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12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN FRANCISCO DIVISION

15  
16 UNITED STATES OF AMERICA, ) No. CR-08-0237-MHP  
17 )  
18 Plaintiff, )  
19 vs. )  
20 DAVID NOSAL, et al., ) Date: March 2, 2009  
21 Defendants. ) Time: 11:00 a.m.  
 ) Courtroom: Hon. Marilyn Hall Patel  
 )  
 )  
 )

22  
23 **DEFENDANT'S REPLY MEMORANDUM**  
24 **IN SUPPORT OF MOTION TO DISMISS INDICTMENT**  
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**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

I. COUNTS TWO THROUGH NINE MUST BE DISMISSED BECAUSE THE INDICTMENT ALLEGES MISAPPROPRIATION, WHICH IS NOT COVERED BY THE COMPUTER FRAUD AND ABUSE ACT ..... 1

    A. The Misappropriation Theory of the CFAA ..... 1

        1. Weight of Authority ..... 1

        2. “Common Sense” and Trespassory Takings ..... 1

        3. The Rule of Lenity ..... 3

        4. Conclusion ..... 3

    B. Vicarious Liability for Count Three ..... 4

II. COUNTS 10 AND 11 MUST BE DISMISSED BECAUSE THEY FAIL TO ALLEGE AN ESSENTIAL ELEMENT OF THE OFFENSE — NAMELY, KNOWLEDGE OF ILLEGALITY ..... 5

III. BECAUSE COUNTS 10 AND 11 ARE MULTIPLICITOUS, ONE OF THEM MUST BE DISMISSED ..... 7

IV. THE MAIL FRAUD COUNTS MUST BE DISMISSED BECAUSE AN UNDISCLOSED BREACH OF AN INVALID CONTRACTUAL PROVISION DOES NOT CONSTITUTE FRAUD ..... 8

    A. Introduction ..... 8

    B. The Misappropriation of Information Allegations ..... 10

    C. The Non-Existent “Honest Services” Theory ..... 11

    D. The Violation of The Non-Compete Provision ..... 11

    E. The Relevance of California State Law ..... 12

CONCLUSION ..... 14

1 **TABLE OF AUTHORITIES**

2 **CASES**

3 *AIG Baker Sterling Heights v. America Multi-Cinema,* 3  
508 F.3d 995 (11th Cir. 2007)

4 *Apprendi v. New Jersey,*  
5 530 U.S. 466 (2000) 5

6 *Bennett v. United States,*  
7 399 F.2d 740 (9th Cir. 1968) 2

8 *Black & Decker v. Smith,*  
9 568 F. Supp. 2d 929 (W.D. Tenn. 2008) 1

10 *Bridal Expo, Inc. v. Van Florestein,*  
11 2009 U.S. Dist. LEXIS 7388 (S.D. Tex. Feb. 3, 2009) 1

12 *Bush v. United States,*  
13 58 F.3d 482 (9th Cir. 1995) 9

14 *Cheek v. United States,*  
15 498 U.S. 192 (1991) 6

16 *Condux International, Inc. v. Haugum,*  
17 2008 U.S. Dist. LEXIS 100949 1

18 *Corley v. Rosewood Care Ctr.,*  
19 388 F.3d 990 (7th Cir. 2004) 11

20 *Edwards v. Arthur Andersen LLP,*  
21 44 Cal. 4th 937 (2008) 13

22 *Hill Med. Corp. v. Wycoff,*  
23 86 Cal. App. 4th 895 (2001) 13

24 *Int'l Ass'n of Machinists & Aero. Workers v. Werner-Matsuda,*  
25 390 F. Supp. 2d 479 (D. Md. 2005) 3

26 *Lasco Foods v. Hall & Shaw Sales,*  
27 2009 U.S. Dist. LEXIS 4241 (E.D. Mo. Jan. 22 2009) 1

28 *Liparota v. United States,*  
471 U.S. 419 (1985) 6

*Morissette v. United States,*  
342 U.S. 246 (1952) 5

*Opera Plaza Residential Parcel Homeowners Association v. Hoang,*  
376 F.3d 831 (9th Cir. 2004) 13

1	<i>Shamrock Foods Co. v. Gast</i> , 535 F. Supp. 2d 962, 963-68 (D. Ariz. 2008)	1
2		
3	<i>Taake v. County of Monroe</i> , 530 F.3d 538 (7th Cir. 2008)	13
4	<i>US Bioservices Corp. v. Lugo</i> , 2009 U.S. Dist. LEXIS 4101 (D. Kan. Jan. 21, 2009)	1
5		
6	<i>United States v. Adesida</i> , 129 F.3d 846 (6th Cir. 1997)	8
7	<i>United States v. Aguilar</i> , 756 F.2d 1418 (9th Cir. 1985)	8
8		
9	<i>United States v. Ahmad</i> , 101 F.3d 386 (5th Cir. 1996)	6
10	<i>United States v. Boren</i> , 278 F.3d 911 (9th Cir. 2002)	4
11		
12	<i>United States v. Bronx Reptiles, Inc.</i> , 217 F.3d 82 (2d Cir. 2000)	6
13	<i>United States v. Galvan</i> , 949 F.2d 777 (5th Cir. 1991)	8
14		
15	<i>United States v. Gordon</i> , 844 F.2d 1397 (9th Cir. 1988)	8
16	<i>United States v. Granderson</i> , 511 U.S. 39 (1994)	3
17		
18	<i>United States v. Hsu</i> , 40 F. Supp. 2d 623 (E.D. Pa. 1999)	6
19	<i>United States v. Krumrei</i> , 258 F.3d 535 (6th Cir. 2001)	6
20		
21	<i>United States v. Lange</i> , 312 F.3d 263 (7th Cir. 2001)	6
22	<i>United States v. Lemire</i> , 720 F.2d 1327 (D.C. Cir. 1983)	11
23		
24	<i>United States v. Mastrangelo</i> , 733 F.2d 793 (11th Cir. 1984)	8
25	<i>United States v. Pedigo</i> , 12 F.3d 618 (7th Cir. 1993)	5
26		
27		
28		

1	<i>United States v. Pennington</i> , 168 F.3d 1060 (8th Cir. 1998)	12
2		
3	<i>United States v. Santos</i> , 128 S. Ct. 2020 (2008)	7
4	<i>United States v. Sheeran</i> , 699 F.2d 112 (3d Cir. 1983)	13
5		
6	<i>United States v. Sun-Diamond Growers</i> , 138 F.3d 961 (D.C. Cir. 1998)	12
7	<i>United States v. Verrecchia</i> , 196 F.3d 294 (1st Cir. 1999)	8
8		
9	<i>United States v. Weyhrauch</i> , 548 F.3d 1237 (9th Cir. 2008)	13
10	<i>United States v. X-Citement Video, Inc.</i> , 513 U.S. 64 (1994)	6
11		
12	<i>United States v. Zalapa</i> , 509 F.3d 1060 (9th Cir. 2007)	8

**STATUTES**

13		
14	Cal. Bus. & Prof. Code 16600	12
15	H.R. Rep. No. 98-894, 10 (1984), reprinted in 1984 U.S.C.C.A.N. 3689, 3695	2
16		

**MISCELLANEOUS**

17	LaFave, <i>Criminal Law</i> 19.1(a) (3d ed. 2003)	2
18		
19	LaFave et al., <i>Criminal Procedure</i> § 19.3(c) (4th ed. 2004)	8
20	Orin S. Kerr, <i>Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes</i> , 78 N.Y.U. L. Rev. 1596, 1609-13 (2003)	10
21		
22		
23		
24		
25		
26		
27		
28		

1 **I. COUNTS TWO THROUGH NINE MUST BE DISMISSED BECAUSE THE**  
2 **INDICTMENT ALLEGES MISAPPROPRIATION, WHICH IS NOT COVERED**  
3 **BY THE COMPUTER FRAUD AND ABUSE ACT**

4 **A. The Misappropriation Theory of the CFAA**

5 The government argues that the CFAA covers misappropriation. It does not respond  
6 directly to the defendant’s arguments about the plain meaning and legislative history of the  
7 statute. Rather, it argues that the weight of authority and common sense support its broader  
8 interpretation of the CFAA’s scope.

9 *1. Weight of Authority*

10 As the defendant noted in his opening memorandum, there is a split of authority among  
11 courts regarding the scope of the CFAA. The government counters that the “weight of  
12 authority” supports its position. It is unclear what that ambiguous phrase means, especially  
13 given that about an equal number of courts have ruled each way. *See Condux Int’l, Inc. v.*  
14 *Haugum*, 2008 U.S. Dist. LEXIS 100949 at \*11 nn.3-4 (D. Minn. Dec. 18, 2008) (collecting  
15 cases).

16 Admittedly, most of the early opinions interpreting the CFAA adopted a broad  
17 interpretation of the statute that would favor the government’s position. But those  
18 interpretations have since been subjected to withering criticisms by both courts and scholars.  
19 Almost all of the more recent cases — including three decided in the last month — have  
20 rejected the *Citrin-Shurgard* line and instead adopted a more restrictive reading of the statute.  
21 *See, e.g., Bridal Expo, Inc. v. Van Florestein*, 2009 U.S. Dist. LEXIS 7388 (S.D. Tex. Feb. 3,  
22 2009); *Lasco Foods v. Hall & Shaw Sales*, 2009 U.S. Dist. LEXIS 4241 (E.D. Mo. Jan. 22  
23 2009); *US Bioservices Corp. v. Lugo*, 2009 U.S. Dist. LEXIS 4101 (D. Kan. Jan. 21, 2009);  
24 *Black & Decker v. Smith*, 568 F. Supp. 2d 929, 933-36 (W.D. Tenn. 2008); *Shamrock Foods Co.*  
25 *v. Gast*, 535 F. Supp. 2d 962, 963-68 (D. Ariz. 2008). The recent trend is clear, and it does not  
26 favor the government.

27 *2. “Common Sense” and Trespassory Takings*

28 Given the split of authority, this Court ultimately must decide which line of cases is  
better reasoned. For the reasons given in his opening memorandum, Mr. Nosal submits that the

1 more recent line of cases has the better of the argument. The government responds that  
2 “common sense” supports its position.

3           Clearly, if an individual *steals* the password of a competitor’s  
4 employee and thereafter fraudulently accesses that competitor’s  
5 computer system and obtains something of value using that  
6 password, such access would be “without authorization” under  
7 Section 1030, regardless of whether the employee from whom he  
8 stole the password was otherwise “authorized” to do so. Under the  
9 defendant’s theory, however, if that same individual *paid* the  
10 competitor’s employee to access the competitor’s computer  
11 systems and obtain information, there would be no “unauthorized  
12 access,” regardless of whether the employee’s actions violated his  
13 agreements with, or duty of loyalty to, his employer.

14 (Government Opposition [hereafter “Opp.”] at 8.) The government’s hypothetical accurately  
15 describes Mr. Nosal’s position regarding the scope of the CFAA. The government believes that  
16 there is no legal difference between the two situations. That is false — the salient legal  
17 difference is simply the difference between a trespassory taking and a non-trespassory taking.

18           The legal difference between trespassory takings and non-trespassory takings dates back  
19 hundreds of years in the criminal law. It marks the difference between the common law crimes  
20 of larceny and embezzlement (also known as misappropriation). Larceny required a “trespass in  
21 the taking”—it required, in other words, that the wrongdoer’s initial possession be unlawful.  
22 LaFave, *Criminal Law* § 19.1(a) (3d ed. 2003); *see also Bennett v. United States*, 399 F.2d 740,  
23 743 (9th Cir. 1968) (discussing the difference between embezzlement and larceny).

24           Thus, under original common law definition of larceny, a servant who misappropriated  
25 his master’s goods was not guilty of larceny. *See* Reporter’s Note, Year Book 3 Henry VII, 12  
26 pl. 9 (Common Pleas 1487). In response to this gap in the law of larceny, the English Parliament  
27 created the crime of embezzlement in 1799. *See* 39 Geo. III, ch. 85 (1799). The statute provided  
28 that a person such as a store clerk or bank teller who was “entrusted with another’s property  
[and] fraudulently converted it was guilty of embezzlement.” LaFave, *supra*, § 19.6(a).

          The question for this Court is whether the CFAA covers only trespassory takings  
analogous to larceny or whether it also covers non-trespassory takings analogous to  
embezzlement. The legislative history of the statute strongly suggests that it was intended to  
cover only trespassory takings. The House Report explicitly indicated that the bill was aimed at

1 those who “trespass into” computers. H.R. Rep. No. 98-894, 10 (1984), reprinted in 1984  
2 U.S.C.C.A.N. 3689, 3695; *see Gast*, 535 F. Supp. 2d at 966 (“[T]he legislative history confirms  
3 that the CFAA was intended to prohibit electronic trespassing . . . .”); *Int’l Ass’n of Machinists &  
4 Aero. Workers v. Werner-Matsuda*, 390 F. Supp. 2d 479, 496-97 (D. Md. 2005) (same).

5 In short, it does not contravene common sense to punish trespassory takings but not non-  
6 trespassory takings. As most recent courts have found, that is precisely what Congress intended  
7 to do when it enacted the CFAA.

### 8 3. *The Rule of Lenity*

9 The government only addresses the rule of lenity in a footnote — it asserts that the  
10 CFAA is not ambiguous. Ambiguity simply means that a statute is “reasonably susceptible” or  
11 more than one interpretation. *AIG Baker Sterling Heights v. Am. Multi-Cinema*, 508 F.3d 995,  
12 1000 (11th Cir. 2007); *see also United States v. Granderson*, 511 U.S. 39, 54 (1994) (“[W]here  
13 text, structure, and history fail to establish that the Government’s position is unambiguously  
14 correct -- we apply the rule of lenity . . . .”). At a minimum, the CFAA is reasonably susceptible  
15 to different interpretations, and the text, structure, and history fail to establish that the  
16 Government’s position is unambiguously correct. Thus, this Court should interpret the statute to  
17 include only trespassory takings of information, not misappropriation of information.

### 18 4. *Conclusion*

19 For the reasons given above, the CFAA does not cover misappropriation. As a result, in  
20 all of the instances where a KFI employee used her own password to obtain information, the  
21 conduct was not a crime under the CFAA *at all*. The government concedes that in Count 2,  
22 Christian used her own password to access information, and that in Counts 4, 5, 6, 7, and 8,<sup>1</sup> J.F.  
23 used her own password to access information. (Opp. at 5). As to those counts, the government’s  
24 factual allegations, even if true, only establish that Christian and J.F. misappropriated  
25

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26 <sup>1</sup> As to Count 8, the language of the indictment was not clear as to whether J.F. used her  
27 own password, or someone else used J.F.’s password. The government’s opposition now  
28 clarifies that Count 8 is based on an instance where Christian asked J.F. to use her password to  
obtain information. (Opp. at 5). Thus, Count 8 fails to allege an offense.

1 information. Such conduct is not a crime — not for the parties directly responsible, and certainly  
2 not for Mr. Nosal.

3 The government now claims that Count 9 is different — it claims Count 9 is based on an  
4 instance where “M.J. used J.F.’s credentials to access the computer system.” (Opp. at 5). But  
5 that is not what the indictment says. Count 9 is based on the July 29, 2005, access of 25 KFI  
6 source lists. (Superseding Indictment at 11.) In describing that conduct, the indictment clearly  
7 states that J.F. herself “remotely logged into” the KFI database using her own password, and  
8 then allowed M.J. to run a query. (*Id.* at paragraph 19(o).) Count 9 also fails to state a claim.

9 **B. Vicarious Liability for Count Three**

10 Count 3 alleges that on April 12, 2005, Christian used J.F.’s password to access KFI’s  
11 database. Assuming that is factually correct, it is unclear whether Christian committed a crime  
12 under the CFAA. Clearly, if Christian had *stolen* J.F.’s password to access the database, she  
13 would have committed a crime. But if J.F. had used her own password to access the database  
14 (and then turned the information over to Christian), she could not have committed a crime. No  
15 court has ever ruled on the intermediate situation where an outsider uses an employee’s  
16 password *with consent*. Mr. Nosal submits that such a consensual access is more akin to the  
17 misappropriation scenario than it is to the theft/hacking scenario, so it also is not a crime.

18 But even assuming arguendo that *Christian* committed a crime on April 12, 2005, that  
19 does not mean that *Mr. Nosal* committed a crime on April 12, 2005. The indictment contains no  
20 factual allegations sufficient to support vicarious liability.

21 First, the government contends that Mr. Nosal may be liable as an accessory for aiding  
22 and abetting Ms. Christian’s crime. While that may be true as an abstract legal matter, the fact  
23 remains that the indictment contains no factual allegations whatsoever that Mr. Nosal did  
24 anything to assist Ms. Christian on April 12. In apparent desperation, the government now  
25 attempts to remedy that omission by citing the factual averments in the plea agreements of Mr.  
26 Nosal’s co-defendants. (Opp., at 6.) But in ruling on a motion to dismiss, absent explicit  
27 incorporation, a court “should not consider evidence not appearing on the face of the  
28 indictment.” *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002) (internal quotation marks

1 omitted).

2 The government failed to allege any factual basis for accomplice liability. If it now  
3 desires to amend the indictment to include such allegations, it may do so, but it cannot cure its  
4 pleading error simply by citing additional evidence it claims to have in its possession.

5 Second, the government alleges that Mr. Nosal may be held liable for Ms. Christian's  
6 crime under the *Pinkerton* liability doctrine. But a *Pinkerton* liability requires proof of certain  
7 factual elements — namely, that a co-conspirator's crime was in furtherance of the conspiracy,  
8 and that it was reasonably foreseeable. As always, every element necessary for a conviction  
9 must be pled in an indictment. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). Consistent  
10 with that general rule, the basis of *Pinkerton* liability must be alleged at least in some form.  
11 *United States v. Pedigo*, 12 F.3d 618, 631 (7th Cir. 1993). But the indictment in this case  
12 contains no hint of an allegation of *Pinkerton* liability.

13 Because Christian used J.F.'s password with permission, her conduct was not a crime.  
14 But even if it was, the indictment contains no allegations sufficient to make Mr. Nosal  
15 vicariously liable for her conduct. Thus, like the other CFAA counts, Count 9 should be  
16 dismissed.

17 **II. COUNTS 10 AND 11 MUST BE DISMISSED BECAUSE THEY FAIL TO**  
18 **ALLEGE AN ESSENTIAL ELEMENT OF THE OFFENSE — NAMELY,**  
**KNOWLEDGE OF ILLEGALITY**

19 Counts 10 and 11 are also deficiently pled because they fail to allege knowledge of  
20 illegality. The government responds: “It is well established, however, that ignorance of the law  
21 is no defense.” (Opp., at 13.) That is, of course, a gross oversimplification. As the drafters of  
22 the Model Penal Code put it:

23 It should be noted that the general principle that ignorance or  
24 mistake of law is no excuse is greatly overstated; it has no  
25 application, for example, when the circumstances made material  
by the definition of the offense include a legal element.

26 *ALI, Model Penal Code and Commentaries*, Comment to § 2.02 at 250 (1985).

27 The truth is that ignorance of the law is a defense if knowledge of the law is an element  
28 of an offense, as it frequently is. Thus, for example, “the crime of larceny is not committed if the

1 defendant, because of a mistaken understanding of the law of property, believed that the property  
2 taken belonged to him.” LaFave, *supra*, § 5.6(d); see *Morissette v. United States*, 342 U.S. 246  
3 (1952). Federal tax crimes require as an element the “voluntary, intentional violation of a *known*  
4 legal duty.” *Cheek v. United States*, 498 U.S. 192, 200 (1991) (emphasis added) In a variety of  
5 conducts, federal courts have held that “knowingly” requires proof of knowledge of illegality.  
6 See, e.g., *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994); *Liparota v. United States*,  
7 471 U.S. 419 (1985); *United States v. Bronx Reptiles, Inc.*, 217 F.3d 82 (2d Cir. 2000); *United*  
8 *States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996).

9 It is true that the statute does not explicitly require knowledge of illegality — it does not  
10 explicitly say what the knowledge element entails. That is precisely the problem. The language  
11 of the EEA is unclear, and “[s]ome elaboration is needed.” *United States v. Lange*, 312 F.3d  
12 263, 266 (7th Cir. 2001). And that is precisely why the courts in *United States v. Krumrei*, 258  
13 F.3d 535 (6th Cir. 2001), and *United States v. Hsu*, 40 F. Supp. 2d 623 (E.D. Pa. 1999), read into  
14 the statute a requirement of knowledge of illegality.

15 The government attempts to wiggle out from under the holdings of *Krumrei* and *Hsu*, but  
16 those cases are clear enough. The courts in those cases faced vagueness challenges, and held  
17 that the EEA was saved from such a challenge so long as knowledge of illegality was proven.  
18 The clear implication is that if knowledge of illegality were not proven, the statute would be  
19 constitutionally infirm. Thus, in order to obtain a constitutionally valid conviction, the  
20 government must prove knowledge of illegality — that is an element of the offense.

21 The government argues that, even if *Krumrei* and *Hsu* are right about the scope of the  
22 statute, they “do not announce a rule of pleading.” (Opp. at 15.) That argument entirely misses  
23 the mark. The underlying question that controls this issue is a question of substantive law. That  
24 is the question settled by *Krumrei* and *Hsu*, which determined that in order to avoid  
25 constitutional concerns, the statute requires proof of knowledge of illegality. In other words,  
26 these cases held, as a matter of substantive law, that knowledge of illegality is a necessary  
27 element of the offense. That substantive ruling gives rise to a number of procedural  
28 implications. The relevant rule of pleading is simple: *All elements must be pled*. Any doubts

1 that may have existed about that proposition were put to rest by the *Apprendi* line of cases.

2           Ultimately, the dispute is about the scope of the statute, not any procedural rules. And  
3 ultimately, the government’s argument is one of policy more than of law: “If the government had  
4 to prove [knowledge of illegality], Section 1832 violations would be nearly impossible to  
5 prosecute . . . .” (Opp. at 13.) As Justice Scalia recently argued, that line of argument turns the  
6 fair warning requirement on its head.

7           The Government also argues for the “receipts” interpretation [of  
8 the money laundering statute] because — quite frankly — it is  
9 easier to prosecute. Proving the proceeds and knowledge elements  
10 of the federal money-laundering offense under the “profits”  
11 interpretation will unquestionably require proof that is more  
12 difficult to obtain. Essentially, the Government asks us to resolve  
13 the statutory ambiguity in light of Congress’s presumptive intent to  
14 facilitate money-laundering prosecutions. That position turns the  
15 rule of lenity upside-down. We interpret ambiguous criminal  
16 statutes in favor of defendants, not prosecutors.

17           *United States v. Santos*, 128 S. Ct. 2020, 2028 (2008). Here, too, the statute drafted by  
18 Congress lacks clarity. Here, too, that lack of clarity implicates the fair warning requirement.  
19 Here, too, the government argues for a broad interpretation that will facilitate prosecutions.  
20 Here, too, that argument must be rejected.

21 **III. BECAUSE COUNTS 10 AND 11 ARE MULTIPLICITOUS, ONE OF THEM  
22 MUST BE DISMISSED**

23           As a legal matter, the government argues that Counts 10 and 11 are not multiplicitous  
24 because it claims that the three substantive subsections of the EEA “define distinct offenses.”  
25 (Opp., at 18.) It does not bother applying the *UCO Oil* test that controls in the Ninth Circuit.  
26 Instead, it cites an unpublished report and recommendation of a magistrate judge in Wisconsin.<sup>2</sup>  
27 That report, nearly devoid of actual legal analysis, is a thin reed. What it lacks in precedential  
28 authority it does not make up in persuasive force. Mr. Nosal submits that under the controlling  
*UCO Oil* test, the different subsections are different ways of committing the same crime. Counts  
10 and 11 are therefore multiplicitous.

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<sup>2</sup> The citation given by the government in its opposition is incorrect. The correct Westlaw citation is 2006 WL 3091115.

1 As for remedy, the government says that dismissing both counts “would amount to  
2 throwing the baby out with the bath water.” But Mr. Nosal never suggested any such remedy —  
3 as he argued in his motion, the proper remedy is to dismiss one of the two counts (at the  
4 government’s election). The government argues instead that the proper remedy is a post-trial  
5 vacatur of the conviction and sentence. That is false. If a valid multiplicity claim is not raised  
6 until during or after trial, then vacatur is a proper remedy; but if a valid multiplicity claim is  
7 timely raised in a Rule 12 motion, then forced election (i.e., dismissal of one count) is the proper  
8 remedy. *United States v. Zalapa*, 509 F.3d 1060, 1063-64 (9th Cir. 2007); *see United States v.*  
9 *Galvan*, 949 F.2d 777, 781 (5th Cir. 1991); *United States v. Mastrangelo*, 733 F.2d 793 (11th  
10 Cir. 1984); LaFave et al., *Criminal Procedure* § 19.3(c) (4th ed. 2004).

11 In any event, even if the government were correct that the three subdivisions define  
12 distinct offenses, then Mr. Nosal would still be entitled to a remedy because Count 10 would be  
13 duplicitous. If Mr. Nosal had failed to raise this objection until trial, a unanimity instruction  
14 would have been the proper remedy; but because he timely raised it in a Rule 12 motion, election  
15 or dismissal are the appropriate remedies. *United States v. Gordon*, 844 F.2d 1397, 1400 (9th  
16 Cir. 1988); *accord United States v. Verrecchia*, 196 F.3d 294, 297 (1st Cir. 1999); *United States*  
17 *v. Adesida*, 129 F.3d 846, 849 (6th Cir. 1997); *United States v. Aguilar*, 756 F.2d at 1418,  
18 1420-21 (9th Cir. 1985).

19 Mr. Nosal submits that the three subdivisions of the EEA describe different means of  
20 committing the same offense. The government disagrees. Regardless of who is correct, the  
21 indictment is improperly pled, and because Mr. Nosal has raised the issue at this early point in  
22 the proceedings, he is entitled to a remedy of election or dismissal.

23 **IV. THE MAIL FRAUD COUNTS MUST BE DISMISSED BECAUSE AN**  
24 **UNDISCLOSED BREACH OF AN INVALID CONTRACTUAL PROVISION**  
25 **DOES NOT CONSTITUTE FRAUD**

26 **A. Introduction**

27 In his motion to dismiss, Nosal asserted that the mail fraud charges (Counts 12 to 20)  
28 failed to state a claim because:

Those counts, on their face, rest at their core on a claim that Mr.

1 Nosal’s alleged breach of contract also constituted criminal  
2 fraud...In short, the government alleges that Mr. Nosal committed  
3 a fraud by violating the non-compete provision of a separation  
4 agreement by hiding his breach from the other contracting party.  
5 But as a matter of law, that allegation, even if true, does not  
6 constitute mail fraud. The government cannot convert a mere  
7 breach of contract into a federal crime, especially where the  
8 relevant contractual provision is invalid as a matter of state law.

9 (Motion at 12-13.)

10 The government replies that “the Indictment alleges much more than an ‘undisclosed  
11 breach’ of contract, and much more than a breach of what Nosal calls the ‘non-compete’  
12 provisions of his agreement with Korn-Ferry.” (Opp. at 19; *see also id.* at 20; “[T]he Indictment  
13 in this case alleges far more than a simple breach of contract by Nosal.”) The government then  
14 sets forth seven bullet points summarizing its additional allegations. (Opp. at 20.)

15 As will be demonstrated below, however, the factual allegations that do not concern the  
16 non-compete allegation simply do not make out a case of fraud — i.e., the obtaining of money or  
17 property by material misrepresentations or omissions. *Bush v. United States*, 58 F.3d 482, 487  
18 (9th Cir. 1995) (“To establish fraud, the government had to show that the employee obtained the  
19 payments in question by means of a material misrepresentation or omission.”). Rather, the core  
20 of the mail fraud charges was and remains the allegation that Nosal wrongly obtained eight  
21 monthly payments of \$25,000 by promising in a separation agreement not to compete with Korn-  
22 Ferry after leaving his employment with that company, and then breaching that contractual  
23 provision. Indeed, the indictment itself characterizes the mail fraud charges thusly: “In sum and  
24 substance, the defendants Nosal and Christian, and others involved in the scheme and artifice,  
25 provided material false information to, and purposefully omitted and concealed material  
26 information from, Korn/Ferry regarding defendant Nosal’s executive search related activities  
27 that were in violation of the Nosal-Korn/Ferry agreements.” (Para. 27.)

28 But the indictment, which incorporates the separation agreement by reference, makes  
apparent that Nosal was to earn those payments (and did) by further search work done for Korn-  
Ferry as an independent contractor, and that the non-compete provision was an added benefit to  
Korn-Ferry that it sought to leverage from Nosal under the agreement. The simple breach of that

1 provision cannot constitute a federal fraud offense, as the government acknowledges,<sup>3</sup> even if the  
2 provision were legally valid, which it was not.

3 **B. The Misappropriation of Information Allegations**

4 The first two bullet points offered by the government to demonstrate that the mail fraud  
5 counts contain factual allegations beyond those concerning the non-compete agreements note  
6 that the mail fraud schemes repeat the claims made in Counts One through Eleven that the  
7 defendant, through others, gained unauthorized access to Korn/Ferry computers and thereby  
8 stole trade secrets. But there are many forms of theft (robbery, embezzlement, etc.) or  
9 unauthorized access, which is limited to the obtaining of property by means of specific  
10 misrepresentations and omissions. Counts Twelve to Twenty do not, and truthfully could not,  
11 allege that Nosal obtained access to, and stole, Korn/Ferry information by specific,  
12 misrepresentations or omissions of material fact.

13 Before specific statutes such as the CFAA and EEA were enacted, prosecutors attempted  
14 to use the mail and wire fraud statutes to prosecute alleged computer misuse. Those attempts  
15 had mixed results in the courts. *See* Orin S. Kerr, *Cybercrime's Scope: Interpreting "Access"*  
16 *and "Authorization" in Computer Misuse Statutes*, 78 N.Y.U. L. Rev. 1596, 1609-13 (2003). In  
17 fact, it was precisely the "uncomfortable fit between computer misuse and traditional property  
18 crimes" such as fraud that led to "the need for computer crime legislation." *Id.* at 1613.

19 In this case, the government uses the mail fraud charges as a sort of fallback to  
20 supplement the CFAA and EEA charges. But the fit between the statute and the conduct is no  
21 less uncomfortable. In fact, now that Congress has passed specific legislature covering computer  
22 misuse, it makes even less sense to stretch the traditional fraud statutes in order to attempt to  
23 reach the same sort of conduct. The computer misuse allegations will or will not pass muster in  
24 this Court's review of the sufficiency of Counts One to Eleven, but they cannot sustain the mail  
25 fraud counts if the other factual allegations in those counts are legally inadequate to constitute

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26  
27  
28 <sup>3</sup> *See* Opp. at 20: "The government agrees that a breach of contract might not, in and of  
itself, constitute a basis for mail fraud charges."

1 fraud.

2 **C. The Non-Existent “Honest Services” Theory**

3 The government’s third bullet point in support of the mail fraud counts demonstrates the  
4 inadequacy of the charges. The government claims that the indictment alleges: “Nosal’s  
5 deprivation of honest services as an independent contractor to Korn/Ferry, by engaging in  
6 business on his own behalf, through shell companies, instead of solely for Korn/Ferry.” (Opp. at  
7 20.)

8 In fact, the indictment does not contain the words “honest services,” nor does it allege a  
9 violation of 18 U.S.C. § 1346, the statute which created the crime of defrauding of honest  
10 services. Furthermore, if such an allegation had been made, it would advance the theory that any  
11 employee who breaches a non-compete agreement in California thereby commits the federal  
12 crime of honest services fraud, even though such provisions are legally invalid under California  
13 law.

14 **D. The Violation of The Non-Compete Provision**

15 The final three bullet points offered by the government all simply allege that Nosal  
16 violated the non-compete provisions of his separation agreement while failing to notify  
17 Korn/Ferry of that breach. (Opp. at 20.) The government cites the three basic legal elements of  
18 mail fraud, and appears to argue that no additional facts are needed to state a fraud offense  
19 because such facts are “not elements of the mail fraud offense.” (Opp. at 21.)

20 The very problem that Mr. Nosal raises here — and that several courts have previously  
21 faced — is that when conceived in their simplest terms, the three basic legal elements of mail  
22 fraud would cover every instance of undisclosed breach of contract by an employee. That  
23 consequence is simply untenable. *See, e.g., United States v. Lemire*, 720 F.2d 1327, 1336 (D.C.  
24 Cir. 1983). Thus, as numerous courts have held, in the employment context, something more  
25 must be proven.

26 The Seventh Circuit has held, for example, that fraud in this context “requires a showing  
27 of deception at the time the promise is made.” *Corley v. Rosewood Care Ctr.*, 388 F.3d 990,  
28

1 1007 (7th Cir. 2004). The government does not even respond to *Corley*,<sup>4</sup> and its indictment  
2 contained no such allegation. Other circuits have adopted an “independent business risk”  
3 requirement. *United States v. Pennington*, 168 F.3d 1060, 1065 (8th Cir. 1998); *United States v.*  
4 *Sun-Diamond Growers*, 138 F.3d 961, 973 (D.C. Cir. 1998). The government responds —  
5 despite the clear holdings of those cases, and without citing any cases to the contrary — that  
6 creation of an independent business risk is not a requirement of mail fraud in employee breach  
7 cases. (Opp. at 21.)

8 To the extent that the government concedes that *something* more than an undisclosed  
9 breach of contract must be proven, it never says *what*. The gist of its legal argument is: “We  
10 have alleged something more than a simple undisclosed breach of contract, and whatever it is  
11 that we have alleged, that constitutes mail fraud.” It is telling that the government avoids  
12 making a more precise legal argument.

13 And in any event, the government in truth has not alleged anything more than an  
14 undisclosed breach of contract. The whole point of *Lemire*, *Corley*, and like cases is that such  
15 an allegation, as a matter of law, does not constitute mail fraud.

#### 16 **E. The Relevance of California State Law**

17 The government appears to argue that Cal. Bus. & Prof. Code 16600 does not apply here  
18 because that statute only applies to “pure ‘noncompetition’ agreements,” whereas the contract  
19 here only contained *some* noncompetition provisions in addition to many other provisions.  
20 (Opp. at 22.) That argument is unconvincing on its face. Section 16600 states: “every contract  
21 by which anyone is restrained from engaging in a lawful profession, trade, or business of any  
22 kind *is to that extent void*.” (Emphasis added.) As the plain language makes clear, and as  
23 California courts have held, § 16600 voids non-compete provisions within otherwise enforceable  
24

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25  
26 <sup>4</sup> Perhaps by way of oblique response to the *Corley* requirement, the government asks this  
27 Court to look “beyond the allegations of the Indictment here” to evidence in the co-defendant  
28 plea agreements that Mr. Nosal had begun planning his scheme prior to signing his agreement  
with KFI. (Opp. at 21 n.7.) Once again, lacking their inclusion or incorporation, no such  
evidence may be considered in considering a facial challenge to the indictment.

1 contracts. *See, e.g., Hill Med. Corp. v. Wycoff*, 86 Cal. App. 4th 895 (2001) (voiding a  
2 noncompete provision within a larger employment and stock repurchase agreement).

3         It is true that the contract between Nosal and KFI contained other valid provisions. But  
4 there is no allegation that Mr. Nosal violated those other provisions. Indeed, he honored the  
5 provision that required him to continue to generate income for Korn/Ferry, which is why they  
6 continued to pay him his monthly stipend. The only provision that he allegedly violated was the  
7 non-compete provision — and that provision is void under § 16600 and *Edwards v. Arthur*  
8 *Andersen LLP*, 44 Cal. 4th 937 (2008).

9         Somewhat more seriously, the government argues that state law cannot limit the scope of  
10 the mail fraud statute. It is, of course, true as a general matter, under the Supremacy Clause and  
11 preemption doctrine, that state law cannot limit federal law. If California were to pass a law  
12 stating that “Mail fraud is legal in California,” that law would have no effect on the federal mail  
13 fraud statute or federal prosecutions thereunder. But even while re-affirming those principles in  
14 public contexts, the Ninth Circuit itself has suggested that state law might have a role in mail  
15 fraud prosecutions arising out of private contexts. *United States v. Weyhrauch*, 548 F.3d 1237,  
16 1245 n.5 (9th Cir. 2008).

17         Those general arguments aside, the more specific and salient problem here is that the  
18 government’s own affirmative theory of liability depends intimately on state law. The core of the  
19 government’s fraud allegation is that Mr. Nosal violated a contract — a contract that is created  
20 under state law and governed entirely by state law. Put simply, the contract at the center of this  
21 case is “clearly a creature of state law.” *Opera Plaza Residential Parcel Homeowners Ass’n v.*  
22 *Hoang*, 376 F.3d 831, 840 (9th Cir. 2004); *see also Taake v. County of Monroe*, 530 F.3d 538,  
23 542 (7th Cir. 2008) (explaining that contracts are solely a creature of state law and that there is  
24 no federal law of contracts). In such cases, where a mail fraud prosecution depends intimately  
25 on an instrument governed solely by state law, of course state law is relevant. *See United States*  
26 *v. Sheeran*, 699 F.2d 112, 115 (3d Cir. 1983).

27         The government’s implicit position is that it makes no difference whether the non-  
28 compete provision was valid. Its implicit position is that an employee who violates an illegal

1 and void contractual provision is just as culpable as an employee who violates a legal and  
2 enforceable contractual provision. Ultimately, its position is that even where states make a  
3 reasoned decision not to enforce contractual provisions as a matter of civil law, the federal  
4 government may enforce them as a matter of criminal law. That position must be rejected.

5 **CONCLUSION**

6 For the reasons stated above and in defendant's prior briefing, all twenty counts of the  
7 Indictment should be dismissed.

8 Dated: February 17, 2009

Respectfully submitted,

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