52 F.3d 1173, 149 L.R.R.M. (BNA) 2001, 130 Lab.Cas. P 11,313
(Cite as: 52 F.3d 1173)

United States Court of Appeals,
Second Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Donald CARSON, Defendant-Appellant,
LOCAL 1804-1, ILA; John Barbato; George Barone; John Bowers; George Bradley; Thomas Buzzanca; Sato Calabrese; Ronald Capri; Harry Cashin; James J. Cashin; Anthony Ciccone; Joseph Colozza; Vincent Colucci; James Coonan; Michael Coppola; Harold Daggett; Doreen Supply Company, Inc.; Tino Fiumara; Anthony Gallagher; Robert Gleason; John Gotti; Leroy Gwynn; ILA Local 1588; ILA Local 1588, Executive Board; ILA Local 1809; ILA Local 1809, Executive Board; ILA Local 1814; ILA Local 1814, Executive Board; Anthony Anastasio; ILA Local 1909; Blase Terraciano; ILA Local 1909, Executive Board; ILA Local 824; ILA Local 824, Executive Board; Kevin Kelly; Joseph C.F. Kenny; George Lachnicht; Gregory Lagana; Frank Lonardo; Venero Mangano; James McElroy; Metropolitan Marine Maintenance Contractors; Carlos Mora; New York Shipping Association; Nodar Ship Repair, Inc.; Ralph Perello; Louis Pernice; Richard Pierce; Anthony Pimpinella; John Potter; Douglas Rago; Joseph Randazzo; Thomas Ryan; Anthony Salerno; Frank Scollo; Anthony Scotto; Alfred Small; and Dominick Sanzo, Defendants.
Donald J. CARSON and Peggy Carson, Plaintiffs-Appellants,
v.
LOCAL UNION 1588, I.L.A., ITS OFFICER, EXECUTIVE BOARD AND TRUSTEES, Defendant-Appellee.

No. 514, Docket 94-6044.
Argued Nov. 21, 1994.
Decided April 12, 1995.

JACOBS, Circuit Judge:

The government asserted civil claims under the Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C. § 1961 *et seq.* ("RICO"), alleging that appellant Donald J. Carson committed various racketeering acts on behalf of organized crime while Carson was Secretary-Treasurer of Local 1588 of the International Longshoremen's Association ("ILA").[FN1] Following a bench trial in which the district court heard ten weeks of evidence and argument distributed over an eleven month period, the United District Court for the Southern District of New York (Sand, *J.*) entered a final judgment in favor of the government, (1) granting injunctive relief, (2) ordering Carson to disgorge ill-gotten gains, and (3) imposing approximately $46,000 of costs. Carson appeals on numerous grounds. In addition, appeal is taken from the district court's dismissal of a complaint filed by Carson and his wife, Peggy Carson, against Local 1588 under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"). This ERISA action had been consolidated with the civil RICO suit.

FN1. Throughout this opinion Donald J. Carson shall be referred to as "Carson", while any reference to his wife, Peggy Carson, shall be through use of her full name.

On his appeal from the civil RICO judgment, Carson contends: (1) that the district court exceeded the scope of its jurisdiction under 28 U.S.C. § 1964 when it ordered him to disgorge his past ill-gotten gains; (2) that the disgorgement order violated the Double Jeopardy Clause of the Constitution; (3) that the injunctive relief was overbroad; (4) that a portion of a transcript from a prior criminal proceeding was improperly admitted into evidence in the civil proceeding; (5) that Carson was prejudiced by the scheduling of the ten weeks of trial over an eleven month period and other features in the conduct of the trial; and (6) that excessive costs were taxed by the clerk of the court. Finally, the Carsons argue that the district court erred when it dismissed their ERISA claim against Local 1588.

We affirm in part, vacate in part and remand to the district court for re-consideration consistent with this opinion.

BACKGROUND

This civil RICO action followed in the wake of a criminal prosecution. The civil action was com-

menced after Carson's criminal conviction in 1988; judgment was entered in the civil action after the Third Circuit's decision in July 1992 overturning the criminal conviction.

In August 1988, Carson was convicted in the District of New Jersey for participating in a conspiracy to conduct the affairs of an enterprise through a pattern of racketeering. The criminal indictment essentially charged that Carson, who served from 1972 until 1988 as the Secretary-Treasurer of ILA Locals 1587 and 1588,[FN2] accepted kickbacks from a waterfront employer at the Military Ocean Terminal, in Bayonne, New Jersey ("MOTBY"), in exchange for labor peace. MOTBY is a government-owned facility used primarily to handle military cargo. The kickbacks were shared by Carson and various associates of the Genovese organized crime family.

FN2. In November 1982, Local 1587 was consolidated into Local 1588. Carson retained his leadership position in Local 1588.

***1177** The government's original civil RICO complaint, filed on February 14, 1990, named more than 50 individual defendants. By the time the trial concluded in 1993, four remained, including Carson. Relying on live testimony, recorded on more than 5,000 transcript pages, and on exhibits and deposition transcripts, the district court found that, during Carson's tenure as the secretary-treasurer of Local 1588, he acted on behalf of organized crime and a group described as the Waterfront Enterprise. The district court found that this Waterfront Enterprise was an alliance among union officials, waterfront businessmen and members of the Genovese and Gambino organized crime families. The district court found that Carson contributed to the wrongdoing of the Enterprise by (1) engaging in a kickback scheme which resulted in the loss of wages for the members of his union, (2) improperly accepting offers of meals and entertainment from union employers, (3) embezzling salary payments from the union, and (4) extorting the democratic rights of Local 1588's membership by maintaining a climate of fear in the union. These findings appear in the second of the five district court opinions that are referenced herein. These opinions, numbered for future reference, are listed in the margin.[FN3]

FN3. *Carson v. Local 1588, Int'l Longshoremen's Ass'n,* 769 F.Supp. 141 (S.D.N.Y.1991) ("*Carson I* "); *United States v. Local 1804-1, Int'l Longshoremen's Ass'n,* 812 F.Supp. 1303 (S.D.N.Y.1993) (" *Carson II* "); *United States v. Local 1804-1, Int'l Longshoremen's Ass'n,* 1993 WL 77319 (S.D.N.Y. March 15, 1993) ("*Carson III* "); *United States v. Local 1804-1, Int'l Longshoremen's Ass'n,* 831 F.Supp. 167 (S.D.N.Y.1993) ("*Carson IV* "); *United States v. Local 1804-1, Int'l Longshoremen's Ass'n,* 831 F.Supp. 177 (S.D.N.Y.1993) ("*Carson V* ").

The MOTBY Scheme: Some time prior to 1981, the federal government leased for commercial use 33 acres of MOTBY to Consolidated Pier Developers ("CPD"), a company controlled by co-defendant Gallagher. CPD, in turn, subleased a building on these 33 acres to United Terminal, Inc. ("UTI"). Sealand Service, Inc. ("Sealand"), a shipping company that moved containerized cargo worldwide, relocated its operations to MOTBY in 1981. UTI served as Sealand's contractual stevedore.

According to the record, two different classes of waterfront laborers are commonly used to load and unload ships: deep-sea labor, and warehousemen labor. Deep-sea laborers in Bayonne were members of Local 1587 while warehouseman laborers were members of Local 1588; both locals were run by Carson. At the time the illegal MOTBY activities took place, deep-sea laborers were paid roughly $5 more per hour than warehouse laborers. ILA policy required that deep-sea labor be used for loading and unloading oceangoing vessels, and opposed the use of "mixed labor" forces.

The contract between Sealand and UTI incorporated the higher wages of the deep-sea laborers. Evidence at trial indicated, however, that after Sealand relocated to MOTBY, UTI no longer hired only deep-sea laborers for the loading and unloading of oceangoing vessels. Instead, pursuant to an agreement among Carson and others, the ships were loaded and unloaded by a mixed labor force. In total, during the 15 months during which this arrangement existed (from June 1981 through September 1982), UTI saved at least $546,000 in wages by using the lower paid warehouse laborers for work generally done using deep-sea laborers. The district court found that

Carson, who signed the union contract with UTI, received a payoff for arranging this utilization of labor.

Based on these findings, the district court concluded that Carson had violated the Taft-Hartley Act, 29 U.S.C. § 186(b), which makes it unlawful for any labor representative to "request, demand, receive, or accept ... any money or thing of value" from an employer. 29 U.S.C. § 186(b)(1).

Meals and Entertainment: The government presented the district court with evidence from the Waterfront Commission audit report documenting occasions on which employers of ILA labor paid for Carson's meals and entertainment. The district court found that the acceptance of such meals and entertainment also violated the Taft-Hartley Act.

Embezzlement of Funds: In 1982, Carson was elected General Organizer of the ILA International. Although his new position required that he spend up to 80 percent of his ***1178** working time at this new position, Carson did not relinquish his position as the secretary-treasurer of Local 1588. His salary from the Local decreased slightly, but still exceeded $50,000. At about the same time, Carson made William Fullam a full-time officer of Local 1588, raising Fullam's salary to match his own. Thus, Carson's elevation to a position in the ILA International thereby caused a substantial increase in Local 1588's total outlay for union officers-from $99,421 in 1981 to $131,628 in 1983. This increase in salary expense, exceeding 30 percent over three years, was made without the required approval of the membership of Local 1588. [FN4] The district court concluded that Carson's continued draw of virtually full salary while working for Local 1588 part-time constituted embezzlement of union funds under 29 U.S.C. § 501(c). *See* *Carson II,* 812 F.Supp. at 1330.

> FN4. In its original liability opinion the district court found that between 1978 and 1988 Carson received reimbursement for more than $75,000 in business expenses from Local 1588's treasury and that Carson alone approved these reimbursements, in violation of the ILA's stated approval procedures. *Carson II,* 812 F.Supp. at 1329-30. Upon reconsideration, the district court withdrew these findings. *See* *Carson IV,* 831 F.Supp. at 174.

Creating a Climate of Fear: Finally, the district court found that Carson displayed his organized crime associations to union members, and that the members were influenced to accept his leadership of the union by their knowledge of these ties. In this way, the district court found that Carson used intimidation and fostered an environment of fear in order to suppress the democratic rights of union members, in violation of 29 U.S.C. § 501(a).

In July 1990, this civil RICO suit was consolidated for purposes of trial with the claim brought by Carson and his wife against Local 1588 claiming entitlement to a pension.

When the non-jury trial commenced before Judge Sand in April 1991, the Carsons were represented by retained counsel on their ERISA claim against the union while Carson represented himself *pro se* in the civil RICO action. Fredric Gross, the Carsons' ERISA attorney, chose not to attend most of the civil proceedings before the district court. The bulk of the trial was, therefore, conducted without the benefit of a representative of Carson in attendance.

Near the end of the trial, Gross apparently realized that resolution of the RICO claim might impact upon resolution of the ERISA claim and expressed an interest in defending Carson against the RICO claims as well. In response to a request by Gross, the district court ordered the government to "use its best efforts" to present evidence relevant to Carson's interests in both the civil RICO case and the ERISA case in a "compact" manner. Joint Appendix ("JA") at 1380.

Gross filed a notice of a general appearance on October 18, 1991 and actually answered the government's civil complaint as it pertained to Carson on January 29, 1992, nearly two years after the complaint had been served on Carson and several weeks after the government had rested its case against him. Ultimately, the government presented little live testimony against Carson after Gross filed his notice of general appearance. Part of the evidence that was introduced, however, was a portion of co-defendant Anthony Gallagher's testimony at his earlier criminal trial (called the "Gallagher confession" by the district court). The transcript of Gallagher's testimony was received into evidence in the civil trial without objec-

tion from any defendant on January 2, 1992. Also admitted into evidence was the transcript of several wiretaps used in the prosecution of the criminal case against Carson. The Gallagher confession and the transcripts of the wiretaps presented the district court with strong evidence of Carson's involvement in the MOTBY kickback scheme.

Carson presented his limited defense during the evenings of January 29 and 30, 1992. He called five witnesses. The district court ruled that Carson was collaterally estopped from disputing factual issues resolved against him in the earlier New Jersey district court criminal trial, and denied Carson the latitude to contest these issues at the later civil trial. JA at 858, 989.

On July 9, 1992, the Third Circuit vacated Carson's New Jersey conviction, and ordered ***1179** the suppression of most of the wiretap transcripts used to convict Carson in his criminal trial. *See United States v. Carson,* 969 F.2d 1480 (3d Cir.1992). On December 31, 1992 the government declined the opportunity to re-try Carson on the criminal charges, and agreed to dismiss the indictment.

Several weeks after the Third Circuit decision ordering the suppression of the wiretap transcripts in the criminal case, the government voluntarily withdrew the transcripts from the record of the civil RICO case. The government also filed a memorandum explaining what evidence it intended to rely on in lieu of the wiretap transcripts. Included in this list of proposed substitute evidence was the Gallagher confession.

On July 30, 1992, the district court ordered the parties to submit briefs appraising the impact of the Third Circuit decision on the civil RICO action. Carson's brief asked the district court to declare a mistrial on the grounds that he had been (a) wrongly barred from contesting the facts behind his conviction and (b) coerced into invoking the Fifth Amendment at his deposition in the civil case. In the alternative, Carson also requested the suppression of all evidence "derivative" of the improperly admitted wiretap tapes. He did not particularize what this derivative evidence was, though he argues on appeal that this motion was a direct challenge to the Gallagher confession. The government's reply brief emphasized the importance of the Gallagher confession as "uncontroverted direct evidence" of Carson's wrongful acts.

The district court issued its findings of fact and conclusions of law on January 14, 1993. *Carson II,* 812 F.Supp. 1303. The court did not base its factual findings on the transcripts of the wiretaps suppressed by the Third Circuit. It did, however, rely substantially on the Gallagher confession, which Carson contends is derivative of the suppressed wiretaps.

As to the Carsons' ERISA suit against Local 1588, the district court found that Carson was estopped from claiming his pension benefits by his breach of fiduciary duty owed to the union, and dismissed the ERISA complaint.

Carson moved pursuant to Federal Rule of Civil Procedure 52(b) to amend the district court's findings. As part of his motion, Carson requested that the district court reconsider the admission of the Gallagher confession. On August 19, 1993, the district court issued an opinion modifying its earlier findings. *Carson IV,* 831 F.Supp. 167. In denying Carson's request to suppress the Gallagher confession, the court noted that Carson had failed to object when it was introduced at trial as well as in his initial post-trial briefing, and that Carson had failed to identify a "good reason" for his failure to make "a timely and specific objection to the Gallagher confession." *Id.* at 172. The court added: "Since the Court gave the defendants an opportunity to raise this objection, and since the defendants failed to avail themselves of this opportunity, this Court will not consider their new theory for suppression of the Gallagher confession at this late date in the proceedings." *Id.*

On August 19, 1993, the district court also issued its opinion spelling out remedies. *Carson V,* 831 F.Supp. 177. The court (1) issued an injunctive order preventing Carson from dealing with any person involved in either organized crime or a labor organization, (2) ordered Carson to disgorge $16,100 in connection with his role in the MOTBY scheme and (3) ordered Carson to disgorge $60,000 in connection with his embezzlement of salary payments. On January 26, 1994, the district court approved the government's request for $45,905.36 in costs as assessed by the Clerk over Carson's objection.

DISCUSSION

A. *Jurisdiction.*

Before turning to Carson's specific claims on appeal, we first consider a challenge to appellate jurisdiction interposed by defendant-appellee ILA Local 1588. The district court exercised jurisdiction over the civil RICO suit pursuant to 18 U.S.C. § 1964. District court jurisdiction over the ERISA claim was pursuant to 29 U.S.C. § 1132.

The order of final judgment was entered on November 12, 1993. Ordinarily, under ***1180** Fed.R.App.P. 4(a)(1), a notice of appeal must be filed with the Clerk of the district court within 30 days after the date of entry of the order of final judgment. In this case, however, because the United States was a party, Rule 4(a)(1) allows 60 days for filing the notice of appeal. Accordingly, Carson's notice of appeal was due on January 11, 1994.

The Clerk's Office did not receive the Carsons' Notice of Appeal until January 12, 1994,[FN5] one day after the time to appeal elapsed. The Carsons moved for an extension of time to file their already late Notice of Appeal, pursuant to Fed.R. of App.P. 4(a)(5), which allows the district court to extend the time for filing "upon a showing of excusable neglect or good cause." The Carsons' attorney told the district court that the Carsons' Notice of Appeal had been sent on Friday, January 7, 1994 from the United States Post Office in Mount Ephraim, New Jersey, with the *hope* that it would arrive on or before Tuesday, January 11, 1994.

> FN5. There is actually some dispute as to when the Clerk's office received the Notice of Appeal. The Notice is stamped January 7, 1994. But the Carsons concede it was not mailed from New Jersey until January 7, making the January 7 stamp an evident error. A certified mail return receipt was stamped January 12, 1994. The district court found as a matter of fact that January 12 was the date the Notice was received by the Clerk's office. There is no reason to disturb this factual finding.

When deciding a Rule 4(a)(5) motion the district court must consider " 'the danger of prejudice to the [non-movant], the length of the delay and its potential impact upon judicial proceedings, the reason for the delay, including whether it was in the reasonable control of the movant, and whether the movant acted in good faith.' " *United States v. Hooper,* 9 F.3d 257, 259 (2d Cir.1993) ("*Hooper I* ") (quoting *Pioneer Investment Serv. Co. v. Brunswick Assoc. Ltd. Partnership,* 507 U.S. 380, ----, 113 S.Ct. 1489, 1498, 123 L.Ed.2d 74 (1993)).

In an opinion issued prior to *Pioneer Investment,* we had specifically held that "*uncontrollable* delays in mail delivery" may be a basis for a finding of excusable neglect. *In re Cosmopolitan Aviation Corp.,* 763 F.2d 507, 514 (2d Cir.) (emphasis added), *cert. denied,* 474 U.S. 1032, 106 S.Ct. 593, 88 L.Ed.2d 573 (1985). We question whether the performance of the Postal Service in delivering this document in two business days constitutes such an "uncontrollable delay[ ]".[FN6] Nevertheless, the Rule 4(a)(5) inquiry " 'is at bottom an equitable one,' " *Hooper I,* 9 F.3d at 259 (quoting *Pioneer Investment,* 507 U.S. at ----, 113 S.Ct. at 1498), subject to appellate review solely for abuse of discretion. *See United States v. Hooper,* 43 F.3d 26, 29 (2d Cir.1994) ("*Hooper II* "). After considering each of the factors identified by the Supreme Court in *Pioneer Investment,* the district court elected to grant the Rule 4(a)(5) relief sought. [FN7] We cannot conclude that this grant of equitable relief was an abuse of the district court's discretion.

> FN6. We take judicial notice of the fact that on Friday, January 7, 1994, the New York metropolitan area was hit by in a major snowstorm in which airports were closed or experienced delays and "highways around New York City were coated in an icy crust." Roger Atwood, *Storm Socks U.S. Northeast With Snow, Sleet and Ice,* Reuters, Jan. 7, 1994, *available in* LEXIS, News Library, CURNWS File.

> FN7. Subsequent to the November 12, 1993 issuance of a final judgment this case was reassigned to Southern District Judge Martin, who considered appellant's Rule 4(a)(5) motion.

Appellate jurisdiction therefore exists pursuant to 28 U.S.C. § 1291.

B. *Disgorgement Under Civil RICO.*

Carson argues that the remedies available under 18 U.S.C. § 1964 do not include the type of disgorgement ordered in his case and that therefore the

district court lacked the jurisdictional power to issue such an order. The district court ordered that Carson disgorge the $16,100 in kickbacks he received during 1981 and 1982 as consideration for his role in the MOTBY scheme. The court further ordered that Carson disgorge the estimated $60,000 that the court found he had embezzled from 1982 through 1988 when he collected a full-time salary while dedicating ***1181** only a portion of his time to Local 1588.[FN8] These sums were significantly less than the amount of disgorgement sought by the government.

> FN8. The $60,000 figure represents approximately one-fifth of the total salary Carson collected while he was receiving a full-time salary yet working only part-time.

As a general rule, disgorgement is among the equitable powers available to the district court by virtue of 28 U.S.C. § 1964. *See United States v. Private Sanitation Indus. Ass'n,* 995 F.2d 375 (2d Cir.1993), *aff'g* 811 F.Supp. 808, 818 (E.D.N.Y.1992); *United States v. Private Sanitation Indus. Ass'n,* 44 F.3d 1082 (2d Cir.1995). Carson argues, however, that disgorgement was an inappropriate remedy in his case because "[e]quitable RICO remedies ... are available only to prevent *ongoing and future* misconduct, and not to remedy past misconduct." Brief of Appellant at 25-26 (emphasis in original). The question of whether § 1964 authorizes disgorgement of gains ill-gotten long in the past is a question of first impression in this Circuit.

In rejecting Carson's argument and deciding to order disgorgement, the district court relied on the argument presented in *United States v. Bonanno Organized Crime Family of La Cosa Nostra,* 683 F.Supp. 1411, 1442-49 (E.D.N.Y.1988), *aff'd on other grounds,* 879 F.2d 20 (2d Cir.1989). In *Bonanno,* Judge Glasser reviewed the legislative history of RICO, and concluded that § 1964(a) was intended to grant the courts broad equitable power:

> The authority to order disgorgement derives from the broad equitable powers given courts under the securities laws to provide such remedies as are necessary to make effective the congressional purpose.... The fashioning of equitable remedies under the securities laws lies within the sound discretion of the court.... A court exercising the broad equitable powers of RICO's § 1964 has similar, if not wider, latitude in designing appropriate relief.

Id. at 1448 (citations and internal quotations omitted). Included within this "broad equitable power[ ]" is the power to order defendants to disgorge "any proceeds from the unlawful conduct of or participation in the enterprise's affairs." *Id.* at 1449; *see also United States v. Private Sanitation Indus. Ass'n,* 793 F.Supp. 1114, 1152 (E.D.N.Y.1992); *United States v. Int'l Bhd. of Teamsters,* 708 F.Supp. 1388, 1408 (S.D.N.Y.1989).

A plain reading of the statute does not support the broad interpretation adopted by the district court and urged by the government. Section 1964 states in pertinent part:

> (a) The district courts of the United States shall have jurisdiction *to prevent and restrain violations* of section 1962 of this chapter by issuing appropriate orders, *including, but not limited to:* ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restriction on the future activities or investments of any person including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provisions for the rights of innocent persons.
>
> (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining order or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(Emphasis added.) This section confers on the district court powers "to prevent and restrain violations of section 1962." There are no additional sources of jurisdiction. The three examples contained in the text of section 1964(a) are forward looking, and calculated to prevent RICO violations in the future. As the government urges, RICO has a broad purpose: the legislative history of § 1964 indicates that the equitable relief available under RICO is intended to be "broad enough to do all that is necessary." ***1182** S.Rep. No. 617, 91st Cong., 1st Sess. at 79 (1969). Nevertheless, we do not see how it serves

any civil RICO purpose to order disgorgement of gains ill-gotten long ago by a retiree.

The district court was "troubled by the consequences" of failing to employ the disgorgement remedy simply because Carson is no longer a member of the union from which he conducted his racketeering activities:

> [i]f Carson is correct that his separation from the union in and of itself removes this Court's power to grant equitable relief like disgorgement-because he will no longer be in a position to engage in labor racketeering-that would mean that a union racketeer, after raiding the union coffers, need only quit his position in order to retain the ill-gotten gains of his tenure. We believe that Congress intended ... to prevent such a result.

Carson III, 1993 WL 77319, at *4. However, the jurisdictional powers in § 1964(a) serve the goal of foreclosing future violations, and do not afford broader redress. The section does not authorize the government to recapture all the losses of those wronged by civil RICO violators. If the parties from whom Carson wrongfully took money wished to recover it, they could have pressed their own claims. The issue presented is therefore whether the disgorgements ordered here are designed to "prevent and restrain" *future* conduct rather than to punish *past* conduct.

The vast majority of the money the district court has ordered Carson to disgorge was received by him long before the civil suit was ever brought against him in 1990. All of the $16,100 ordered disgorged in connection with the MOTBY scheme was received in 1981 and 1982. The $60,000 ordered disgorged in connection with the salary embezzlement was received between 1982 and 1988. Much of this money was acquired by Carson too far in the past for its disgorgement to be part of an effort to "prevent and restrain" *future* conduct.

Categorical disgorgement of all ill-gotten gains may not be justified simply on the ground that whatever hurts a civil RICO violator necessarily serves to "prevent and restrain" future RICO violations. If this were adequate justification, the phrase "prevent and restrain" would read "prevent, restrain and discourage," and would allow any remedy that inflicts pain. Ordinarily, the disgorgement of gains ill-gotten long in the past will not serve the goal of "prevent[ing] and restrain[ing]" future violations unless there is a finding that the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose. The disgorgement of gains ill-gotten relatively recently is more easily justifiable on the basis of the same analysis.

We do not determine what portion (if any) of the disgorgement order should ultimately survive. Rather, we vacate the existing order of disgorgement and remand to the district court for a determination as to which disgorgement amounts, if any, were intended solely to "prevent and restrain" future RICO violations.

* * * *

Conclusion

In sum, we affirm in all respects, except that we vacate the order of disgorgement and the order to pay costs, and remand for consideration consistent with this opinion.

C.A.2 (N.Y.),1995.
U.S. v. Carson
52 F.3d 1173, 149 L.R.R.M. (BNA) 2001, 130 Lab.Cas. P 11,313