I. INTRODUCTION

The purpose of this paper is to place the Government's investigation in appropriate factual context and enumerate the factors which mandate an internal, independent evaluation of the prosecution against Michael Segal and Near North Insurance Brokerage, Inc. ("Near North").

II. BACKGROUND

On Wednesday, January 23, 2002, one of Mr. Segal's former employees called him on his cell phone to arrange a meeting in the lobby of a local hotel the following Saturday. The relationship between Mr. Segal and his former employees had been contentious in recent months. There had been numerous accusations and threats of litigation and, unbeknownst to Mr. Segal, his email messages were being pilfered on an almost daily basis by a computer hacker who was funneling information to the former Near North employees who threatened to and were trying to destroy Mr. Segal's business.

At approximately 7:45 a.m. on January 26, 2002, Mr. Segal was approached by FBI Agent Patrick Murphy in the lobby of the Westin Hotel as he prepared to meet with the former employee. Agent Murphy threatened Mr. Segal with immediate arrest and asked him to accompany him to a private guest room in the hotel. They proceeded to a private room where Assistant United States Attorney Dean Polales was waiting. After interrogating Mr. Segal for more than two hours, [1]Agent Murphy formally advised Mr. Segal that he was under arrest and the FBI proceeded to execute search warrants at Mr. Segal's home, office and storage sites.[2]

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[1] Mr. Segal was asked questions at insurance regulatory practices, and attempted to explain these practices, however it then became apparent that the questions were centered upon incomplete and inaccurate allegations contained in the civil litigation between the government parties of interest (i.e., ex-Near North insurance officers). The government went on to make statements that paralleled the subsequently sealed arrest warrant. Segal attempted to explain that he was being set up, and the government made it known that the subject of the investigation was public corruption. Neither he nor Near North had any criminal history or prior involvement in the criminal justice system. Mr. Segal was never employed by any governmental body or agency. NNNG grew organically to become the 5th largest private insurance broker in the U.S., with offices in eight cities and London. The company solely charged in the government's indictment was Near North Insurance Brokerage. Segal provided in the record, an affidavit from the IL Department of Insurance that for 40 years, there was no record of business complaints or infractions. Mr. Segal answered all questions truthfully and exhibited the same voluntary conduct, subsequently during four proffer sessions (which lasted two to three hours each), which solely consisted of non-insurance related issues.

[2] While executing the search warrant at Mr. Segal's home, federal agents detained Mr. Segal's wife, a psychologist, who was in the process of conducting a pro bono group

On January 26, 2002, the Government filed a Complaint charging Mr. Segal with violations of 18 U.S.C. § 1033(b)(l)(A) (making false statements) and (B) (misappropriation of insurance funds) and 8 1341 (mail fraud).[3] A preliminary hearing was scheduled for February 15, 2002 at 10:00 a.m. Mr. Segal subpoenaed several of his former employees - the Government's prime accusers - to testify at the hearing. An indictment was returned on February 14, 2005 thereby rendering the preliminary hearing moot and precluding the examination of the former employees.[4]

On February 14, 2002, the Special May 2001 grand jury returned an indictment charging Mr. Segal with a single count of making a false statement to the Illinois Department of Insurance in violation of 18 U.S.C. § 1033 (a)(l). The indictment alleged that Mr. Segal falsely represented in his application for an insurance broker license that he properly maintained premiums in a Premium Fund Trust Account as required by Illinois state law. On February 25, 2002, the Government moved to dismiss the Complaint without prejudice. The motion was granted by Order dated February 25, 2002.

On October 31, 2002, the Government filed a Superseding Indictment against Mr. Segal. The Superseding Indictment contained 16 counts, including seven counts of mail fraud in violation of 18 U.S.C. § 1341, one count of wire fraud in violation of 18 U.S.C. § 1343, one count of violating the Racketeer Influenced and Corrupt Organizations Act

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therapy session with several clients. Mrs. Segal was told that she could not make a phone call or use the restroom and that it would be a long time before she would see her husband again. She was detained for more than two and-a-half hours before being allowed to leave to care for her daughter who suffers from lupus.

[3] The Government's cooperating witnesses were apparently aware of Mr. Segal's arrest before the arrest was made public. As set forth below, see infra n. 17, they repeatedly used inside information concerning the investigation and prosecution for their own economic advantage. It is also noteworthy that, on the day of Mr. Segal's arrest, several of his executives and at least one large customer were advised of the arrest. The employees were encouraged to seek new employment and the customer was encouraged to place its business elsewhere. Importantly, the defense documented a series of phone calls between FBI agents and the Government's cooperating witnesses (many of which were not summarized in a 302 report) and between the cooperating witnesses and the media during the weeks before and after Mr. Segal's arrest.

[4] Immediately after the arrest, an independent board of directors was established and Mr. Segal resigned any management role. The board consisted of a prior United States Attorney, a retired CEO of an insurance company, a retired FBI supervisor and a past vice-chairman of a media company.

("RICO"), 18 U.S.C. § 1962(c),[5] and seven counts of making false statements in violation of 18 U.S.C. *5* 1033(a). The indictment charged that Near North and other entities owned and controlled by Mr. Segal constituted a RICO "enterprise." The Government also sought forfeiture of Mr. Segal's interest in the alleged enterprise pursuant to 18 U.S.C. § 1963. A11 of the charges stemmed from the submission of applications for a State of Illinois insurance broker license and/or maintenance of accounting records and customer premiums under Illinois law.

On June 13, 2003, the grand jury returned a 17-count Second Superseding Indictment charging Mr. Segal with mail fraud and conspiracy to commit mail fraud in violation of 18 U.S.C. § 1341, wire fraud in violation of 18 U.S.C. § 1343, and making false statements to the Illinois Department of Insurance in violation of 18 U.S.C. § 1033(a)(l). In addition to these charges, the Government sought forfeiture pursuant to 18 U.S.C. § 1963. Near North was charged for the first time with the same counts of mail fraud and making false statements. The Second Superseding Indictment also charged a former employee of Near North, Daniel E. Watkins, with mail fraud in violation of 18 U.S.C. § 1341 and a single count of embezzlement of insurance premiums in violation of 18 U.S.C. § 1033(b)(1).[6]

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[5] The racketeering acts alleged in the RICO count included the mail and wire fraud alleged in the other counts.

[6] Mr. Watkins admitted that he embezzled funds from Near North's petty cash fund while he was employed. He pleaded guilty to a single count of embezzlement pursuant to a plea agreement which required him to cooperate in the prosecution of Mr. Segal and Near North. Mr.Watkins did not testify at trial, nevertheless, the Government contends that it satisfied its burden with a single unauthenticated memo from Dan Watkins to Mr. Segal in 1989. This memo has a left-handed simulated scribble, which allegedly is Mr. Segal's scribble, however one witness testified that he knew Mr. Segal's squiggle and that this was not written by Mr. Segal. The Government did not disclose that their handwriting expert could not establish one way or the other. No expert report was furnished by the Government and yet, they had Mr. Segal sit for two handwriting sessions. Mr. Segal contends that no evidence was established to its authorship, its creation, or how it has been maintained, and more concerning is the Government's testimony as to the finding of the 1989 memo raises questions of facts in comparison to the Government's investigation and IRS records to the testimony of the IRS agent as to where the memo was found.
In essence, the Government's theory was that every dollar which the defense was unable to attribute to theft by Mr. Watkins by inverse logic was proof of a Klein tax conspiracy involving Mr. Segal.

Even though, Mr. Watkins was not called to testify by the Government he is referred to in the trial transcripts, he is referred to in the Government Sentencing Motion and multiple times in the PSR report. The government had Mr. Watkins and a total of 1800 another government agent/confidential informant Tom McNichols conducted 700 hours of wire transcripts. Not one minute of the 700 hours was entered into the trial or any motion. There is credible evidence on the Government's own

On February 24, 2004, more than two years after Mr. Segal's arrest, the Government sought the return of a Third Superseding Indictment containing the same charges referenced above, as well as the following additional charges: three counts charging Mr. Segal and Near North with misappropriating insurance premiums in violation of 18 U.S.C. § 1033(b)(l), a single count charging Mr. Segal with making false statements in violation of 18 U.S.C. § 1001 during the January 26, 2002 interrogation,[7] and a single count charging Mr. Segal and Mr. Watkins with conspiring to commit tax fraud in violation of 18 U.S.C. § 371.

On May 18, 2004, the grand jury returned a Fourth Superseding Indictment which essentially reasserted the same charges.

The case was tried before a jury in the Northern District of Illinois from April through June 2004. Throughout the trial, the defense emphasized the irrefutable truth that there was no proof of intent to defraud and no proof that any person or entity suffered a loss. In other words, there was no victim and therefore no crime. The Government presented no proof that any person or entity suffered a loss and offered no testimony from any victims of the alleged wrongdoing. On June 21, 2004, the jury returned a verdict of guilt against Mr. Segal and Near North on all counts charged in the Fourth Superseding Indictment. On June 23, 2004, the jury returned a verdict of forfeiture against Mr. Segal under 18 U.S.C. § 1963. On July 2, 2004, the district court entered a Preliminary Order of Forfeiture declaring Mr. Segal's interest in, inter alia, Near North forfeit to the Government pursuant to 18 U.S.C. § 1963(a)(2) and directed the United States Marshal to seize and take custody of Mr. Segal's interest in the enterprise pursuant to 18 U.S.C. § 1963(e). On the same date, the Court appointed a Trustee of the forfeited enterprise.

Mr. Watkins entered a plea of guilty to the embezzlement charge in Count 27 of the Fourth Superseding Indictment on or about March 23, 2004, and subsequently sentenced to 6 months of home confinement.

The Vindictive Rico Superseding Indictment became a legal flame only fueled by Rico forfeiture burning out Near North business relationships, restricting legal fees and chasing out prospective purchasers of Near North. The most basic due process and constitutional rights are supported by evidence as to ASAU unparalleled misuse of

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tapes and other documents that the Government knew Mr. Segal's tax conspiracy charges were incomplete and inaccurate as to the facts supporting know exculpatory evidence by the Government. The government in this case deliberately ignored their duty to disclose this exculpatory evidence and facts prove its destruction.

[7] The specific 18 U.S.C. § 1001 charge was dismissed by the Government at the close of their case in chief. The Government dismissed the false-statement charge to the jury, but its dismissal did not preclude the Government from resurrecting the allegation as a sentencing enhancement or retract the media portrayal or other negative taint.

prosecutorial aggressive conduct no matter what the risks of conduct to cover and protect the ex employees, co-conspirators who funneled confidential proprietary information stolen and false set up information furthering their own economic gain, for with the exposed proven illegal computer hacking the Government and their parties of interest closed ranks further to shut down and destroy Near North.

The ex-employees financial agenda provides important context for these prosecutors. The prosecutors provided these parties with unlimited economic benefits in addition to the prosecution as to credibility. Near North Civil Suit and other cover up protection proven in the Governments investigation records.

The prosecutors and FBI provided the co-conspirators advantages and used the media and thus solicit clients with negative press worldwide and other conduct in contribution. It is also noteworthy that Government FBI agents directly interfered with Near North Business relationships on specific …out of with several of its major clients informing them of the ongoing Near North investigation. These tactics helped the co-conspirators steal the clients . These incidents are well documented and include such clients as the LA airport authority, Major League Baseball, and Starwood Hotel.

The prosecutors continued to use their ill gained RICO indictment to interfere with any potential sales of Near North companies. As an example a ASAU called the Chairman of a potential buyer and told said buyer "Do you know what RICO is?...When a Near North Attorney questioned the validity of such interference they answered by way of meeting at a major law firm.(See Winston & Strawn)

III. THE GOVERNMENT VIOLATED MR. SEGAL'S FOURTH AND SIXTH AMENDMENT RIGHTS.

A. The Government Knew of and Acquiesced in Unlawful Computer "Hacking."

Shortly after his arrest, Mr. Segal discovered that the Near North computer and electronic mail system, including private and confidential communications between himself and his counsel, had been unlawfully accessed by a computer hacker. An investigation revealed that the hacker was a former employee of Near North. Despite overwhelming evidence that the former employee had violated federal law, and although the Government was aware of the criminal activity, the Government took no action to conduct a cyber-crime investigation under the FBI or DOJ Guidelines, to prosecute the former employee, or otherwise seek to hold him accountable for his actions. This, in itself, is troubling. But there is more. The materials produced by the Government to the defense prior to trial suggest that the Government's key witnesses against Mr. Segal, his former employees and prime accusers, received unlawfully hacked materials and passed those materials on to the Government, thereby implicating the Government in the hacking scheme. This sequence of events raises important First, Fourth and Sixth Amendment issues which warrant close review, much of which is supported in the Government's own investigation.

The pretrial record developed in the district court amply demonstrates that Near North

and Mr. Segal were the victims of thousands of unlawful intrusions onto Near North's computer systems.[8] The hacker unlawfully accessed Near North's computer network on an almost daily basis during the period from August 17, 2001 to April 23, 2002. The hacking was pervasive and targeted. The hacker rummaged through Near North's electronic files and folders, oftentimes searching for documents that had been created and stored some time earlier. In the process, he selectively and methodically accessed dozens of privileged and confidential communications between Mr. Segal and Near North's general counsel or his own personal counsel. The privileged nature of the communications was apparent on their face.[9] Nonetheless, the hacker accessed those privileged communications and delivered copies of the hacked e-mail messages to the Government's cooperating witnesses. The Government was aware as early as January 14, 2002 --- two weeks before Mr. Segal's arrest --- that the cooperating witnesses had received and were continuing to receive confidential electronic information from the hacker.[10] The Government later obtained copies of hacked e-mail messages from the cooperating witnesses.[11] Persons referenced in the hacked electronic messages and documents were called before the grand jury or were interviewed in connection with the Government's investigation. The subject matter of a hacked email is used in the grand

[8] When the hacker accessed Mr. Segal's e-mail account, the first screen that he accessed was the "In Box" which contained an alphabetical list of all messages. The hacker methodically scrolled through the list in order to access e-mail messages between Mr. Segal and various lawyers, including Near North's general counsel.

[9] A number of the privileged communications that were unlawfully accessed by the hacker related to the federal criminal case or the civil suit against the former employees which was filed 6 days before Mr. Segal's arrest. These were not the only privileged communications that were accessed. The Government also seized numerous attorney-client privileged communications during execution of the search warrants. No taint team was employed in this process. In fact, the Government failed to employ meaningful screening procedures to ensure that federal agents did not review privileged communications and deviated from established Department of Justice policies concerning searches of seized materials.

[10] It must be noted that there were frequent contacts between the Government and its cooperating witnesses during this period that were never documented, limited sources proven, in excess of 400 undocumented 302's as to contacts, Government's records are silent as to initial contact with the Government witnesses.

[11] Although the Government denied having knowledge that the e-mail messages were accessed unlawfully, the interception of e-mail messages is documented in several FBI 302 reports. Moreover, the private and privileged nature of the communications is apparent from their face. In pre-trial evidence, an email on its face, hacked from NNIB and sent to Matt Walsh, Government witness, is sent directly to FBI Agent Murphy's home email account. Agent Murphy denies receiving the transmission on February 8, 2002.

jury questioning with evidence known to the Government, from the FBI 1A notes after facts that support violations of the DOJ policies as to segregation and taint procedures as to attorney client privilege documents that took place as to January 26, 2002 search and proven inconsistent electronic data furnished by a court order as to electronic exclusion of attorney client privilege in search of NNIB database.

The defense presented these specific, detailed facts to the district court and sought an evidentiary hearing to establish violations of the Fourth and Sixth Amendments. The motion was denied. As a result, several significant questions remain.

First, why did the hacker exclusively target documents that had been created and stored before Mr. Segal's arrest on January 26,2002? The documents presented in connection with the motion for an evidentiary hearing established that, prior to January 26,2002, the hacker rummaged through stored electronic files and selectively accessed messages and other documents that had been created hours, days, weeks, months or years earlier. The hacking after January 26, 2002 focused almost exclusively on documents created after that date. With the exception of a single message that personally involved the hacker, the more than 500 proven incidents of hacking after January 26, 2002 targeted documents created after January 26, 2002. This fact is significant because the Government seized Near North's computer hardware on January 26, 2002 pursuant to a search warrant and was itself able to search pre-January 26, 2002 records. Did the hacker focus only on documents created after January 26, 2002 because the Government already had access to the pre-January 26, 2002 electronic files?

Second, why did the timing of the hacking closely parallel the Government's computer searches? Pursuant to its pre-trial discovery obligations, the Government produced to defense counsel a list of searches performed by its personnel on the Near North computer system seized in January 2002. Those searches were conducted in close tandem with the unlawful hacking: when the hacking stopped, the Government searches began and vice versa. For example, on April 18, 2003, the Government conducted a search on Near North's computer system (seized pursuant to the search warrant on January 26, 2002) at 12: 18 p.m.; the hacker unlawfully accessed Near North's computer system between 1:08 p.m. and 1:11 p.m.; and the Government searched again at 1:23 p.m. and 1:24 p.m. On April 19, 2002, the hacker accessed the system at 7:29 a.m. and 9:37 a.m.; the Government searched at 9:54 a.m. and 11:30 a.m.; the hacker accessed the system between 11:43a.m. and 12:25 p.m.; the Government searched between 12:46 p.m. and 3:15 p.m.; and the hacker again searched the database between 4:07 and 453 p.m. Was the Government collaborating with the hacker?

Third, why wasn't the hacker prosecuted? As stated above, the hacker was never charged with any state or federal criminal offenses although his conduct was well-documented by a nationally renowned security consulting firm and despite repeated requests from Near North that he be held criminally accountable for his wrongdoing. The proven cyber-crime remains unpunished.

These issues raise substantial questions as to the violations of DOJ guidelines concerning a defendant's right of privacy in the electronic age and strike at the heart of the First, Fourth and Sixth Amendments. Mr. Segal was denied the opportunity to present this evidence at a pre-trial hearing in the district court. The Department of Justice should now undertake a thorough review of these important issues.

B. The Government Improperly Monitored the Defense's Review of Documents.

The unlawful access to Mr. Segal's electronic messages and the lack of a taint team as to the search of attorney client privileged records was not the only intrusion on his First and Sixth Amendment rights. In addition, the Government monitored defense counsel's access to records during the trial, and facts exist of Government use of hacked email in grand jury questioning and other records presented.

During the execution of the search warrants in January 2002, the Government seized hundreds of boxes of documents belonging to Near North. The Government subsequently made the documents available for the defense's review and inspection at a storage location that was under the Government's control. The Government monitored the documents that the defense reviewed and made for itself copies of all documents that the defense reviewed and selected for photocopying.[12] This monitoring of the defense's trial preparation constitutes a clear violation of the Sixth Amendment and the due process guarantee, let alone the hardship on maintaining NNIB business regime of client services.

III. The Charges Against Near North Are the Product of Prosecutorial Vindictiveness.

The Government followed through on a direct threat to file additional charges if the defendants exercised their constitutional right to seek legal relief against the Government's cooperating witnesses in a civil lawsuit.[13] The demonstrated vindictiveness taints this entire prosecution and warrants close scrutiny by the Department of Justice.

Prior to the commencement of this criminal prosecution, Near North sought judicial protection from the tortuous conduct of its former employees by commencing a civil suit in the Circuit Court of Cook County.[14] Unbeknownst to Mr. Segal or Near North, at the

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[12] The prosecutors had exclusive control of the documents and the photocopying process; if the defense wished to copy certain records, they were required to tab the records for copying by a Government-selected vendor.

[13] Even the most zealous advocates of the RICO statute would have to question whether it was stretched beyond its limits in this case. The mere fact that the alleged misconduct was indictable under 18 U.S.C. § 1033, an insurance fraud statute that cannot serve as a predicate act under RICO, is telling.

[14] As the facts unfolded, it became clear that these parties of interest had worked for more than a year and a half to take control of Near North. They first demanded an

time the civil suit was filed; those former employees, who solicited the Government after they were rebuffed by Near North.
(In fact, those former employees were Mr. Segal's prime accusers and business competitors.) However still staying on at Near North for six months, waiting for new Federal Prosecutor, September 4,2005 these employees continued to create and present a "set up" manufactured allegations as to incomplete and inaccurate accounting and insurance regulatory interpretations. It is proven that their plan is launched in the fall of 1999 when the leader of the group brought in his own candidate for CFO whom became part of the plotting and when he was hired he insisted on removing a team of more qualified accounting personnel.

Evidence in the record shows phone calls in April 2004 while working at Near North as to volumes of contacts made with new employer and media for prejudice and collaboration as to create economic issues for Near North. The first known contact not disclosed by Government was a cell phone call by one of the government parties of interest dated September 17th 2001. Facts provide evidence of the alliance made with the new employer in April 2001 with resources connected and provided by billion dollar public company who considered Near North most potential independent broker competition in the home town of Chicago. There existed a pattern of prior intense competition well known by the chairman of this company and Mr. Segal. The co-conspirators received unusually large stock guarantees in the employment agreements. Moreover there is a pattern of employee related litigation and litigation as to trade secrets .

Critical events in the civil suit thereafter triggered retaliatory acts by the Government in the context of this criminal prosecution. For example, when Near North's counsel advised the Government that the corporation planned to amend the civil complaint to implicate the former employees in a conspiracy to utilize information illegally hacked from Near North's computer network, [15] the prosecutors warned that the new allegations would be taken into account in deciding whether to charge Near North in a superseding indictment or name Near North as a RICO enterprise and stated the Government did their own investigation and that their witnesses had no communication. On the day after the amended pleading was filed, the Government issued a grand jury subpoena duces tecum upon Near North compelling the production of all evidence supporting the conspiracy allegations, including known attorney client privilege of stolen documents.. Just three days after Mr. Segal requested an evidentiary hearing in the criminal case to establish that the former employees were acting as agents for the Government when they obtained stolen electronic information from Near North's computers, the Government obtained a 2nd superseding indictment on June 13 2003

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ownership interest in the business valued in the millions of dollars and later demanded a $1,000,000 settlement to avoid litigation.

[15] This was the same unlawful hacking referenced above. See supra pp. 6- 10.

containing the same allegations but adding Near North as a defendant after repeated threats (for the first time) in thirteen of the seventeen counts.

This sequence of events, coupled with the Government's apparent desire to shield, protect and benefit the former employees, gives rise to a presumption of prosecutorial vindictiveness which taints this entire prosecution.

The vindictiveness was express. As stated above, the Government's identification of Near North as a racketeering enterprise followed immediately on the heels of Near North's exercise of its First Amendment right to pursue civil remedies against its former employees.[16] But there is more. When the Government was advised of Near North's intent to allege a conspiracy between the acknowledged hacker and the Government's witnesses, the prosecutors adamantly objected, characterized such allegations in pejorative terms and, in what must be viewed as a textbook example of vindictiveness, expressly warned that the assertion of such a claim would be taken into account in determining whether to indict Near North and/or name Near North as a RICO enterprise in a superseding indictment.[17] (A copy of the Affidavit of Joshua T. Buchman, Esquire documenting the threat is attached hereto as Exhibit "A.") It is now beyond peradventure that these were not idle threats. Within a few weeks of Near North's filing of an amended complaint containing the conspiracy claim which the prosecutors had adamantly objected to, Near North was in fact named as a RICO enterprise in the first Superseding Indictment handed up on October 31, 2002 and, when Near North's sole shareholder later pressed those allegations further by filing a motion for an evidentiary hearing in the criminal case on the issue of the former employees' cooperation with the Government, the Government responded by indicting Near North just three days later on June 13, 2003. There were ongoing press releases and threats and Mr. Segal's bail was revoked.

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[16] The right of access to the courts to seek redress for legal wrongs is, of course, an aspect of the First Amendment right to petition for redress of grievances. See. e.g., Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731,741, 103 S. Ct. 2161,2169,76 L. Ed. 2d 277 (1983).

[17] If, as the Government claims, it had no knowledge concerning the relationship between the hacker and the cooperating witnesses, then the Government had no reason to suspect that the conspiracy allegations were unfounded and no basis for demanding that Mr. Segal and Near North cease pursuing that claim. It is now clear (based on the agent notes) that the Government had evidence of a connection between the "hacker" and one or more of its cooperating witnesses as of at least January 14, 2002. The Government's claim that its investigation revealed "no connection whatsoever" between the hacker and the cooperating witnesses is thus highly suspect. And it is also provided in the record that on Feb 18th 2002 FBI Agent Murphy received to his personal email a copy of hacked email by Walsh. Other evidence indicates Government knew of their witness agents had received and used hacked emails.

The surprisingly explicit threat to indict Near North establishes the prosecutors' vindictiveness. It is difficult to imagine more direct or powerful proof of a punitive or vengeful motive: a threat was made by the Government upon learning that Near North intended to pursue a conspiracy claim alleging that the hacker and the government's cooperating witnesses conspired to pilfer Near North's confidential information and use it to engage in unfair competition against Near North; Near North filed an amended complaint asserting that the government cooperating witnesses conspired with the hacker; and, in relatively short order, the prosecutorial threat was carried out. The vindictive motivation underlying the indictment and consequential damages could not be more plain.[18]

Moreover, the Government had a significant stake in preventing Near North from exercising its First Amendment right to pursue its civil claims against the Government's cooperating witnesses. The allegation that the cooperating witnesses conspired with a hacker to funnel confidential and proprietary information(Feb 9-Dec28) to the Government for use in its prosecution against Segal --- and, not incidentally, for their own economic gain[19] --- threatened to severely damage the cooperating

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[18] The Government alleged no new facts in the Second Superseding Indictment but rather repeated verbatim the charges in the previous filing. No new facts supported the new criminal allegations ---just a new, closely related corporate defendant and additional pressure on Mr. Segal. The fact that the Government possessed the material information on which the mail fraud charges and false statements charges were based prior to Near North's assertion of the conspiracy claim further supports the claim of vindictiveness. Also there was at no tome a plea negotiations taking place so that defense is moot. Vindictiveness consequentially violated due process constitutional rights as well. This also raises issue of using ill gained Rico indictment by ASUA when he called the chairman of potential buyer of NNIB post arrest and stated "Do you know what a Rico indictment means?"
ASAU made a demand and threat to attorney J. Buchman to withdraw and take down Near North Press Statement about the hacking. (see Buchman affidavit) Also see how there is a pattern of interaction between the Government and the press as a continuing tactic.(see matrix)

[19] The ex-employees' financial agenda provides important context for this prosecution. The prosecutors provided the former employees with information concerning the status of its investigation which the employees then used to their own economic advantage. For example, one of the former employees contacted the president of an affiliated insurance agency, advised him that federal authorities would be contacting him shortly concerning the Segal investigation and asked him to consider ending his business relationship with Near North. As the former employee predicted, the insurance agent was in fact contacted by the Government the next day. This is just one of the examples in which the former employees attempted to utilize this criminal prosecution for their own advantage. It is also highly relevant that, prior to leaving Near North, the former employees accused Mr. Segal of the same accusations that

witnesses' credibility. The Government thus had a strong interest in preventing the pursuit of these claims and a strong motive to pursue a retaliatory strategy: by bringing Near North to its knees, the Government could protect its cooperating witnesses.

This sequence of events must be viewed against the backdrop of the charges alleged in the indictment. As explained below, infra pp. 17-21, there is no public record of any criminal prosecution of the state licensing irregularities alleged here. The mail fraud and false statement charges in the indictment represent a sweeping and unprecedented enlargement of the federal prosecutorial authority conferred by Congress. The thinness of the charges itself raises a significant question as to why this particular prosecution was undertaken.

In sum, this case presents one of the unfortunate situations which the Sixth Circuit recognized is bound to occur from time to time in our system of justice:

It is not only the inexperienced and the overly ambitious who may be tempted to misuse the prosecutorial power, although they are certainly subject to that temptation. There are times when the judgment of even the most highly qualified and virtuous of prosecutors --- perhaps especially they --- will yield to an excess of zeal.

United States v. Adams, 870 F.2d 1140, 1145 (6th Cir. 1989). While it is not clear at this point exactly what drove the Government's obvious animus towards Near North and Mr. Segal, this much is clear: the indictment of Near North was vindictively motivated. If this sequence of events leaves any room for doubt concerning the prosecutors' vindictive motive, it is dispelled by the prosecutors' insistence that Near North retract a press release announcing the new allegations in the civil case, again in violation of Near North's First Amendment rights.[20] (check out Gag Motion)

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form the basis for this prosecution and demanded a significant ownership interest in the company in exchange for their commitment to remain affiliated with the organization. It is also noteworthy that Government agents interfered with Near North's relationships with several of its clients by contacting those clients and informing them of the ongoing investigation. These tactics also inured to the business advantage of the cooperating witnesses who solicited the clients to become affiliated with their new employer. As a result, the livelihoods of many Near North employees were sacrificed for the benefit of the former employees who became the Government's cooperating witnesses. These witnesses never testified at the trial.

[20] A pattern of interaction between the Government and the press was a continuing tactic employed by the Government to taint the fair presentation of this case. During trial time a person –leading ASAU, told Mr. Segal's lawyer that he had a personal dislike for Mr. Segal, alluding to an unknown long past incident involving his uncle. Also immediately after the posting on NNNIB website, corporate counsel Josh Buchman received a call from ASAU Hogan demanding to take down that NNIB take down any press release regarding hacker and to stop communicating to the press

Tellingly, the Government offered no justification for the challenged prosecutorial decisions. It pointed to no new facts arguably discovered after the original charges were filed, cited no new legal analysis and offered no explanation as to why the new charges followed so closely on the heels of defendants' exercise of their constitutional rights. Nor did the Government show any evidence that plea negotiations were taken place. Nor did the Government call any of its cooperating witnesses as witnesses at trial, lending further support to the argument that the Government's prime interest was in protecting those witnesses at all costs.

Soon the Government took a joint venture of interest and bias with Government witnesses/co-conspirators takeover of NNIB and the Government's obsession of proving a case taken on by a promise of a home run capture of a political kingpin but what in reality turned out to be fanciful, tantalizing, but dull set of accounting regulatory conundrum. Whether consciously knowing or not ultimately plotted by a public company in direct battle competition with Mr. Segal's NNIB.

During investigation period someone communicated to ASUA as to …….contact to NNIB business clients, partners and employees on specific fact basis. However said person received no response. Subsequently another incident took place. ….in contact when Government witness alleged proven false incident at a well known Chicago restaurant, FBI extensive investigation and Grand Jury was put into play immediately. After affidavits and other fact patterns were obtained by Mr. Segal's attorneys that co-conspirator/Government witnesses threaten NNIB business partners to leave and join their employer and that said person could expect a call and surprise visit FBI Agent Murphy which did take place immediately after the conversation. Moreover it is known and proven that FBI Agent Murphy ……interviewed existing and potential clients out of ….investigator time frames that had the effect of causing NNIB to lose certain specific issues……..as to Los Angeles Airport Authority which was dropped. NNIB two days before to received the assignment and gave ……to Government Witnesses/co-conspirators new employer.

The demonstrated vindictiveness taints this entire prosecution and cries out for close scrutiny by the Department of Justice - both for Mr. Segal and for hundreds of thousands of other insurance brokers and business owners who find themselves in similar circumstance.[21]

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about the hacker or NNIB would be indicted and Mr. Segal's bail would be revoked.(See Buchman affidavit)

[21] It is noteworthy that the Government strenuously argued for revocation of Mr. Segal's bail and therefore Mr. Segal has been detained at Chicago's Metropolitan Correctional Center since June 2004. His detention raises significant Sixth and Eighth Amendment concerns. First from a medical standpoint there were damages.

Mr. Segal was known by his doctors, employees, clients and family to be battling a life long struggle with ADD and its debilitating syndromes. Medications, behavioral therapy, cognitive conditioning and therapy were always part of his treatment protocol. Mr. Segal was not given the medication that he had been taking prior to

IV. The Charges Against Mr. Segal and Near North Are an Unwarranted Expansion of the Federal Criminal Law.

Mr. Segal and Near North had no prior criminal history. Near North, which had been in the insurance brokerage business for more than 40 years, had never been the subject of customer complaints or regulatory violations.(attach proof here) Nor was there any customer complaint in connection with the subject matter of this prosecution. The evidence at trial was undisputed and indisputable: Every customer that paid for insurance coverage received insurance coverage and every insurance carrier that issued a policy was paid in full. There was no loss and there were no victims. Moreover, prior to the commencement of the federal investigation, **Near North self-reported the issues as to accounting regulatory confusion after 10 months of audits** in its premium fund trust account (PFTA)[22] to the State of Illinois Department of Insurance which declined to initiate any regulatory or state criminal proceedings. In these circumstances, and especially given the absence of any victim or economic loss, federal prosecution of alleged administrative irregularities is inappropriate and unprecedented.

As to accounting and regulatory issues with its premium collection account September 1,2001 NNIB agreed to reengineer its accounting practices under the Illinois Regulatory Self Help provisions. After Segal's indictment January 2002 the Illinois DOI spent 10 months of the appropriate regulatory accounting audit and determined there was no criminal violation. More concerning are the facts that support the Government leveraging the Illinois DOI by threatening and then backing off the director. The ASAU directed the DOI to look deeper…putting a burden of false media about DOI and

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incarceration. The record reflects the brain synaptic deterioration of Mr. Segal by way of with drawling scheduled medications. Mr. Segal has unusual concerns as to BOP strict mandate that ADD medication is provided in the U.S. Prison System in spite of ADD being recognized under the American With Disabilities Act.

At Mr. Segal's bail hearing the court accepted ASAU argument that 3 million dollars bail to be tendered was unacceptable. The rational was that one of the parties who help to post was extremely wealthy and thus would not care if Mr. Segal fled the country with his money. Just like the ADD medical issue this reasoning appeared to be bizarre and selective. Thresholds placed at such a irrational and harmful marker that can be viewed as vindictive.

[22] PFTA accounts are solely a creature of state law. Not all states require such accounts. A recent survey confirmed that approximately half of the states impose such an obligation on insurance producers. This disparity, coupled with the prohibition against federal regulation of insurance embodied in the McCarran-Ferguson Act, 15 18 U.S.C. § 1012(b) ("No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance…unless such Act specifically relates to the business of insurance."), compel the conclusion that this federal criminal prosecution was unwarranted.

providing benefit to the Government Case. Is this not Federal Government interfering with the States law?

A. 18 U.S.C. § 1341 Has No Application Here.

This entire prosecution represents an unwarranted intrusion into areas traditionally and exclusively policed by the State of Illinois. The Government's prosecution theory rested solely on alleged violations of state law. The Government claimed, among other things, that Mr. Segal and Near North misappropriated insurance premiums in violation of state law and gave rebates to customers in violation of state law. Similar violations were dealt with administratively in the State of Illinois. Indeed, the public records reveal no instance in which an insurance broker was criminally charged under these state law provisions. (See Amicus Curae) Unable to find a legitimate basis to bring federal criminal charges,[23] the Government stretched, squashed and squeezed the conduct into a charge of deprivation of honest services in violation of 18 U.S.C. § 1341. But there was no proof of intent to defraud customers or insurers.[24] This prosecution represents an unjustified and unconstitutional expansion of the mail fraud statute and the reach of the federal prosecutorial power. ***See*** Cleveland v. United States, 53 1 U.S. 12, 25-27, 12 1 S. Ct. 365, 148 L. Ed. 2d 22 1 (2000) ("Absent clear statement by Congress, we will not read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States.").

B. 18 U.S.C. § 1033(b) Has No Application to Insurance Brokers.

Consistent with Congressional intent to protect against fraud affecting the solvency of the insurance companies that bear the risk of loss in an insurance transaction,[25] 18 U.S.C. § 1033(b), by its own terms, applies only to persons who are

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[23] As stated above, Mr. Segal and Near North were also charged with making false statements to an insurance regulator in violation of 18 U.S.C. § 1033(a). The district court concluded that the license renewal application forms that formed the basis for the Section 1033(a) charges were not "financial" documents as required by the statute and granted the defense motion for judgment of acquittal on these counts on December 13, 2004. However Court never addressed the jurisdictional issues of 18USC1033.

[24] The Government's pre-sentence reports for both Mr. Segal and Near North confirm the lack of evidence in this regard. The PSR for Mr. Segal states: "There is no evidence the defendant intended to defraud either the insurance clients or the insurance companies . . ." (PSR at 22,11.645-47.) The PSR for Near North states: "There is no evidence that Near North intended to defraud either the insurance clients or the insurance companies . . ." (PSR at 18,ll. 554-55.)

[25] The legislative history demonstrates that the legislature's overriding concern was protecting against insurance company failures and ensuring that information used by

engaged in the "business of insurance." The "business of insurance" is statutorily defined as "the writing of insurance, or the reinsuring of risks, by an insurer, including all acts necessary or incidental to such writing or reinsuring and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons." 18 U.S.C. § 1033(f)(l).

A fair reading of this definition leaves no doubt that the statute has no application to insurance brokers like Mr. Segal and Near North. Neither Mr. Segal nor Near North was in the business of writing insurance or reinsuring risks. Neither was an officer, director, agent or employee of any insurance company or reinsurance company. Neither was specifically authorized to act on behalf of any insurance carrier for any purpose. No representative of any insurance carrier was called to testify at trial and there was no evidence that Near North had an agency or other relationship with any particular carrier.[26] A recent decision from the United States Court of Appeals for the Seventh Circuit provides strong support for the argument that an insurance broker like Mr. Segal and an insurance brokerage like Near North are not the equivalent of an insurance company. United States v. Spano, 2005 U.S. App. LEXIS 18974 (7th Cir. Sept. 1, 2005). The Seventh Circuit held that the sentencing enhancement for an offense which jeopardizes a "financial institution" does not apply to brokers because brokers are not in the business of insuring against the risk of loss:

> **[W]hat makes an insurance company a financial institution is that it invests its premiums in order to create a fund out of which to pay claims; it is a financial intermediary. SRC [the broker] was not an insurance company and did not engage in financial intermediation. Money flowed through it, from the Town treasury to claimants and of course to the defendants, so it was "intermediate" between Town and claimants in a literal sense. But that is no different from the situation of a**

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state regulators to measure insurance company net worth is accurate. See, e.g., 140 Cong. Rec. H. 1905 at H1914 (Mar. 23, 1994) (explaining that legislation makes it "a federal crime to defraud an insurance company'); H.R. Rep. Np. 103-468, 103d Cong., 2d Sess. 2 (1994) (report by House Subcommittee on Oversight and Investigations which concludes that then existing remedies were ineffective against behaviors that drove insurance companies into insolvency); see also Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, Failed Promises: Insurance Company Insolvencies, 101" Cong., 2d Sess. 1 (1990) (summary report notes that committee was primarily concerned with "[a]n insurer's ability to pay - its solvency"). Neither Mr. Segal nor Near North was ever licensed as an insurance carrier. As brokers, their solvency did not and could not affect the insurance carriers' ability to pay the claims of insureds.

[26] To the contrary, the Government went out of its way to suggest to the jury that Near North had no authority to bind any carrier and implied that Near North thereby placed its customers at a serious risk of loss.

grocery store, which takes in money from its customers and pays it out to its owners and suppliers.

Slip op. at 11-12.

Additional facts in the record infer that Government had knowledge that NNIB was an insurance broker and not an insurance company as clearly defined in 18 USC1033b. (See Government opening : transcript 302-303)

"Let us make sure that you understand just the basic concept of an Insurance brokerage. Near North Insurance is a brokerage. It is not a Company that is an insurance carrier, it's a brokerage, meaning much Like the middleman in an insurance deal The carrier are insurance Companies They carry the loss.

(See PSR 876-879)

"The company did not underwrite insurance or provide insurance Benefits and was not a risk bearing entity. Therefore this Officer did not find NNIB met the definition of a financial institution And did not apply for a 2 level enhancement"

It should be noted that every indictment of Mr. Segal contained 18USC 1033 (a) and (b) charges. Even though the Court reversed the 6 counts of 1033a it was done only after the verdict and incarceration of Mr. Segal. The prejudicial spillage was harmful to the jury to the press and ultimately harmful to the insurance brokerage industry itself. Now 2 million insurance brokers are under Federal Jurisdiction and will make their protest known.

In sum, Mr. Segal and Near North were not in the "business of insurance" as required for a conviction under Section 1033(b). There is no basis for the application of Section 1033(b) in these circumstances.

V. CONCLUSION

The Government's tactics are shocking, improper and violative of established Department of Justice policy and the defendants' constitutional rights. Accordingly, the Department of Justice should engage in a thorough review of the charges and the deliberative process that preceded the initiation of this investigation and prosecution. Fundamental fairness and constitutional concerns compel nothing less.