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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS INDICTMENT

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

A. The Misappropriation Theory of the CFAA

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

1. Weight of Authority

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

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

2. "Common Sense" and Trespassory Takings

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

more recent line of cases has the better of the argument. The government responds that "common sense" supports its position.

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

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

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

Thus, under original common law definition of larceny, a servant who misappropriated his master's goods was not guilty of larceny. *See* Reporter's Note, Year Book 3 Henry VII, 12 pl. 9 (Common Pleas 1487). In response to this gap in the law of larceny, the English Parliament created the crime of embezzlement in 1799. *See* 39 Geo. III, ch. 85 (1799). The statute provided 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

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

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

3. The Rule of Lenity

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

4. Conclusion

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

[1] As to Count 8, the language of the indictment was not clear as to whether J.F. used her own password, or someone else used J.F.'s password. The government's opposition now 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.

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

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

B. Vicarious Liability for Count Three

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

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

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

omitted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As a legal matter, the government argues that Counts 10 and 11 are not multiplicitous because it claims that the three substantive subsections of the EEA "define distinct offenses." (Opp., at 18.) It does not bother applying the *UCO Oil* test that controls in the Ninth Circuit. Instead, it cites an unpublished report and recommendation of a magistrate judge in Wisconsin.[2] That report, nearly devoid of actual legal analysis, is a thin reed. What it lacks in precedential 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.

[2] The citation given by the government in its opposition is incorrect. The correct Westlaw citation is 2006 WL 3091115.

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

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

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

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

A. Introduction

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

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

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

(Motion at 12-13.)

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

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

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

provision cannot constitute a federal fraud offense, as the government acknowledges,[3] even if the provision were legally valid, which it was not.

B. The Misappropriation of Information Allegations

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

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

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

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[3] *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."

fraud.

C. The Non-Existent "Honest Services" Theory

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

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

D. The Violation of The Non-Compete Provision

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

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

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

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

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

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

E. The Relevance of California State Law

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

[4] Perhaps by way of oblique response to the *Corley* requirement, the government asks this Court to look "beyond the allegations of the Indictment here" to evidence in the co-defendant 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.

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

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

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

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

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

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

CONCLUSION

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

Dated: February 17, 2009

Respectfully submitted,

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PROOF OF SERVICE BY MAIL -- 1013(a), 2015.5 C.C.P.

Re: United States v. Nosal No. CR 08-0237 MHP

I am a citizen of the United States; my business address is 523 Octavia Street, San Francisco, California 94102. I am employed in the City and County of San Francisco, where this mailing occurs; I am over the age of eighteen years and not a party to the within cause. I served the within:

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS INDICTMENT

on the following person(s) on the date set forth below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box at San Francisco, California, addressed as follows:

Kyle F. Waldinger
Assistant U.S. Attorney
450 Golden Gate Avenue, 11th Floor
San Francisco, CA 94102

[x] BY MAIL: By depositing said envelope, with postage thereon fully prepaid, in the United States mail in San Francisco, California, addressed to said party(ies);*

[ ] BY PERSONAL SERVICE: By causing said envelope to be personally served on said party(ies), as follows: **[ ] FEDEX [ ] HAND DELIVERY [ ] BY FAX**

I certify or declare under penalty of perjury that the foregoing is true and correct. Executed on February 17, 2009 at San Francisco, California.

/s/ Jocilene Yue
Jocilene Yue