is the doctrine of tribal sovereign immunity wholly inapplicable in a circumstance where payday loans are made by a Native American tribe in affiliation with an entity acting as an "arm of the tribe" where such loans are made at interest rates in excess of state regulations, thus rendering the loans *ipso facto* unlawful debts in violation of the RICO statute?

3. Does the government have to prove willfulness to establish a RICO conspiracy to collect an unlawful debt?

## RELATED PROCEEDINGS

Charles Hallinan, the Petitioner's co-defendant at trial and co-appellant on appeal, has also petitioned this Court for a writ certiorari from the judgment entered by the United States Court of Appeals for the Third Circuit at *Charles M. Hallinan v. United States*, No. 19-1087.

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The Hon. William Canby, *American Indian Law, Sixth Edition*, (West Publishing, 2015) ................................................ 23

Grant Christensen, *A View from American Courts: The Tear in Indian Law 2017*, 41 Seattle Law Review, 805 (2018) .............................................. 27

Richard B. Collins, *To Sue and Be Sued: Capacity and Immunity of American Indian Nations*, 51 Creighton L.Rev. 391 (March, 2018) ............................................... 29

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Victor Lopez, When Lenders Can Legally Provide Loans Above 1000% Is It Time for Congress to Consider Federal Interest Cap on Consumer Loans?, 42 Journal of Legislation 36 (2016) .................................................................. 29

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## PETITION FOR A WRIT OF CERTIORARI

Wheeler Neff respectfully petitions this Court for a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Third Circuit following his criminal conviction.

## OPINIONS BELOW

The Third Circuit's decision affirming Petitioner's counts of conviction (Pet. App. 1a-29a) is reported at *United States v. Neff*, 787 Fed. App'x 89 (3d. Cir. Sep. 6, 2019). The Third Circuit's *en banc* decision denying Petitioner's motion for rehearing is not reported. Pet. App. 30a-31a.

## JURISDICTION

The Third Circuit issued its opinion and entered judgment on September 6, 2019, and denied a timely motion for rehearing on November 5, 2019. *See* Pet. App. 30a-31a. On January 10, 2020 Justice Alito extended the time to file a petition for a writ of certiorari to and including April 1, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions (Article I, Section 8 of the United States Constitution, 18 U.S.C. § 1341, 18 U.S.C. § 1343, and 18 U.S.C. § 1962) are reproduced in the appendix to this petition. *See* Pet. App. 32a-39a.

## STATEMENT OF THE CASE

Lawyer Wheeler Neff was a sole practitioner for the last 17 years in Delaware with considerable experience in the lending and banking fields as a former Deputy Attorney General and Counsel to the Office of the Delaware State Bank Commissioner. Subsequent to that, he served as counsel to the banking and credit card operations of Beneficial Corporation and its three federally chartered banks in the consumer loan field. For a period of a few years prior to 2013, he represented various entities serving as servicing agents for payday loans made under the auspices of Native American tribes.

In 2016, the government charged that the advice Neff gave those clients and the payday lending activities in which they engaged rendered them guilty of a RICO conspiracy to charge customers interest rates that exceeded state usury laws, despite application of the established doctrine of tribal sovereign immunity which would have exempted the tribal loans from state regulation. Neff and one of his principal clients, Charles Hallinan, were also charged under the mail/wire fraud statutes with allegedly devising a scheme to defraud the plaintiffs in an Indiana class action lawsuit involving payday lending by concealing information regarding Hallinan's ownership of APEX, a payday loan servicing company, during settlement negotiations.

The question at trial was whether Neff, after nearly 70 years of living a life unblemished by any criminal charges or professional discipline, abandoned all of that to embrace a conspiracy with Hallinan to openly engage in widespread lending practices

that he knew violated the federal racketeering law. This fateful decision, otherwise inexplicable, was, as the theory went, motivated solely by his receipt of normal legal fees that he charged to other clients.

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

At sentencing, the government initially sought a sentence for Neff of between 262 and 327 months incarceration with the District Court ultimately concluding that Neff was responsible for causing a staggering amount of loss in excess of $9.5 million to the Indiana plaintiffs under USSG § 2B1.1.

After departing and varying downward to a degree from the United States Sentencing Guidelines, the District Court sentenced the then nearly 70 year old Neff to 8 years incarceration, 3 years supervised release and a $50,000 fine, the Court further ordering that Neff forfeit his interest in the home that he shared with his wife from which he practiced law.

On appeal, the Third Circuit Court of Appeals affirmed the judgments imposed against Neff and Hallinan finding that: 1) the deception about Hallinan's ownership with respect to APEX in connection with the Indiana lawsuit deprived the plaintiffs of money or property in violation of the mail and wire fraud statutes; 2) tribal sovereign immunity did not shield payday loans from Pennsylvania's usury rate limitations; and, 3) willfulness was not required to be

proven to establish a RICO conspiracy.[1]

## REASONS FOR GRANTING THE PETITION

### I. THE LOWER COURT PERMITTED AN UNPRECEDENTED EXPANSION OF THE MAIL AND WIRE FRAUD STATUTES BY AFFIRMING A CONVICTION BASED ON THE THEORY THAT A MISREPRESENTATION CONCERNING THE TRUE OWNER OF A BUSINESS DURING THE COURSE OF SETTLEMENT NEGOTIATIONS TO RESOLVE A CIVIL CLAIM DEPRIVED THE PLAINTIFFS OF MONEY OR PROPERTY WHERE NO MONEY OR PROPERTY WAS SOUGHT OR OBTAINED.

The facts pertaining to the mail/wire fraud counts in this case are both simple and, for purposes of this appeal, undisputed.

After a group of plaintiffs in Indiana brought a class action suit against APEX 1 Processing, the company which serviced the payday loans that were made to them, a question arose as to the ownership of APEX. The government charged in counts three through eight of the indictment that Neff and his co-defendant Charles Hallinan misrepresented to these plaintiffs that Hallinan was not the principal owner of APEX, the result of which would be that he would not be personally liable for any judgment that might

[1] Charles Hallinan's petition for a writ certiorari was filed on March 4, 2020.

be obtained against APEX if the litigation had gone to trial and verdict. The government's theory was that this misrepresentation, made while the case was pending and during the time the parties were negotiating a voluntary settlement of the claim, somehow constituted a deprivation of money or property cognizable under the mail/wire fraud statutes, Title 18 U.S.C. §§ 1341 and 1343.

The misrepresentation at issue did not go to the extent of the injury the plaintiffs purportedly suffered nor to the statutory or other damages in question but was limited to the question of whether the deep pocket defendant, Hallinan, could possibly be joined in the lawsuit.[2]

On appeal, Neff argued that the evidence offered, in the light most favorable to the government, did not constitute mail/wire fraud since no "money or

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[2] The plaintiffs were aware of Hallinan's actual position with respect to APEX prior to the time they agreed to settle the case for $260,000. The plaintiffs' attorney testified that he received a letter received from an Assistant United States Attorney investigating Hallinan six months prior to the settlement that made him aware that Hallinan could be joined as a defendant. Tactically, however, the plaintiffs chose not to do so because his presence would create diversity jurisdiction and result in the transfer of the case to federal court where an arbitration clause would likely have been enforced and their recovery would have been limited to an amount far less than what the case actually settled for pursuant to *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

property" of the alleged victims was sought to be obtained by the defendants through the misrepresentation as to ownership since, at the time the misrepresentation was made, the plaintiffs had nothing but an un-adjudicated civil claim without any legal entitlement to damages. Accordingly, Neff asserted that the plain error doctrine should cause the dismissal of these counts. See, *United States v. Jones*, 471 F.3d 478 (3rd Cir., 2006). These counts of conviction and the concomitant amount of loss calculations had an enormous impact on Neff's sentencing guideline calculations and were otherwise prejudicial to him at trial.

In the course of these appeals, the government has essentially been challenged to cite to any appellate court decision which has interpreted a misrepresentation made in the course of a negotiation to settle an un-adjudicated civil claim to be a cognizable offense under statutes that prohibit devising or intending to devise "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses representations or promises." Title 18 U.S.C. §§ 1341 and 1343. The government has failed to do so. This failure is not because of the government's incapacity as legal researchers but reflects the fact that no case has ever expanded these statutes into an area such as this which is so clearly outside the realm Congress has authorized.

By accepting this case for review, the Court will once again draw the proper line circumscribing these statutes and restrain the unfortunately recurring tendencies of federal prosecutors to attempt to extend them by executive fiat instead of by proper ap-

plication to Congress for amendments in accord with the doctrine of separation of powers.

The offenses charged here were not cognizable under the federal fraud statutes for three reasons, any one of which would be sufficient to render them subject to dismissal. First, there was no "property" of the alleged victim that the defendants sought to obtain by fraud. Second, there was no scheme to "defraud" since being *deceived* by a falsehood does not always equate to being *defrauded*. And third, the defendants did not seek to "obtain" anything from the victims by the alleged misrepresentation.

A. "Property"

The mail/wire fraud statutes are about the protection of individuals from the theft of their *property* by those who wish to obtain it through a scheme to defraud. This point was made compellingly in *McNally v. United States*, 483 U.S. 350 (1987) when this Court struck down the vast expansion of the mail fraud statute proposed by the government to take its simple and direct wording and apply it to situations where politicians and others allegedly deprived citizens of their right to the honest services of their government officials. In *McNally*, this Court looked at the 19th century origins of the mail fraud statute as it was proposed in a recodification of the postal laws in 1872. As the Court noted:

> The sponsor of recodification stated, in apparent reference to the anti-fraud provision, that measures were needed "to prevent the frauds which are mostly gotten up in the large cities… by thieves

> forgers and rapscallions generally, for the purpose of deceiving and fleecing the innocent in the country." Insofar as the sparse legislative history reveals anything, it indicates that the original impetuous behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property.

*Id*. at 356. See also, *Mail and Wire Fraud*, 55 American Criminal Law review, 1447, 1458 (2018).

*McNally's* reading of this history made it clear that when Congress used the term "property" in this statute, it meant the clear and common understanding of that term, precluding from the statute's reach any deception that would deprive an individual of an expectation of some fairness of process or other interest which was not traditionally and rigorously understood to be equal to cash in hand of a victim that a fraudulent actor might seek to obtain. *Id*. at 359-360. This requirement is also mandated by the maxim of statutory interpretation that holds that, where there is more than one rational reading of a criminal statute, a Court may choose the harsher one only when Congress "has spoken in clear and definitive language" since there are no constructive offenses in the federal system. *McNally* at 359-360.

While this Court would sensibly and properly note soon after *McNally* that an established property interests may sometimes be of the intangible variety, (such as confidential, proprietary information of a company) that could be embezzled or taken by fraud

raising an offense under these statutes, *Carpenter v. United States*, 484 U.S. 19, 25 (1987), "property" is not so fungible a concept as to permit artistic and creative expansions of it at a prosecutor's whim. Indeed, if there is any suggestion that the word itself is ambiguous, resolution of ambiguity in a criminal statute is to be made in favor of lenity with the adoption of the stricter interpretation required. *Cleveland v. United States*, 531 U.S. 12, 25 (2000).

In *Cleveland*, the issue was the obtaining of video poker licenses from the state through misrepresentations by those who sought the licenses. While the license in the hands of the defendant would be property, this Court held that the focus of the mail fraud statute is on whether the license would be property while in possession of the state since a cognizable mail fraud scheme must seek to separate a victim from their property and effect a transfer thereof to the defendant. *Id.* at 26. Nonetheless, the Court rejected the idea that the state had a property interest in the license before it was issued, sensibly indicating that the state was really utilizing a regulatory process in which the license was a non-property feature. *Id.*

The Court of Appeals in this case cited in passing the cases of *Pasquantino v. United States*, 544 U.S. 349 (2005) and *United States v. Hird*, 913 F.3d 332 (3rd Cir., 2019) as cases sufficiently similar to Neff's circumstance to permit affirmance of the conviction. Pet. App. 15a-18a. In fact, these two cases are strong authority against this proposition and further support the position Neff has taken in this matter.

*Pasquantino* concerned a scheme to smuggle liquor into Canada and thereby avoid paying the excise tax to the Canadian government. This Court realized that once the liquor crossed the international border, Canada had a legal entitlement to the tax revenue and the scheme was meant to deprive the Canadian government of the funds to which they were entitled. As the Court put it, the right to collect the excise taxes was a property right since it constituted "an entitlement to collect money from the defendant, the possession of which is something of value to Canada." *Id.* at 355. Since the collection of excise taxes was a "valuable entitlement" to the Canadian government that arose automatically at the time the liquor was imported, "had petitioners complied with this legal obligation, they would have paid money to Canada, making their actions the same thing as if they had embezzled funds already within the Canadian treasury." *Id.* at 356. The Court found that its decision did not conflict with *Cleveland* because the scheme to deprive Canada of money was meant to deprive it of something to which "it was entitled by law." *Id.* at 357.

In *United States v. Hird*, 913 F.3d 332 (3rd Cir., 2019), officials in the Philadelphia Municipal Traffic Court system rigged the process to prevent and frustrate the ability of the city and the Commonwealth to collect fines and costs on judgments obtained in motor vehicle infraction cases. The *Hird* indictment itself stated that the actions of the defendants deprived the government of funds to which it was "entitled" *Id.* at 339, and the key to the scheme was that the process "was rigged to produce only judgments

that impose lower fines-or most often, no fines and costs at all." *Id*. at 341-342.

So while Pasquantino and Hird each properly note that a clear legal entitlement may constitute property for the purposes of these statutes, it is equally clear that the plaintiffs in Indiana had nothing to which they were entitled by law at the time of the misrepresentation as to the true owner of APEX. The plaintiffs had gone to Court in Indiana seeking to get an entitlement to get money from APEX or others through winning a judgment that would have given them the right to collect whatever damages the Court awarded. But since at the time of these negotiations they had no judgment entered against APEX or anyone else, they had no legal entitlement which could be identified as "property" in conformity with the federal fraud statutes.

The critical importance of understanding the limited nature of the term "property" was emphasized by this Court in the related context of a Hobbs Act prosecution in *Sekhar v. United States*, 570 U.S. 729 (2013). The Hobbs Act prohibits "the obtaining of property of another" through extortion. 18 U.S.C. § 1951. In *Sekhar*, a company official sought to threaten the attorney for a state agency to recommend that funds of the agency be invested in the defendant's brokerage firm. This Court dismissed the case finding that no "property" was sought to be obtained.

Conceptually, the Hobbs Act and mail/wire fraud are cousins in the same family. Both seek to protect a victim from having their property taken from them by a perpetrator, with the principle difference be-

tween the two being the means by which the taking is to be effected. Under the Hobbs Act, it is through extortion while under mail/wire fraud it is to be through deception. In *Sekhar*, this Court held that the phrase "obtaining of property" requires both a deprivation and an acquisition, mandating that the scheme be one to have a victim part with his property and transfer it to the control of another. Since *Sekhar* was not trying to obtain the power of the agency to make a recommendation but was rather simply trying to coerce the official into making the recommendation, the Court found that no cognizable Hobbs Act violation had occurred.

The mail fraud statute means the same thing as the Hobbs act in this critical respect. The phrase "whoever having devised a scheme or artifice to defraud or for the purpose of obtaining money or property" means obtaining the property of another. As the *McNally* Court recognized, this was the statute's meaning since its inception. Mail/wire fraud, like the Hobbs Act, works to protect a victim from being separated from their property and vesting control of it with the defendant.

Here, at the moment the alleged misrepresentation was made, the plaintiffs possessed nothing that any Court has ever construed as "property" for the purposes of these related federal criminal statutes.

### B. "To Defraud"

The law is clear that a scheme to deceive does not constitute mail or wire fraud as a scheme to deceive does not involve the taking of money or property. Rather, it is only a scheme to defraud someone out of

their money or property that is actionable as a mail or wire fraud. Ellen S. Podgor, *White Collar Crime*, Second Edition, 77 (2018). While a scheme to deceive may be unethical and morally wrong, all lies and misrepresentations are not converted into mail fraud because someone affixes postage to them and deposits them in a Post Office.

Indeed, courts have recognized that deception and misdirection are unfortunately common in negotiation and it is only where a party uses such prevarications to separate a victim from their property that a mail or wire fraud occurs. *United States v. Weimert*, 819 F.3d 351 (7th Cir. 2016).

Where what has happened is that an innocent party is deceived about the fairness or legitimacy of a process like bidding or negotiation, no federal fraud occurs. In *United States v. Henry*, 29 F.3d 112 (3rd Cir., 1994), government officials rigged a bidding process to steer funds controlled by a commission to a certain bank. The Court dismissed the mail fraud counts finding that the only thing the other banks were deprived of was their interest in a fair bidding process. While that process would be a valuable consideration to them, it was not a property right cognizable under the mail fraud statute. *Id*. at 115. And the mere fact that the winning bank and others profited from the scheme financially did not convert the scheme into one prosecutable under the mail fraud statute since there was no property of the victim that was sought to be obtained by the defendants.

Like the other banks in *Henry*, every civil litigant hopes that the process of negotiating a settlement

will be open, fair and honest. When that expectation is violated by an intentional misrepresentation, penalties can be assessed by numerous state statutes and regulations, not the least of which would involve the professional discipline of the attorneys involved. But the expectation of a fair and open negotiation process free of any hint of deceit is not, when unfulfilled, a cognizable issue under the federal fraud statutes.

### C. "To Obtain"

Reduced to their essence, the federal fraud statutes are meant to prevent theft accomplished not by threatening a victim with a gun or by surreptitiously breaking into the victim's house at night, but by using lies and deception to transfer to the perpetrator the property of the victim, obtaining it by transferring control of it from them to him. The notion that a scheme to defraud properly cognizable under these statutes requires a transfer of property currently possessed by the victim to the defendant is another reason why a prosecution under these statutes is not conceptually possible here.

In *United States v. Walters*, 997 F.2d 1219 (5th Cir., 1993), the mail fraud charged involved a sports agent secretly signing amateur players to professional contracts and thereby making them ineligible to play for their college teams. That ineligibility also meant that the colleges to which misrepresentations about the amateur status were made wasted the money spent on scholarships for the players. Walters, of course, got none of the scholarship money himself.

The government argued that neither an actual nor potential transfer of property from a victim *to a defendant* was essential in a federal fraud case and that the only thing important was that victim lost something that was valued. *Id*. at 1224. The Fifth Circuit ridiculed this position, pointing out that no case from this Court dealing with mail/wire fraud has ever involved a scheme in which a defendant neither obtained nor tried to obtain the victim's property through a fraudulent scheme. *Id*. at 1226. The Court found that both the scheme or artifice to defraud clause and the clause prohibiting the obtaining money or property contemplate a transfer of some kind between the victim and the perpetrator. Without that, no mail/wire fraud could occur. Since Walters did not seek to obtain anything from the colleges, no fraud prosecution could be sustained even though the colleges lost money because of player ineligibility.

At the time of the misrepresentation, the victims had nothing Neff and Hallinan wished to deprive them of since all the victims "had" was unadjudicated claim (in other words, a legal assertion or demand - Black's Law Dictionary, 2018) against APEX that gave them no entitlement to anything. Neff and Hallinan did not want to acquire any claim the plaintiffs had against APEX and they did nothing to seek to transfer anything from the plaintiffs.

Indeed, the defendants here did nothing to take from the plaintiffs any avenue of redress the plaintiffs had to seek the judgment/entitlement that they otherwise could access. *Hird* spoke to the fact that the scheme there broadly undercut the ability of the

city and Commonwealth to obtain judgments in the first place by obviating the entire process to obtain them. The scheme was meant to interfere with the judgment process and take it out of the hands of government to prevent fines and costs from being imposed. *Id.* at 343. The scheme meant to corrupt the process by which they could be collected.

But here, there was no rigging of the process as the misrepresentation had no effect on the legal process by which the plaintiffs could access the courts of Indiana in an effort to obtain a judgment and realize an entitlement to get money from defendants against whom that judgment was entered. Nothing that the defendants did by way of any misrepresentation deprived the plaintiffs of their ability to seek a judgment or access fully the process by which one could be obtained. Nothing was sought to be transferred from the alleged victims to Neff and Hallinan.

C. Conclusion.

If the decision in this case is to be upheld, it will be the first time in the history of these statutes that a circumstance not involving "property," not involving a scheme "to defraud," and not involving an attempt "to obtain" the property of another was judged sufficient. And such upholding will violate basic Constitutional principles and invite more in the future.

The mail/wire fraud statutes have always proved seductive to federal prosecutors. As one former federal prosecutor who later became a District Court judge has written, "the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our

Cuisinart – and our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law 'darling' but we always come home to the virtues of 18 U.S.C. 1341, with its simplicity, adaptability, and comfortable familiarity." Jed S. Rakoff, *The Federal Mail Fraud Statute (Part One),* 18 Duq. Law Rev. 4 (1980). This ode to the fraud statutes makes light, however, of an ominous undertone. The history of these statutes shows that despite the boundaries the Courts have set for their use, prosecutors regularly seek to expand their reach even though Congress has given no such explicit authorization.

It is the duty of the Courts to reign them in. As this Court said in *Morissette v. United States*, 342 U.S. 246 (1952), there are times when "[t]he government asks us by a feat of construction radically to change the weights and balances in the scales of justice." Id. at 263. When this occurs, the Court must remember that "[t]he spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute." *Id*.

Both *McNally* and *Cleveland* reiterated this point, warning that the outer boundaries of criminal statutes cannot be left ambiguous and that expansion of them is a matter left to the legislative branch: "If Congress desires to go further it must speak more clearly than it has." *McNally* supra. at 360. And the Court in *Cleveland* held that its decision was not simply based on the fact that the government's con-

struction would stray from traditional concepts of property but added: "we resist the government's reading of Section 1341 as well because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Id.* at 24.

The same admonition resonates here as well. Never before has any federal Court given approval to a mail/wire fraud prosecution involving a circumstance of the kind presented by this record. Failing to reverse the lower Courts will invite a massive expansion of the fraud statutes into areas Congress has clearly not intended. If the flood of new federal criminal prosecutions such an expansion will bring is actually desired, that decision should be left in the hands of Congress.

Accordingly, pursuant to Rule 10(a), Rules of the Supreme Court of the United States, certiorari should be granted because the Circuit's opinion, a) conflicts with every other opinion by this Court and other Circuits on this point; and, b) so far departs and sanctions the lower Court's departure from accepted and usual judicial proceedings by expanding without Congressional authorization a federal criminal statute that the exercise of this Court's supervisory power is warranted.

## II. THE TRIAL COURT'S JURY INSTRUCTION, AFFIRMED BY THE COURT OF APPEALS, CONTAINED A FUNDAMENTAL ERROR OF LAW IN HOLDING THAT THE ESTABLISHED DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY WAS CATEGORICALLY INAPPLICABLE TO WHETHER THE PAYDAY LOANS AT ISSUE WERE UNLAWFUL DEBT.

The gravamen of the charge set forth in Counts 1 and 2 of the present indictment was that, during the period 2007 to 2013, Neff and Hallinan conspired to commit RICO in violation of §1962(d) of Title 18, U.S.C., "through the collection of unlawful debt."

Of course, neither Neff nor Hallinan loaned any money to anyone during that time. The loans were made by internet businesses that were set up explicitly to operate as legitimate "arms" of the Native American Indian tribes under whose auspices the loans were being issued. If the loans were made by an Indian tribe through an entity properly operating as an "arm of the tribe," then, pursuant to the longstanding and established doctrine of tribal sovereign immunity, the loans were lawful despite the fact that they were issued at interest rates that exceeded state usury limits. That was the law during the indictment period, and it is the law today.

And if the loans issued by the tribes and their "arms" were lawful, neither Neff nor Hallinan could be guilty of these two counts.

Prior to advising his clients regarding the proper way to structure these arrangements, Neff engaged

in extended research and drew upon his considerable experience as a lawyer with an unblemished personal and professional record of practice in the commercial area. His view was shared by many lending institutions, Native American tribes and a wide spectrum of attorneys in the field at the time.[3] The view continues to be held by Native American tribes which issue such loans to this day.

On its face, the indictment did not dispute that a lawfully constituted "arm of the tribe" arrangement could properly make such loans; nor did the indictment assert that tribal sovereign immunity was irrelevant to payday lending. Instead, the indictment specifically alleged that the companies Neff advised had entered into "sham business arrangements" with tribes (Count 1, ¶20 and Count 2, ¶19), a circumstance that, if proven, would negate the otherwise fully applicable protections tribal sovereign immunity would afford to the contracts borrowers entered into with the tribes to get the loans. A fair reading of the indictment would have led anyone to anticipate that while the government would concede that tribal immunity did render loans issued by properly structured arms of the tribe lawful, it in-

[3] A number of government witnesses, who were involved in payday lending at various levels during this time period, each testified that their own lawyers, representatives of the Indian tribes and the banking and lending institutions with which they dealt and their attorneys all proceeded with tribal payday lending without anyone issuing a warning that the model was illegal and would subject anyone to prosecution under the RICO statute.

tended to prove that the arrangements here did not meet that standard, whatever that standard might be.

But everything changed at trial. At an early point, the government asserted that tribal sovereign immunity was completely irrelevant to the conduct of payday lenders, even going so far as to proclaim that if a recognized Native American tribe, acting alone, engaged in payday lending in a jurisdiction outside of its own tribal lands, such a activity would be "absolutely" criminal and subject the tribe to prosecution.

An error of the most fundamental and far-reaching kind then occurred when the District Court fully embraced the government's position and, by Its jury charge, materially amended the indictment in a way that radically lowered the Constitutionally required standard of proof, fatally prejudicing the defendants.

The District Court proclaimed at trial that It was "ultimately…going to find that [the payday lending] was illegal" and in charging the jury, dismissed any possible applicability of the doctrine of tribal sovereign immunity by instructing the jury that:

> Outside an Indian reservation, however, absent express Federal law to the contrary, Indian tribes and members of Indian tribes are subject to state law otherwise applicable to other citizens of that state. Tribal sovereign immunity does not provide a tribe or its members with any rights to violate the laws of any states. Instead, tribal sovereign

> immunity limits the means by which a state can enforce its laws against an Indian tribe. Tribal sovereign immunity does not provide a tribe or its members with any immunity from criminal prosecution.

Pet. App. 49a.

This instruction was wrong in every material respect.

First, as this Court recognized in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 US 751 (1998), tribal immunity is not confined to activities of tribes occurring on reservations, and it extends to commercial as well as government actions of the tribe. *Id.*, at 755. While the Court noted the policy concerns such immunity raises, It nonetheless held that tribes enjoy immunity regarding suits on contracts whether the subject of the contracts is commercial or governmental and whether they are made on or off the reservation. *Id.* at 760. Reform in this area is in the purview of Congress. *Id.* at 758.

A decade and a half later, this Court re-affirmed these principles in *Michigan v. Bay Mills*, 572 U.S. 782 (2014), holding that tribal immunity applies whether individuals or the government brings the action, whether the suit involves commercial or governmental acts, and whether the acts occur on the reservation or on state land. Id. at 789-790. While again noting that such immunity can raise legitimate concerns about the reach of state regulations aimed at matters such as consumer protection, the Court nonetheless was emphatic that "it is fundamentally

Congress's job, not ours, to determine whether or how to limit tribal immunity." *Id.* at 800.

The *Bay Mills* case is particularly compelling since the dissent of Justice Thomas in that case, which calls for the Court to overturn *Kiowa*, specifically bemoans the fact that *Kiowa* will allow tribal sovereign immunity to prevent regulation in new areas specifically including payday lending, one of the practices he notes are outside the scope of state regulations due to tribal sovereign immunity. *Id.* at 825.[4]

Moreover, tribal immunity does afford the tribe the ability to circumvent application of state laws including, at times, those sorts of criminal statutes meant to achieve regulatory ends.

In *American Indian Law*, Sixth Edition, (West Publishing 2015), the Honorable William Canby, Senior Judge of the United States Court of Appeals for the Ninth Circuit, explains that from at least 1831, the Supreme Court has recognized that the inherent power of a tribe to exert sovereign immunity is limited only by federal law. *Id*, at p. 76 and following. This immunity has curtailed the attempts of states to apply *criminal* laws against tribes and indi-

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[4] The broad reach *Bay Mills* gives to tribal immunity and the impact of Judge Thomas' reference to payday lending as being a practice able to "escape state regulation by arranging to share profits with the tribes in exchange for using tribal immunity" was noted by the Harvard Law Review in 2014. Note, *The Supreme Court 2013 Term,* 128 Harvard Law Review, 301-305 (2014).

viduals from the tribes with regard to activities occurring *outside* tribal lands, where the laws being applied seek regulatory and not prohibitory purposes. In *Prairie Band Nation v. Wagnon*, 475 Fed. 3d. 818 (10th Cir. 2007) the regulatory but criminal Kansas Motor Vehicle Code was held not to apply against individuals who had their vehicles registered on tribal lands only but operated off-reserve lands in Kansas. A similar result was reached in *Cabazon Band v. Smith,* 388 Fed. 3d. 691 (9th Cir. 2008) (California Motor Vehicle Code held inapplicable). And this Court, in *California v. Cabazon Band of Mission Indians,* 480 US 202, 209-211 (1987), found that state restrictions on bingo and other gaming activities were regulatory in nature and inapplicable when applied to a tribal operation.

Case law is equally clear that tribal immunity is not just enjoyed by the tribe itself since "[w]hen the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe." *Allen v. Gold County Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006).

In *Williams v. Big Picture Loans*, 929 F3d 170 (4th Cir. 2019), tribal immunity was found to make Virginia's usury laws inapplicable to payday loans made by a proper "arm of the tribe" entity. *Id*. 174-177. The 4th Circuit held that this Court has recognized the arm of the tribe concept in *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701 (2003) wherein the Court declined to permit a tribe from suing the local district attorney under a Title VII action since the tribe as a sovereign was not a person for those purposes. Importantly, the suit also involved as a co-

plaintiff the gaming corporation the tribe had set up, and the United States conceded that "the corporation is an arm of the tribe for sovereign immunity purposes" and was thus equally unable to press the claim. *Id*. at 705, n. 1.

The *Williams* case also points out that while this Court has recognized the arm of the tribe concept, It has not yet articulated a specific test to establish when a non-tribal entity enjoys that protection. *Id*. at 176. In all respects, the ruling of the Third Circuit below and the *Williams* case are in direct conflict.

In the present case, all of these considerations that a proper recognition by the District Court of tribal sovereign immunity would have embraced were deemed totally irrelevant. Instead, the District Court issued, and the Circuit affirmed the categorical ruling that tribal immunity did not apply here at all, the Third Circuit disregarding the applicability of tribal sovereign immunity by concluding that there was no error, plain or otherwise, because this was a criminal prosecution and the doctrine of tribal sovereign immunity was simply inapplicable to RICO:

> Tribal sovereign immunity thus limits how states can enforce their laws against tribes or arms of tribes, but, contrary to Neff's understanding, it does not transfigure debts that are otherwise unlawful under RICO into lawful ones. See, e.g., Neff Br. 16 ("Tribal Sovereign immunity made those loans lawful."). A debt can be "unlawful" for RICO purposes even if tribal sovereign immunity

> might stymie a state civil enforcement action or consumer suit (or even a state usury prosecution, although tribal sovereign immunity does not impede a state from "resort[ing] to its criminal law" and "prosecuting" offenders, *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014)).

Pet. App. 19a.

In reaching this conclusion, the Third Circuit completely missed that if tribal sovereign immunity made the loans in question lawful in the first instance that there was no collection of an "unlawful" debt predicated on state law and therefore no plausible commission of a RICO offense as Title 18, U.S.C § 1961(6) defines "unlawful debt" in pertinent part, as a debt (A)... 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 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.

Thus, despite the loans at issue not being usurious under Pennsylvania law because tribal sovereign immunity shielded them from the reach of state usury laws, the lower court deemed them usurious as a matter of judicial fiat, resolving in the government's favor the key element of the offense. This was clear and plain error. *United States v. Gaudin*, 515 U.S. 506, 511 (1995).

Simply put, unless the government proved beyond a reasonable doubt that the particulars of the relationships between the tribes and related companies here did not merit the protections of tribal immunity, the loans made were not barred by state law and were therefore not unlawful for RICO purposes.

A host of authoritative legal commentators have addressed this issue and concluded, as did Wheeler Neff, that a proper arm of the tribe arrangement made such lending legal until and unless Congress acted to abrogate tribal immunity with respect to it.

In 2018, Professor Grant Christensen of the University of the North Dakota School of Law made the point directly:

> The payday lending cases all derive from questions of tribal sovereignty. Tribes are generally not subject to state law, and tribes have used this exception to expand their economic development in a number of different directions. Some tribes have opted to operate or help facilitate payday lending because **tribal entities are otherwise exempt from state usury laws**.

Christensen, *A View from American Courts: The Year in Indian Law 2017*, 41 Seattle Law Review 805, 890 (2018) (emphasis supplied).

Christensen points out that such an exemption arises when the relationship of the tribe and its affiliated entity meets the "arm-of-the-tribe" test. Various jurisdictions have formulations for an effective

test, although none has yet received universal acceptance by Congress or this Court. Such a test, when met, however, wholly justifies tribal payday lending. *Id*. at 891-892.

A 2017 article in the American Indian Law Journal points out that several tribes continue to operate payday lending businesses consistent with the framework of tribal sovereign immunity. Bree Black Horse, *The Risk and Benefits of Tribal Payday Lending to Tribal Sovereign Immunity: Tribal Payday Lending Enterprises are Immune Under a Proposed Universal Arm-of-the-Tribe Test*, 2 American Indian Law Journal, 388 (2017). The regulation of payday lending must be focused on either Congressional legislation or, on a case by case basis, when courts (or Congress) adopt a consistent arm-of-the-tribe test that sets an effective rubric to determine permissible relationships within the scope of tribal sovereign immunity. *Id*. at 395-396. But contrary to the District Court's categorical dismissal of tribal immunity in this area, the doctrine is vitally relevant:

> Tribal Sovereign Immunity protects subordinate secular or commercial entities acting as arms of a tribe from state regulation and legal action. Tribal Sovereign Immunity may extend to the subdivisions of a tribe, including those engaged in economic activities, provided that the relationship between the tribe and entity is sufficiently close to properly permit the entity to share in the tribe's immunity. In order to determine which tribal entities can share in a

> tribe's immunity, Courts implement what is commonly referred as the "arm of the tribe" test. *Id*. at 398.

See also, Note, *Tribal Sovereign Immunity and the Need for Congressional Action*, 59 Boston College Law Review, 2469, 2491 and 2502 (2018).

Professor Adam Creppele's 2018 analysis concludes that tribal model payday lenders, on or off tribal lands, "are entitled to sovereign immunity." Adam Crepple, *Tribal Lending and Tribal Sovereignty,* 66 Drake L. Rev. 1, 24 (2018). While courts continue to struggle to find an accepted test for an "arm of the tribe" determination, the arms are clearly entitled to protection as well. *Id*. at 35-42. Another article published that same year is in accord: Richard B. Collins, *To Sue And Be Sued: Capacity And Immunity Of American Indian Nations*, 51 Creighton L. Rev. 391, 421 (March, 2018) ("Tribal immunity has defeated attempts to sue lenders under such laws. This in turn has led to criticism of this deployment of immunity.").[5]

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[5] See also, Hilary B. Miller, *The Future of Tribal Lending Under the Consumer Financial Protection Bureau*, American Bar Association Business Law Today (2013); Victor Lopez, *When Lenders Can Legally Provide Loans Above 1000% Is It Time for Congress to Consider Federal Interest Cap on Consumer Loans?*, 42 Journal of Legislation 36 (2016); Shane Mendenhall, *Payday Loans: The Effect of Predatory Lending*, 32 Ok. City L. Rev. 299 (2007).

In Nathalie Martin and Joshua Schwartz's *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 Wash & Lee L. Rev. 751 (2012), the authors make the following critical points which are echoed in other scholarly writings:

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

- *Kiowa* means that "[i]t is presumptively true . . . that an internet-based payday lender that is formed, funded and run by a tribe for the benefit of the tribe is entitled to tribal sovereign immunity." *Id.* at 777; *Update on Tribal Loans to State Residents*, originally published in Vol. 69, #2 of The Business Lawyer (2013). (a Colorado trial Court even held that if the "arms" of the tribe were "shams" the immunity would not be lost).

- Tribal sovereign immunity applies to entities that function as "arms of the tribe" and a corporation can fulfill that role, *Id.* 774, 777.

- While payday lending can be criticized on public policy grounds, critics must "not question the right of tribes to utilize tribal sovereign immunity to engage in payday lending," p. 788;

> *Update on Tribal Loans to State Residents*, *supra*. ("most agree that Federally recognized sovereign tribes had the authority to engage in internet lending to state residents without those tribes being subjected to state authority.") Regulation of such lending requires specific Congressional action, *Id*. 788.

See also, Adam Mayle, *Usury on the Reservation*, 31 Rev. of Banking & Fiduciary Law 1054 (2012).

And a 2019 Note reiterates these critical points:

> … non-tribal payday lenders seeking to evade state usury laws and lend to borrowers in states with interest rate caps are often incentivized to form relationships with tribes to benefit from their tribal sovereign immunity from state usury laws and any suites to enforce them. **This immunity is possible if such lenders establish legitimate ties with a tribe because arm-of-the-tribe entities are protected under tribal sovereign immunity**. (emphasis supplied).

Note, *Tribal Lending Under CFPB Enforcements: Tribal Sovereign Immunity and The "True Lender" Distinction*, 23 NC. Banking Institute Journal, 401, 402 (March 2019).

The wholly erroneous jury instruction on RICO prejudiced Neff in multiple ways, each of which in-

dependently call for either the grant of a new trial or dismissal of his conviction.

First, the District Court usurped the province of the jury to determine an element of the offense, that is, that the alleged conspiracy involved *unlawful* loans. The government was thus never called upon to prove that because of the alleged "sham business arrangements" the loans issued by the companies related to the tribes were illegal; instead, the Court preempted that finding by declaring the loans categorically illegal. But "before a District Court may issue an instruction permitting the jury to infer the presence of even a single essential element from a set of facts, the inference must, at the least, be shown capable of leading a rational trier of fact to the conclusion that the element in question is proven to the level demanded by the applicable standard of proof. [citation omitted] Neither may a District Court ever issue instructions that effectively relieve the government of proving each essential element specified by Congress." *United v. Makkar*, 810 F.3d 1139, 1143-1144 (10th Cir. 2015) (Gorsuch, J). See also, *Bennett v. Superintendent*, 886 F.3d 268, 284 (3rd Cir. 2018) and *United States v. Korey*, 472 F.3d 89, 93 (3rd Cir. 2007).

Second, had the Court let the jury determine whether the loans were illegal, it would have been clear that, to convict Neff, he would have to have known they were illegal when he advised the companies and tribes to make them. But with its preemptive ruling that the loans were illegal, the Court then completely confused the matter of whether Neff's requisite knowledge and intent needed to be

knowledge of illegality or, as the Court charged at some points, was simply knowledge that a loan exceeded the rate cap in a given state. Pet. App. 46a-56a. Adding to this, while the Court told the jury that Neff had a good faith defense entitling him to acquittal if the jury found that he honestly believed that he was not violating the law, the Court, having told the jury that the law made the loans illegal, also told them that Neff's "ignorance of the law [was] no excuse." Pet. App. 48a. This created a fatal paradox in conflicting instructions,[6] requiring a reversal. *Francis v. Franklin*, 471 U.S. 307, 322 (1985).

Third, having ruled that the loans were illegal, the District Court severely restricted Neff's direct testimony and denied him the right to defend by showing the effort he made to analyze the legality of the tribal loan model and the legitimacy of the conclusion he reached. His conclusion, confirmed by the analysis of so many others then and now, was presented to the jury as presumptively wrong despite all evidence to the contrary.[7]

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[6] Neff had requested that the Court instruct that willfulness was the proper *mens rea* standard for the RICO conspiracy offense charged here. The Court improperly rejected that requested charge.

[7] The District Court repeatedly upheld government objections to Neff explaining the import of the cases he reviewed and how these cases informed his judgment with respect to the tribal lending programs he designed, the following exchange being emblematic of the curtailment of Neff's trial testimony:

And, finally, the evidence in this case simply did not make out the charge brought by the government. While the indictment charged that Neff's clients were involved in "sham business arrangements," no such proof was ever offered, and no standard for articulating what was a "sham" and what was not was ever put to the jury for its consideration. Instead, the illegality of the loans was given to the jury as a fait accompli by the trial judge, despite the fact that the prevailing view is that tribal sovereign immunity made payday lending lawful if the loans were made by an arm of the tribe.

Accordingly, pursuant to Rule 10(a), Rules of the Supreme Court of the United States, certiorari should be granted because the Circuit's opinion, a) conflicts with opinions by this Court and other Circuits regarding the applicability of tribal immunity; and, b) so far departs and sanctions the lower Court's departure from accepted and usual judicial proceedings in the specific ways set forth above which devastated the due process rights of the petitioner that the exercise of this Court's supervisory power is warranted.

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

## III. THE TRIAL COURT'S JURY INSTRUCTION WAS FUNDAMENTALLY INCORRECT AS IT DID NOT SPECIFY THAT WILLFULNESS WAS REQUIRED TO PROVE A RICO CONSPIRACY.

As RICO does not contain a prescribed *mens rea* in either its substantive or conspiratorial form, the District Court was required to exercise "particular care" to avoid construing the RICO statute to dispense with a mental state "where doing so would 'criminalize a broad range of apparently innocent conduct.'" *Staples v. United States*, 511 U.S. 600, 610 (1994).

The Third Circuit, however, concluded that there was no error in failing to include a willfulness instruction with respect to the RICO conspiracy charge because the collection of unlawful debt in this case fell outside the realm of innocent conduct as a reasonable person would know that collecting an unlawful debt was unlawful. Pet. App. 12a-13a.

But in so holding, the Third Circuit overlooked the legal community's consensus during the period that tribal lending was legal made giving a willfulness charge here compelling. See, *Morissette v. United States,* 342 U.S. 246 (1952) (theft requires proof that a defendant did not reasonably believe item was abandoned); *Liparota v. United States*, 471 US 419 (1985) (proof that the defendant knowingly acquired food stamps is insufficient as criminal liability can only attach where it was proven that he knew that he acquired them illegally); *Staples v. United States*, 511 US 600 (1994) (proof that a defendant knew the illegal characteristics of the weapon that made it ful-

ly automatic is required); *Elonis v. United States*, 575 U.S. 723 (2015) (where the key element of sending threats in interstate commerce was the threatening nature of the message, the government could not simply prove a reasonable person might consider the message to be a threat).

The jury was told that the "knowing" component of the RICO conspiracy could be satisfied if Neff knew what the maximum rate of interest was in Pennsylvania and could do the math to figure out that loans from the lending companies would exceed it. But the jury should have been required to find that despite the research that led him and many others to conclude that tribal sovereign immunity gave safe harbor to these loans, Neff subjectively knew that tribal lending was criminal usury and purposely tried to break the law.

Accordingly, pursuant to Rule 10(a), Rules of the Supreme Court of the United States, certiorari should be granted because the Circuit's opinion, a) conflicts with opinions by this Court and other Circuits regarding the necessity of a willfulness instruction in a case of this nature; and, b) so far departs and sanctions the lower Court's departure from accepted and usual judicial proceedings by misstating the elements of the offense and arbitrarily lowering the standard of proof that the exercise of this Court's supervisory power is warranted.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 2020

# APPENDIX

**APPENDIX A**

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 18-2282 & 18-2539

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UNITED STATES OF AMERICA,

v.

WHEELER K. NEFF,

Appellant in No. 18-2282

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UNITED STATES OF AMERICA,

v.

CHARLES M. HALLINAN,

Appellant in No. 18-2539

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On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Nos. 2-16-cr-00130-001 & 2-16-cr-00130-002
District Judge: Honorable Eduardo C. Robreno

Submitted Pursuant to Third Circuit L.A.R.
34.1(a) June 27, 2019

Before: CHAGARES, GREENAWAY, JR., and
GREENBERG, *Circuit Judges*.

(Filed: September 6, 2019)

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OPINION*

CHAGARES, *Circuit Judge.*

Charles Hallinan and Wheeler Neff were convicted of conspiring to collect unlawful debts in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), federal fraud, and other crimes. Their RICO convictions are based on their efforts to skirt state usury laws by partnering with American Indian tribes to offer usurious payday loans. And their fraud convictions are based on their defrauding consumers who sued one of Hallinan's payday businesses into settling their case for a fraction of its worth. They now appeal their convictions and sentences on numerous grounds. We will affirm.

I.

We write for the parties and so recount only the facts necessary to our decision.

Payday loans are a form of short-term, high-interest credit, commonly due to be repaid with the borrower's next paycheck. The loans are not termed in interest rates, but rather in fixed dollar amounts. The borrower is required to pay this amount — termed a fee — in order to secure the loan and is charged this amount each time the borrower misses the due date to pay off the loan. As a result of this cycle, the annual percentage rates (APR) on payday loans are exceedingly high: 400% for loans made through brick-and-mortar

* This disposition is not an opinion of the full court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

shops on average, and 650% for those made through the internet. Seventeen states outright prohibit these types of loans by capping the allowable APR on consumer loans at 36% or less. Twenty-seven regulate these loans by imposing licensing requirements, limiting the size of the loans or the number of renewals, or by structuring APR limits to a cap that would not all but assure the prohibition of these loans. And only six states permitted unlicensed payday lending to their residents during the indictment period.

Hallinan has been partnering with Indian tribes to offer payday loans since 2003. In 2008, after a falling out with his first tribal partner, Hallinan joined up with Randall Ginger, a self-proclaimed "hereditary chief" of a Canadian Indian tribe. They met through Neff, an attorney who previously worked with Ginger and a different payday lender. In late 2008, Neff drafted contracts by which Hallinan sold one of his companies, Apex 1 Processing, Inc., to a sole proprietorship owned by Ginger — although none of Apex 1's operations changed and Ginger never actually became involved in them.

In March 2010, Apex 1 was sued in a class action in Indiana for violating various state consumer-credit laws. The plaintiffs sought over $13 million in statutory damages ($2,000 for five violations apiece against over 1,300 class members). Through Neff, Hallinan hired an attorney to defend Apex 1.

Hallinan and Neff replaced Ginger with the Guidiville tribe, a federally recognized Indian tribe based in the United States, in late 2010. In 2011, they also introduced the tribe to Adrian Rubin, Hallinan's former payday-lending business partner, and Neff drafted agreements to facially transfer Rubin's payday loan portfolio to the tribe while Rubin continued to provide the money for the loans and the employees to collect on them. From 2010 until 2013, Hallinan used new entities associated with this tribe to issue and collect debt from payday loans to borrowers across the county (including hundreds with Pennsylvania residents) all of which had three-figure interest rates.

In July 2013, soon after the class was certified in the Indiana lawsuit, Neff sent Hallinan an email warning him that he faced personal liability of up to $10 million if the plaintiffs could prove that he did not really sell Apex 1 to Ginger. Neff advised: "[T]o correct the record as best we can at this stage, and present Apex 1 as owned by Ginger as intended, it would be helpful if [your accountant] could correct your tax returns and remove the reference to [Apex 1] on the returns and re-file those returns." Joint Appendix ("JA") 6890. He continued:

> Also, for settlement discussion purposes, it's important that Apex 1 not be doing any further business other than maintaining a minimum net worth. For that reason, if there is any business being done through Apex 1, it would be very helpful to have all such activity discontin

> used and retroactively transferred to another one of your many operating companies for the entire 2013 year. All that will tend to confirm that Ginger owned Apex 1 and there are only a minimal amount of assets available for settlement . . . .

*Id.* Hallinan forwarded this email to his accountant and wrote: "Please see the seventh paragraph down re; my tax returns. Then we can discuss this." JA 6889.

So Hallinan called Ginger and said, "I'll pay you ten grand a month if you will step up to the plate and say that you were the owner of Apex One Processing, and upon the successful conclusion of the lawsuit, I'll give you fifty grand." JA 6391. Hallinan also falsely testified in a deposition that: Apex 1 went out of business around 2010, he sold Apex 1 to Ginger in November 2008, he became vice president after the sale and only made $10,000 a month, he resigned from Apex 1 in 2009 and stopped receiving payments, and he did not pay Apex l's legal fees. As Neff wrote in a later email, the goal was "to avoid any potential questioning . . . as to any deep pockets or responsible party associated with Apex 1." JA 7066. In April 2014, the plaintiffs settled the Indiana lawsuit for $260,000, which Hallinan paid through one of his payday-lending companies.

Later in 2014, the Government empaneled a grand jury to investigate Hallinan and Neff's payday-lending scheme, as well as their conduct in the Indiana class action (and Ginger's as well). As part of the investigation, the Government served

subpoenas for documents on Apex l's attorneys in the Indiana case. They produced some documents but withheld or redacted others as privileged communications with their client, Apex 1. When the grand-jury judge held that any privilege was held by Apex 1, not Ginger, Ginger and Hallinan hired attorney Lisa A. Mathewson to represent Apex 1 and assert its privilege. Ginger signed Mathewson's engagement letter as Apex 1's "authorized representative," while Hallinan signed an agreement to pay Mathewson for her representation. Over the course of two years, Hallinan paid Mathewson over $400,000 to represent Apex 1 in the grand-jury investigation.

The Government also served document subpoenas on Hallinan's accountant. Among other documents, he produced the July 2013 email from Neff that Hallinan had forwarded to him. The Government moved to present this email to the grand jury. The district court concluded that the email was protected attorney work product but allowed it to be presented to the grand jury under the crime-fraud exception. Hallinan filed an interlocutory appeal to this Court. We held that the crime-fraud exception did not apply since no actual act to further the fraud had been performed. *In re Grand Jury Matter #3*, 847 F.3d 157 (3d Cir. 2017).

The grand jury indicted Neff and Hallinan and later returned a seventeen-count superseding indictment. The first two counts charged them with RICO conspiracy to collect unlawful debt in violation of 18 U.S.C. § 1962(d). Counts three through eight charged them with defrauding and

conspiring to defraud the Indiana plaintiffs, in violation of 18 U.S.C. §§ 371, 1341, 1343. Counts nine through seventeen charged Hallinan with money laundering in violation of 18 U.S.C. § 1956(a)(2)(A).

Before trial, the Government moved in limine to admit the July 2013 email. The Government's motion was based on the argument that the July 2013 email had furthered certain tax crimes, not the fraud that this Court considered, and so it was admissible under the crime-fraud exception despite this Court's earlier decision. After a hearing at which Hallinan's accountant testified, the District Court agreed and granted the motion.

Trial took place in the fall of 2017 over ten weeks. Neff testified extensively over the course of four days, including about the sources he consulted regarding the legality of tribal payday lending. The District Court did not permit him to testify about the details of those sources or to introduce them into evidence, however. Hallinan and Neff were convicted on all counts in November 2017.

In 2018, after a bench trial, the District Court ordered forfeiture of certain assets of both defendants. Hallinan was ordered to forfeit over $64 million in proceeds of the RICO enterprise as well as the funds in eighteen bank accounts and three cars as a part of his interest in the RICO enterprise. Neff was ordered to forfeit his legal fees obtained from his participation in the RICO enterprise and a portion of his interest in his residence that corresponded with the home office in which he facilitated the conspiracies.

Then the District Court sentenced the defendants. As to Hallinan, the court calculated his total offense level to be 36, resulting in a Guidelines range of 188-235 months of imprisonment, which included a two-level enhancement for obstruction of justice. That enhancement was due to Hallinan's hiring of Mathewson to make privilege assertions on behalf of Apex 1 in the grand jury investigation. The court then granted a two-level downward departure based on Hallinan's age and poor health, and varied down one more level under 18 U.S.C. § 3553(a), resulting in a final offense level of 33 and a Guidelines range of 135-168 months of imprisonment. The court sentenced Hallinan to 168 months of imprisonment followed by three years of supervised release.

As to Neff, the Presentence Report set his offense level for the fraud charges at level 39, which included a 20-level upward adjustment for an intended loss amount exceeding $9.5 million. *See* U.S.S.G. § 2B1.1(b)(1)(K). That adjustment was based on his July 2013 email to Hallinan that set the risk of the Indiana lawsuit at $10 million. But the court instead applied a loss amount of $557,200, the amount of a settlement offer extended to the Indiana plaintiffs in December 2013. The court then varied downward from the Guidelines range of 121-151 and sentenced Neff to 96 months of imprisonment followed by three years of supervised release.

This timely appeal followed.

II.[1]

Hallinan and Neff challenge their convictions and sentences on nine distinct grounds. Both defendants challenge (A) the admission of the July 2013 email at trial; (B) the mens rea jury instruction; (C) the limit on Neff's testimony; and (D) whether they defrauded the Indiana plaintiffs of "property" under the mail and wire fraud statutes. Neff alone challenges (E) the tribal-immunity jury instruction; (F) the sufficiency of the evidence against him; and (G) the loss calculation at his sentencing. Hallinan alone challenges (H) his obstruction-of-justice enhancement and (I) his forfeiture and money judgment. We address these issues in turn.

A.

We begin with the admission of the July 2013 email at trial. The District Court admitted this email under the crime-fraud exception to attorney work-product privilege. The crime-fraud exception applies when "there is a reasonable basis to suspect (1) that the privilege holder was committing or intending to commit a crime or fraud, and (2) that the attorney-client communication or attorney work product was used in furtherance of that alleged crime or fraud." *In re Grand Jury*, 705 F.3d 133, 155 (3d Cir. 2012). The District Court determined that "there is a reasonable basis to suspect that (1) the defendants were committing or intended to commit tax crimes, and (2) the email was used in furtherance of those crimes," and that this Court's

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[1] The District Court had jurisdiction under 18 U.S.C. §3231, and we have appellate jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. 3742(a).

earlier decision did not "foreclose the possibility that the email was used in furtherance of a *different* crime or fraud." U.S. Supp. App. 129. "We review the District Court's determination that there is sufficient evidence for the crime-fraud exception to apply for an abuse of discretion." In *re Grand Jury Subpoena*, 745 F.3d 681, 691 (3d Cir. 2014).

This determination was not an abuse of discretion. The evidence suggested that Hallinan's sale of Apex 1 to Ginger was a sham and that Hallinan continued to own and operate the company. After the July 2013 email, however, Hallinan ceased declaring this ownership on his taxes and ceased having his accountant file tax returns for Apex 1. This is the "actual act to further the [crime]" that we found lacking before. *In re Grand Jury Matter #3*, 847 F.3d at 160; *see* 26 U.S.C. § 7203 (prohibiting willfully failing to file a return); *id.* § 7206(1) (prohibiting willfully filing a return that the taxpayer "does not believe to be true and correct as to every material matter"). There is reason to suspect that the July 2013 email precipitated those acts, since it instructs Hallinan to "present Apex 1 as owned by Ginger." JA 6890. Although Hallinan took a different tack than Neff recommended, he nonetheless "used [this advice] to shape the contours of conduct intended to escape the reaches of the law." *In re Grand Jury Subpoena*, 745 F.3d at 693; *see also In re Grand Jury*, 705 F.3d at 157 ("All that is necessary is that the client misuse or

intend to misuse the attorney's advice in furtherance of an improper purpose.").

The law-of-the-case doctrine does not compel a different result. Even if we conclude that the doctrine applies — that is, that this issue was either expressly or by implication decided in a prior appeal, *In re City of Phila. Litig.*, 158 F.3d 711, 718 (3d Cir. 1998) — any error is harmless. Far from the "lynchpin" of the Government's case, all this email showed was that Hallinan and Neff acknowledged the risk the Indiana lawsuit posed and were motivated to mitigate it. The substantial sums that Hallinan paid to carry out the mitigation effort alone suffice as other evidence from which this fact could be gleaned.

B.

We turn next to the District Court's mens rea jury instruction. Both Neff and Hallinan argue that the District Court should have instructed the jury that their conduct must have been willful, not merely knowing. The difference is that the term "knowing" requires "only that the act be voluntary and intentional and not that a person knows that he is breaking the law," *United States v. Zehrbach*, 47 F.3d 1252, 1261 (3d Cir. 1995), while "willful" requires that the defendant knew that his conduct was unlawful, *see*, *e.g.*, *United States v. Starnes*, 583 F.3d 196, 210-11 (3d Cir. 2009). Since the defendants raised this objection at trial, our review is plenary. *United States v. Waller*, 654 F.3d 430, 434 (3d Cir. 2011).

"The RICO statute itself is silent on the issue of mens rea . . . ." *Genty v. Resolution Tr. Corp.*, 937 F.2d 899, 908 (3d Cir. 1991). "When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct." *Elonis v. United States*, 135 S. Ct. 2001, 2010 (2015) (quotation marks omitted). Some statutes require a mens rea of willfulness to separate wrongful from innocent conduct, but for others, "a general requirement that a defendant act knowingly is itself an adequate safeguard." *Id. Compare*, *e.g.*, *Liporata v. United States*, 471 U.S. 419, 425 (1985) (holding that a statute prohibiting the unauthorized possession or use of food stamps required the defendant to know that his conduct was unauthorized), *with Carter v. United States*, 530 U.S. 255, 269 (2000) (holding that a statute prohibiting taking items from a bank "by force and violence" does not require willfulness because "the concerns underlying the presumption in favor of scienter are fully satisfied" by proof of a taking at least by force), and *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 564-65 (1971) (concluding that a statute that criminalized the violation of a regulation regarding transportation of corrosive liquids only required a showing of knowledge and not willfulness in part because a company that is engaged in business involving significant risks to the public should know of the regulations applying to its business).

A conviction for conspiring to collect unlawful debt does not require willfulness to distinguish

innocent from guilty conduct. Collecting an unlawful debt, like "a forceful taking," necessarily "falls outside the realm of the 'otherwise innocent.' *Id*. at 270. Reasonable people would know that collecting unlawful debt is unlawful. Moreover, those engaged in the business of debt collection, whose risks to the public are all too familiar, should be aware of the laws that apply to them, particularly laws determining an aspect as essential as how much interest they can charge. The Government therefore need prove only that a defendant knew that the debt collected "had the characteristics that brought it within the statutory definition of an unlawful debt. *Staples v. United States*, 511 U.S. 600, 602 (1994). The District Court did not err by declining to give a willfulness instruction.

C.

Next we consider the defendants' challenge to the limit that the District Court imposed on Neff's testimony. The District Court permitted Neff to testify about the legal sources he consulted concerning the legality of tribal lending, but not to testify about the details of those sources or to introduce them into evidence. "We review the District Court's decisions as to the admissibility of evidence for abuse of discretion." *United States v. Serafini*, 233 F.3d 758, 768 n.14 (3d Cir. 2000).

This limitation was not an abuse of discretion. Testimony about what Neff reviewed goes to his good-faith defense — whether he honestly believed that the debt was lawful because of tribal sovereign

immunity. But Neff wanted to prove more — that tribal immunity did make the debts lawful — and thus to refute the District Court's instruction to the contrary. Such efforts to convince the jury that the court had the law wrong "would usurp the District Court's pivotal role in explaining the law to the jury." *Berckeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 217 (3d Cir. 2006). The District Court rightly limited Neff's efforts to contest its legal explanations before the factfinder.

Basically conceding that the District Court's ruling was not an abuse of discretion, Neff and Hallinan claim instead that their constitutional right to "a meaningful opportunity to present a complete defense . . . must take precedence over an otherwise applicable evidentiary rule." Neff Br. 37; *see* Hallinan Br. 44-52. The Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). "This right is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quotation marks and brackets omitted). But the Constitution permits courts "to exclude evidence that . . . poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.' *Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)); *see also Holmes*, 547 U.S. at 314 ("[W]ell-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or

potential to mislead the jury."). The District Court's limitation was not irrational or arbitrary, but was justified by the risk that Neff s testimony would confuse or mislead the jury about the law, which the District Court is tasked with explaining.

D.

We turn to Neff and Hallinan's last joint argument: that an unvested cause of action is not a property right protected by the federal fraud statutes. Since they failed to raise this point before the District Court, we review it only for plain error. See *United States v. Gonzalez*, 905 F.3d 165, 182 (3d Cir. 2018). "Under plain error review, we require the defendants to show that there is: (1) an error; (2) that is 'clear or obvious'; and (3) that 'affected the appellants' substantial rights.' *Id.* at 182-83 (quoting *United States v. Stinson*, 734 F.3d 180, 184 (3d Cir. 2013)). "If those three prongs are satisfied, we have 'the *discretion* to remedy the error — discretion which ought to be exercised only if the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Stinson*, 734 F.3d at 184 (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)).

The federal mail and wire fraud statutes require that an individual intended to defraud someone of "money or property." 18 U.S.C. §§ 1341, 1343. The Supreme Court has held that these statutes are "limited in scope to the protection of property rights." *McNally v. United States*, 483 U.S. 350, 360 (1987). "[T]o determine whether a particular interest is property for purposes of the fraud

statutes, we look to whether the law traditionally has recognized and enforced it as a property right." *United States v. Henry*, 29 F.3d 112, 115 (3d Cir. 1994).

We do not see a plain error with applying the fraud statutes here. The Supreme Court has upheld fraud convictions based on schemes to defraud victims of "[t]he right to be paid money," which "has long been thought to be a species of property." *Pasquantino v. United States*, 544 U.S. 349, 356 (2005). In *Pasquantino*, the Court held that a country's "right to uncollected excise taxes" is "an entitlement to collect money," the possession of which is "property" within the meaning of the wire fraud statute. *Id.* at 355-56. Along those lines, we recently held that the right to the uncollected fines and costs associated with unadjudicated traffic tickets — claims that a motor-vehicle-code violation has taken place — constituted "a property interest." *United States v. Hird*, 913 F.3d 332, 339-45 (3d Cir. 2019). An unadjudicated civil cause of action is sufficiently similar under plain-error review. *Black's Law Dictionary* defines "cause of action" as "a factual situation that entitles one person to obtain a remedy in court from another person." *Black's Law Dictionary* (11th ed. 2019). An entitlement to a remedy is like an entitlement to money (the most common remedy). In addition, the Supreme Court has held that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *see also Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950). While Neff argues that "[t]hese cases speak of 'property' in the unique context of the 14th

Amendment," Neff Reply 22-23, he never explains why they do not still illuminate "whether the law traditionally has recognized and enforced [a cause of action] as a property right," *Henry*, 29 F.3d at 115. This caselaw suggests that it was not an error at a minimum, not a clear and obvious plain error — to consider a cause of action to be property protected by the fraud statutes.

Neff and Hallinan's other responses are similarly unpersuasive. They cite cases "in other contexts [that have] concluded that there are no vested property interests in a cause of action before final judgment," Hallinan Br. 41, but they cite no authority suggesting that property rights must be vested for the fraud statutes to protect them. They also make a policy argument: that this theory transfigures "misstatements during civil litigation into a felony," Hallinan Br. 40, which "would have enormous ramifications in both the civil and criminal contexts," Neff Reply 24 n.9. But the fraud statutes are concerned with *fraud* — "false representations, suppression of the truth, or deliberate disregard for the truth." Third Circuit Model Jury Instructions § 6.18.1341-1. We reject the suggestion that "every civil litigant" commits fraud in the regular course of litigation. Hallinan Reply 16. Finally, the rule of lenity does not require a different conclusion: it controls "only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Muscarello v. United States*, 524 U.S. 125, 138 (1998) (alterations and quotation marks omitted). There is no such "grievous ambiguity or uncertainty" here. *Huddleston v. United States*, 415

U.S. 814, 831 (1974). Instead, "[v]aluable entitlements like these are 'property' as that term ordinarily is employed." *Pasquantino*, 544 U.S. at 356 (citing *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) ("When interpreting a statute, we must give words their ordinary or natural meaning."), and *Black's Law Dictionary* 1382 (4th ed. 1951) (defining "property" as "extend[ing] to every species of valuable right and interest")). So, it was not a plain error to consider a cause of action to be "property" protected by the fraud statutes.

E.

Turning now to the defendants' individual arguments, Neff alone challenges the court's tribal-immunity instruction. The District Court told the jury that tribal sovereign immunity "protects federally recognized Indian tribes from being sued" such that "individual states do not have the authority to apply their laws to Indian tribes," but that it "does not provide a tribe or its members with any rights to violate the laws of any states" or "with any immunity from criminal prosecution." JA 5985-86. Neff argues that this instruction foreclosed a debatable question: whether an Indian tribe that lends money at usurious rates has engaged in the "collection of an unlawful debt" under RICO. Since he did not object on this basis in the trial court, we review only for plain error.

We see no plain error with respect to this instruction. RICO defines an unlawful debt as an unenforceable usurious one, and it looks to state or federal law to distinguish between enforceable and

unenforceable interest rates. See 18 U.S.C. § 1961(6). Sovereign immunity, on the other hand, is simply a "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Tribal sovereign immunity thus limits how states can enforce their laws against tribes or arms of tribes, but, contrary to Neff s understanding, it does not transfigure debts that are otherwise unlawful under RICO into lawful ones. *See*, *e.g.*, Neff Br. 16 ("Tribal Sovereign immunity made those loans lawful."). A debt can be "unlawful" for RICO purposes even if tribal sovereign immunity might stymie a state civil enforcement action or consumer suit (or even a state usury prosecution although tribal sovereign immunity does not impede a state from "resort[ing] to its criminal law" and "prosecuting" offenders, *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014)). The possibility of a successful state lawsuit is not an element of a RICO offense. And so the tribal-immunity instruction was not plain error.

F.

Neff also challenges the sufficiency of the Govern-ment's evidence against him. When assessing challenges to the sufficiency of the evidence, we ask only whether some rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution. See, e.g., *United States v. Shaw*, 891 F.3d 441, 452 (3d Cir. 2018). The answer here is yes. For example, when Hallinan partnered with a new tribe in 2010, it was Neff who emailed the

tribe to advise them that their payday-lending ordinance's cap on interest at a legally enforceable rate "would render the loan program unfeasible from the outset," U.S. Supp. App. 775, and would be "a deal killer, which would require us to immediately move on to another tribe," JA 2979. And it was Neff who suggested rewriting the faux contracts to nominally grant the tribe the majority of payday-lending revenues to make the "optics" of them "much better" without changing the actual negligible percentage the tribe received, but warned that assigning the tribe the lion's share of the revenue "would seem bogus on its face," would "invite a further inquiry into the details," and "would be very suspicious to people." JA 3091, 3094-95. A rational factfinder could have concluded that Neff knowingly conspired to collect unlawful debts.

G.

Neff's final challenge is to the District Court's loss calculation at his sentencing. The District Court found that the intended loss of Neff's fraud on the Indiana class-action plaintiffs was $10 million — but, finding this amount overstated the offense's seriousness, keyed the loss for purposes of the Guidelines to the $557,200 settlement offer instead. Neff argues that the Indiana plaintiffs did not actually lose $10 million, but that argument ignores that the District Court concluded "that the *intended* loss" — not the *actual* loss — "was $10 million," JA 7898, and that under the Guidelines the relevant "loss is the greater of actual loss or intended loss," U.S.S.G. § 2B1.1 note 3(A). And we see no clear error with the District Court's factual finding about the amount of loss Neff intended, which finds support in the record based on Neff s assertion in the June 2013 email about a possible $10 million award to the Indiana plaintiffs. See *United States v. Napier*, 273 F.3d 276, 278 (3d Cir. 2001). An error would have been harmless anyway, since the District Court used the settlement offer despite its intended-loss finding. See e.g., *United States v. Jimenez*, 513 F.3d 62, 87 (3d Cir. 2008).

We also reject Neff's contention that he intended no "loss" at all as that term is used in the Guidelines. He relies on our decision in *United States v. Free*, 839 F.3d 308, 323 (3d Cir. 2016), but there we merely rejected the "view that the concept of 'loss' under the Guidelines is broad enough to cover injuries like abstract harm to the judiciary." The "narrower meaning" of loss that we endorsed — "i.e., pecuniary harm suffered by or intended to be suffered by victims," *id.* — encompasses the loss

in this case. So we will affirm the District Court's loss calculation.

H.

We now turn to Hallinan's individual challenges. He first contests the obstruction-of-justice enhancement applied at sentencing. See U.S.S.G. § 3C1.1. The District Court found that this enhancement applied to Hallinan due to the hiring of Mathewson (whom Hallinan paid) to assert privilege on behalf of Apex 1 — in the court's view, a defunct company that Hallinan claimed not to own, which would not have asserted privilege but for Hallinan's machinations — and his attempts to influence Mathewson after hiring her. This arrangement, the court concluded, amounted to "a sham organized to protect Hallinan, and to prevent the effective prosecution of this case." JA 8163. We review the factual finding that Hallinan willfully obstructed or attempted to obstruct justice for clear error. *Napier*, 273 F.3d at 278.

We are not left with the definite and firm conviction that a mistake has been made based on the facts and the reasonable inferences from them. *See, e.g.*, *United States v. Grier*, 475 F.3d 556, 570 (3d Cir. 2007). The trial evidence laid bare Hallinan's relationship with Apex 1. His own testimony in the Indiana case was that he sold the company to Ginger in 2008, he stopped being involved with it in 2009, and the company ceased doing business in 2010. Yet he funded and orchestrated its litigation defense in that case for years afterward, before eventually paying Ginger $10,000 a month to "step up to the plate" and assert ownership. JA 6391. It is a reasonable

inference that Hallinan controlled Apex 1 through Ginger and that it was his decision to hire Mathewson to assert Apex 1's privilege in an attempt to impede the grand jury investigation. Or, as the District Court put it at the August 2017 motions hearing, it was "abundantly clear that Apex's reason for its existence is only to assert this privilege." JA 326. Regardless of the validity of Apex l's privilege assertions, the evidence is sufficient to conclude that the District Court's factual finding that Hallinan willfully obstructed or attempted to obstruct justice was not clearly erroneous.

I.

Finally, we turn to Hallinan's challenges to the District Court's forfeiture order and calculation of the money judgment against him. Under 18 U.S.C. § 1963, RICO convictions carry mandatory forfeiture. The Government must prove the relationship between the property interest to be forfeited and the RICO violations beyond a reasonable doubt. *United States v. Pelullo*, 14 F.3d 881, 906 (3d Cir. 1994). Since the District Court conducted a bench trial on forfeiture after Hallinan waived his right to a jury trial, "we review [its] findings of facts for clear error and exercise plenary review over conclusions of law." *Norfolk S. Ry. Co. v. Pittsburgh & W. Va. R.R.*, 870 F.3d 244, 253 (3d Cir. 2017). Hallinan contests the forfeiture order and money judgment on three grounds. None is persuasive.

1.

First, Hallinan challenges the forfeiture of the funds in five bank accounts in his own name (identified as Properties 14-18 in the forfeiture

order). The District Court found that "[t]he evidence at trial and at the forfeiture hearing establishes that the specific property listed as Properties 14 through 18 are funds received in bank accounts from Hallinan Capital Corp., which is part of the [RICO enterprise]," and so the properties "are forfeitable pursuant to 18 U.S.C. § 1963(a)(2)(A)." U.S. Supp. App. 622. Section 1963(a)(2)(A) provides: "Whoever violates any provision of section 1962 of this chapter . . . shall forfeit to the United States . . . any . . . interest in . . . any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962."

We see no clear error with the District Court's finding that the money in these accounts was a part of Hallinan's interest in the RICO enterprise. The Government offered the affidavit and testimony of a financial analyst to support this finding. That evidence showed deposits from accounts owned by Hallinan Capital Corporation (HCC) into each of these accounts. The court found the lowest balance in each account after the HCC deposits to be forfeitable enterprise funds. This finding is therefore supported by the record.

Hallinan does not dispute this evidence, but argues only that identifying his interest in the enterprise in this way contravenes our decision in *United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996). He is incorrect. In *Voigt*, we considered how to identify "property traceable to [tainted] property" under 18 U.S.C. § 982, not the "interest in . . . any enterprise" under § 1963(a)(2)(A) or the meaning of "cannot be divided without difficulty" as used in substitute-asset provisions more broadly. While the RICO statute also requires that the Government

proceed by way of the substitute-asset provision where property "has been commingled with other property which cannot be divided without difficulty," 18 U.S.C. § 1963(m)(5), the term "traceable to" appears nowhere in the statute. Rather, as we acknowledged in *Voigt*, "[t]he RICO forfeiture provision is by far the most far reaching" of the criminal-forfeiture provisions because it "is extremely broad and sweeping," encompassing forfeiture of "any interest the person has acquired or maintained in violation of [§] 1962, . . . any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over . . . any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of [§] 1962[,] . . . [and] any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity . . . in violation of section 1962." *Voigt*, 89 F.3d at 1083-84 (quotation marks omitted) (quoting 18 U.S.C. § 1963(a)(1)—(3)). The District Court's determination of Hallinan's interest in the RICO enterprise under § 1963 therefore did not run afoul of our decision in *Voigt*.[2]

[2] We acknowledge that the case on which the District Court relied also dealt with a different forfeiture provision with a different standard of proof *See United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986). But even if we were to conclude that the District Court erred, the error would probably be harmless, since the Government had the authority to seek forfeiture under the substitute-asset provision and provided Hallinan ample notice it would do so, and the District Court

2.

Hallinan next argues that the District Court did not sufficiently exclude proceeds from the six states where payday lending is legal. This too is a factual finding that we review only for clear error. See *Norfolk S. Ry. Co.*, 870 F.3d at 253.

To account for those states, the District Court excluded 4.79% of Hallinan's gross proceeds, which was the percentage of "leads" (or payday-loan candidates identified with online data) that came from those states. Hallinan concedes that "the government can use reasonable extrapolations to calculate illegal proceeds." Hallinan Br. 60. And he gives no reason to think that the percentage of legal leads is not a reasonable approximation of the percentage of legal loans. He does not show, for example, that a lead from Delaware was meaningfully more likely to become a loan than a lead from California. With no evidence disrupting the reasonable inference that lead states correlate to loan states, we cannot conclude that the District Court's factual finding was clearly erroneous.

Hallinan's counterarguments rest on the fact that very few leads became loans — only .15%. From this, he asserts that "it was over 99% certain that there was no correlation between leads and loans." Hallinan Br. 61. But the fact that few leads became loans says nothing about whether the distribution of leads among the states correlates

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had already found that substitute assets would be proper. *See United States v. Hallinan*, No. 16-130-01, 2018 WL 3141533, at *5, *12-13 (E.D. Pa. June 27, 2018).

with that of the loans. Hallinan also contends that "the small sample size of the leads also make[s] any correlation statistically insignificant." Id. But the Government analyzed all the leads and then offered the reasonable inference that the distribution among states would be the same for the loans, which Hallinan has not rebutted. It did not rely on a sample of leads at all. So there was no clear error.

3.

Third, and finally, Hallinan contests the District Court's interpretation of what constitutes forfeitable RICO "proceeds" under 18 U.S.C. § 1963(a)(3). When determining Hallinan's RICO "proceeds," the District Court excluded "the costs the unlawful enterprise incurs as a result of performing the contracts" — that is, "the principal extended to borrowers" — but not the enter-prise's "regular business expenses." U.S. Supp. App. 616-17 (emphasis omitted). Hallinan concedes that his "overhead such as office space, supplies, or taxes" is not deductible. Hallinan Br. 63. And the Government does not challenge on appeal the deduction of the principal of the loans (although it did before the District Court). *See* Gov. Br. 150 & n.53. The issue on appeal is a narrow one: whether the District Court was wrong not to deduct certain operational expenses — for example, "marketing, credit fees, and salaries," Hallinan Br. 63 — when determining the RICO "proceeds" to be forfeited under § 1963(a)(3). Whether the term "proceeds" in § 1963(a)(3) excludes these expenses is a question of law over which we exercise plenary review. See *Norfolk S. Ry. Co.*, 870 F.3d at 253.

The District Court relied on the reasoning of the Court of Appeals for the Second Circuit in *United States v. Lizza Industries, Inc.*, 775 F.2d 492 (2d Cir. 1985). There, the court endorsed "deducting from the money received on the illegal contracts *only* the direct costs incurred in performing those contracts." *Id.* at 498. It explained:

> Forfeiture under RICO is a punitive, not restitutive, measure. Often proof of overhead expenses and the like is subject to bookkeeping conjecture and is therefore speculative. RICO does not require the prosecution to prove or the trial court to resolve complex computations, so as to ensure that a convicted racketeer is not deprived of a single farthing more than his criminal acts produced. RICO's object is to prevent the practice of racketeering, not to make the punishment so slight that the economic risk of being caught is worth the potential gain. Using net profits as the measure for forfeiture could tip such business decisions in favor of illegal conduct.

*Id.* at 498-99. In other words, the court interpreted "proceeds" in the RICO statute to mean gross profits — total revenues minus marginal costs, but not fixed costs.

The District Court did not err by adopting this reasoning to refuse to deduct the operational expenses such as marketing, credit processing, and collection fees from Hallinan's forfeitable RICO "proceeds." Our Court has not interpreted the meaning of "proceeds" in § 1963(a)(3), but many other Courts of Appeals have interpreted it to mean gross *receipts* — a broader definition than that

adopted by the court in *Lizza Industries a*nd the District Court here. *See*, *e.g.*, *United States v. Christensen*, 828 F.3d 763, 822 (9th Cir. 2015) ("We agree with the view that 'proceeds' in the RICO forfeiture statute refers to gross receipts rather than net profits."); *United States v. Simmons*, 154 F.3d 765, 770-71 (8th Cir. 1998); *United States v. McHan*, 101 F.3d 1027, 1041-43 (4th Cir. 1996); *United States v. Hurley*, 63 F.3d 1, 21 (1st Cir. 1995); cf. *United States v. DeFries*, 129 F.3d 1293, 1315 (D.C. Cir. 1997) (concluding that taxes paid on illegal profits should not be deducted from the calculation of RICO "proceeds"). Only the Court of Appeals for the Seventh Circuit has interpreted "proceeds" in § 1963(a)(3) more narrowly than the District Court to mean net profits. See *United States v. Genova*, 333 F.3d 750, 761 (7th Cir. 2003) (explaining that proceeds in § 1963(a)(3) means "profits net of the costs of the criminal business"); *United States v. Masters*, 924 F.2d 1362, 1369-70 (7th Cir. 1991). The District Court did not err by taking a more conservative view than that adopted by the majority of the Courts of Appeals. Since the District Court excluded the principal of the loans and Hallinan does not contest the inclusion of his overhead and taxes, we need not and do not decide whether "proceeds" means, more broadly, gross receipts.

III.

For these reasons, we will affirm Neff's and Hallinan's judgments of conviction and sentence.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18-2282 &18-2539

UNITED STATES OF AMERICA

v.

WHEELER K. NEFF,

Appellant in No. 18-2282

UNITED STATES OF AMERICA

v.

CHARLES M. HALLINAN,

Appellant in No. 18-2539

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Nos. 2-16-cr-00130-001 & 2-16-cr-00130-002)

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS and *GREENBERG, *Circuit Judges*

The petition for rehearing filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Michael A. Chagares
Circuit Judge

Dated: November 5, 2019
Lmr/cc: All Counsel of Record

* Hon. Morton I. Greenberg's vote is limited to panel rehearing

## APPENDIX C

Section 1341 of Title 18 of the United States Code Annotated provided in pertinent part:

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster

> or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C.A., § 1341 (Jan. 7, 2008).

## APPENDIX D

Section 1343 of Title 18 of the United States Code Annotated provided in pertinent part:

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C.A. § 1343 (Jan. 7, 2008).

## APPENDIX E

Article I, Section 8 of the United States Constitution provided in pertinent part:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
>
> To borrow money on the credit of the United States;
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
>
> To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
>
> To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
>
> To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
>
> To establish Post Offices and Post Roads;
>
> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
>
> To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all

Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; And

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article I, Section 8 of the United States Constitution.

## APPENDIX F

Section 1962 of Title 18 of the United States Code Annotated provided in pertinent part:

§ 1962. Prohibited Activities

(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, 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 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.

18 U.S.C.A. § 1962 (Nov. 8, 1988).

## APPENDIX G

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CRIMINAL NOS. 16-130-1, 2

UNITED STATES OF AMERICA

v.

CHARLES M. HALLINAN (1)
WHEELER K. NEFF (2)

Philadelphia, Pennsylvania
November 20, 2017
9:54 o'clock a.m.

JURY TRIAL
BEFORE THE HONORABLE
EDUARDO C. ROBRENO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:

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* * *

[32] Count 1 of the indictment charges that from at least 2007 until at least early 2013, in the Eastern District of Pennsylvania, as elsewhere, the Defendants Charles M. Hallinan and Wheeler K. Neff knowingly conspired or agreed together with others to conduct and participate in the conduct of the affairs of an enterprise, what we may call the Hallinan payday lending organization, through the collection of unlawful debt.

Count 2 of the indictment charges that from at least November 2011 until at least March of 2012, in the Eastern District of Pennsylvania and elsewhere, Defendant Charles M. Hallinan and Wheeler K. Neff

agreed to conspire together with others to conduct or to participate in the conduct of the affairs of an enterprise, which we will call the Rubin payday lending organization, through the collection of unlawful debt.

In order to convict a defendant on the racketeering conspiracy offense charged in Counts 1 and 2, the Government must prove each defendant knowingly agreed that a conspirator, which may include the defendant himself, would commit a violation of Title 18 United States Code section 1962(c).

Section 1962(c) is commonly referred to as a RICO statute, R-I-C-O, which stands for, is a short moniker for Racketeering and Corrupt Organizations Act.

The relevant provision of the RICO statute provides as follows, and I quote: "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," in this case, "the collection of unlawful debt," close quote.

It is a Federal crime for two or more persons to agree or to conspire to commit any offense against the United States, even if they never actually achieve their objective.

A conspiracy is kind of a criminal partnership. In order for you to find a defendant guilty of conspiracy to conduct or to participate in the conduct of an enterprise's affairs through the collection of unlawful debt, you must find that the Government proved beyond a reasonable doubt each of the following three elements: first, that

two or [34] more persons agreed to conduct or to participate, directly or indirectly, in the conduct of an enterprise's affairs through the collection of unlawful debt; second, that the defendant was a party to or a member of that agreement; and, third, that the defendant joined the agreement or conspiracy knowing of its objectives to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs through the collection of unlawful debt, and intending to join with at least one other alleged conspirator to achieve that objective. That is, that the defendant and at least one other alleged conspirator shared a unity of purpose and the intent to achieve the objective of conducting or participating in the conduct of an enterprise's affairs through the collection of unlawful debt.

Let me explain. The Government is not required to prove that the alleged enterprise was actually established; that the defendant was actually employed by or associated with the enterprise; that the enterprise was actually engaged in, or its activities actually affected, interstate or foreign commerce; or that the defendant actually collected an unlawful debt. Indeed, it is not necessary for you to find that the objective or purpose of the conspiracy was achieved at all. However, the evidence must establish that a defendant knowingly agreed to facilitate or further the scheme, which, if completed, would include the collection of [35] an unlawful debt committed by at least one other conspirator.

In short, to find Charles M. Hallinan and Wheeler K. Neff guilty of either RICO conspiracies, the conspiracy charged in Counts 1

and 2 of the indictment, you must find that the Government proved beyond a reasonable doubt that the Defendant joined in an agreement or conspiracy with another person or persons knowing that the objective or purpose was to conduct or to participate, directly or indirectly, in the conduct of the affairs of an enterprise through the collection of unlawful debt, and intended to join with other person or persons to achieve that objective.

Let's break this down by elements now. I will now instruct you to some of the general principles applicable to the law of conspiracy. These principles apply to the RICO conspiracy charged in Counts 1 and 2, and they also apply to the other conspiracies charged in the indictment.

The first element of the crime of conspiracy is the existence of an agreement. The Government must prove beyond a reasonable doubt that two or more persons knowingly and intentionally arrived at a mutual understanding or agreement, either spoken or unspoken, to work together to achieve the overall objective of the conspiracy, which is to conduct or to participate, directly or indirectly, in the conduct of the affairs of an enterprise through the collection of unlawful debt.

The Government does not have to prove the existence of a formal or written agreement, or an express oral agreement spelling out the details of the understanding. The Government also does not have to prove that all of the members of the conspiracy directly met or discussed between themselves their unlawful objective, or agreed to all of the details, or agreed to what the means were by which the objective would be

accomplished. The Government is not even required to prove that all of the people named in the indictment were in fact parties to the agreement, or that all members of the alleged conspiracy were named or that all members of the conspiracy are even known.

What the Government must prove beyond a reasonable doubt is that two or more persons in some way or manner arrived at some type of agreement, mutual understanding or meeting of the minds to try to accomplish a common and unlawful objective.

You may consider both direct evidence and circumstantial evidence in deciding whether the Government has proved beyond a reasonable doubt that an agreement or mutual understanding existed. You may find the existence of a conspiracy based on reasonable inferences drawn from the actions and statements of the alleged members of the conspiracy, from the circumstances surrounding the scheme, and from evidence of related facts and circumstances which

* * *

[43] As I instructed you earlier, the objectives of the racketeering conspiracy charged in Counts 1 and 2 was to violate Title 18 United States Code Section 1962(c) by participating in the affairs of the enterprise, directly or indirectly, through the collection of unlawful debt.

* * *

[51] You may find that the defendant participated, indirectly or directly, in the conduct of the affairs of the enterprise if you

find that he was a lower-level participant who acted under the direction of upper management, knowingly furthering the aims of the enterprise by implementing a management decision or carrying out the instruction of those in control, or that the defendant knowingly performed acts, functions or duties that were necessary to or helpful in the operation of the enterprise.

In order to prove RICO conspiracy, the Government must prove that the defendant agreed that a conspirator, which could be the defendant himself or any other conspirator, would commit a collection of an unlawful debt. The Government is not required that the defendant personally collected or agreed to personally collect any unlawful debt. Indeed, it is not necessary for you to find that the objective or purpose of the conspiracy was achieved at all. However, the evidence must establish that the defendant knowingly agreed to facilitate or further a scheme, which, if completed, would include the collection of unlawful debt committed by at least one other conspirator.

A collection of unlawful debt is defined as follows. The term unlawful debt means that; one, the debt was unenforceable in whole or in part under Federal or state law because of the laws relating to usury; and, two, was incurred [52] in connection with the business of lending money or anything of value at a rate that was usurious under Federal or state law where the rate was at least twice the legally enforceable rate.

Usury is the lending of money at an illegally high rate of interest. Pennsylvania has a legally enforceable rate of interest; any higher rate of

interest is illegal. Specifically, in Pennsylvania the enforceable rate of interest on consumer loans of up to $25,000 is six percent for unlicensed lenders and approximately 24 percent for lenders who are licensed with the Pennsylvania Department of Banking.

Pennsylvania also has a law which makes it a crime to charge a rate of interest higher than 25 percent per year on most loans to individuals.

The term, quote, "rate of interest," close quote, includes fees, charges and any other costs associated with the loan. These Pennsylvania laws on interest limits apply to all loans made to Pennsylvania borrowers even if the lenders are physically located outside of Pennsylvania and have no offices in Pennsylvania, and even if the borrower signs a contract agreeing that Pennsylvania law does not apply and that the borrower is willing to pay an interest rate higher than the enforceable rate of interest.

Therefore, if you believe the Government has [53] presented evidence demonstrating that the Defendants agreed to collect debt from loans to borrowers living in Pennsylvania with loans at interest rates that exceeded twice the enforceable rate of interest, you may consider such evidence as evidence that the Defendant agreed to collect unenforceable debt.

Some states other than Pennsylvania also has interest rate limits on consumer loans that are either 36 percent per year or less. These states include Connecticut, Georgia, Maine, Maryland, Massachusetts, Montana, New Hampshire, New Jersey, New York, North Carolina, Ohio, Vermont,

and West Virginia. Washington, DC has an interest rate limit of 24 percent.

If you believe the Government has presented evidence demonstrating that the Defendant agreed to collect debt from loans to borrowers living in these states where the loan had interest rates that exceeded twice the enforceable rate of interest in those states, you may consider such evidence as evidence that the Defendants agreed to collect unenforceable debt.

Other states permitted some payday lending if the lenders obtained licenses from the states and complied with their regulations. If you believe the Government has presented evidence demonstrating that the Defendants agreed to collect debt from loans to borrowers living in any of [54] those states without complying with the law of those states, you may consider such evidence as evidence that the Defendants agreed to collect unenforceable debt.

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

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

prove that the Defendant Charles M. Hallinan or Wheeler K. Neff knew that the criminal usury rate was 25 percent for that the enforceable rate of interest was six percent for a licensed lender, nor does the Government have to prove that the Defendant knew the usury laws or the enforceable rates of interest in any other state.

Now, throughout the trial you heard testimony and evidence regarding the concept of, quote, "tribal sovereign immunity," close quote. Tribal sovereign immunity is a legal rule that protects federally recognized Indian tribes from being sued.

Within the United States, federally recognized Indian tribes are domestic dependent nations that exercise inherent sovereign authority. This sovereign authority is dependent on and subordinate to only the Federal Government and not the states. That means that only the Congress may decide whether and under what circumstances to regulate activity occurring within the boundaries of an Indian reservation. Unless Congress expressly permits them to do so, individual states do not have the authority to apply their laws to Indian tribes.

Outside an Indian reservation, however, absent express Federal law to the contrary, Indian tribes are subject to state law otherwise applicable to other citizens of that state. Tribal sovereign immunity does not provide a tribe or its members with any rights to violate the laws of any states. Instead, tribal sovereign immunity limits the means by which a state can enforce its laws against an Indian tribe. Tribal sovereign immunity does not provide a tribe or its members with any immunity from criminal prosecution.

Now, let's talk about the mental state that is necessary on Counts 1 and 2.

In order to find a defendant guilty of conspiracy, you must find that the Government proved beyond a reasonable doubt that the defendant joined the conspiracy knowing of its objective and intending to help further or achieve that objective. That is, the Government must prove that the defendant knew of the objective or goal of the conspiracy, the collection of unlawful debt; that the defendant joined the conspiracy intending to help further or achieve the goal or objective of the collection of unlawful debt; and, three, that the defendant and at least one other alleged conspirator shared a unity of purpose towards that objective or goal.

You may consider both direct and circumstantial evidence, including a defendant's words or conduct, and other facts and circumstances in deciding whether that defendant had the required knowledge and intent. For example, evidence that a defendant derived some benefit from the conspiracy, or had some stake in the achievement of the conspiracy or objective, might tend to show that the defendant had the required intent or purpose that the conspiracy objective be achieved.

Often the state of mind, intent and/or knowledge with which a person acts at a given time cannot be proved directly, because one cannot read another person's mind and tell what he or she is thinking. However, a defendant's state of mind can be proved indirectly from the surrounding circumstances. Thus, to determine a defendant's state of mind as to what he intended or knew at a particular time, you may consider evidence of what the defendant said or what he did or failed to do, how he acted, and all of

the other facts and circumstances shown by the evidence that may prove what the defendant's mind was at the time.

It is entirely up to you decide what the evidence presented during the trial proves or fails to prove about a defendant's state of mind. You may consider the natural and probable result or consequences of any act the defendant knowingly did, or whether it is reasonable to conclude that he intended those results or consequences. You may find, but you are not required to find, that the defendant knew or intended the natural and probable consequence or result of acts he knowingly did. This means that if you find that an ordinary person in the defendant's situation would have naturally realized that certainly consequences would result from his actions, then you may find, but you're not required to find, that the defendant did know and did intend that those consequences would result from his action. This is entirely up to you to decide as the finders of facts in this case.

Now, the offenses charged in the indictment require that the Government prove that the defendant acted, quote, "knowingly," close quote, with respect to an element of the offense. This means that the Government must prove beyond a reasonable doubt that the defendant was conscious and aware of the nature of his actions, and that the surrounding facts and circumstances as specified in the definition of the offense charged.

With respect to Counts 1 and 2 in particular, as I previously explained, the Government must prove that the defendant knew of that objective or role of that conspiracy was the collection of unlawful debt.

In deciding whether a defendant acted, quote, "knowingly," close quote, you may consider evidence of what the defendant said, what the defendant did and failed to do, how the defendant acted, and all other facts and circumstances shown by the defendant that may prove what was in the defendant's mind at the time. The Government is not required to prove that the defendant knew his acts were against the law.

The offense charged in the indictment also require that the Government prove that the defendant acted intentionally with respect to certain elements of the offense. This means that the Government must prove beyond a reasonable doubt either that; one, it was the defendant's conscious desire or purpose to act in a certain way or to cause a certain result; or that, two, the defendant knew he was acting in that way and would be practically certain to cause that result.

With respect to Counts 1 and 2 in particular, as I previously explained, the Government must prove the defendant joined the conspiracy intending to help further or achieve the goal or objective of the collection of unlawful debt.

In deciding whether the defendant acted, quote, "intentionally," close quote, you may consider evidence of what the defendant said, what the defendant did or failed to do, how the defendant acted, and all other facts and circumstances shown by the evidence that may prove what was in the defendant's mind at the time.

Now, the RICO offenses charged in Counts 1 and 2 of the superseding indictment require proof beyond a reasonable doubt that the defendant acted, as I have just said to you, knowingly and intentionally. If you find that the defendant acted in, quote, "good faith,"

close quote, that would be a complete defense to those charges, because good faith on the part of a defendant would be inconsistent with his acting with knowledge and intent.

For purposes of a RICO charge, a person acts in good faith when he or she has an honestly held belief, opinion, or understanding that the goal or objective of the conspiracy was not the collection of unlawful debt, as that term is defined in paragraph 170, even if the belief, opinion or understanding turns out to be inaccurate or incorrect.

Thus, in this case, if the defendant made an honest mistake or had an honest misunderstanding about whether the goal or objective of the conspiracy was the collection of unlawful debt, then he did not act with knowledge and intent.

The Defendants do not have the burden of proving, quote, "good faith," close quote. Good faith is a defense that is inconsistent with the requirement of the RICO charge that both the Defendants acted with knowledge and intent. As I have told you, it is the Government's burden to prove each element of the offense, including the mental element.

In deciding whether the Government proved that the Defendants acted knowingly and intelligently or, instead, whether they acted in good faith, you should consider all of the evidence presented in the case that may bear upon the Defendants' state of mind. If you find from the evidence presented that the Defendants acted in good faith, as I have defined for you, or if you find for any reason that the Government has not proved beyond a reasonable doubt that the Defendants acted knowingly and intelligently, then you must find the Defendants not guilty of those charges.

Now, you have heard Defendant Wheeler K. Neff testify regarding the legal sources he reviewed in order to determine whether or not he believed that the goal or objective of the conspiracy was the collection of unlawful debt. You may consider Mr. Neff's testimony regarding these legal sources in order to determine whether Mr. Neff's beliefs regarding the legality of the activities were honestly held. You may not consider his evidence for the truth of the matter; that is, in order to determine whether the activities were lawful or unlawful. You also may not consider this evidence in order to determine whether or not his beliefs regarding the legality of these activities were objectively reasonable. The objective reasonableness of Mr. Neff's belief is only relevant to the extent you consider it for purposes of determining whether those beliefs were honestly held.

And as I previously instructed you, while the lawyers in their questions and the witnesses in their testimony, including Mr. Neff's testimony, may comment on the law in order to put the conduct in context, you must accept the law from me and from me only, even if contrary to what a witness has testified to or what a lawyer has argued.

Now, if you find that the defendant -- strike that -- to find a defendant guilty of RICO conspiracy charged in Counts 1 and 2, you must find that the Government proved beyond a reasonable doubt that the defendant knew that the objective or goal of the conspiracy was the collection of unlawful debt.

In this case, there is a question whether the Defendants knew that the objectives or goal of the conspiracy was the collection of unlawful debt. When, as in this case, knowledge of a particular fact

is an essential part of the offense charged, the Government may prove that the defendant knew of that fact even if the evidence proved beyond a reasonable doubt that the defendant deliberately closed his eyes to what otherwise would have been obvious to him.

No one can avoid responsibility for a crime by deliberately ignoring what is obvious. Thus, you may find that a defendant knew that the objective or goal of the conspiracy was the collection of unlawful debt based on evidence which proved that; one, the defendant himself subjectively believed that there was a high probability that this fact existed; and, two, that the defendant consciously took deliberate action to avoid learning or knowing about the existence of this fact.

You may not find that a defendant knew that the object or goal of the conspiracy was the collection of unlawful debt if you find that the defendant actually believed that this fact did not exist. Also, you may not find that the defendant knew the objective or goal of the conspiracy was the collection of unlawful debt if you find only that the defendant consciously disregarded a risk that the fact existed, or that the defendant should have known that the fact existed, or that a reasonable person would have known of a high probability that the fact existed.

It is not enough that the defendant may have been reckless or stupid or foolish, or may have acted out of inadvertence or accident. You must find that the defendant himself subjectively believed there's a high probability of the existence of a fact that the objective or goal of the conspiracy was the collection of unlawful debt, consciously took deliberate action to avoid learning or used deliberate efforts to avoid

knowing about it and did not actually believe that it did not exist.