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12 **UNITED STATES DISTRICT COURT**
13 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

14 UNITED STATES OF AMERICA,) NO: CR 12-441(A)-MWF-1
15 Plaintiff,)
16) REPLY TO GOVERNMENT'S
17) OMNIBUS OPPOSITION AS TO
18) DEFENDANT HESLOP & KOVALL'S
19) MOTIONS IN LIMINE TO
20 v.) PRECLUDE EVIDENCE
21)
22 GARY EDWARD KOVALL, et al.)
23)
24) DATE: February 18, 2014
25) TIME: 3:00 p.m.
26) CTRM: Hon. Judge Fitzgerald
27)
28)

29 Defendant Gary Edward Kovall, ("Mr. Kovall") by and
30 through his attorney of record Edward M. Robinson, hereby
31 files his reply to Doc 203, the government's omnibus
32 opposition to co-defendant David Alan Heslop's and Mr.
33 Kovall's motions in limine to preclude evidence. (Doc 176)
34 DATED: February 14, 2014 LAW OFFICE OF EDWARD M. ROBINSON

35 /s/ Edward M. Robinson
36 EDWARD M. ROBINSON
37 Attorney for Defendant
38 GARY EDWARD KOVALL

1 **INTRODUCTION**

2 The government opposes Mr. Kovall's motion to strike as
3 surplusage in paragraph 4 of the First Superceding
4 Indictment ("the indictment") on the grounds that his
5 alleged failure to comply with a state bar ethical rule is
6 relevant to proving the element of corrupt intent as
7 required under a prosecution for the conspiracy and bribery
8 charges remaining in the indictment. ¹

9 Curiously, the government cites United States v. Renzi,
10 2009 WL 995474 (D. Ariz. Jan 13, 2009) and United States v.
11 Mandel, 415 F. Supp. 997 (D.C. Md. 1976) as authority for
12 their proposition that inclusion of the state bar ethical
13 rule is not surplusage and therefore is fair game for proof
14 to the jury.

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I.**

17 **MR. KOVALL'S ETHICAL OBLIGATIONS AS PLED IN THE**
18 **INDICTMENT ARE SURPLUSAGE AND LEGALLY IRRELEVANT.**

19 The government's reliance on Renzi and Mandel is
20 misplaced. While Mr. Kovall agrees with the general
21 principle that concealment may in certain cases be evidence
22 of intent, in this case inclusion of the ethical obligation
23 in the indictment and the government's reliance on proving
24 that alleged violation will, at a minimum, unfairly
25 prejudice Mr. Kovall.

26 _____
27 ¹ The government has moved to dismiss the
28 wire fraud scheme alleged against Mr.
Kovall in Counts 32 and 33. (Doc 200)

1 In the District Court's order in Renzi, the Court cited
2 Mandel and struck the ethical violations from Renzi's
3 indictment. The Court reasoned, "[reference to the ethical
4 rules] risk prejudice in this case, in that a jury might
5 erroneously conclude that a violation of those allegations
6 amounts to a criminal honest services fraud." Renzi at 4.
7 The same concern applies in this case as to Mr. Kovall. As
8 argued previously, the danger is that if the jury is
9 persuaded that Mr. Kovall violated a non criminal ethical
10 rule they would likely erroneously construe that *ethical*
11 violation as conclusive evidence Mr. Kovall's *criminal*
12 intent.

13 The due process concerns that caused the Supreme Court
14 in Skilling v. United States, 561 U.S. (2010) to reject the
15 amorphous failure to disclose theory of fraud as
16 unconstitutional are present in this case if the government
17 seeks to prove Mr. Kovall's guilt through the alleged
18 ethical violation. The defense of Mr. Kovall becomes a
19 moving target. The nuance of defending a non criminal
20 ethical violation to a criminal jury is fraught with peril.
21 Hypothetically, if the evidence shows that Ms. Shambaugh
22 earned the money paid to her by Mr. Heslop, and as such
23 there is strong argument for acquittal of Mr. Kovall on the
24 criminal charges, a government argument that he violated an
25 ethical rule is certain to confuse the jury as to their task
26 and will have the effect of unconstitutionally lessening the
27 burden of proof. In re Winship, 397 U.S. 358 (1970).

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CONCLUSION

For the reasons set forth herein, Mr. Kovall asks that this Court grant the Order requested in his initial motion in limine. (Doc 176)

DATED: February 14, 2014 LAW OFFICE OF EDWARD M. ROBINSON

/s/ Edward M. Robinson
EDWARD M. ROBINSON
Attorney for Defendant
GARY EDWARD KOVALL