

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

v.

MICHAEL SEGAL, DANIEL E.
WATKINS, and NEAR NORTH
INSURANCE BROKERAGE, INC.

No. 1:02-CR-112

(Hon. Ruben Castillo)

FILED
FEB 14 2004
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

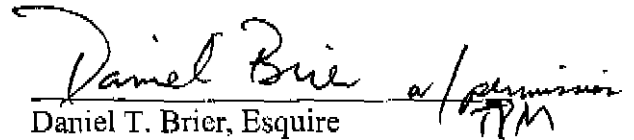
**DEFENDANTS' MOTION FOR RECONSIDERATION
OF THEIR RENEWED MOTION FOR EVIDENTIARY
HEARING AND TO SUPPRESS ILLEGALLY SEIZED EVIDENCE**

Defendants Michael Segal and Near North Insurance Brokerage, Inc. ("NNIB"), through their undersigned counsel, hereby move for reconsideration of the Memorandum Opinion and Order entered on January 21, 2004 denying their Renewed Motion for An Evidentiary Hearing and To Suppress Illegally Seized Evidence in the above-captioned matter. The grounds supporting this motion are set forth in the accompanying Memorandum of Law.

Date: February 4, 2004

Respectfully submitted,

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**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR
RECONSIDERATION OF THEIR RENEWED MOTION FOR EVIDENTIARY
HEARING AND TO SUPPRESS ILLEGALLY SEIZED EVIDENCE**

In its Memorandum Opinion entered on January 21, 2004, the Court determined that at least one of the Government's cooperating witnesses "took affirmative steps" to obtain information that had been unlawfully "hacked" from Near North Insurance Brokcrage, Inc.'s ("NNIB") computer network and that the Government was aware of the unlawful hacking. (Mem. Op. at 8.) The Court also concluded that the Government failed to properly document communications with the cooperating witnesses that might have shed light on the relationship between the Government agents, the cooperating witnesses and the hacker. (*Id.* at 8 n.4.) Nonetheless, the Court refused the defense request for an evidentiary hearing, reasoning that "[t]hese facts fall far short of establishing that the[] cooperating witnesses were government agents." (*Id.* at 8.) In rejecting the request on this basis, the Court applied an incorrect --- and impossible --- standard.

Respectfully, the issue is not whether the defense is able to establish, using the limited information gleaned during pre-trial discovery, that the "cooperating witnesses were government agents." (Mem. Op. at 8.) If this were the test, the Government would be able to thwart a

suppression motion simply by electing not to maintain discoverable records. Rather, the necessity of an evidentiary hearing turns on the question of whether the defense has demonstrated the existence of a disputed issue of material fact. *See, e.g., United States v. Sims*, 808 F. Supp. 596, 605 (N.D. Ill. 1992). The defense has met its burden in this regard. The record amply demonstrates that NNIB and Michael Segal were the victims of thousands of unlawful hacking intrusions¹; that the hacker specifically targeted and accessed confidential attorney-client privileged communications², many of which relate to the subject matter of the criminal charges; that at least one of the cooperating witnesses affirmatively solicited information from the hacker; that the Government was aware of the unlawful computer access; and that there were frequent, (approximately 400) undocumented contacts between the cooperating witnesses and the Government during the relevant period. These undisputed facts give rise to a powerful inference that the Government "had a hand" in the unlawful searches for purposes of Fourth Amendment analysis. *See Lustig v. United States*, 338 U.S. 74, 78-79, 69 S. Ct. 1372, 1374, 93 L. Ed. 1819, 1823-24 (1949) (plurality opinion); *see also United States v. Knoll*, 16 F.3d 1313, 1320 (2d Cir. 1994), cert. denied, 513 U.S. 1015, 115 S. Ct. 574, 130 L. Ed.

¹ For example, prior to January 26, 2002, the hacker sifted through stored electronic files and selectively accessed e-mail messages and other documents that had been created earlier. The hacking after January 26, 2002, however, focused almost exclusively on documents created after that date. With the exception of two messages (one of which personally involved the hacker), preliminary analysis indicates that there are more than 500 instances of hacking after January 26, 2002 targeting documents created after January 26, 2002. (A chart demonstrating selected instances in which the hacker reviewed backdated records on selected dates after January 26, 2002 is attached hereto as Exhibit "A.") This fact is significant because the Government seized NNIB's e-mail server and a mirror image of various desktop computers on January 26, 2002 pursuant to a search warrant and was itself able to search pre-January 26, 2002 records at will. Why did the hacker focus on documents created after January 26, 2002 immediately after the Government seized the pre-January 26, 2002 electronic files? Who, if anyone, directed the hacker to focus on post-January 26, 2002 files after the government's search and seizure. The defense should be permitted to develop a complete record on this issue at an evidentiary hearing.

² When the hacker accessed Michael 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 Michael Segal and various lawyers, including Sherri Stanton, Esquire, Clinton W. Francis, Esquire, Stuart P. Shulruff, Esquire and Richard Lipton, Esquire.

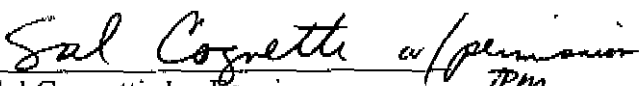
2d 490 (1994). The Government's "poor" documentation of contacts among the government, its cooperating witnesses, and the hacker leaves the record purposefully and permanently incomplete. Further fact-finding at an evidentiary hearing is necessary and warranted.

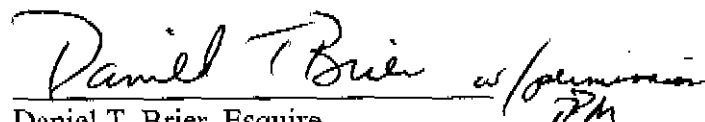
Information received only after the defense filed their motion for an evidentiary hearing further underscores the need for a hearing. In December 2003, the Government produced a list of search queries performed by its personnel on NNIB computer data compiled after the government executed search warrants in January 2002. In several key instances, those search queries occurred in close tandem with the unlawful hacking: when the hacking stopped, the Government search queries began, and vice versa. For example, on April 18, 2002, the Government ran a search on NNIB's computer data (seized pursuant to a search warrant on January 26, 2002) at 12:18 p.m.; the hacker unlawfully accessed NNIB's computer system between 1:08 p.m. and 1:11 p.m., and the Government searched 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 11:43 a.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 4:53 p.m. (A chart demonstrating the timing of the Government computer data queries, phone call activity involving the government's cooperating witnesses and/or the government, and unlawful hacking is attached hereto as Exhibit "B.") Although there were frequent telephone calls between the cooperating witnesses and the Government during this period of start-and-stop searches, those calls were not memorialized by the Government in any way. The defense should be permitted to fully develop the record on this issue at an evidentiary hearing.

In sum, the undisputed facts of record raise a substantial question as to whether the cooperating witnesses acted as agents for the Government when they interacted with the computer hacker. Nothing more is required to warrant an evidentiary hearing. Nor can the defense offer additional facts without an evidentiary hearing, given the incomplete record of the government's investigation and voluminous undocumented contacts with its cooperating witnesses. Accordingly, defendants respectfully move the Court to reconsider their request for an evidentiary hearing to substantiate that the unlawful hacking violated the defendants' Fourth Amendment rights.

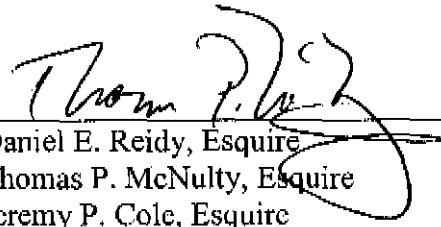
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A handwritten signature in black ink, appearing to read "Thomas P. McNulty", is written over a horizontal line. The signature is stylized and cursive.

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CERTIFICATE OF SERVICE

I, JEREMY P. COLE, ESQUIRE, hereby certify that a true and correct copy of the foregoing Motion for Reconsideration of Renewed Motion for Evidentiary Hearing and to Suppress Illegally Seized Evidence and Memorandum in Support was served by messenger hand delivery upon:

Virginia M. Kendall, Esquire
Dean Polales, Esquire
Assistant U.S. Attorney
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219 South Dearborn Street, 5th Floor
Chicago, Illinois 60604

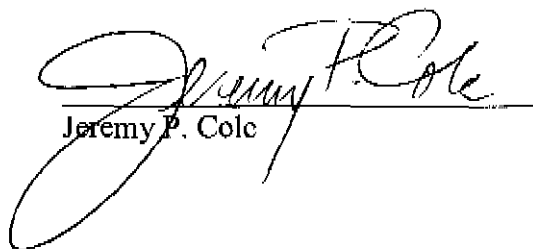
and by United States Mail, postage prepaid, upon:

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on the 4th day of February, 2004.


Jeremy P. Cole

See Case
File For
Exhibits