

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT  
NO. 2008-11214/ 001-002, 004-007  
2008-11215/ 001-002

COMMONWEALTH

V.

RICHARD VITALE  
WN ADVISORS, LLC

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COMMONWEALTH'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS  
INDICTMENTS FOR INSUFFICIENCY OF EVIDENCE BEFORE THE GRAND JURY AND  
FAILURE TO PRESENT EXCULPATORY EVIDENCE TO THE GRAND JURY

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INTRODUCTION

As a result of a referral from the Secretary of State in June of 2008, the Attorney General's Office began an investigation into allegations of illegal lobbying of the Commonwealth's Legislature on behalf of the Massachusetts Association of Ticket Brokers ("MATB").<sup>1</sup>

Starting in September of 2008, a grand jury heard from 13 different witnesses over 10 days and 189 exhibits were marked which represented tens of thousands of pages of documents.<sup>2</sup>

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<sup>1</sup> Massachusetts lobbying registration requirements are found in sections 39-48 of chapter 3 of the General Laws. They require individuals and entities that wish to lobby to register with the Secretary of State and file periodic reports disclosing their clients and expenses. A client of a lobbyist is also required to register that it has hired a lobbyist. A lobbyist is prohibited from contributing more than \$200 to a political campaign under section 7A of chapter 55 of the General Laws.

<sup>2</sup> The grand jury heard evidence on the following dates:

1. September 4, 2008 – herein referred to as "G.J. I"

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This extensive investigation resulted in the presently contested indictments which were returned on December 18, 2008. In the end, the evidence showed that the Richard Vitale used his connections to former Speaker of the Massachusetts House of Representatives Salvatore DiMasi (herein referred to as "Speaker DiMasi") to influence legislation for the benefit of a paying client. In addition, the defendant set up a separate company, defendant WN Advisors, to conduct this business and ignored the warnings of the colleagues at his accounting firm that political representation of the ticket brokers was inconsistent with the accounting work of his firm.

The defendants challenge the indictments premised on the basis that defendant Vitale was not acting as a "legislative agent" under G.L. c. 3 § 39. The defendants mistakenly interpret § 39 as establishing an irrebuttable presumption that any person who either does the covered acts for less than 50 hours or makes less than \$5,000 in a covered period is not a legislative agent. This interpretation is misplaced and would allow a person, such as the defendant, who has close ties to key legislators to benefit financially while skirting the clear intent of the statute, transparency.

## **FACTS**

### **Background**

Richard Vitale ("Vitale" or "the defendant") is one of the co-founders of the public

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2. September 30, 2008- herein referred to as "G.J. II"
  3. October 16, 2008- herein referred to as "G.J. III"
  4. November 3, 2008- herein referred to as "G.J. IV"
  5. November 13, 2008- herein referred to as "G.J. V"
  6. November 20, 2008- herein referred to as "G.J. VI"
  7. November 24, 2008- herein referred to as "G.J. VII"
  8. December 11, 2008- herein referred to as "G.J. VIII"
  9. December 15, 2008- herein referred to as "G.J. IX"
  10. December 18, 2008- herein referred to as "G.J. X"

accounting firm of Vitale, Caturano and Company (“VCC”), currently located in Charlestown.<sup>3</sup> VCC employs approximately 380 people.<sup>4</sup>

The defendant also has a close personal relationship with former Speaker DiMasi.<sup>5</sup> Among other things, the defendant was Speaker DiMasi’s personal accountant, vacationed with him, played golf with him, and even had Speaker DiMasi live with him during a time before he was the Speaker but was still a state representative.<sup>6</sup> In June of 2006, the defendant also provided the Speaker and his wife a revolving line of credit up to \$250,000 secured by a third mortgage on their North End condominium.<sup>7</sup>

James Holzman (“Holzman”) is the founder and president of Ace Tickets (“Ace”), a large Massachusetts based ticket reseller.<sup>8</sup> As his company grew, Holzman hired VCC to do Ace’s accounting work and began working with the defendant Vitale.<sup>9</sup>

In 2005 Ace was the subject of a private lawsuit alleging that it violated the 1924 ticket reselling law.<sup>10</sup> This case was eventually dismissed.<sup>11</sup> However, Holzman believed that his business would always be at risk as long as the current law regarding ticket resales was in place.<sup>12</sup> Approximately in the spring of 2006, Holzman mentioned this problem to the defendant.<sup>13</sup> The defendant responded that he had a “group” who might be able to help Holzman with his problem.<sup>14</sup>

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<sup>3</sup> G.J. IX, p. 134-5.

<sup>4</sup> Id.

<sup>5</sup> G.J. IX, p. 156; p. 163.

<sup>6</sup> G.J. IX, p. 165, p. 168; G.J. IX, p. 29.

<sup>7</sup> G.J. ex. 53; 54.

<sup>8</sup> G.J. III, p. 24.

<sup>9</sup> G.J. III, p. 28.

<sup>10</sup> Id.

<sup>11</sup> G.J. III, p. 29.

<sup>12</sup> Id.

<sup>13</sup> G.J. III, p. 30.

### Negotiating an Agreement

Although there was no official contract yet in place, by June of 2006 the defendant already began working to update the 1924 ticket resale legislation.<sup>15</sup> Apparently as a result of an inquiry from the defendant, on June 7, an aide to Speaker DiMasi forwarded the defendant existing versions of pending ticket reselling legislation that had been filed during the 2005-2006 legislative session.<sup>16</sup> The next day, June 8, the defendant emailed one of his subordinates at VCC and in the same email instructed her to both set up a new entity, “WN Advisors”, as a limited liability corporation (“LLC”) and to arrange for a \$250,000 revolving line of credit to Speaker DiMasi from one of the defendant’s existing companies, Washington North Realty.<sup>17</sup>

On June 15, 2006, the defendant WN Advisors (herein referred to as “WNA”) filed official paperwork to become a Delaware LLC.<sup>18</sup> The defendant was its sole member.<sup>19</sup> According to VCC co-founder Richard Caturano, the establishment of WNA was unknown to other partners at VCC.<sup>20</sup>

On June 22, 2006, Speaker DiMasi came to the offices of VCC and signed a note and mortgage on his condominium in the North End to secure the \$250,000 revolving line of credit.<sup>21</sup> The document was witnessed by the same aide to the Speaker who had forwarded the defendant the ticket legislation.<sup>22</sup> That same day, the defendant had arranged a meeting with Holzman,

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<sup>14</sup> Id.

<sup>15</sup> G.J. III, p. 29-34.

<sup>16</sup> In separate emails, the aide to Speaker DiMasi forwarded two different versions of ticket legislation. One version had been filed by a Representative and the other version had been filed by a Senator. G.J. ex. 22, pages 2346-2369.

<sup>17</sup> G.J. ex. 52.

<sup>18</sup> G.J. ex. 124.

<sup>19</sup> GJ ex. 124-6.

<sup>20</sup> G.J. IX, p. 161; 171-2.

<sup>21</sup> GJ ex. 53; ex. 132.

<sup>22</sup> GJ ex. 51; ex. 53.

Speaker DiMasi and the Speaker's aide at the offices of VCC.<sup>23</sup> At the meeting, which the defendant also attended, Holzman pressed Speaker DiMasi for the Legislature to adopt an update in the ticket laws which would allow for the free market to set the price of resold tickets.<sup>24</sup>

June of 2006 was a transition time for the defendant at VCC.<sup>25</sup> The firm had decided to lower the age at which it required shareholders to redeem their shares from 72 to 62.<sup>26</sup> The defendant, who was then 61, was the first person at the firm whom this would affect and there were a number of partner meetings that summer around this issue.<sup>27</sup> As part of this process, on June 26, 2006, Richard Caturano sent an email out to VCC Executive Committee members with an agenda for a July 18 meeting.<sup>28</sup> One of the bullet points was, "RV buyout and what it does and doesn't mean for the firm".<sup>29</sup> The defendant replied via email to Richard Caturano and suggested an additional agenda item, "[t]he issue of being in business with clients".<sup>30</sup> The defendant then went on to list various business ventures and relationships he had with clients, including: (1) an interest in a minor league baseball team, (2) being owner with others in a property management firm and (3) that he sometimes used a company he owned to lend people money.<sup>31</sup> In this email, he never mentioned his formation of WN Advisors, his relationship with MATB or his loaning the Speaker money secured by a third mortgage.<sup>32</sup>

However, in the summer of 2006, VCC had a company retreat at which the defendant bragged about being close to Speaker DiMasi, and the defendant also indicated that he was

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<sup>23</sup> GJ ex. 55-56; G.J. III, p. 32-34, 38.

<sup>24</sup> G.J. III, p. 32-34.

<sup>25</sup> GJ IX, p. 142-145.

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> GJ ex. 145.

<sup>29</sup> Id.

<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> Id.

helping Ace Tickets get new legislation passed.<sup>33</sup> This boast was relayed to members of the VCC Executive Committee.<sup>34</sup>

At an August 23, 2006 Executive Committee meeting, members told the defendant that he should not be involved in such activity.<sup>35</sup> Members of the Executive Committee were concerned that this activity was outside the scope of the work of the firm and it would “hurt” the firm.<sup>36, 37</sup> The defendant assured his partners that he was not involved with lobbying, but was merely making an introduction to Speaker DiMasi.<sup>38</sup> The defendant said there was “nothing to worry about” as there was nothing inappropriate in this behavior.<sup>39</sup> The defendant left his partners with the impression that he would reduce or stop what he was doing.<sup>40</sup> However, the records of VCC show that on the same day, August 23, 2006, defendant Vitale arranged another meeting with himself, Speaker DiMasi and Holzman at the offices of VCC.<sup>41</sup> After the Executive Committee meeting, the defendant’s partners were unaware that he continued this line of work for the ticket brokers until the spring of 2008 when the Boston Globe started reporting it.<sup>42</sup>

During the summer and fall of 2006, the defendant and Holzman continued to communicate and finalize a representation arrangement.<sup>43</sup> On August 6, 2006 in an email exchange accompanying a draft of a proposed representation agreement, the defendant wrote:

*agree, it will be easier to have multiple agents combine and work under one agreement.  
This agreement is carefully worded by an attorney who specializes in working with*

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<sup>33</sup> G.J. IX, p. 156.

<sup>34</sup> Id.

<sup>35</sup> G.J. IX, p. 159-161.

<sup>36</sup> Id.

<sup>37</sup> One partner even mentioned that no one wanted to read about this (referring to the association with the Ticket brokers) on the front page of the Boston Globe. G.J. IX, p. 161.

<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> GJ ex. 58.

<sup>42</sup> G.J. IX, p. 163.

<sup>43</sup> GJ ex. 11, p. 607-620.

*lobbyists etc. Its important that all the parties know I am not a lobbyist as they have to register. Its also important there are many advisors not registered.*<sup>44</sup>

### Finalizing the Agreement

After an exchange of several drafts between Vitale and Holzman, a written agreement was finalized and entered into between the defendant WNA and MATB on December 15, 2006.<sup>45</sup> It was signed by Holzman and defendant Vitale.<sup>46</sup> The relevant provisions were that WNA was a “consultant” to perform a variety of business-related functions for MATB as well as “advising, promoting, and drafting legislation.”<sup>47</sup> However, the defendant did not perform any of these business-related functions and focused predominantly, if not solely, on getting legislation passed.<sup>48</sup> The contract called for payment of \$5,000 per month for eighteen months for a fee of \$90,000 and a contingent success fee of an additional \$20,000 “when the appropriate revised legislation for the benefit of the ticket brokers is enacted.”<sup>49</sup>

Each month thereafter, from December 2006 through April 2008, defendant WNA sent a bill to MATB for \$5,000 per month.<sup>50</sup> Defendant WNA received its first payment of \$5,000 on December 20, 2006,<sup>51</sup> and WNA from time to time made disbursements to Vitale.<sup>52</sup>

### Focusing on Legislation

Holzman spent the early part of 2007 re-organizing the MATB.<sup>53</sup> Holzman contacted a number of smaller ticket brokers and convinced them it was time to regroup.<sup>54</sup> Holzman’s

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<sup>44</sup> GJ ex. 11, p. 656.

<sup>45</sup> GJ ex. 11, p. 607-620; GJ ex. 42; G.J. III, p. 40.

<sup>46</sup> GJ ex. 42.

<sup>47</sup> Id.

<sup>48</sup> G.J. III, p. 42-45.

<sup>49</sup> GJ ex. 42.

<sup>50</sup> GJ ex. 25

<sup>51</sup> Despite the August 2006 email about Vitale not being a lobbyist, the two checks in 2007 to WN Advisors have the word, “Lobbyist” in the memo field. (GJ ex. 25, p. 2440-2442). This prompted a March 2007 email from Vitale to Holzman telling him to replace the word lobbyist with the term “Legislative Advisor”. (G.J. ex. 60).

<sup>52</sup> GJ ex. 2.

arguments to his fellow ticket brokers were that: (1) they needed to change the law to protect themselves from private lawsuits and (2) they needed representation because the national ticket brokers such as Ticketmaster had lobbyists.<sup>55</sup>

According to the Office of Campaign and Political Finance (“OCPF”), on or about March 22, 2007, the defendant contributed \$250 to the campaign committee of Representative David Torrisi.<sup>56</sup>

In May of 2007 the MATB held a number of private meetings.<sup>57</sup> The purpose of these meetings was to re-establish the MATB and consider hiring a lobbyist.<sup>58</sup> MATB elections were held and Holzman was elected President.<sup>59</sup> Holzman also informed the membership that he had engaged WNA to represent the association’s interests and the association began to collect dues toward the costs of the contract with WNA.<sup>60</sup> Also in May of 2007, Holzman testified before the joint Committee on Consumer Protection and Professional Licensure regarding pending ticket resale legislation.<sup>61</sup>

Despite at least two different requests for a representative of WNA to meet with the MATB, the defendant himself never appeared in front of the group, but instead sent John McLaughlin (“McLaughlin”), an attorney from the law firm of Berluti & McLaughlin, who also does estate planning work for clients of VCC.<sup>62</sup> After meeting with the defendant and Holzman

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<sup>53</sup> GJ V, p. 5-6.

<sup>54</sup> Id.

<sup>55</sup> GJ ex. 11, p. 705-706; G.J. V, p. 11, 14.

<sup>56</sup> GJ ex. 183.

<sup>57</sup> GJ ex. 28; G.J. X, p. 15.

<sup>58</sup> GJ ex. IV, p. 40-45.

<sup>59</sup> G.J. V, p. 18.

<sup>60</sup> G.J. V, p.

<sup>61</sup> G.J. III, p. 51-52.

<sup>62</sup> G.J. III, p. 74-78.



at VCC on May 9, 2007<sup>63</sup>, McLaughlin attended the May 10, 2007 meeting of the MATB and explained the legislative process.<sup>64</sup> At least one attendee remembers McLaughlin explaining that WN Advisors was not a “registered lobbyist” but represented that he and his associates could do things that registered lobbyists could not.<sup>65</sup> Attorney McLaughlin recalls that he informed MATB members that WN Advisors was not a lobbyist and that the MATB should consider hiring a lobbyist who could meet with legislators.<sup>66</sup>

On May 16, 2007 the joint Committee on Consumer Protection and Professional Licensure held a hearing on ticket resale legislation.<sup>67</sup> Although the defendant did not attend the hearing, within a week prior to the hearing Holzman had a private meeting with the defendant and Attorney McLaughlin and discussed how the MATB should present itself at the public hearing.<sup>68</sup> Holzman and a representative of the National Association of Ticket Brokers (“NATB”) testified at the hearing.<sup>69</sup> Holzman testified at the grand jury that defendant Vitale secured spots for both him and the NATB representative to testify.<sup>70</sup>

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<sup>63</sup> On May 8, 2007 Holzman emailed the defendant: *“Hi Dick, I know this McLaughlin gentlemen is smart, and hope that things will work out. I don’t know what he is privy to in regards to this entire WNA thing, is it okay for me to say anything with him in the room? Im only asking this for your protection, if not than we should have a private 5 minutes before we sit down with him. Ill leave it up to you.”* The defendant responded, *“He is ok. Say anything.”* (GJ ex. 61). The defendant’s Outlook Calendar and time records show a meeting on May 9, 2007 at VCC with Holzman and McLaughlin. (GJ ex. 62)

<sup>64</sup> GJ IX, p.

<sup>65</sup> G.J. IV, p. 13. In fact, this same witness, John Higgins, a member of the MATB remembers addressing the attendee as “Dick Vitale” (coincidentally the name of a famous basketball announcer) and not being corrected. He subsequently identified a photo of Attorney John McLaughlin in the grand jury as the person he remembered being “Dick Vitale”. G.J. IV, p. 9-13, GJ ex. 31.

<sup>66</sup> G.J. IX, p. 42-43.

<sup>67</sup> G.J. VIII, p. 18.

<sup>68</sup> G.J. IX, p. 27; The defendant’s Outlook Calendar shows a calendar entry on May 14, 2007, *“call Petro on hearing.”* (GJ ex. 63). “Petro” is Thomas Petrolati, Speaker Pro Tempore of the Massachusetts House of Representatives. (G.J. VIII, p. 19). In addition, on the day of the hearing May 16, 2007, there is an Outlook Calendar entry for the defendant from 12:30-1:30 pm: *“Petrolati (@State hse)”* (GJ ex. 63).

<sup>69</sup> G.J. VIII, p. 18.

<sup>70</sup> G.J. III, p. 52.

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On May 17, 2007, the defendant contributed \$500 to the campaign committee of Representative Robert DeLeo, Chairman of the House Ways and Means Committee, according to OCPF records.<sup>71</sup>

On May 24, 2007, the defendant contributed \$250 to the campaign committee of Representative Petrolati according to OCPF records.<sup>72</sup>

During the summer of 2007, Holzman regularly communicated with the defendant for updates on the legislative process; for example, on July 16, 2007, Holzman asked for an update and the defendant responded:

*I will be with him tomorrow for a few hours. It is my number one push. [Speaker of the House Pro Tempore Thomas] Petrolati is suppose to be overseeing it for me but that has been problematic. His key aide is out with cancer tratments [sic] and he is taking him for the treatments. I was told by the top we would get the draft of the legislation and with the 4<sup>th</sup> and the other crap they have not been as responsive as they could be.*<sup>73</sup>

Again, on July 19, 2007 Holzman emailed the defendant still requesting an update to which the defendant responded:

*He spoke to [Representative Michael] Rodrigues and told him he wants to move it along faster. Not sure he can get it done until Sept and has to make sure he has senate buy in the way we want it. I have Petrolati on it starting on a daily basis. i [sic] gave him the NY legislation today.*<sup>74</sup>

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<sup>71</sup> GJ ex. 184.

<sup>72</sup> GJ ex. 182.

<sup>73</sup> GJ ex. 22, p. 2385

<sup>74</sup> GJ ex. 11, p. 629. There are repeated references to “he” or “him” in the defendant’s emails which Holzman understood to mean Speaker DiMasi. (G.J. III, p. 53).

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On July 24, the defendant emailed Holzman, *"just got off the phone with Petrolati. Last night he was assigned to meet with Rodrigues to move it along. I'm out with him at a golf event today"*.<sup>75</sup>

According to records, on August 2, 2007, the defendant met with Representative Petrolati, who was assisting a sick aide, at the Dana Farber Cancer Institute.<sup>76</sup> On his time records, the defendant charged two hours that day to work for the MATB and the cost of parking at the Dana Farber to the MATB account.<sup>77</sup> The defendant then arranged for Holzman to have an in-person meeting with Representative Petrolati at the offices of VCC on August 16, 2007.<sup>78</sup>

On August 16, the defendant held a meeting at VCC.<sup>79</sup> The defendant, Holzman and Representative Petrolati were there in person.<sup>80</sup> Speaker DiMasi participated via conference call.<sup>81</sup> Holzman pitched his reasons why the legislation needed to be updated and his view of what should be in any updated legislation.<sup>82</sup> Again, the defendant billed the time he spent at this meeting to the MATB.<sup>83</sup>

## Legislation Passes in the House of Representatives

In MATB's view, September of 2007 was a crucial month for the ticket legislation in the House of Representatives.<sup>84</sup> On September 17, 2007, a Quincy District Court judge ruled that one of the MATB members had violated state law by selling an \$85 face value Red Sox Ticket

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<sup>75</sup> G.J. ex. 159, p. VCC-AG-04-025339.

<sup>76</sup> GJ ex. 22, p. 2335.

<sup>77</sup> G.J. ex. 67-68.

<sup>78</sup> G.J. III, p. 55-58

<sup>79</sup> Id.; GJ ex. 73.

<sup>80</sup> Id.

<sup>81</sup> G.J. III, p. 56.

<sup>82</sup> Id.

<sup>83</sup> GJ ex. 38, p. VCC-AG-06-044413.

<sup>84</sup> GJ III.

for \$500.<sup>85</sup> This court ruling increased the anxiety among the ticket brokers.<sup>86</sup> Holzman emailed the defendant about this development the day it happened.<sup>87</sup> The defendant responded that he was making inquires concerning the legislative process.<sup>88</sup>

Two days later on September 19, 2007, Holzman emailed the defendant that members of the MATB were getting anxious and wanted another meeting.<sup>89</sup> Holzman also went on to explain that with the Quincy court decision and big upcoming events, including Red Sox playoffs and a highly publicized Hannah Montana concert, he was worried that the media, which Holzman perceived as supporting a change in the ticket resale legislation, would change its opinion.<sup>90</sup> The defendant responded:

*Spoke to him and still planning on next week. Told him goal is NY legislation. Indicated the teams are looking to protect season ticket holder which I think means they don't want them reselling them. Anyway he knows to deliver the draft to my office before anything. Are the sox ok with complete NY legislation (he didn't ask me that). My take is he has not taken the time to gain a complete understanding but is moving it along. Based on past history we will have our input if there are things we don't like.*<sup>91</sup>

In addition to responding to Holzman, the defendant forwarded Holzman's email to his assistant with the following instructions: *"Have a copy of this delivered to Petrolati this*

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<sup>85</sup> GJ ex. 11, p. 655; G.J. III, p. 59-60.

<sup>86</sup> Id.; GJ ex. 11, p. 636; GJ ex. 80.

<sup>87</sup> Id.

<sup>88</sup> Id.

<sup>89</sup> GJ ex. 76.

<sup>90</sup> GJ ex. 43.

<sup>91</sup> GJ ex. 76. As with other e-mails, the defendant used "he" to refer to Speaker DiMasi. (GJ ex. 112) The reference to the NY legislation appears to refer to recently enacted New York Legislation which, among other things, prohibited teams from taking restrictive measures against ticket season holders who resell their tickets. (G.J. III, p. 50).

morning *PERSONAL AND CONFIDENTIAL*.<sup>92</sup> Courier service records show that a package was delivered from VCC to Representative Petrolati's office at 10:20 AM that same day.<sup>93</sup>

On Monday of the following week, September 24, 2007, House Bill 4251, An Act Relative to the Resale of Tickets, was reported favorably out of the committee on Consumer Protection and Professional Licensure, with various changes recommended by the committee from the original bill that had been filed.<sup>94</sup>

Holzman emailed the defendant the next day, Tuesday, September 25, 2007 with two concerns about the legislation as it was reported out of committee:

*A couple of items to note, it needs to be included something that says an unlicensed individual may resell there [sic] tickets to a licensed broker. The bill now mentions only stubhub reselling. The bill also mentions limiting runners and ticket limits that may be purchased, these things should not be part of this bill, and are to be regulated by the venue and ticketmaster, not the state.*<sup>95</sup>

The defendant emailed his assistant to have a copy of this email delivered "*to Petro asap...personal and confidential*".<sup>96</sup> Courier records corroborate a delivery from VCC to Representative Petrolati's office that day.<sup>97</sup> In addition, phone records show five calls between the cell phones of Representative Petrolati and the defendant's that day.<sup>98</sup>

Also on September 25<sup>th</sup>, a member of the MATB inquired of Holzman about contacting legislators, and Holzman emailed back, "*You don't need to do anything, the battle continues as*

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<sup>92</sup> GJ ex. 43

<sup>93</sup> GJ ex. 167, p. 6869.

<sup>94</sup> GJ ex. 119.

<sup>95</sup> GJ ex. 79.

<sup>96</sup> Id.

<sup>97</sup> GJ ex. 167, p. 6870.

<sup>98</sup> GJ ex. 18; 19.

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*we speak, its all behind the scenes maneuvering. We have momentum don't worry. Our hired gun should get us all we need (hopefully)."*<sup>99</sup>

On Thursday, September 27, 2007, the defendant had an entry in his outlook calendar reading, "*DiMasi - Language on teams reselling not in there.*"<sup>100</sup> The next day, September 28, 2007, a legislative staff member from the Committee on Consumer Protection sent an email to a member of the Speaker's staff attaching a revised draft of the legislation "*with changes made from yesterday as the Speaker requested.*"<sup>101</sup> (emphasis added). This draft of the legislation contained changes that specifically adopted both of the changes requested by Holzman's email of September 25, 2007 to the defendant – the email that defendant Vitale had sent along to Representative Petrolati in hard copy format via courier.<sup>102</sup> The new draft included new, specific language exempting from the definition of the "business of ticket reselling" persons who sell tickets to a licensed broker; and the new draft eliminated previous provisions of the bill (as reported by the Committee on September 24, 2007) that limited the activities of runners, such as standing in line to obstruct others, or buying more than the quantity of tickets allowed by a venue.<sup>103</sup>

In the midst of trying to influence the legislative process, on September 27, 2008, defendant Vitale arranged for the payment of \$7,424.17 worth of legal bills for the Speaker's in-laws.<sup>104</sup> The payment was made from the bank account of defendant WNA.<sup>105</sup>

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<sup>99</sup> GJ ex. 11, p. 655.

<sup>100</sup> GJ ex. 81.

<sup>101</sup> GJ ex. 121; G.J. VIII, p. 85.

<sup>102</sup> G.J. VIII, p. 88-90.

<sup>103</sup> Id.

<sup>104</sup> GJ ex. 82-84; 135-137. Attorney John McLaughlin, the same attorney who represented WN Advisors at MATB meetings, explained in grand jury testimony that defendant Vitale referred estate work and business planning work to him and that these outstanding bills represented work he had some for the Speaker's wife's parents. (G.J. IX, p. 75-80).

<sup>105</sup> GJ ex. 82-83.

On Friday, September 28, 2007, Holzman emailed the defendant indicating that he was concerned that the bill was supposed to come out next Tuesday (October 2) and Holzman had not received a copy of the latest legislation.<sup>106</sup> The defendant emailed his assistant and told her that he (the defendant) just spoke to Representative Petrolati.<sup>107</sup> The defendant instructed his assistant to call Representative Petrolati on Monday morning and remind the Representative to hand-deliver the legislation to VCC, and then for the assistant to arrange to get the legislation to Holzman.<sup>108</sup> The defendant also included in this email that he had given Holzman the cell phone number of Representative Petrolati “*if Jim [Holzman] has any issues*”.<sup>109</sup> Courier service delivery records corroborate a delivery from Representative Petrolati’s office to VCC on Monday, October 1, 2007.<sup>110</sup> In addition, the defendant’s assistant reported in an email: “*I sent package to Jim. He called & said they’re ok w/it on their end. Do I need to let Petrolati know anything?*”<sup>111</sup>

The next day, Tuesday October 2, 2008 the House Ways and Means Committee reported a new version of the ticket bill favorably to the House Steering, Policy and Scheduling Committee, which also reported it out that day.<sup>112</sup> The House was in session on that day. During its session the House suspended its rules, substituted a new version of the bill (H. 4263), ordered it to a third reading, and passed the bill all in the same day.<sup>113</sup> The final bill included changes consistent with the requests in Holzman’s September 25, 2007 email, as well as a new provision favorable to the MATB requiring a broker to maintain at least one physical office in

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<sup>106</sup> GJ ex. 11, p. 640.

<sup>107</sup> GJ ex. 44.

<sup>108</sup> Id.

<sup>109</sup> Id.

<sup>110</sup> GJ ex. 167, p. 6871.

<sup>111</sup> GJ. ex. 44.

<sup>112</sup> GJ ex. 86.

<sup>113</sup> Id., G.J. VIII, p. 47, G.J. VI p. 82-83. GJ ex. 119, 120.

Massachusetts in order to be licensed.<sup>114</sup> Within minutes of the legislation's passage in the House, Holzman sent an email to the MATB members announcing the success and saying "[w]orking together with WN has brought us this far and ill [sic] keep all of you updated as to any new developments."<sup>115</sup>

### Ticket Legislation is referred to the Senate

After passage in the House, the legislation was referred to the Senate.<sup>116</sup>

From mid to late October, Holzman and the defendant emailed back and forth. Holzman consistently was looking for an update on the Senate status of the bill.<sup>117</sup> By the end of October, Holzman reported via email to the defendant that some MATB members were asking for a meeting with WN for an update: "*Dick, ive [sic] been getting numerous requests from my membership to hold a meeting with WN for some type of updates as to where we are at. Any suggestions at this point?*"<sup>118</sup>

On Friday, October 26, 2007 the defendant forwarded this email to his assistant and instructed her to call Representative Petrolati and ask if the Representative found out what was happening with the bill in Senate Ways and Means and wrote: "*read him Jim's email*". That same afternoon, the assistant reported back to the defendant in an email that the "Senate Council [sic]" was reviewing it and Representative Petrolati would have more information on Monday. She also reported that she read Holzman's email to Representative Petrolati.<sup>119</sup>

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<sup>114</sup> This would be important to the MATB which is comprised of local ticket brokers because most of the membership do not have offices in the Commonwealth unlike large national brokers such as Stub Hub or Ticket Master.

<sup>115</sup> GJ ex. 87

<sup>116</sup> GJ ex. 121, p. 64.

<sup>117</sup> GJ ex. 45, 88.

<sup>118</sup> GJ ex. 159, p. VCC-AG-04-024203

<sup>119</sup> Id.



During this time, Holzman was becoming more frustrated by a lack of progress on passing the legislation.<sup>120</sup> On November 20, 2007, he sent a pleading email to the defendant blaming WN for not getting the legislation passed in 2007.<sup>121</sup> Holzman also told the defendant he (the defendant) needed to think about meeting with the membership of MATB.<sup>122</sup>

By the end of November, Holzman was getting more requests for meetings from the membership of MATB.<sup>123</sup> Holzman communicated this to the defendant.<sup>124</sup> The defendant responded with a suggestion by a registered lobbyist who represents StubHub, to wait until the beginning of the year to “attack the senators” and spend December lining up support.<sup>125</sup> The defendant also told Holzman that there was a fundraiser for Senator Joan Menard on January 16 and that “*we may want three or four of you.*”<sup>126</sup> The defendant indicated that Attorney McLaughlin could represent WN at a meeting of the MATB.<sup>127</sup>

Records show that from December of 2007 to mid-January of 2008, the defendant had meetings with members of House leadership.<sup>128</sup> For example, on December 6, 2007 the defendant’s Outlook Calendar shows a meeting at VCC with Speaker DiMasi, an aide to the Speaker, Representative DeLeo and Representative Petrolati.<sup>129</sup> This was also corroborated in an email on December 29<sup>th</sup>, 2007 in which the defendant wrote, “I spend several hours a week on state house matters..”<sup>130</sup>

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<sup>120</sup> GJ ex. 90.

<sup>121</sup> Id.

<sup>122</sup> Id.

<sup>123</sup> GJ ex. 91.

<sup>124</sup> Id.

<sup>125</sup> Id., G.J. VIII, p. 55-56.

<sup>126</sup> Id.

<sup>127</sup> Id.

<sup>128</sup> GJ ex. 92-93.

<sup>129</sup> GJ ex. 93.

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### Lack of Progress in the Senate

By early January of 2008, Holzman was again emailing for a copy of the Senate legislation, inquiring about the Menard fundraiser and was concerned about “THE MAN” leaving.<sup>131</sup> The defendant emailed back, “*He’s not leaving, I will get further update.*”<sup>132</sup>

By mid-January of 2008, the defendant was starting to involve other lobbyists.<sup>133</sup> Richard McDonough (“McDonough”) is a registered lobbyist who is a friend of the defendant’s.<sup>134</sup> On Saturday, January 12, 2008, the defendant emailed McDonough with the subject line “Monday night”:

*Sal [DiMasi] doesn’t know his schedule. He is meeting with leadership Monday noon to start the process. I told him what we were meeting on and that we should go to dinner to lay out the battle plans. Assuming he goes, we need to pick a venue. If Boston, we need a private room. He won’t want to go far. Idea’s.*<sup>135</sup>

That same week, on January 16, 2008, Vitale hosted a fundraiser at the offices of VCC for Senator Joan Menard.<sup>136</sup> Holzman attended and spoke briefly to Senator Menard about the ticket bill.<sup>137</sup> Holzman also gave her a contribution for her campaign committee, as did the defendant.<sup>138</sup>

After a few more emails requesting updates and/or the Senate version of the legislation, Holzman became extremely frustrated and sent the defendant a long email on Saturday, February

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<sup>130</sup> GJ ex. 159, p. VCC-AG-04-025074. This email is to Paul Grant with whom defendant Vitale had formed a property management company. In this email he references working on “several projects” at the state house and talking to “Sal” about the defendant’s priorities.

<sup>131</sup> GJ ex. 95.

<sup>132</sup> Id.

<sup>133</sup> GJ ex. 96.

<sup>134</sup> G.J. VIII, p. 60.

<sup>135</sup> GJ ex. 96, G.J. VIII p. 60.

<sup>136</sup> GJ ex. 97, 98; G.J. VIII, p. 61; G.J. III, p. 83.

<sup>137</sup> G.J. III, p. 83-84.

<sup>138</sup> G.J. III, p. 84-85; GJ ex. 185.

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2, 2008.<sup>139</sup> It starts out with Holzman telling the defendant that the failure to pass an updated law has cost Holzman many lucrative business opportunities.<sup>140</sup> In the email, Holzman wrote, *"It has been 3 long years of me being in a situation where ive [sic] waited patiently for the results that I have fully entrusted you with, and that you have assured me will happen."*<sup>141</sup> Holzman went on to explain to the defendant that MATB membership was questioning him about exactly who "WN" was.<sup>142</sup> Holzman also wrote that he (Holzman) was being challenged for the presidency of MATB.<sup>143</sup> Holzman ended the email to defendant by saying *"[i]n this entire project the results is that you and I together are 'Heroes or Zeroes'. Together let's be heroes."*<sup>144</sup>

The defendant responded quickly and did two things with the "heroes or zeroes" email.<sup>145</sup> Within 30 minutes he forwarded it to the home email address of the Speaker's wife, Debbie DiMasi, with the following note: *"Please have Sal [the Speaker] read this and I will call him to discuss. Sal for your information, I, we never guaranteed him a victory on this like he indicates."*<sup>146</sup>

The defendant also responded to Holzman:

*I have a meeting with him on Tue. It may change because of the [presidential] primary, but if it does it will be immediately rescheduled for this week. I have made him aware of all of your concerns and issues. Being a politician he did say..wow..if he get his legislation and then hits it out of the park. WN gave him a good deal...I told him I disagree (because I'm not a politician). He also has said several times he preferred that*

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<sup>139</sup> GJ ex. 99.

<sup>140</sup> Id.

<sup>141</sup> Id.

<sup>142</sup> Id.

<sup>143</sup> Id.

<sup>144</sup> Id.

<sup>145</sup> GJ ex. 100

<sup>146</sup> GJ ex. 100, 101.

*WN just represent you and not MTBA [sic]. On this point at the time I felt it should be MBTA [sic].*<sup>147</sup>

On February 8<sup>th</sup>, 2008 Holzman emailed the defendant asking, “do you really think its next week”.<sup>148</sup> Holzman also explained he still had a business opportunity, implying that this opportunity depended upon a change in the law.<sup>149</sup> The defendant forwarded this email to Debbie DiMasi’s email account explaining, “he needs to talk to me on this also.”<sup>150</sup>

The defendant then vacationed for several days with Speaker DiMasi and Debbie DiMasi in Florida starting on February 15, 2008.<sup>151</sup> The day before on February 14, Holzman emailed the defendant concerned because the Patriots’ attorneys were issuing subpoenas to members of the MATB and the members were pushing for a meeting with our “Advisors”.<sup>152</sup> The defendant also had this email delivered via courier to Representative Petrolati’s office.<sup>153</sup>

The next day, Holzman pressed the defendant in an email: “to schedule a meeting with a WN representative asap.”<sup>154</sup>

The defendant while in Florida, responded:

*I am meeting with him tonight in florida [sic] and will be with him until late Tuesday. I don’t mind being bugged but they should know no one ever guaranteed results and if they hired a lobbyist like Murphy it would have been no different and a lot more money.*<sup>155</sup>

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<sup>147</sup> G.J. VIII, p. 65.

<sup>148</sup> GJ ex. 105, 113.

<sup>149</sup> Id.

<sup>150</sup> GJ ex. 104.

<sup>151</sup> GJ ex. 106-109.

<sup>152</sup> In 2007 the Patriots sued StubHub, alleging among other things, that StubHub’s business induced season ticket holders to sell their Patriot’s tickets in violation of Patriots’ policies. As part of the litigation the Patriots served subpoenas on ticket resellers to obtain documents to identify the individuals who purchased or sold tickets through resellers. G.J. ex. 109-111.

<sup>153</sup> G.J. VIII, p. 71.

<sup>154</sup> GJ ex. 109.

<sup>155</sup> Id.

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Within a few days, other members of the MATB, very concerned about the Patriots litigation, set up a meeting for February 25, 2008.<sup>156</sup> On February 18, Holzman emailed the defendant to ask if a WN representative could attend.<sup>157</sup> The defendant responded, *"I have a message into McLaughlin. I have given him the senate bill and your concerns. He is away with his family for school vacation but has info and will work on it. I will get his thoughts before next Mon if possible."*<sup>158</sup> The next day February 19, the defendant clarified in an email to Holzman, *"on my message about giving him the senate bill, and him being away, I was talking about HIM not McLaughlin. He is also updated on the Patriots."*<sup>159</sup>

The MATB held a meeting on February 25, 2008.<sup>160</sup> The defendant did not attend but sent attorney McLaughlin on behalf of WN Advisors.<sup>161</sup> McLaughlin talked about what process a bill needs to follow to get through the Senate.<sup>162</sup> According to one of those in attendance, McLaughlin also indicated that WN Advisors had more influence in the House than in the Senate; McLaughlin did not recall saying this.<sup>163</sup>

## Holzman Considering Options

By mid-March Holzman was under attack again by members of the MATB and he emailed the defendant on March 12 saying he was again being challenged as president.<sup>164</sup> The defendant responded:

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<sup>156</sup> GJ ex. 110.

<sup>157</sup> Id.

<sup>158</sup> GJ ex. 112.

<sup>159</sup> Id.

<sup>160</sup> GJ ex. 110, G.J. IX, p. 52-53.

<sup>161</sup> G.J. IX, p. 53-58.

<sup>162</sup> Id.

<sup>163</sup> G.J. V, p. 23-24; G.J. IX, p. 57.

<sup>164</sup> GJ ex. 115.

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*I had mentioned a meeting today and that was the first thing on the agenda and Petro was instructed to go over to the Senate and find out what is going on. If they terminate you, that may not be all bad, because who ever they hire as a lobbyist will be a dead end street.*<sup>165</sup>

A few minutes later, Holzman replied, *"I believe you'd still be the lobbyist, you would just have to deal with someone else rather than me, chances are they'd be more inquisitive."*<sup>166</sup>

By the end of March, there was no evidence that the Senate was taking up the bill.<sup>167</sup>

On April 2, 2008 there was meeting with the defendant, McDonough, Marty Corry (another lobbyist) and Holzman to consider hiring Corry to push the legislation in the Senate.<sup>168</sup>

Rather than hiring Corry, however, Holzman himself met with Chairman Morrissey in an attempt to advocate his position.<sup>169</sup> On April 3, 2008 Holzman emailed the defendant in anticipation of his meeting with Senator Morrissey and asked, *"when asked, what do I tell Morrissey about WN"*<sup>170</sup>

The defendant responded in an e-mail, explicitly instructing Holzman to conceal the existence of WN Advisors from Senator Morrissey: *"don't tell him about it...he doesn't have to know and shouldn't. You have been working on this yourself, and have had meetings with some house members. If he asks say Petrolati. Petrolati has been talking to him about this."*<sup>171</sup>

After a number of articles in the Boston Globe in April and May of 2008, the defendant and the MATB were contacted by the Secretary of State's office concerning their failure to

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<sup>165</sup> Id.

<sup>166</sup> Id.

<sup>167</sup> GJ ex. 11, p. 737.

<sup>168</sup> G.J. X, p. 43.

<sup>169</sup> G.J. X, p. 46-47.

<sup>170</sup> G.J. ex. 118.

<sup>171</sup> Id.

register as legislative agents.<sup>172</sup> In response, defendant WNA registered as a lobbying entity, and listing the defendant as a lobbyist, for 2008 only.<sup>173</sup>

Shortly before one of the Boston Globe stories in April of 2008, defendant Vitale called Richard Caturano, his partner at VCC, and left a voicemail indicating that he (defendant Vitale) was cleaning his email “in accordance with firm policy”, but he realized copies of the emails would still exist on the firm’s servers.<sup>174</sup> Defendant Vitale went on to ask Mr. Caturano if the emails could be permanently deleted.<sup>175</sup> This did not happen.<sup>176</sup>

Ultimately, from December of 2006 through January of 2008, WNA received \$60,000 under this contract.<sup>177</sup> The final \$10,000 payment was made on January 8, 2008.<sup>178</sup> There were some outstanding bills that were never paid in 2008.<sup>179</sup>

## ARGUMENT

**The Grand Jury heard sufficient evidence that defendant Vitale was paid substantial amounts of money to make repeated lobbying contacts with legislators that were not simply incidental to his professional activities and was indeed a “Legislative Agent”, and thus both defendants violated the registration requirements of G.L. c. 3 § 41 and defendant Vitale violated the campaign contribution limits of G.L. c. 55 § 7A(b).**

The test by which an indictment is measured is the sufficiency of the evidence for probable cause to arrest. Commonwealth v. Suarez, 59 Mass. App. Ct. 111, 119 (2003). That standard has been defined as whether the grand jury heard “reasonably trustworthy

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<sup>172</sup> GJ ex. 178.

<sup>173</sup> GJ ex. 181

<sup>174</sup> G.J. IX, p. 176-177.

<sup>175</sup> Id.

<sup>176</sup> Id.

<sup>177</sup> GJ ex. 2; 25; G.J. ex. 22, p. 2376

<sup>178</sup> Id.

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information...sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense.” Commonwealth v. McCarthy, 385 Mass. 160, 165 (1982).

The challenged indictments are triggered by defendant Vitale’s work as a “legislative agent” as defined by G.L. c. 3 § 39.<sup>180</sup> Under G.L. c. 3 § 41, both a legislative agent and a “lobbyist entity” have annual reporting requirements to the secretary of state.<sup>181</sup> A “lobbyist entity” is “an entity providing lobbyist services, consisting of at least 1 legislative or executive agent, including...limited liability partnership or company...”.<sup>182</sup> Thus when the defendant created WN Advisors, LLC and started acting as lobbyist, he triggered registration requirements for both himself and WNA. He also triggered the campaign contributions limits established by law.<sup>183</sup>

The defendants take the position that defendant Vitale’s lobbying was simply “incidental” to his profession as an accountant as solely determined by function of the number of hours devoted to lobbying. (Defendant’s Motion, at 4). The defendant takes the further position that the statute creates an “irrebuttable presumption” that any individual who simply stays under the designated time cap of fifty hours per six month reporting period or earns less than five

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<sup>179</sup> Id.

<sup>180</sup> A “legislative agent” is defined as...*a person who for compensation or reward does any act to promote, oppose or influence legislation, or to promote, oppose or influence the governor’s approval or veto thereof. The term “legislative agent” shall include a person who, as part of his usual and regular business or professional activities and not simply incidental thereto, attempts to promote, oppose or influence legislation or the governor’s approval or veto thereof, whether or not any compensation in addition to salary for such activities is received for such services; provided, however, that for purposes of this definition a person shall be presumed to engage in activity covered by this definition in a manner that is simply incidental to his usual business or professional activities if he engages in any activity or activities covered by this definition for not more than fifty hours during any reporting period or receives less than five thousand dollars during any reporting period for any activity or activities covered by this definition.*

<sup>181</sup> *Each legislative agent, executive agent and lobbyist entity shall file an annual registration statement with the state secretary on forms prescribed and provided by the state secretary. The annual registration shall be completed not later than December 15 of this year preceding the registration year. G.L. c. 3 § 41 (2<sup>nd</sup> para.).*

<sup>182</sup> G.L. c. 3 § 39

<sup>183</sup> *Notwithstanding any other provision of this chapter, the aggregate of all contributions by a legislative or executive agent for the benefit of any one candidate and such candidate’s committee shall not exceed the sum of two hundred dollars in any calendar year. Notwithstanding any other provision of this chapter, the aggregate of all*



thousand dollars per six month reporting period is not a legislative agent. (Defendants' Motion, at 5). This is simply illogical. This interpretation not only ignores the clear statutory language, but would mean that a person who has a high level of influence and can simply accomplish their client's goals in under 50 hours would never have to register as a legislative agent.

The definition of "legislative agent" in section 39 does indeed establish a presumption that a person's lobbying activities are "simply incidental" – and thus do not trigger registration requirements – if he lobbies for less than 50 hours during a six-month reporting period. See G.L. c.3, § 39. Nothing in this language, however, makes this presumption *irrebutable*. If the Legislature intended to create an absolute, bright-line safe harbor for activity below a certain hourly threshold, it would have said so. Instead, however, section 39 merely establishes a presumption.

Under section 39, the ultimate test remains whether a person's lobbying activity was "simply incidental." Where, for instance, the lobbyist receives very substantial amounts of money to advocate for legislation (here, \$60,000), a jury could reasonably conclude that he was a legislative agent even if he spent only 30 or 40 hours lobbying during a reporting period. A jury could likewise look at the nature of the lobbying activity. Relevant considerations would include whether the person made a few isolated phone calls, or instead a large number of communications, and whether his activity was a minor by-product of other business activity (such as representing a client in related legal matters not involving legislation).

Here, the grand jury heard ample evidence to find that defendant Vitale's acts were those of a "legislative agent". Defendant Vitale was able to affirmatively influence the legislation as it passed through the House of Representatives. He did this by meeting privately with Speaker

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*contributions by a legislative or executive agent to any political committee, other than a ballot question committee, shall not exceed the sum of two hundred dollars in any calendar year. G.L. c. 55 § 7A(b).*

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Pro Tempore Tom Petrolati in August of 2006, arranging for Jim Holzman to meet privately with Speaker DiMasi in June of 2006 at VCC's offices and then in August of 2007 to meet with Representative Petrolati at VCC's offices during which Speaker DiMasi called in, and funneling messages and emails to Speaker DiMasi through Speaker Pro Tempore Petrolati. The grand jury heard evidence that in 2007, Vitale had numerous communications with these high-ranking House members. Finally, the grand jury was warranted in crediting the contemporaneous emails from legislative staff members working on the ticket legislation in the days before passage in the House that the Speaker influenced the outcome of the legislation which specifically benefitted defendant Vitale's client, the MATB.

It was reasonable for a jury to find that defendant Vitale set up WNA to shield his activities starting in June of 2006. In that same month, he withheld this specific information regarding WNA from the co-founder of VCC. Later that summer, after defendant Vitale was warned by members VCC's executive committee that his association with the ticket brokers was not the type of business association the firm desired, he represented he not doing anything inappropriate.

The grand jury was also warranted in finding that defendant Vitale had a close personal and professional relationship with the Speaker. Defendant Vitale was the Speaker's accountant, one time roommate, confidant, lent the Speaker a substantial sum of money, paid his in-laws legal bills, vacationed with the Speaker and his family and had both phone and email access to the Speaker. Thus, unlike a traditional lobbyist, because of his relationship with the Speaker, defendant Vitale was able to succeed with little effort. Hence, it is not surprising that the contract between the MATB included an unusual provision capping the number of hours the defendant would devote to lobbying for MATB, but still had a success fee.

## **Filed Under Seal**

Defendant Vitale continued to assist his paying client, the MATB, as the legislation was pending in the State Senate. The grand jury was warranted in concluding that defendant Vitale communicated directly with legislators for updates on the Senate legislation. The defendant held a fundraiser for a State Senator at VCC's offices where he was able to get Jim Holzman time to speak to the state senator

Contrary to someone who believed his actions were fully covered by the "incidental exemption" to the definition of "legislative agent" within G.L. c. 3 § 39 with no need to worry about appearances of improprieties, defendant Vitale did everything he could to hide his activities. First, he set up defendant WNA instead of having either Jim Holzman on behalf of Ace Tickets or the MATB contract directly with him as a named party. In June of 2006 in an email in which he was listing his extra-business activities to Richard Caturano, his fellow co-founder of VCC, he failed to disclose the existence of WNA. Later in the summer, despite being warned by members of VCC's executive committee about representing the MATB, he continued to do so. Despite repeated requests to attend MATB meetings, defendant Vitale never appeared and always sent Attorney McLaughlin. In all the emails he sent to Holzman, he never referred the Speaker directly, only vaguely referring to "he" or "him". Finally, in April of 2008 when Jim Holzman was going to meet Senator Morrissey, the Senate chairman of the Consumer Protection Committee, defendant Vitale instructed Holzman to lie about the work of WNA and say that Holzman had been dealing directly with Representative Petrolati. These are not the actions of someone acting within the law, albeit an exemption.

The defendants also complain that the Commonwealth failed to provide the grand jury with exculpatory evidence, namely a compilation of defendant Vitale's billing records which,

according to the defendant, would have shown that he did not bill more than 50 hours per six month period and thus was only “incidentally” lobbying.

First, the defendants ignore the testimony of Barbara Martin, a 25 year employee and manager at VCC, who testified at length as to the billing practice of the defendants.<sup>184</sup> In addition, the relevant billing records were introduced into evidence.<sup>185</sup> Indeed, based on defendant Vitale’s own statements,<sup>186</sup> the grand jury was warranted in finding that the defendant spent a couple of hours a week on statehouse matters, and thus worked more than fifty hours per six months. The grand jury was also warranted in taking into account such things as the Florida vacation in February of 2008 in determining the amount of time defendant Vitale spent lobbying.

Most importantly, the grand jury could believe based on the overwhelming evidence that defendant Vitale’s conduct was in no way “incidental” to his professional activities. Whether activity is “simply incidental” is, in the end, a function not only of the total number of hours, but also the amount of money paid and the nature and quality of the lobbying and its relationship, or lack thereof relationship, to the person’s other professional activities. Therefore, the number of hours, whether two or two hundred, were immaterial to the grand jury’s ultimate determination of probable cause. As the Court has ruled, “[w]e have not required a prosecutor to present evidence to a grand jury that a person under investigation claimed a license or exemption, where subsequent investigation demonstrated the claim was invalid.” Commonwealth v. Clemmey, 447 Mass. 121, 131 (2006).

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<sup>184</sup> G.J. IX, p. 104-105. Previous to Ms. Martin testifying, Attorney John McLaughlin had testified that WN Advisors had assigned its membership interest (basically its shares) from defendant Vitale to another LLC named Golf Advisors in September of 2006. G.J. IX, p. 125-127; GJ ex. 125, 126.

<sup>185</sup> G.J. ex. 38 & 138. (These records consisted of both defendant Vitale’s personal billing records and Golf Advisors invoices from November of 2006 to April of 2008)

<sup>186</sup> G.J. ex. 159, p. VCC-AG-04-025074 (“I spend several hours a week on statehouse matters.”).

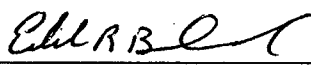
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**CONCLUSION**

For the foregoing reasons, the defendants' request to dismiss the indictments for insufficiency of evidence and failure to present exculpatory evidence to the grand jury should be denied.

Respectfully Submitted  
For the Commonwealth

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