UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 05 CR 254
	)	
AMIR HOSSEINI and	)	Judge Milton I. Shadur
HOSSEIN OBAEI	)	

GOVERNMENT' CONSOLIDATED RESPONSE
TO DEFENDANTS' PRETRIAL MOTIONS

The United States of America, by its attorney, Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, hereby responds in one consolidated pleading to all of the defendants' pretrial motions, as follows:

I. MOTION FOR SEVERANCE

Defendant Hosseini has moved, pursuant to Fed. R. Crim. P. 8(b) and 14, to sever his trial from that of co-defendant Obaei, or in the alternative, to sever count two from the joint trial. Hosseini contends that the indictment merely charges him and his co-defendant Hossein Obaei with "parallel, not coordinated, conduct." Def. Mot. 2. Furthermore, Hosseini denies that the "drug trafficking allegations [against Obaei] 'well up' out of the separate and independent financial crimes alleged jointly against Hosseini and Obaei." Def. Mot. 6. As explained below, Obaei's conduct relating to Count Two did in fact arise out of the greater conspiracy alleged in Count One against Hosseini and Obaei. Thus, Hosseini's motion is without merit and should be denied.

A. All Counts Are Properly Joined.

Federal Rule of Criminal Procedure 8(b) provides that multiple defendants may be tried in a joint trial "if they are alleged to have participated ... in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together

or separately. All defendants need not be charged in each count." Fed. R. Crim. P. 8(b). The Seventh Circuit has interpreted the "same series of acts or transactions" to mean those that are pursuant to a common plan or scheme, which are usually those acts or transactions that are part of a single conspiracy. *See United States v. Lanas*, 324 F.3d 894, 899 (7th Cir. 2003). For purposes of Rule 8(b), conspiracy charges provide the bond that links divergent substantive crimes into a single transaction. *Id.* Thus, joinder under Rule 8(b) is proper if co-defendants are part of a common conspiracy. *United States v. Thompson*, 286 F.3d 950, 968 (7th Cir. 2002). In regards to the non-conspiracy counts, Rule 8(b) explicitly states that all defendants do not need to be charged in each count. Fed. R. Crim. P. 8(b).

When interpreting joinder issues, courts should give due deference to the strong preference in the federal system to jointly try defendants who are indicted together. This preference exists because joint trials reduce judicial, prosecutorial, and witnesses' time and otherwise promote justice by giving juries the best perspective on all evidence, thereby increasing the likelihood of correct outcomes. *United States v. Zafiro*, 506 U.S. 534, 537-38 (1993). In accessing whether joinder of counts and defendants is proper, the court looks solely to the face of the indictment. *Lanas*, 324 F.3d at 899; *United States v. Marzano*, 160 F.3d 399, 401 (7th Cir. 1998)("the test is what the indictment charges, not what the evidence shows").

Following this standard, a brief review of the indictment and its relevant allegations is in order. Hosseini and Obaei are alleged to have participated jointly in: (1) a racketeering conspiracy (Count One); (2) a money laundering conspiracy (Count Three); (3) two substantive counts of money laundering (Counts 10 and 11); and, (4) a mail fraud scheme to avoid paying state sales taxes on the cars sold by the enterprise (Counts 97-100):

- Count One, ¶ 4 alleges that Hosseini and Obaei controlled and operated Sho Auto Credit ("SHO").
- Count One, ¶ 7 states that Hosseini and Obaei, along with the three car dealerships, Standard, American, and SHO, constituted the Standard Auto Enterprise.
- Count One, ¶ 8(A-E) alleges that Hosseini and Obaei conspired "to conduct and participate, directly and indirectly, in the conduct of the affairs of the Enterprise through a pattern of racketeering activity consisting of money laundering, mail fraud, bank fraud, bribery, and the structuring of financial transactions to evade reporting requirements."
- Count One, ¶ 10(a) alleges that through the Standard Auto Enterprise, Hosseini and Obaei sold "automobiles in exchange for cash to persons they knew to be Chicago area narcotics traffickers."
- Count One, ¶ 10(d-k) alleges that Hosseini and Obaei conducted a scheme in which both defendants would recover cars that were lawfully seized by the United States and the City of Chicago by fraudulently placing liens (an innocent ownership claim) on cars sold to narcotics traffickers and gang members involved in drug trafficking. If the City or a federal law enforcement agency were to seize one of these cars, Hosseini and Obaei would falsely claim an interest in the car to prevent forfeiture and return the car to the narcotics traffickers. In exchange, these "customers" would pay an additional fee or would exchange the seized car for another one.
- Count One ¶ 10(l) describes how Hosseini and Obaei defrauded the State of Illinois by failing to pay sales tax for vehicles sold by the Standard Auto Enterprise.

- Count One ¶ 10(q, r) alleges that Hosseini and Obaei defrauded financial institutions by making fraudulent representations on loan applications. On one occasion, Hosseini gave Obaei the VIN number for a Cadillac Escalade that Hosseini had sold so that Obaei could apply for a loan on the vehicle.
- Count Two details a conspiracy by Obaei to aid and abet an ongoing narcotics trafficking operation. Obaei facilitated this operation by engaging in the exact conduct stated in the above Counts, and by performing additional acts that raised his conduct from money laundering to an additional aiding and abetting charge.
- Count Three, ¶ 5(d) alleges that Hosseini and Obaei conspired to send money from the Northern District of Illinois, through Canada and the United Arab Emirates, to Iran in order to conceal the sources of the money (drug trafficking) and to avoid transaction reporting requirements under state and federal law.
- Count Three, ¶¶ 7-8 state that Hosseini and Obaei accepted cash payments from narcotics traffickers in excess of $10,000 without reporting these transactions to the Internal Revenue Service. Furthermore, Hosseini and Obaei falsified paperwork to reflect that cash received from car sales at American, Standard, and SHO were in amounts less than $10,000.
- Count Three, ¶9 alleges that in order to avoid reporting requirements, Hosseini and Obaei made multiple cash deposits in amounts less than $10,000 into the bank accounts of the three car dealerships at various financial institutions in Chicago.

- Counts 10 and 11 specify that Hosseini and Obaei received cash payments on two particular occasions in amounts greater than $10,000 from two known drug dealers for the purchase of two cars.
- Counts 97-100 detail a scheme in which Hosseini and Obaei would pay an Illinois Secretary of State's Office employee in exchange for audit stamps on vehicle registration and sales tax paperwork for cars sold by Standard Auto Enterprise. The scheme allowed Hosseini and Obaei to avoid payment of at least $700,000 in sales taxes on more than 1,200 vehicles they had sold.

Thus, looking solely at the four corners of the indictment, the nexus of the Count Two (Obaei's aiding and abetting of a drug trafficking conspiracy) and the additional Hosseini/Obaei Counts is direct and explicit. In fact, the only difference between Count Two and the other counts is that Hosseini was not named.

Hosseini argues, without merit, that Count Two is misjoined because it did not "well up out of the separate and independent financial crimes alleged jointly against Hosseini and Obaei." (Def. Mot. 6). He further contends that the allegations that he and Obaei committed the "same type of financial offenses over the same period of time," constitutes parallel conduct at best. (Def. Mot. 3, 6). But the Hosseini-Obaei counts outlined above show that Hosseini and Obaei did more than commit parallel crimes. Rather, they worked <u>together</u> as part of a RICO conspiracy to commit a variety of crimes, and Obaei's conduct alleged in Count Two grew out of this greater joint enterprise.[1]

[1] As set forth in the section below regarding severance pursuant Rule 14 of the Federal Rules of Criminal Procedure, defendants acted in concert to accomplish every aspect of the racketeering conspiracy. As the defendants are aware, the government has produced witness statements and

All that is necessary to validate a Rule 8(b) joinder is a showing of good-faith allegations in the indictment. *Lanas*, 324 F.3d at 899; *Marzano*, 160 F.3d at 401. As alleged in the indictment, between April 2004 and March 21, 2005, Obaei sold Carlos Velazquez-Salgado and members of his narcotics trafficking organization at least twenty sport utility vehicles (SUVs), "knowing that those cars were going to be used to smuggle multi-kilogram loads of cocaine and heroin from Mexico into the United States and the Chicago area." (Indictment, p.15). Just as he and Hosseini had done with more than 1,200 other cars between 1995 and March 2005, Obaei "fraudulently maintained liens on the majority of the vehicles sold" to Velazquez-Salgado in order to assist Velazquez-Salgado "in retrieving those vehicles from federal of local law enforcement in the event those vehicles were seized." (*Id.* at p.16). Moreover, Obaei accepted cash from Velazquez-Salgado, and members of his drug trafficking organization, knowing that the cash "represented the proceeds of Carlos Velazquez-Salgado's narcotics trafficking activities." (*Id.* at p. 15). In Count Three of the Indictment (a money laundering conspiracy against both Hosseini and Obaei) these two defendants are charged together with engaging in this very conduct. Specifically, the indictment charges that "defendants Hosseini and Obaei sold luxury automobiles to narcotics traffickers for cash, which funds represented the proceeds of specified unlawful activity, namely drug trafficking." (*Id.* at 21).

Count Two charges Obaei alone because he gave Velazquez-Salgado a notarized letter authorizing a Nissan Armada SUV (purchased from Obaei at American) to travel to and from Mexico between September 15, 2004 and November 15, 2004. *Id.* at p.17. Obaei provided this letter to Velazquez-Salgado "in order to facilitate...the smuggling of multi-kilogram quantities of

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documents demonstrating that fact. However, the government has limited its response to the defendants' misjoinder claim to the face of the indictment.

cocaine and heroin from Mexico into the United States." *Id.* at p.18. This one additional act raised Obaei's conduct from money laundering to the level of aiding, abetting, and facilitating an ongoing narcotics trafficking conspiracy. *Id.* at p.14. But the other steps that Obaei took to aid in this drug trafficking operation (receiving a cash payment in exchange for a car and a falsified lien) were identical to the steps taken by Obaei and Hosseini pursuant to their greater conspiracy alleged in Count One. Thus, Hosseini's argument that Count Two (Obaei's aiding and abetting of a drug conspiracy) does not "well up" as Hosseini's offenses is meritless.

Joinder of individual charges with joint conspiracy charges in a single indictment is particularly proper when the former charges are a product of the latter charges. *See United States v. Shelton*, 669 F.2d 226, 260 (7th Cir. 1982) (upholding a joinder of mail fraud conspiracy charges against five defendants with tax evasion charges against only three of the five defendants); *United States v. Emond*, 935 F.2d 1511, 1511-12 (7th Cir. 1991) (upholding a joinder of RICO charges against several defendants with tax evasion charges against Emond and his wife because the unreported illegal income stemmed from the joint illegal activities); *United States v. Stillo*, 57 F.3d 553, 557 (7th Cir. 1995) (finding that there was a connection between the RICO and extortion counts because a similar factual basis would be used to prove both charges). The Seventh Circuit has also applied this principle to individual charges under 18 U.S.C. § 841(a)(1). *See United States v. Doyle*, 121 F.3d 1078, 1081 (7th Cir. 1997). In *Doyle*, the jury had convicted thirty-eight defendants in a joint RICO conspiracy, along with a single defendant for a narcotics conspiracy. *Id.* On appeal, the Seventh Circuit affirmed the convictions.[2] Accordingly, this Court should find that Obaei's separate

[2]The defendant did not appeal on misjoinder grounds. *Doyle*, 121 F.3d at 1081.

drug trafficking charge, which "welled up" from the joint RICO charges against he and Hosseini, is properly joined under Rule 8(b).[3]

B. Rule 14 Provides No Basis For Severance.

In his final argument, and in the alternative, Hosseini next argues that even if joinder is proper under Rule 8(b), severance is necessary under Rule 14 because he will suffer undue prejudice from a joint trial. Def. Mot. 2. Severance pursuant to Rule 14 is proper "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539. To obtain a separate trial, a defendant must demonstrate that the denial of severance will cause him "actual prejudice" that will deprive him of his right to a fair trial; it is insufficient that separate trials will give a defendant a better opportunity for an acquittal. *United States v. Rollins*, 301 F.2d 511, 518 (7th Cir. 2002).

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[3]Hosseini's reliance upon *United States v. Saleh*, 875 F.2d 535 (6th Cir. 1989) as support for his parallel conduct argument is misplaced. In that case the co-defendants were charged with violating the same statute, but the government never alleged "that these defendants conspired or otherwise participated *jointly* in any prescribed *conduct*." 875 F.2d at 538 (emphasis in original). *Saleh* is not applicable to this case because Count One charges Hosseini and Obaei with participating in a joint conspiracy. Obaei's individual conduct, which brought the charges in Count Two against him, was "pursuant to a common plan or common scheme" with Hosseini. *See Lanas*, 324 F.3d at 899.

In addition, another case cited by Hosseini, *United States v. Marzano*, 160 F.3d 399 (7th Cir. 1998) actually support joinder and is analogous to the case at bar. There, two brothers (Charles Marzano and Daniel Marzano) were charged together with money launder, but Charles was also charged with narcotics trafficking offenses. *Id.* at 400. Daniel did not participate in the drug offenses and did not launder drug proceeds; rather he laundered embezzled funds to help finance the drug conspiracy. *Id.* at 401. The Seventh Circuit upheld joinder of all of the counts in that case because there was a "chain or circle" that connected the drug dealing at one end with the money laundering at the other. *Id.* Thus, joinder under Rule 8(b) is proper in this case.

In cases where the government indicts multiple defendants together, the federal system prefers a joint trial. *United States v. Souffront*, 338 F.3d 809, 828 (7th Cir. 2003). Joint trials play a "vital role in the criminal justice system" because they promote efficiency and serve justice by preventing inconsistent verdicts. *Id.* Specifically, a joint trial reduces the burdens on the judiciary, prosecutors, witnesses, the extra expenses incurred in multiple trials, and the risk that each defendant will attempt to create reasonable doubt by blaming an absent co-conspirator. *United States v. Blassingame*, 197 F.3d 271, 286 (7th Cir. 1999). In all but the "most unusual circumstances," the risk of prejudice arising from a joint trial is "outweighed by the economies of a single trial." *Id.* Thus, there is well-established judicial recognition of the merits of a joint trial in facilitating th truth finding process. These interests are paramount and thus trump interests rooted in other tactical advantages.

In this case, Hosseini fails to show that a joint trial would compromise a specific trial right or would prevent the jury from making a reliable judgment about his guilt or innocence. To the extent that evidence will apply only to Obaei and not to Hosseni regarding Count Two, the government will urge this Court to instruct the jury pursuant to Seventh Circuit instruction 4.05 (separate consideration for each defendant). Thereafter, the appropriate inquiry is "whether it is within the jury's capacity to follow the trial court's limiting instructions requiring separate consideration for each defendant and the evidence admitted against him." *United States v. Neely*, 980 F.2d 1074, 1090 (7th Cir. 1992). But courts presume that a jury will follow this instruction, *Thompson*, 286 F.3d at 968, and Hosseini offers no concrete reason why the jury in this case would not do so.

But even aside from a limiting instruction, all of the evidence in this case stems from the greater conspiracy run by both defendants. The fact that the indictment individually charges Obaei and Hosseini in some Counts does not warrant severance. Hosseini argues that evidence of Obaei's association with a narcotics trafficking organization would prejudice his defense against charges for alleged financial crimes because the two charges are unrelated. (Def. Mot. 11-12). But, Hosseini conveniently ignore the fact that evidence of his illegal dealings with known drug dealers underlies nearly all of the charges brought against him in this case. Laundering gang members and drug dealers narcotics proceeds was the bread and butter of Hosseini and Obaei's illicit operation. (Indictment, Counts One and Three).

Not only was Hosseini aware of the source of his customers' cash payments, but he even facilitated a meeting between two of his customers because they both sold cocaine. (Compl. ¶¶108-110). Moreover, during a search of Hosseini's business pursuant to a federal search warrant on the day of his arrest, the FBI found photographs in Hosseini's office depicting: (1) a drug press, two bricks of apparent narcotics, and three assault weapons; (2) a photograph of a document about an "Afghan Heroin Processing Laboratory"; and, (3) a document about a "South American Cocaine Processing Laboratory." (Photographs attached as Exhibit A). Additionally, during the course of Obaei's aiding and abetting of the drug trafficking conspiracy, the FBI twice observed Obaei making cash payments to Hosseini. (Compl. ¶¶ 26-27, 244-46). The first transaction occurred outside of American on October 22, 2004 when FBI agents observed Obaei hand Hosseini a sum of cash through a car window. *Id.* at ¶26. On the latter occasion, which occurred on December 31, 2004, Obaei provided Hosseini with $23,000 in cash that Obaei had received that day in two separate money laundering transactions with drug dealers. (Compl. ¶¶ 244-46). The fact that before and

after Obaei sold Velazquez-Salgado the Nissan SUV, FBI agents observed Obaei handing Hosseini large amounts of cash demonstrates that the defendants were not on parallel tracks; Hosseini and Obaei were sharing ill-gotten gains from their money-laundering activities.[4]

Hosseini concedes that when there is a significant amount of evidence overlap between counts, severance is inappropriate. (Def. Mot. 13); *United States v. Koen*, 982 F.2d 1101, 1111 (7th Cir. 1992) (noting "that there is a great deal of temporal and evidentiary overlap with respect to these charges that makes the decision to try them together especially justifiable"). Hosseini's argument that Count Two will prejudice his defense as to the "financial crimes" is without merit, and severance is therefore improper under Rule 14.

II. MOTION FOR BILL OF PARTICULARS[5]

Defendants seek a bill of particulars pursuant to Fed. R. Crim. P. 7(f). Despite the government's detailed indictment and the fact that the government's entire case is built on the business records created and maintained by the defendants — all of which were in their control before the March 2005 arrests, and which have been freely available for review since their arrests

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[4] Hosseini's assertion that charged enterprise was "non-existent" is spurious. To begin with, in addition to their connection to SHO Auto and to all three dealerships, as the complaint makes abundantly clear, these defendants: (1) moved several hundred thousand dollars back and forth between their business bank accounts; (2) as noted above, shared cash from illegal money laundering transactions; (3) owned commercial property together; (4) shared employees; (5) obtained cars together at the auto auction on an almost weekly basis; (5) discussed how to structure bank funds; and (6) shared customers. Moreover, as of December 1, 2004 (during the heart of the conspiracy and three months before the defendants' arrests) Hosseini listed Obaei as an employee of Amer Leasing Sales, Inc. and obtained a group health insurance plan for Obaei and his family. (Insurance invoice attached as Exhibit B). Thus, this Court should make short shrift of Hosseini's off-handed challenge to the existence of the racketeering enterprise.

[5] Hosseini filed a motion seeking specific information for specific Hosseini-related counts. Obaei filed a motion to adopt Hosseini's motion. The government will treat Obaei's request as if it sought information particular to him, as Hosseini did.

— defendants have asked the government to create work product to guide them through relatively straightforward allegations. But because there is no legal basis for ordering a bill of particulars where the indictment sufficiently informs defendants of the charges and the government has produced all the evidence supporting them, defendants' motion should be denied.

A. The Law Does Not Require the Relief Sought by Defendants.

A defendant is not entitled to a bill of particulars as a matter of right. *Wong Tai v. United States*, 273 U.S. 77, 82 (1927). Moreover, the law is well-established that a bill of particulars is not necessary when the indictment "sets forth the elements of the offense charged and sufficiently apprises the defendant of the charges to enable him to prepare for trial." *United States v. Kendall*, 665 F.2d 126, 134 (7th Cir. 1981). *See United States v. Canino*, 949 F.2d 928, 949 (7th Cir. 1991). *See also Hamling v. United States*, 418 U.S. 87, 117-19 (1974) (indictment that repeats wording of the statute is generally sufficient).

An indictment satisfies this standard if it sets forth the elements of each offense charged and cites the statutes that are violated, as well as the time and place of the defendant's conduct that allegedly violated the statute. *United States v. Roya*, 574 F.2d 386, 391 (7th Cir.1978); *United States v. Russo*, No. 97 CR 501, 1988 WL 58594, at *1 (N.D. Ill. June 1, 1988). This is true because a defendant has only a constitutional right to know the offenses with which he is charged, not "the details of how it will be proved." *United States v. Kendall*, 665 F.2d at 135; *United States v. Richardson*, 130 F.3d 765, 776 (7th Cir. 1997); *United States v. Balogun*, 971 F. Supp. 1215, 1227 (N.D. Ill. 1997). Thus, a bill of particulars may not be used to obtain evidentiary details about the government's case. *United States v. Russo*, *supra*. *See United States v. Edwards*, 105 F.3d 1179, 1181 (7th Cir.1997) (indictment for conspiracy to distribute drugs need not identify the controlled

substances or the quantities involved). *See also United States v. Glecier*, 923 F.2d 496, 501 (7th Cir.1991)

In accordance with the general proscription against compelled pretrial disclosure of the details of the government's evidence, courts have held that a motion for a bill of particulars should be denied when the indictment, combined with the discovery provided by the government, adequately informs the defendant of the charges. *United States v. Society of Independent Gasoline Marketers*, 624 F.2d 461 (4th Cir. 1979); *United States v. Giese*, 597 F.2d 1170, 1180 (9th Cir.1979); *United States v. Roya*, 574 F.2d at 391; *United States v. Guerrerio*, 670 F. Supp. 1215, 1224-25 (S.D. N.Y. 1987)*; United States v. Swiatek*, 632 F. Supp. 985, 988 (N.D. Ill. 1986). The Seventh Circuit has deemed a bill of particulars inappropriate when, as in this case, the government supplements an indictment with extensive discovery and engages in an "open file" policy of discovery with defendant. *See United States v. Canino*, 949 F.2d 928, 949 (7th Cir. 1992) ("a bill of particulars is not required when information necessary for a defendant's defense can be obtained through 'some other satisfactory form[,]'" and labeling an "open file" discovery policy one such form).

In this case, defendants are charged in a descriptive indictment that supplies innumerable details about the nature of the charges and what constitutes the offending conduct. Further, the government has already tendered all material necessary to prove its charges and has agreed to supply a *Santiago* proffer well before the trial. Thus, the defendants have received or will receive sufficiently extensive pretrial disclosures from the government regarding the evidence in this case to enable them effectively to prepare for trial — well in advance of when the rules of procedure or statutes require such disclosure. In short, the defendants and the government now have the same

access to the same people and the same documents. "[A] bill of particulars is not required when information necessary for a defendant's defense can be obtained through 'some other satisfactory form.'" *United States v. Canino*, 949 F.2d, 928, 949 (7th Cir. 1991). The extensive pretrial disclosures undertaken by the government in this case have provided the defendants with clear and sufficient information to adequately prepare their defense. Any additional disclosures would be summary charts, and would be prepared from the exact same set of evidence available to the defense.

B. The Indictment Is Sufficiently Specific.

The 100-count indictment is not the complicated horror defendants describe in their motion. Count One describes the day-to-day business activities of three auto dealerships controlled tightly by defendants. It explains that customers (whose statements have been turned over), many of whom were drug dealers and gang members, went to the Standard Auto dealerships to purchase cars, because they knew they could do so in cash and receive documents under-reporting their down payments, to help them hide their cash transactions from the government. The indictment alleges that these customers also put their cars in the names of other people, like girlfriends and mothers, to avoid detection. These customers' statements are corroborated by employees of both defendants, and statements made by these employees (and identifying particular drug dealers and gang members) have also been turned over to defendants. At trial, the government will call these witnesses to describe the racketeering scheme generally. It will also introduce the business records maintained by defendants, which on their face prove the defendants' conduct.

Counts Ninety-Seven through One Hundred charge another simple, straightforward scheme whereby defendants failed to pay sales tax. This count will again be proven through the documents (deal jackets and boxes of un-sent tax forms) already made available to the defendants, and which

show that defendants did not submit the ST-556 forms required by state law. The scheme described in the indictment does not require elaboration: the defendants failed to pay sales taxes on a significant amount of cars. The government arrived at the number of cars contained in the indictment by reviewing the deal jackets it seized from the defendants. The defendants have the same access to the documents, and the additional knowledge of their fraudulent activity from a first-hand source — the defendants themselves.

The remaining counts of the indictment are even more straightforward and discreet. Count Two charges Obaei with aiding and abetting a simple drug charge. Counts Three through Eleven charge specific money laundering transactions by one of the other of the defendants. Count Twelve charges Hosseini with a single, specific, illegal international money transmission. The remaining counts allege specific structured cash deposits, identified by bank, time, date and amount. As with the racketeering scheme and the mail fraud scheme, the government's proof of these counts will be made by introducing the bank records, which prove structured deposits on their face.

Setting aside the hyperbole about the complexity of this case, the defendants' primary purpose for requesting a bill of particulars is that they do not want to spend the time reviewing their own business records that prove the government's allegations. Instead, their motion asks the government to do that for them, by seeking documents they already have, or summaries of information contained in the files. For example, the information they seek in request nos. 1, 2, 3, 4, 6, 7, 9, 11, 12, 14, 18, 19 and 22 are available in the deal jackets for the cars sold by the dealerships at issue. Witnesses (largely straw purchasers whose identity is in the dealership records, drug dealers whose testimony has been disclosed, and the defendants' employees) will testify to the information sought in request no. 5. The forfeiture actions relevant to the charges (and sought in

no. 8) have been disclosed. The "specified unlawful activity" sought in no. 17 is detailed elsewhere in the indictment, mostly in Count One. he requests relating to the enterprise are also addressed in the indictment and in the financial documents and witness statements that set forth the relationship between the defendants and the dealerships that constitute the Standard Auto Enterprise.[6] These deal jackets constitute most of the documents seized from the defendants and which form the backbone of the indictment. In particular, one can tell, just from a cursory review of a particular sales transaction, whether an ST-556 form was submitted for sales tax payments, whether the dealership prepared fraudulent documents, whether the Forms 8300 are accurate or whether the dealership made or "lost" money on the sale. As the indictment alleges, every one of these false sales is a part of the schemes or enterprise activities.

C. The Government Has Provided Comprehensive and Detailed Discovery.

Even more specific than the charges are the defendants' own documents. A patient review of these records proves each of the government's charges, even without the testimony of the enterprise's employees who carried out the illegal activity at the defendants' direction and which corroborates the documents. While the government is not required to explain how it will prove the racketeering allegations (Count One) or the mail fraud scheme (Counts Ninety-Seven through One Hundred), it will direct the defendants to review the documents. If they (or this court or the jury) review 5 deal jackets, they will likely see: 5 drivers' licenses from 5 straw purchasers, which do not

[6] Defendants complain here and in other motions that the Enterprise is not a "real" entity. There is no requirement that a racketeering enterprise register with the Secretary of State, only that it be an association on fact that sets out to accomplish a criminal purpose. In any event, the government has described in detail in the indictment the relationship between the defendants and among their dealerships. It has also disclosed the documents and witness statements supporting those allegations. *See also* Exhibit B attached hereto.

correspond to the source, address or other identifying information of the persons who made the down payments; no sales tax forms; Forms 8300 for high-end luxury vehicles but in amounts under $10,000; documents reflecting that the Standard Auto Enterprise dealership purchased the car from an auction at a price higher that the supposed actual sales price (meaning the defendants always lost money on a car sale, which is unlikely, given their lifestyle, cash flow and structuring activity); an undervalued "trade-in" vehicle; and, a lien for an amount that does not match the defendant's cash deposit from the down payment. If defendants spend some additional time reviewing the detailed grand jury testimony and witness statements, the defendants' attorneys will see that the obvious and reasonable inferences to be drawn from these car sales is supported by the testimony of customers, straw purchasers and employees.

The government is not required to do defendants' work for them, but an example of the materials from one deal jacket is illustrative. Attached hereto as Exhibit C are documents from a deal jacket seized from a box of documents at Hosseini's personal desk at Amer Leasing. The documents correspond to the sale of a 2002 Cadillac Escalade bearing VIN 3GYEK63N82G226161. The first sales contract in the file, dated January 26, 2002, lists the purchaser as Lonnie Brown, and the trade-in vehicle as a 2001 GMC Denalli, VIN 1GKEK63U91J173520. The second contract, dated a week later on February 2, 2002, and for the same Cadillac Escalade, lists the purchaser as Tiffany Craig, who allegedly traded in the same GMC Denalli. The sales contracts both list the sales price as $52,000, and the cash on delivery for the trade-in as $27,000, resulting in an alleged unpaid balance of $25,000. As with all cars sold by Hosseini or Obaei to straw purchasers, both contracts reflect no charges for delivery and handling, sales tax, plate or transfers or an extended service contract. The deal jacket also contains a sales receipt showing that Hosseini bought the car from

Foley Cadillac for $48,000. There is an ST-556 Form in the file, though it is still in triplicate, meaning no part of the form was ever sent in to the State of Illinois. If Amer Leasing had paid an 8% sales tax on this car, the dealership would have paid Foley Cadillac more for the car than it received from either of the two supposed buyers, resulting in an even greater loss to the dealership. Other documents in the file show the vehicle was seized by the DEA as a forfeitable asset.

Because he sold the car, Hosseini is in a better position than the government to know why this car was supposedly sold twice and whether Amer Leasing Sales really lost money on the deal. Indeed, Hosseini and Obaei are in the best position to know the circumstances of every car they sold, since the documents are false. (Disclosed testimony from sales managers, salespeople and office employees corroborate this allegation. In addition, most sales show a loss if defendants' own records are to be believed.)

The government has made every single document available for the defendants' review. (*See* Gov. Resp. to Discovery Motions, discussing open file discovery in this case.) These documents include: (1) individual file folders that agents created for each day of structured deposits; (2) every document supporting the government's charges that Hosseini and Obaei failed to pay sales tax on certain cars; (3) every deal jacket for every car sold by the racketeering entities; and (4) every witness statement pertaining to these transactions, including grand jury testimony. For categories (1) and (2), the government has provided 100% of the documents to support its allegations. For category (3), the government has done the same thing, with the added fact that the documents are maintained in exactly the same filing system the defendants themselves kept. This organized, thorough production omits <u>only</u> the work product by government agents in calculating the cars for

which defendants failed to pay sales tax, and which the government has absolutely no obligation to turn over because of its privileged nature, as discussed below.

D. The Government Should Not Be Ordered To Disclose Its Work Product.

Hosseini argues that he should have access to the government's "database" of the cars on which Hosseini did not pay sales tax (and "all similar lists"). Mot. at 6-8. The motion should be specifically denied as to this point.

The government reviewed all deal jackets seized from defendants and produced in discovery, and made a list of the cars where there was no corresponding ST556 (sales tax) form. This list was created as a result of the agents' diligent review of the discovery. It was created in the course of this investigation and litigation, and it is privileged work product. The government then asked the Illinois Department of Revenue for documents showing whether the defendants paid sales taxes on those vehicles. The unpaid taxes are reflected in the charges at Counts Ninety-Seven through One Hundred. All documents — the deal jackets and the Department of Revenue documents — have been available for defendants' review. However, each time Special Agents have suggested to counsel that they review them, counsel has refused, presumably because they would rather have the government do their work for them. It would be inappropriate, especially in a case with retained counsel, to order the government to do defendants' work for them.

Because the indictment is sufficiently detailed and defendants have access to the same underlying documents the government used to create its work product, with the added benefit of having their clients to explain the records, this court should deny defendants' request for a bill or particulars.

III. DISCOVERY MOTIONS

Defendant Hosseini filed the following discovery-related pretrial motions:

- Motion in Limine Regarding the Admissibility of Co-Conspirator Declarations;
- Motion for Disclosure of Brady and Impeachment Information;
- Motion to Require the Government to Give Notice of Intention to Use Evidence of Other Crimes, Acts, Wrongs or Specific Conduct Per. Fed. R. Evid. 404(b) and/or 608(b); and,
- Motion for Preservation of Rough Notes and Other Materials with Legal Authorities in Support Thereof.

Defendant Obaei filed the following discovery-related pretrial motions:

- Corrected Motion for Production of Codefendants' Statements;
- Motion for Discovery and Inspection;
- Motion for List of Government Witnesses;
- Motion for Disclosure of Favorable Evidence; and,
- Motion for an Order Requiring the Government to Give Notice of its Intention to Use Evidence of Other Crimes, Wrongs, or Acts.

Each motion should be denied, or granted in part, as discussed herein.

On March 22, 2005, the government arrested defendants and seized documents and other materials located at locations enumerated in several search warrants approved by Magistrate Judge Keys and Chief Judge Kocoras. The majority of documents seized were business records maintained at defendants' offices at Amer Leasing and Sales, American Car Exchange and SHO Auto Credit. These documents — with which the defendants were already intimately familiar — were made available for inspection and copying after the arrests. In accordance with this court's order, on September 8, 2005, the government complied with its obligations under Fed. R. Crim. P. 16, and then some. On that date, the government disclosed all documents and items not previously disclosed to defendants, including documents and items the government has no obligation to disclose at this early date. (A copy of the government's Rule 16 disclosure letter is attached hereto as Ex. D.) The United States has adopted this "open file" discovery to streamline trial preparation, and because it

has nothing to hide. It will continue to produce documents and statements as they become available.

The defendants and their attorneys are well aware of the government's generous discovery position. Indeed, whenever the defendants have asked to review the documents, the government has made them available for inspection and copying. With two exceptions where the defendants' requests have been particularly voluminous, the government has, at its own expense, copied documents sought by defendants, even though it has no obligation to do so. Accordingly, the short response to every discovery motion is that the government has provided all it has, and whenever it has received additional documents or items, it has immediately disclosed them to defendants. It will continue to do so.

In the Rule 16 letter, the government offered to discuss with the defendants a timetable for disclosure of some documents it is required to produce at a later date, including 404(b) evidence, a Santiago proffer and § 3500 materials. Defendants have never responded to the government's offer, and instead filed discovery motions. To the extent it may not have already done so through the "open file" discovery in this case, and although it is not required to produce these materials so early, the United States hereby offers to disclose 404(b) evidence, a Santiago proffer and § 3500 materials one month before trial, or on December 22, 2006.

The government additionally responds to the particular defense discovery motions as follows.

A. Defendant Obaei's Motions for Production of Exculpatory and Favorable Evidence and Rule 16 Materials; Defendant Hosseini's Motion for Brady Material

Defendants seek disclosure of several categories of exculpatory and favorable evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), and *United States v. Bagley*, 473 U.S. 667 (1985), including but not limited to: (a) witness statements favorable to defendants; (b) specific evidence that detracts from the credibility of government evidence; (c) exculpatory evidence related to defendants; and (d) information that can be used to impeach government witnesses. Hosseini has additionally asked that such material be produced 30 days before trial.[7]

The government understands its *Brady* obligation to produce exculpatory evidence to the defense. As discussed above, the government has already produced everything it is aware of, and if any additional evidence comes to the government's attention, it will be turned over.

The government is also aware of, and will comply with, its *Giglio* obligations to turn over information that impeaches its witnesses. Specifically, with respect to the persons the government intends to call in its case-in-chief, the information the government will turn over will include, and has already included: prior inconsistent statements of the particular witness, evidence concerning a witness's addiction to alcohol or drugs, promises of reward to a witness, statements of advice concerning future prosecutions, including proffer letters and non-subject letters, promises of

[7] Obaei has not asked for a particular date by which it seeks the information it has requested. As set forth above, the government agrees to provide such evidence to defendants four weeks prior to trial (except as to any witness who could be endangered by such pretrial disclosure), provided that defense counsel agrees to make the same disclosures regarding defendant's witnesses at the same time. Given that this offer to provide impeachment, *Giglio*, and Jencks material four weeks prior to trial is not required by any law, rule or case, it is more than sufficient.

leniency or favorable treatment, grants of immunity, criminal records, things of value provided to witnesses (other than statutory witness fees, costs of transporting witnesses, and the like), prior acts of misconduct which the witness has acknowledged or which have been established to the satisfaction of the government, plea agreements, results of polygraph examinations, and placement in a witness relocation or protection program. *Cf. United States v. Heidecke*, 683 F. Supp. 1211, 1215 n. 5 (N.D. Ill. 1988).

However, Obaei and Hosseini also seek some discovery that the government has no obligation to turn over, and absent any legal authority supporting its disclosure, will not turn over. These categories of documents include work product such as drafts of plea agreements and internal memoranda regarding the government's arrangements with witnesses. The government is not required to turn over drafts or internal memoranda reflecting privileged communications or attorney work product. Defendants' unsupported requests also include irrelevant documents not maintained in the possession, custody or control of the prosecutors, such as: (1) documents regarding unrelated federal, state, or administrative investigations into any government witnesses by any government entity; (2) all polygraph examinations of any witness by any government employee; (3) tax returns of witnesses; (4) witness personnel files; (5) medical insurance documents for Alfonso Lopez (who may not even be a government witness at trial); (6) handwriting identification by prosecutors, but not experts; (7) police reports irrelevant to the government's charges; (8) medical and psychiatric reports not obtained by the government and not produced pursuant to any valid subpoena. Counsel have obtained this court's permission for early return of trial subpoenas, and can use that authority to conduct their own, additional, investigation into potential government witnesses. In the

meantime, the government has turned over the information it has that could potentially lead to cross examination material, and it will continue to do so.

B. Defendants' Motion to Require Notice of Intention to Use Other Crimes, Wrongs or Acts Evidence

1. Rule 404(b) Evidence

Defendants have moved for disclosure of "other acts" evidence offered pursuant to Federal Rule of Evidence 404(b). This Rule requires the government to provide "reasonable notice in advance of trial ... of the general nature of any such evidence it intends to introduce at trial." The government agrees to make every effort to provide such notice four weeks prior to trial (as requested by Hosseini), in the form of all written reports in its possession concerning these events. The government also agrees that four weeks prior to trial, it will turn over to defendant all *Giglio* and *Jencks* materials in its possession relating to any 404(b) evidence it intends at that time to use at trial. Of course, the government has already turned over ample evidence against the defendants that is arguably admissible under Rule 404(b), and it will continue to do so, should such information become available.

2. Rule 608(b) Evidence

Defendants also request that the government turn over all "other act" impeachment evidence for any witness, including the defendants and defense witnesses. This is a request for advance disclosure of material that might be used to impeach a defense witness under Federal Rule of Evidence 608(b). This request should be denied on the ground that Rule 608(b) material is not part of the government's case in chief, but merely potential impeachment evidence to be used in the event defendants, or another defense witness, testify at trial. The Seventh Circuit has held that "there is no general requirement that each side give notice of impeachment evidence." *U.S. v.*

Braxton, 877 F.2d 556, 560 (7th Cir.1989); *accord United States v. Messino*, 855 F. Supp. 955, 965 (N.D. Ill. 1994) (denying motion for disclosure of Rule 608(b) evidence); *United States v. Sims*, 808 F. Supp. 607, 611 (N.D. Ill. 1992) (Rule 608(b) material not discoverable because not part of government's case in chief); *United States v. Randy*, No. 92 CR 1029, 1993 WL 322799, at *1 (N.D. Ill. Aug. 20, 1993) ("The rule, firmly entrenched in this circuit, is that a defendant is not entitled to pre-trial disclosure of Rule 608(b) evidence.").

In addition, specific instances of conduct under Rule 608(b) may *only* be used on cross-examination. Since specific instances of conduct cannot be used in the government's case-in-chief, defendants are not entitled to discovery of evidence admissible solely under Rule 608(b). *See Messino*, 855 F. Supp. at 965; *Sims*, 808 F. Supp. at 611. Therefore, defendants' motions in this regard should be denied.

Lastly, in his motion, Obaei "reserves the right to file a severance motion at a later date," based on the possible disclosure of 404(b) evidence against his co-defendant. Obaei 404(b) Mot. at 2-3. However, the court has already set a date specifically for filing severance motions, and that date has passed. Moreover, none of the cases cited by Obaei support his argument that 404(b) evidence introduced against a co-defendant, without more, is reasonable grounds for a severance of counts or defendants. Indeed, Obaei's request to possibly file a severance motion at a later date would be based on information already disclosed to him in reports of witness interviews, *i.e.*, that they believe Hosseini is a drug dealer, like Obaei. There is no reason why Obaei could not have filed his motion already. Moreover, the government cannot see what the basis of such motion would be, since Obaei is already facing drug charges of his own. Thus, his request for a possible, last minute severance should be denied.

C. Defendant Hosseini's Motion to Preserve Government Agents' Rough Notes

Defendant Hosseini moves for an order requiring the government to preserve all handwritten notes of government agents. The government agrees that all agents involved in this case are to preserve their notes, provided that "notes" is construed as limited to drafts of agent interviews or investigative reports. The government therefore has instructed agents to preserve, to the extent that they still exist, all handwritten notes made by agents during interviews of defendants and prospective witnesses.

The government's agreement to direct the preservation of these notes, however, should not be misconstrued as an agreement to disclose or turn over these notes without a further showing by any defendant. Such disclosure is not required under the law. *See*, *e.g.*, *United States v. Muhammad*, 120 F.3d 688, 699 (7th Cir. 1997) ("defendant is not entitled to an agent's notes if the agent's report contains all that was in the original notes"); *United States v. Starnes*, 644 F.2d 673, 681 (7th Cir. 1981) (agent notes not discoverable unless "a substantially verbatim transcript of [defendant's] remarks, or ... his own written statements adopted or approved by him,"citing 18 U.S.C. § 3500(e)).

D. Defendant Hosseini's Motion Regarding a *Santiago* Proffer

Defendant Hosseini has moved that the government provide a *Santiago* proffer and for the court to hold a pretrial hearing on the matter. If the government intends to offer co-conspirators' statements into evidence at trial under Federal Rule of Evidence 801(d)(2)(E), the government agrees to file its *Santiago* proffer two weeks prior to trial. Defendants already have been given extensive discovery regarding co-conspirator statements, including the complaint in this case, which sets forth much of the government's evidence concerning the conspiracy, grand jury statements and

reports of statements by coconspirators and § 3500 materials. Given this information, a *Santiago* proffer filed two weeks prior to the start of the trial is more than ample for defendants to prepare for trial. In the unlikely event the court cannot rule as to the admissibility of the coconspirators' testimony based on the filing alone, it can schedule a hearing.

E. Defendant Obaei's Motion for Production of Co-defendants' Statements

To the extent grand jury testimony or reports of such statements exist, the government has produced them, and it will continue to do so.

F. Defendant Obaei's Motion for Witness List

This motion is premature. Trial is ten months away, and the government is still determining who it might call to testify at trial. The government will, of course, disclose a witness list before trial, in accordance with its legal obligations and any dates set by the court.

G. Government's Motion for Reciprocal Discovery

The government, pursuant to Rule 16(b) of the Federal Rules of Criminal Procedure, moves this Court to enter an order requiring defendants to make available immediately for inspection by the government:

1. All photographs, books, papers, documents, and tangible objects, including tape recordings which they intend to introduce at trial (Rule 16(b)(1)(A));
2. Any result or report of any physical or mental examination and scientific tests or experiments made in connection with this case, which defendants may raise at trial (Rule 16(b)(1)(B));
3. Any and all documents and tangible objects which defendants intend to mark as exhibits at trial (Rule 16(b)(1)(A));

4. Statements of defense witnesses (Rule 26.2);

5. Notice of any alibi or similar defense the defendants intend to raise, including any defense of necessity or coercion and any defense asserting the defendants' unavailability on or near the dates named in the indictment (Rule 12.1); and,

6. Notice of any defense to be raised of a mental defect inconsistent with the state of mind required for the offense charged (Rule 12.2).

The disclosures requested are specifically covered by the Federal Rules of Criminal Procedure, and were requested by the government in its initial Rule 16 letter. Moreover, defendants have been given discovery by the government; therefore, it is appropriate that defendants now make the reciprocal disclosures that the rules of criminal procedure require, since, "[d]iscovery must be a two-way street." *Wardius v. Oregon*, 412 U.S. 470, 475 (1973).

IV. MOTION TO STRIKE SURPLUSAGE FROM THE INDICTMENT

Defendants have asked this court to strike from the indictment language describing their mail fraud scheme and referring to the Standard Auto Enterprise that committed that scheme.[8] However, none of this language is "surplusage," but rather a description of the scheme and the entities and victims involved in the scheme. Accordingly, the motion should be denied.[9]

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[8] Hosseini filed the motion, but Obaei has joined in all motions. In any event, evidence of one participant's actions in furtherance of a mail fraud scheme is admissible against other participants in that scheme. *United States v. Adeniji*, 221 F.3d 1020, 1027 (7th Cir. 2000).

[9] It is somewhat ironic that defendants claim on the one hand that the indictment is so lacking in detail that defendants' need a bill of particulars, and, on the other hand, claim that the indictment is too detailed in other respects and that allegations must be struck as surplusage. However, the defendants' contrary positions shed light on their true intentions – they would like to have access to the government's work product while, at the same time, rewriting the indictment to their benefit. This Court should indulge neither request.

A. Relevant Law

Courts in this District have held that "[m]otions to strike portions of the indictment should be granted 'only if the targeted allegations are clearly not relevant to the charge and are inflammatory and prejudicial.'" *United States v. Stoecker*, 920 F. Supp 867, 887 (N.D. Ill. 1996), *quoting United States v. Andrews*, 749 F. Supp. 1517, 1518-19 (N.D. Ill. 1990) (emphasis added). *Accord, United States v. Bucky*, 691 F. Supp. 1077, 1081 (N.D. Ill. 1988). However, "language in the indictment which covers information which the government, in good faith, intends to prove at trial cannot be stricken as surplusage, no matter how prejudicial it may be." *United States v. Lavin*, 504 F. Supp. 1356, 1362 (N.D. Ill. 1981), *citing United States v. Climatemp, Inc.*, 482 F. Supp. 376, 391 (N.D. Ill. 1979). "Simply put, legally relevant information is not surplusage," and, "due to the exacting standard, motions to strike information as surplusage are rarely granted." *Bucky*, 691 F. Supp. at 1081 (citing cases). Measured against these established legal standards, the surplusage claims of defendants must be denied.

B. An Explanation of the State of Illinois Sales Tax Procedures Should Not Be Stricken.

Defendants ask this court to strike the indictment's explanation of how and why the Illinois Secretary of State's Office, a victim of the fraud scheme, reviews ST556 forms and payments. Mot. at 2-4. They have also asked the court to strike the one-paragraph description of how the Secretary of State's Office missed the fact that defendants had not paid taxes for years during the scheme. This evidence is intimately related to the mail fraud scheme, defendants' intent and the state's late discovery of the scheme.

References to laws, duties, policies and procedures that governed the activities of the victim the defendants defrauded, such as procedures addressing review of tax filings, are relevant to the

issue of intent and help define the process the defendants took advantage of. As defendants know from the government's case against former Secretary of State employee Brenda Strong (05 CR 279)[10], defendants knew they could avoid paying sales tax by paying Ms. Strong and others to collect partial tax payments, because Ms. Strong would not send the documents and money through the State's audit procedures. By bribing Ms. Strong, defendants were able to circumvent the State's tax collection. Evidence that the government will present at trial concerning the Secretary of State's policies and procedures will explain to the jury how defendants were able to get away with the scheme and avoid paying taxes on most vehicles. *See United States v. Marker*, No. 94-40002-01-SAC, 1994 WL 114741 (D. Kan. July 17, 1994) (where defendants were charged with mail fraud, bank fraud, embezzlement and money laundering, references to violations of federal regulations and internal policies and procedures were relevant to defendants' intent and motive in structuring transactions, and motion to strike such references was denied). Accordingly, paragraph 10 of Counts Ninety-Seven through One Hundred should remain in the indictment.

C. A Description of the Entire Fraud Scheme Should Not Be Stricken.

Ignoring all rules regarding how a scheme to defraud is to be charged, defendants ask that the mail fraud scheme alleged in Counts Ninety-Seven through One Hundred be gutted. However, as defendants well know, a scheme to defraud describes an overarching scheme, and includes

[10] Defendant Strong pled guilty before Judge Guzman to accepting bribes from Hossein Obaei and others to influence or reward her in connection with the auditing of vehicle paperwork, in a series of transactions having a value of $5,000 or more, in violation of Title 18, United States Code, Section 666(a)(1)(B). Strong pled guilty pursuant to a cooperation agreement and has agreed to testify against Hosseini and Obaei in this matter. Her plea agreement is attached hereto as Ex. E.

specific executions of the scheme, rather than an explanation of each and every instance where a defendant mailed or wired something to accomplish the purpose of the overall scheme.

In *United States v. Lanas*, 324 F.3d 894 (7th Cir. 2003), the Seventh Circuit rejected a similar argument. In *Lanas*, defendant Hendershot worked as a claims adjuster for Alexsis Risk Management and often hired outside vendors to conduct surveillance on claimants. He was charged with engaging in a mail fraud scheme by sending surveillance work to six vendors who, in exchange, paid him cash kickbacks for each job. The three-count indictment, which named as defendants Hendershot, his bagman, and one vendor, defendant Lanas, charged only three mailings, but described a broader scheme to defraud the victim. On appeal, defendants argued that the proof at trial showed multiple schemes, in variance with the specific executions charged in the indictment. The Seventh Circuit rejected this claim, finding that the evidence proved exactly what the indictment alleged – a single scheme to defraud Alexsis through the solicitation and receipt of kickbacks from vendors. The defendants also argued the evidence relating to other vendors who paid kickbacks that did not involve the charged mailings was, "uncharged, other acts evidence," but the court also rejected that argument, stating, "The defendants' arguments appears to be based on their belief that the scope of a mail fraud scheme is limited by the mailings that are specifically charged in the indictment." *Id.* at 901. Declaring this view to be wrong, the court held that the indictment set forth one overarching scheme to defraud, and the evidence relating to the vendors who paid kickbacks that were not charged as specific mailings "was not Rule 404(b) evidence at all but was properly admitted as proof of that overall scheme." *Id.*

Here, too, the government has alleged a failure to pay taxes on 1200 cars, but has identified only 4 specific mailings as the execution of the broader scheme. At trial, through witnesses and

documents previously disclosed to defendants, and possibly through summary charts based on the underlying documents produced in discovery, the government will prove that each of the other 1196 cars was part of the same mail fraud scheme, and that the defendants committed mail fraud in the same manner for each of those vehicles.

D. The Description of the Standard Auto Enterprise Should Not Be Stricken From the Mail Fraud Scheme.

Defendants have asked this court to strike any reference to the defendants scheming together to commit the mail fraud alleged in Counts Ninety-Seven through One Hundred. But as the defendants well know, both of them bribed Secretary of State employees to circumvent the tax auditing system and assist their failure to pay taxes on at least the 1200 cars alleged in the indictment. Moreover, the tax avoidance scheme was conducted in the same manner by each of the three dealerships in the enterprise, *i.e.*, customers were not charged sales tax, and defendants did not pay it. ST556 forms were kept in a separate box or file in each defendant's office, and neither defendant paid the taxes on a car-by-car basis. Instead, they bribed Secretary of State office employees to come to their dealerships and collect a lump sum payment, which they represented was for several cars. The SOS employee then processed the paperwork without following the proper audit procedures, so no one could check to make sure the documents matched the contracts and the amounts paid.[11] As with other aspects of their racketeering activity, defendants acted together and in the same manner, because they were part of an enterprise.

[11] For a more detailed description fo the scheme, *see* Brenda Strong Plea Agreement, attached hereto as Ex. E.

Alternatively, if the court believes, at the close of the evidence, that the government has not sufficiently proven that defendants were an enterprise, the Court can then strike any references to the entity in Counts Ninety-Seven through One Hundred, before it goes to the jury for review.

V. DEFENDANTS' MOTION TO STRIKE THE RICO PREDICATE INVOLVING MAIL FRAUD

Defendants also move to dismiss paragraphs 10(d) through (k) of Count One (the racketeering conspiracy) which allege that defendants carried out a scheme to defraud the United States and the City of Chicago of money and property, namely automobiles seized by the government, by means of false representations. Defendants argue that the Indictment does not allege a property right, but merely asserts a "potential right" that is not recognized by the federal mail fraud statute, 18 U.S.C. § 1341. As detailed below, the defendants' argument is misplaced because the property at issue was indeed a tangible one – the very cars seized by the government – and not some "ethereal" right as they assert.

A. Defendants' Motion Misconstrues the Allegations in the Indictment.

The portions of the indictment relevant to this motion charge the defendants with engaging in a lien fraud scheme wherein they would maintain liens on cars sold to drug dealers in money laundering transactions to assist those drug dealers in retrieving their vehicles when they were seized by law enforcement. Specifically, the indictment alleges that drug dealers (often referred by other drug dealers) went into one of the affiliated dealerships comprising the Standard Auto Enterprise and purchase a car by paying for the vehicle in full with cash. The defendants, in turn, maintained a false lien on the car to retrieve the car back for their drug dealer clients in the event that it was seized by law enforcement. The defendants then falsely claimed to the local or federal government agency involved that they held a legitimate ownership interest in the vehicle seized and seek its

return, thereby defeating the government's property right in the seized vehicle. At the moment the defendants laundered the drug dealer and gang members' money by selling them cars with false liens, the defendants committed a federal offense and the right, title, and interest in the property vested in the United States. 21 U.S.C. 853(c) ("[a]ll right, title, and interest in property . . . vests in the United States *upon commission of the act giving rise to forfeiture under this section*") (emphasis added).

In their motion, defendants have attempted to convert what has been charged as a scheme to "obtain *money and property* from the United States and the City of Chicago" (Indictment, ¶ 10(d)), into an intangible rights scheme. However, defendants' gloss on what is really meant by the charges does not change the fundamental charging language.

To begin with, both the Seventh Circuit and the Supreme Court have recognized that "'property' may compromise both tangible and intangible property rights." *United States v. Bucey*, 876 F.2d 1297, 1309 (7th Cir. 1989); *see also Carpenter v. United States* 484 U.S. 19, 27 (1987) (confidential business information constitutes "property" protected by the mail and wire fraud statutes). However, the indictment in this case is more specific, in that it charges that the defendants schemed to defraud the United States and the City of Chicago of concrete pieces of property, namely automobiles in which the federal government already had a vested property interest. At trial, the government will put on evidence of cars that were purchased by drug dealers and paid for in full with cash, and on which the defendants maintained liens so they could retrieve them from government authorities, which they did in numerous instances. Thus, the property in question was tangible, in that vehicles were actually seized and then fraudulently returned to defendants. The fact that the defendants' scheme was well conceived and involved a number of

intermediate steps simply demonstrates the deviousness of the scheme, it does not negate the property interest at issue.

The Supreme Court recently again described the elements of the federal fraud statutes (mail and wire). *Pasquantino v. United States*, 125 S.Ct. 1766 (2005). In *Pasquantino*, the Supreme Court noted that elements of the crime (apart from the wiring or mailing) are "that the defendant engage[d] in a 'scheme or artifice to defraud,' and that the 'object of the fraud be money or property in the victim's hands." *Id.* at 1771. In that case, the defendants were charged with a wire fraud scheme where they purchased alcohol in the United States and smuggled the alcohol into Canada to avoid paying taxes in Canada, which would approximately double the liquor's purchase price. *Id* at 1770-71. The defendants challenged their convictions and alleged that "Canada's right to collect taxes from them was not 'money or property' within the meaning of the wire fraud statute." *Id.* at 1771. The Supreme Court, citing its prior decision in *McNally v. United States*, 483, U.S. 350, 358 (1987), rejected this argument and held that:

> "Canada's right to uncollected excise taxes on the liquor petitioners imported into Canada is 'property' in its hands. This right is an entitlement to collect money from petitioners, the possession of which 'is something of value' to the Government of Canada. Valuable entitlements like these are 'property' as that term ordinarily is employed."

Id. at 1771-72 (internal citations omitted). *Pasquantino* is analogous to the case at bar. Here, as in *Pasquantino*, the defendants assert that the government's right to forfeit vehicles was not a property right within the meaning of the mail fraud statute. But, just as uncollected excise tax was valuable to the government of Canada, so too is the United States and the City of Chicago's unexercised right to forfeit vehicles "property" within the meaning of the mail fraud statute. *See Bucey*, 876 F.2d at 1297 ("[T]he fact that the government's interest in unpaid taxes is intangible is no definitive obstacle

to a mail or wire fraud conviction. The determinative inquiry is whether Bucey's money laundering scheme defrauded the federal government of a property right, thereby injuring the government in its role as a 'property-holder.'"). Thus, even taking defendants' intangibility argument at face value, the argument fails as both the Supreme Court and the Seventh Circuit have recognized intangible property rights such as the right at issue here in analogous circumstances.

The case defendants principally rely on in their motion, *United States v. Bruchhausen*, 977 F.2d 464, 467 (9th Cir. 1992), is irrelevant to this court's analysis, because the charging document did not allege deprivation of a money or property right, as the government alleged in this case. In *Bruchhausen*, the government alleged the defendant's scheme was, "[to] defraud the United States and its executive agencies, namely the Department of Commerce, the Department of State and the Customs Service of their right to conduct their affairs free from stealth, chicanery, fraud, false statements and deceit." *Id.* This so-called right to be free from fraud was found to be circular because the statutes could not be the property right, but only confer it. By contrast, in this case, the government has alleged a tangible right, namely the seized cars as well as the entitlement to seize cars that was conferred on the government when defendants laundered their clients' money. *Pasquantino*, 125 S.Ct. at 1771-72; 21 U.S.C. § 853(c).

Defendants also cited *United States v. Vollner*, 1 F.3d 1511, 1520-21 (7th Cir. 1993) and *United States v. Duff*, 336 F.Supp.2d 852, 856 (N.D. Ill. 2004) to support their claim that *Bruchhausen* has "force and vitality" in this Circuit. Mot. at 4. However, like *Bruchhausen*, the right allegedly deprived from victims was purely hypothetical and not concrete, *i.e.*, a legislative grant of authority that conveyed no property interest. *Vollner*, 1 F.3d at 1520-21. In *Duff*, the district court found the government had a tangible property interest in the contractual relationship

it had with minority businesses, which is more ethereal than a right in actual money or property, as alleged here. *Duff*, 336 F.Supp.2d at 856. Further, it is unclear why defendants believe *Duff* supports *Bruchhausen* at all, since the *Duff* court called defendants' reliance on it (and on *Vollner*) in that case "unpersuasive." *Duff*, 336 F.Supp.2d at 856 n.1.

Because the government has alleged that defendants schemed to defraud it of money and property, they have sufficiently alleged a RICO predicate mail fraud scheme, and defendants' motion to strike that portion of the indictment should be denied.

Dated: April 21, 2006

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

By: /s/ Lisa M. Noller
DANIEL RUBINSTEIN
LISA M. NOLLER
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-5314

Certificate of Service

The undersigned Assistant United States Attorney hereby certifies that in accordance with Fed. R. Crim. P. 49, Fed. R. Civ. P. 5, LR 5.5 and the General Order on Electric Case Filing (ECF), that the Government's Consolidated Response to Defendants' Pretrial Motions was served on Staes & Scallan and Arnstein & Lehr, pursuant to the district court's ECF system, on April 21, 2006.

By: s/Lisa M. Noller
LISA M. NOLLER
Assistant United States Attorney
219 S. Dearborn Street
5th Floor
Chicago, Illinois 60604
(312) 353-5314