

No. 14-10037; 14-10275

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID NOSAL,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California
District Court No. CR 08-0237 EMC

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

I. THE CFAA DOES NOT CRIMINALIZE PASSWORD SHARING. 1

 A. The Two CFAA Prongs. 1

 B. This Court’s Conclusion in Nosal. 4

II. THE ACCOMPLICE THEORY WAS BOTH UNPROVEN AND INVALID.. . . . 6

III. THE CONSPIRACY CONVICTION IS INVALID BECAUSE THE JURY WAS NOT REQUIRED TO FIND A TRADE SECRET. 9

 A. The Constructive Amendment. 9

 B. Reversal of Count One Requires that All of Mr. Nosal’s Convictions Be Vacated. 13

IV. THE GOVERNMENT DID NOT PROVE THAT THE DOWNLOADED INFORMATION WAS A TRADE SECRET, NOR DID IT PROVE THE REQUISITE ELEMENTS OF KNOWLEDGE AND INTENT. 13

 A. Introduction. 13

 B. Trade Secret Law Redux 15

 C. The Government Failed to Prove that The Information at Issue Had Not Been Disclosed to Parties Who Had No Obligation to Maintain It as Confidential. 16

V. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN ADMITTING IRRELEVANT OPINION EVIDENCE CONCERNING THE NON-COMPETE COVENANT BUT EXCLUDING CONCLUSIVE EVIDENCE THAT THE PROVISION WAS LEGALLY VOID. 21

VI. THE RESTITUTION ORDER WAS EXCESSIVE AND ILLEGAL. 24

CONCLUSION. 26

TABLE OF AUTHORITIES

CASES

Buffets, Inc. v. Klinke,
73 F.3d 965 (9th Cir. 1996)..... 16, 17

Cole Asia Business Ctr., Inc. v. Manning,
2013 WL 3070913 (C.D. Cal. June 18, 2013)..... 16, 18

Deal v. United States,
508 U.S. 129 (1993). 3

Edwards v. Arthur Andersen LLP,
44 Cal. 4th 937 (2008)..... 22

Egbert v. Lippmann,
104 U.S. 333 (1881). 15

Gal-Or v. United States,
113 Federal Cl. 540 (2013). 16

Griffin v. United States,
502 U.S. 46 (1991)..... 8, 9

LVRC Holdings LLC v. Brekka,
581 F.3d 1127 (9th Cir. 2009)..... 1, 2, 3, 5

Rosemond v. United States,
134 S.Ct. 1240 (2014). 6, 7, 8

Ruckelshaus v. Monsanto Company,
467 U.S. 986 (1984). *passim*

Taquino v. Teledyne Monarch Rubber,
893 F.2d 1488 (5th Cir. 1990)..... 15

United States v. Awadallah,
436 F.3d 125 (2d Cir. 2006). 23

United States v. Carter,
742 F.3d 440 (9th Cir. 2014)..... 25

Table of Authorities continued

United States v. Chung,
659 F.3d 815 (9th Cir. 2011)..... 14, 15

United States v. Cuti,
778 F.3d 83 (2d Cir. 2015). 25

United States v. Davenport,
753 F.2d 1460 (9th Cir. 1985)..... 23

United States v. Dokich,
614 F.3d 314 (7th Cir. 2010)..... 24

United States v. Hsu,
155 F.3d 189 (3d Cir. 1998). 11, 12

United States v. Lange,
312 F.3d 263 (7th Cir. 2002)..... 12

United States v. Nosal,
676 F.3d 854 (9th Cir. 2012)..... 3, 4, 5, 6

United States v. Stoddard,
150 F.3d 1140 (9th Cir. 1998)..... 24

United States v. Walker,
673 F.3d 649 (7th Cir. 2012)..... 22

United States v. Ward,
747 F.3d 1184 (9th Cir. 2014)..... 10

United States v. Waters,
627 F.3d 345 (9th Cir. 2010)..... 23

United States v. Xu,
706 F.3d 965 (9th Cir. 2013)..... 24

United States v. Yang,
281 F.3d 534 (6th Cir. 2002)..... 11, 12

WEC Carolina Energy Solutions LLC v. Miller,
687 F.3d 199 (4th Cir. 2012)..... 3

Table of Authorities continued

Yates v. United States,
135 S.Ct. 1074 (2015). 3

STATUTES

18 U.S.C. § 1030(a)(4). 3, 4

I. THE CFAA DOES NOT CRIMINALIZE PASSWORD SHARING

Some of the arguments in this case feel like *deja vu* all over again. In the interlocutory appeal, the government argued for a broad reading of the CFAA based in part on an expansive reading of this Court's holding in *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127 (9th Cir. 2009). The *Nosal* en banc panel rejected the government's arguments. But the government continued to press the same arguments on remand, and it effectively convinced the district court to ignore the *Nosal* en banc opinion. It now urges upon this Court many of the same arguments previously rejected en banc. They should once again be rejected.

A. The Two CFAA Prongs

At the core of the government's strategy is an effort to sever the two CFAA prongs—access “without authorization” and access “exceeding authorization.” The government suggests that these two prongs are essentially separate crimes, and that two groups of counts (“own-password” and “shared-password”) were charged separately in this case. It argues that in dismissing the “own password” counts, the *Nosal* en banc opinion only addressed the “exceeding authorization” prong. It thus suggests that the remaining “shared password” counts, which were not before the Court in *Nosal*, are subject only to *Brekka*, and that the *Nosal* en banc opinion is substantially irrelevant. This artificial distinction is wrong, both as a matter of fact and as a matter of law.

First, as a factual matter, all eight substantive CFAA counts were initially charged under both prongs. The government's claim that the five own-password

counts dismissed en banc were charged under the “exceeding authorization” prong, and the three shared-password counts were charged under the “without authorization” prong (Govt. Brief at 25) is simply not true. The superseding indictment filed in 2008 charged all eight counts under both prongs. (Dkt. 42 at 10-11.) Even after this Court’s decision in *Brekka* in 2009, the government maintained that all eight counts were properly charged under both prongs.¹

In its interlocutory appeal, the government for strategic reasons (i.e., to avoid the implications of *Brekka*) relied solely on the “exceeding authorization” prong. (Govt. Interlocutory Appeal Brief at 23 & n.9-10.) After losing that appeal, the government pursued the flip side of the same strategy. For strategic reasons (i.e., to avoid the implications of *Nosal*), it relied solely on the “without authorization” prong. In sum, in this case, the supposed distinction between the “without authorization” charges and the “exceeding authorization” charges was a distinction of the government’s own creation.

Second, and more importantly, as a legal matter it makes no sense to draw a sharp distinction between the two CFAA prongs. The reason is plain: as a matter of statutory interpretation, there is no sensible way to define one prong without defining the other. The two prongs are closely related in the statutory text. And “it is a ‘fundamental principle of statutory construction (and, indeed, of language

¹ For example, in one filing, the government argued: “the Indictment can be fairly read to allege that the defendant and his conspirators were not authorized to access Korn/Ferry’s computer system, or exceeded authorized access, by violating the explicit limitations on the access to and use of information contained on Korn/Ferry’s computer systems” (Dkt. 124 at 8.)

itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.” *Yates v. United States*, 135 S.Ct. 1074, 1082 (2015) (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993)). The two prongs cannot be interpreted in isolation, in part because ultimately the meaning of both prongs depends on the meaning of the word “authorization.”

It is for that reason that this Court, in both *Brekka* and *Nosal* en banc, interpreted both prongs together as part of a statutory whole. *See Nosal*, 676 F.3d 854, 858 (9th Cir. 2012); *Brekka*, 581 F.3d at 1133. Indeed, the *Nosal* en banc Court concluded with the following: “the government’s charges fail to meet the element of ‘without authorization, or exceeds authorized access’ under 18 U.S.C. § 1030(a)(4).” *Nosal*, 676 F.3d at 864; *see also id.* at 856 (stating that *Brekka* “construed narrowly the phrases ‘without authorization’ and ‘exceeds authorized access’ in the CFAA”). Other courts have done the same. As the Fourth Circuit recognized, the distinction between the two prongs is “arguably minute.” *WEC Carolina Energy Solutions LLC v. Miller*, 687 F.3d 199, 204 (4th Cir. 2012).

The claim that *Nosal* only addressed one prong and *Brekka* only addressed the other is not true. At various points in this litigation, the government has suggested that any language in *Brekka* about “exceeding authorization” was dicta, and any language in *Nosal* about “without authorization” was dicta. Those labels misunderstand how statutory interpretation works. In both cases, this Court properly considered both prongs, and particularly in *Nosal*, this Court adopted a narrow interpretation of both prongs.

B. This Court's Conclusion in Nosal

In sum, the principles adopted in the *Nosal* en banc opinion apply with equal force to the remaining shared-password counts, and those principles require dismissal of those counts. In *Nosal* en banc, this Court already considered and rejected many of the arguments now advanced by the government.

First and foremost, the *Nosal* en banc Court already considered the issue of password sharing. As part of its opinion, the Court noted that it would be absurd to criminalize the relatively common practice of password sharing in violation of contractual terms. 676 F.3d at 861. The government complains that in this case, it would be unfair to allow Froehlich-L'Heureaux to “unilaterally override” KFI’s decision to terminate Christian and Jacobson’s access.” (Govt. Brief at 29.) But that artful framing does not alter the underlying analysis. It could be similarly said that a son should not be allowed to “unilaterally override” Facebook’s user agreement by sharing his password with his mother.

Password sharing may admittedly be a contractual violation, both in the employment setting and in the *Nosal* Court’s Facebook example. The question is whether such contractual violations are also criminal violations under the CFAA. The *Nosal* Court held that they are not.

This Court rejected several subsidiary arguments as well. In the interlocutory appeal, the government argued that this Court should consider only § 1030(a)(4), and should not consider the impact of its ruling on § 1030(a)(2). It suggests the same argument again in this appeal. (Govt. Brief at 32 n.5.) But the

Nosal en banc Court already rejected that argument. *See* 676 F.3d at 859.

In the interlocutory appeal, the government argued that if the Court adopted a broad reading of the statute, it could count on prosecutors not to charge innocuous but technically criminal conduct. It suggests the same argument again in this appeal. (Govt. Brief at 32 (“[I]n the unlikely event that the government attempted to prosecute one of *Nosal*’s hypothetical cases”). But the *Nosal* en banc Court already rejected that argument. *See* 676 F.3d at 862 (“[W]e shouldn’t have to live at the mercy of our local prosecutor.”).

Perhaps most substantively, the government argued in the interlocutory appeal that under *Brekka*, authorization depends on the actions of the employer. It relies heavily on the same argument again in this appeal. (Govt. Brief at 30.) But while this argument was convincing to the *Nosal* en banc dissenters, *see* 676 F.3d at 864-65, it did not convince the majority. What the majority held is that not all employer-instituted restrictions on access are sufficient to trigger criminal liability. In particular, restrictions based on employment contracts and company handbooks do not trigger liability.

When Froehlich-L’Heureaux shared her password with Christian and Jacobson, she may have violated KFI contracts and policies. Her conduct may have been ethically, morally, or even legally wrong for other reasons. But she did not commit an act of computer hacking proscribed by the CFAA. Under the *Nosal* en banc opinion, consensual password sharing is not a crime under the CFAA. And to the extent that precise question raised here was left undecided by *Nosal*,

both the rule of lenity and common sense dictate the same result. The evidence in this case did not prove a crime under the CFAA, and at a minimum, the jury instructions were erroneous because they did not require the jury to find the elements of the offense, as defined by *Nosal*. The CFAA convictions must therefore be reversed.

II. THE ACCOMPLICE THEORY WAS BOTH UNPROVEN AND INVALID

As to the substantive CFAA counts, Mr. Nosal was not convicted as a principal—he did not download any source lists. Rather, the government’s primary theory at trial was that Mr. Nosal was guilty as an accomplice. That theory has been rendered invalid by the Supreme Court’s intervening decision in *Rosemond v. United States*, 134 S. Ct. 1240 (2014). *Rosemond* reaffirmed that accomplice liability requires intent, and that intent can only be inferred from knowledge if the defendant had “advance knowledge” of the principal’s planned crime. The government does not dispute the meaning of *Rosemond*. It argues instead that it proved advance knowledge, at least implicitly.

Notably, however, the government presents no argument whatsoever regarding Count Four, the Jacobson count. It thus appears to tacitly concede that Count Four cannot be upheld. Instead, the government argues that Counts Two and Three, the Christian counts, may be upheld. The government argues in general that Christian and Nosal were close, and that Nosal instructed Christian to “get what you need.” (Govt. Brief at 37.) But the background evidence marshaled by the government shows nothing about Nosal’s knowledge that Christian would

use Froehlich-L'Heureaux's password, as opposed to having Froehlich-L'Heureaux run the searches herself. The only piece of evidence the government has of such knowledge is a single piece of testimony from Christian where she stated, without explanation, that Nosal knew she was using Froehlich-L'Heureaux's password. (Govt Brief at 37 (citing ER484)).

But Christian never testified either how or *when* Nosal knew. And under *Rosemond*, the *when* is critical—it is the sine qua non of accomplice liability. Even if there was sufficient evidence of knowledge, there was no evidence of advance knowledge, and the accomplice theory therefore was not demonstrated, much less proven beyond a reasonable doubt.

Sufficiency aside, the simpler point is that the jury was not required to find the advance knowledge required by *Rosemond*. In fact, the instructions were explicitly phrased in the past tense, stating that the jury could find Mr. Nosal guilty if it found that he “was aware of a high probability that, [the others] *had gained* unauthorized access” to KFI computers. (ER263-64.) Under *Rosemond*, if an alleged accomplice only learns after the fact that his principals *had committed* a criminal offense, he is not guilty. The chronology is critical. “In telling the jury to consider merely whether Rosemond ‘knew his cohort used a firearm,’ the court did not direct the jury to determine *when* Rosemond obtained the requisite knowledge.” 134 S. Ct. at 1251-52 (emphasis in original). That is precisely what happened here as well.

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Moreover, deliberate indifference—as opposed to actual knowledge—is not sufficient. While deliberate indifference might be the proper standard for certain substantive offenses requiring knowledge, it is not the proper standard for accomplice liability. To reiterate *Rosemond* once again: accomplice liability requires intent, which may be inferred from knowledge only where there is actual advance knowledge. *See id.* at 1248-49. Tellingly, the government cites no case at all (much less a post-*Rosemond* case) holding that deliberate indifference is the proper standard for accomplice liability. The accomplice liability instructions were wrong.

The government argues that even if those instructions were wrong, the convictions can be affirmed instead on the alternate *Pinkerton* theory. (Govt. Brief at 35-36). That is wrong for two reasons. First, for reasons given in Argument III below, the conspiracy count itself was flawed, and the *Pinkerton* theory necessarily disappears with the conspiracy count.

Second, even if the conspiracy count remains, this Court cannot affirm on an alternate ground if the other ground was “legally inadequate.” *Griffin v. United States*, 502 U.S. 46, 59 (1991). *Griffin* distinguished between legal inadequacy and factual inadequacy. *See id.* at 58-59 (describing the difference). The latter allows affirmance on alternate grounds but the former does not. Because the accomplice instruction incorrectly stated the law, the accomplice theory was “legally inadequate” under *Griffin*. Consequently, the convictions may not be affirmed on any alternate grounds.

The evidence was insufficient, and the instruction was legally incorrect. The accomplice instruction incorrectly stated the law, because quite plainly, it allowed the jury to find Mr. Nosal guilty even if he only learned after the fact that Christian and Jacobson “had gained unauthorized access” to KFI computers using someone else’s password. That error cannot be cured with alternate grounds.

III. THE CONSPIRACY CONVICTION IS INVALID BECAUSE THE JURY WAS NOT REQUIRED TO FIND A TRADE SECRET

A. The Constructive Amendment

In response to Mr. Nosal’s claim of a constructive amendment to the indictment, the government does not dispute that the indictment alleged theft of actual trade secrets. (*See, e.g.*, ER1171, ¶ 15 (alleging conspirators would “steal...trade secrets from Korn/Ferry’s computer system, including source lists and other information”); *id.* ¶¶ 16, 23-25.) And the government agrees that the district court’s instructions allowed a finding of guilt “even if the government *did not prove that the information Nosal conspired to misappropriate, receive, possess, and transmit was, in fact, a trade secret.*” (Govt. Brief at 60; emphasis added.)

The government asserts, however, that “Nosal’s constructive-amendment claim amounts to a complaint that the jury instructions narrowed the indictment.” (Govt. Brief at 63). That claim is puzzling. Obviously, a universe which includes both trade secrets and non-trade secrets is vastly greater than a universe limited to trade secrets. The government’s burden of proof on the conspiracy charge was lessened by the court’s instruction lifting the prosecution’s obligation to prove that

the information that the defendants allegedly conspired to steal in fact constituted trade secrets. Plainly, the instruction broadened the indictment.

The government's principal argument appears to be that language in an indictment of narrower scope than the broadening terms of the court's instructions to the jury can be ignored for purposes of constructive amendment analysis if the indictment's narrowing language was "'superfluously specific ... describing alleged conduct irrelevant to the defendant's culpability under the applicable statute.'" *United States v. Ward*, 747 F.3d 1184, 1191 (9th Cir. 2014)." (Govt. Brief at 63.)

Mr. Nosal welcomes the citation to *Ward*, which found a constructive amendment when the indictment charged identity theft from two specific persons but the jury instructions broadened the class of victims by permitting conviction if the defendant "stole the identity of 'a real person,' without further specificity." 747 F.3d at 1192. In so doing, *Ward* reiterated first principles:

It is the exclusive prerogative of the grand jury finally to determine the charges, and once it has done so neither a prosecutor nor a judge can change the charging part of an indictment to suit [his or her] own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes. If an indictment could be so lightly departed from, then the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says no person shall be held to answer, [might] be frittered away until its value is almost destroyed.

Id. at 1189 (citations omitted).

Given the importance of the grand jury function, the government must convince this Court that in indicting the defendants for conspiracy, the grand jury's reliance on the term "trade secrets" (as opposed to what the alleged conspirators merely believed to be trade secrets, however wrongly) was mere surplusage. To put it another way, the Court must be convinced that the grand jurors would have returned a charge of conspiring to steal trade secrets even if the government's theory before the grand jury had conceded that the source lists referred to in the indictment were *not* trade secrets.

The government's "surplusage" essentially rests on the fact that some circuits, but not this one, have in specific factual contexts held that conspiracies or attempts to steal trade secrets require proof only that the defendants believed the information at issue constituted trade secrets, even though they were not. As Mr. Nosal noted in his opening brief, the lead case in that regard, *United States v. Hsu*, 155 F.3d 189 (3d Cir. 1998), involved a "sting" operation in which government agents posing as corporate insiders promised the defendants to exchange valuable trade secrets for cash. The Third Circuit stated explicitly that its ruling was limited to cases where the charges were *only* charges of attempt, and where there was "no charge of actual theft of trade secrets." *Id.* at 194. *United States v. Yang*, 281 F.3d 534, 544 (6th Cir. 2002), cited by the government, also involved a sting operation.

But *Hsu* and *Yang* cannot be read to broadly permit deletion of the requirement of proving the existence of trade secrets in a conspiracy case, as here,

in which the defendants are charged in the indictment with agreeing to misappropriate real documents charged as trade secrets, when that status is very much in dispute at trial. Subsequent to *Hsu* and *Yang*, the Seventh Circuit in *United States v. Lange*, 312 F.3d 263 (7th Cir. 2002) explained why such “sting” cases, where the defendants are told by undercover agents in unequivocal terms that they can buy valuable trade secrets, are distinguishable from cases in which the trade secret status of real documents must be determined.

[F]actual impossibility is no defense to a prosecution for attempt [cites omitted]. This does not mean, however, that the defendant's belief alone can support a conviction. All attempt prosecutions depend on demonstrating that the defendant took a substantial step toward completion of the offense, which could have been carried out unless thwarted....A sale of trade secrets may be thwarted by substituting a disk with the collected works of Shakespeare for the disk that the defendant believed contained the plans for brake assemblies, or by an inadvertent failure to download the proper file. The attempted sale of the disk is a culpable substantial step. *But it is far less clear that sale of information already known to the public could be deemed a substantial step toward the offense, just because the defendant is deluded and does not understand what a trade secret is.* Selling a copy of *Zen and the Art of Motorcycle Maintenance* is not attempted economic espionage, even if the defendant thinks that the tips in the book are trade secrets....

Lange, 312 F.3d at 268-269 (emphasis added)

As *Lange* makes clear, outside of sting operations in which the accused's intention to violate the EEA is well established, whether information is in fact a trade secret or whether it is instead “information already known to the public” is an important and significant issue in an EEA prosecution. Obviously, a grand jury

will more readily indict for conspiracy to steal trade secrets if informed by the government that the purported agreement was directed at what were really trade secrets. The government obtained an indictment against Mr. Nosal on the basis of that express representation to the jury, which was then incorporated into the language of the indictment. That allegation was certainly not “superfluous” to the theory on which the grand jury decided to charge Mr. Nosal. The court’s instructions eliminating the prosecution’s burden of proving that the information which was the object of the alleged conspiracy in fact constituted trade secrets constructively amended the indictment.

B. Reversal of Count One Requires that All of Mr. Nosal’s Convictions Be Vacated

The Count One conspiracy conviction must be reversed for the reasons given above. In his opening brief, Nosal argued that, because all of the substantive counts in the indictment were presented on a *Pinkerton* theory, they must fall along with the conspiracy count. (AOB 40-41) The government’s opposing brief does not dispute this claim of prejudice raised by Mr. Nosal. Consequently, no further argument on the point is needed.

IV. THE GOVERNMENT DID NOT PROVE THAT THE DOWNLOADED INFORMATION WAS A TRADE SECRET, NOR DID IT PROVE THE REQUISITE ELEMENTS OF KNOWLEDGE AND INTENT

A. Introduction

The government seeks to sustain Mr. Nosal’s convictions based on proof that Korn/Ferry generally took reasonable measures to protect the confidentiality

of its corporate information. In so arguing, the government largely ignores the requirement that the information in question have been maintained in “actual secrecy,” an element separate and apart from that of “reasonable measures.”

United States v. Chung, 659 F.3d 815 (9th Cir. 2011).

Nosal has argued that the government failed to meet its burden of proof on the element of “actual secrecy” as to the specific information at issue in Counts Five and Six. Yet, while describing at length the general measures KFI took to protect the confidentiality of its information (Govt. Brief at 40-43), the government says little as to Nosal’s claim that the prosecution failed to prove the “actual secrecy” of the source lists at issue in Counts Five and Six, and what it does say is wrong as a matter of law and fact.

At trial, KFI and the government took the position that KFI could give or sell information to a second party free of any obligation to keep it secret, yet could continue to claim trade secret status for that same information vis-a-vis third parties. For example, Peter Dunn, general counsel for KFI, testified that while KFI “often” had confidentiality agreements with clients (ER1007), he disagreed that “[i]f you sell information to a client and it’s not subject to a written confidentiality agreement, you’ve made it public.” (ER1008)²

The government’s position here is clearly at odds with the Supreme Court

² The government recently made the same claim at trial in another EEA prosecution in the Northern District of California (*United States v. Walter Liew*, et al., [N.D.Cal. No. CR 11-00573 JSW]). An appeal from the EEA convictions in *Liew* is presently being briefed in this Court. Ninth Cir. No. 14-10367.

authority on which Nosal has relied in this appeal. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984) (citing 1 R. Milgrim, *Trade Secrets* § 1.01[2] (1983) (“If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished...”); *Egbert v. Lippmann*, 104 U.S. 333 (1881). The government never mentioned the *Monsanto* principle in its closing argument.

Reading the *Monsanto* rule out of the EEA would have an enormous and deleterious effect on trade secret law. No court has previously endorsed that view of the EEA, and this Court should not be the first to do so.

B. Trade Secret Law Redux

The government’s brief contains little discussion of the law defining “actual secrecy.” *Chung* notes that the EEA’s definition of trade secrets is derived from the Uniform Trade Secrets Act (hereafter “UTSA”), which long preceded the EEA’s passage, rendering prior precedents in civil cases involving state trade secret law relevant to the EEA’s interpretation. 659 F.3d at 825. The Comment to the Uniform Trade Secrets Act § 1(4) provides:

The language “not being generally known to and not being readily ascertainable by proper means by other persons” does not require that information be generally known to the public for trade secret rights to be lost. If the principal persons who can obtain economic benefit from information are aware of it, there is no trade secret.

Accord Taquino v. Teledyne Monarch Rubber, 893 F.2d 1488, 1500 (5th Cir. 1990) (Party claiming trade secret status must prove “that others in the industry

did not have the same information.”).

In *Monsanto*, the company had provided data to the Environmental Protection Agency which was under a statutory obligation to maintain the confidentiality of that information for ten years. *Id.* at 1006. Because Monsanto was on notice that the EPA was thereafter free to publish the data if it chose to do so, the Supreme Court held that the information lost trade secret status after the ten year period expired. *Id.* at 106-07; accord *Cole Asia Bus. Ctr., Inc. v. Manning*, 2013 WL 3070913 (C.D. Cal. June 18, 2013) (client list disclosed to a competitor without subjecting the competitor to confidentiality agreement could not receive trade secret protection.); *Gal-Or v. United States*, 113 Fed. Cl. 540, 553-55 (2013) (holding that, because plaintiff disclosed trade secrets to others, “who were under no obligation to protect the confidentiality of the information,” that information lost trade secret status); *Buffets, Inc. v. Klinke*, 73 F.3d 965, 968 (9th Cir. 1996) (trade secrets must “be undisclosed or disclosed only on the basis of confidentiality”).

C. The Government Failed to Prove that The Information at Issue Had Not Been Disclosed to Parties Who Had No Obligation to Maintain It as Confidential

At trial, Becky Christian, the government’s most important witness, testified that she had mailed source lists to clients and others outside KFI. (ER422.) She had attended many “pitches” during which Korn/Ferry personnel provided prospective clients with “a source list or target list of candidates” to show the client that KFI “could deliver” results if awarded the executive search being

sought. (ER423.) Those source lists, which contained information from Searcher, would sometimes be left with the clients. (ER 424.) Christian said nothing about those lists being subject to confidentiality agreements. (*Id.*)

Carolyn Nahas, one of KFI's top partners, testified that KFI performed mapping projects for clients in which KFI would sell the clients information on prospective executive candidates. (ER886-887; *see also* ER590 (Briski testimony that KFI sells "mapping" information to clients that came from Searcher, rendering that information non-confidential).) Furthermore, while claiming such disclosures were "unusual" (ER858-59), Nahas testified unequivocally that: "If a client requests a source list, we would forward it to them." (ER903.)

In the face of this testimony, in order to establish that the information at issue in Counts Five and Six was actually secret, the government had to prove beyond a reasonable doubt that the Cal Micro and Perkins Elmer lists and Sirna "cut and paste" information had not been disclosed without confidentiality protections to third parties, including the clients themselves in those three searches.

The government's response to Nosal's claim is both legally and factually flawed. First, it asserts that, as a matter of law, "the government was not required to prove that Korn/Ferry withheld these source lists from the clients for whom they were developed." (Govt. Brief at 43). To the contrary, the *Monsanto* rule required that the government prove that the lists alleged to constitute trade secrets either had been withheld from the clients in those cases or had been disclosed to them

subject to a confidentiality agreement. *See also Manning*, 2013 WL 3070913 (client list disclosed to a competitor without subjecting the competitor to confidentiality agreement could not receive trade secret protection). The government's legal position is at odds with the *Monsanto* rule.

After disclaiming any obligation to prove that the source lists herein at issue had not been made public, the government also claims that it did prove that fact, relying on one purported piece of testimony, the existence of which it asserts that the defense has conceded:

Specifically, Korn/Ferry Vice President of Information Services Marlene Briski, who was responsible for the data in Searcher in 2005, testified that none of these source lists had become available to the public. *ER:647-50, 687*. The jury was entitled to credit her testimony and therefore conclude that these source lists were not public. Although Nosal contends that other Korn/Ferry source lists may have been publicly known, he does not dispute Briski's testimony that these particular source lists were not. *See AOB:47-48*.

(Govt Brief at 44; emphasis added)

In the context of Mr. Nosal's claim that the government failed to prove that the charged source lists had not been disclosed to parties free to make whatever use of the information they chose, this assertion is quite misleading. Ms. Briski testified that although she had once been a search professional at KFI, she had left that position to become an IT specialist in 1985. (ER 688.) Thus, she had not been in the business of performing executive searches, handling source lists, or dealing with clients for over 28 years. During her cross-examination, when defense counsel attempted to question her as to whether source lists were given to

clients during pitches, she responded: “I don’t know. I’m not sitting with clients; I’m not pitching to clients...” (ER 588.) When defense counsel attempted to further pursue the inquiry, the government objected that “this line of questioning is asking Ms. Briski, who is not a search professional at Korn Ferry, to speculate.” (ER 589.)

Having taken the position that Ms. Briski *was not qualified* to testify on what went on between KFI search professionals and their clients, the government engaged in an exchange with her on redirect concerning her knowledge of the search lists at issue in this case. Ms. Briski was first asked whether any of the source lists about which she testified have been available to the general public. She responded: “*to the general public. Like any of the people here?*” (ER 648.) She then said “no,” but, following an objection, the court required a showing of foundational knowledge. (*Id.*)

Briski then testified that: (1) she had not seen any of these source lists on the Internet (ER 648); (2) no one had called her on the phone to say that they had the Sirna list (ER 649); and (3) she had not seen any of the source lists on the street outside KFI. (*Id.*) The following question and answer followed: Q.: “Do you have any information that other than providing them to the government or in discovery to Mr. Nosal, that any of those have ever been released by Korn/Ferry? A.: No, I don't have any.” (ER 649-650)

Of course, Ms. Briski did not “have any information” on whether source lists in general or the source lists named in Counts Five and Six had been given by

KFI search executives to clients in the course of business; as the government agreed, she herself was not a search executive, and any claim to knowledge on that subject on her part would have been, as the government stated, “speculative.” The fact that the IT chief of a mortgage brokerage firm has no information on the practices of the company’s brokers cannot prove that the brokers in fact informed prospective clients of their contractual rights during sales pitches. Likewise, Briski’s testimony lacked any probative value concerning the issue of whether or not the charged source lists had been disclosed to third parties under no obligation to maintain them in secrecy.

The government also argues that “the evidence established that Korn/Ferry typically did not send source lists to its clients and that, when it did so, it designated them as confidential and for the client’s use only.” (Govt. Brief at 44, citing ER:858-59, 1007.) But while Carolyn Nahas testified that KFI rarely gave clients source lists, she also clearly admitted that they sometimes did so. (ER 903.) And the government’s claim that, when distributed to clients, such lists were “designated as confidential” is again misleading. General counsel Peter Dunn testified that KFI “often” had confidentiality agreements with clients, while asserting that KFI’s information would remain protected even if disclosed in the absence of a confidentiality agreement. “Often” is defined as meaning “frequently,” or “a lot;” that is a far cry from “always” or “without fail.” Proof that some KFI source lists might have been maintained in actual secrecy and thus could qualify as trade secrets cannot substitute for proof beyond a reasonable

doubt that the lists charged in Counts Five and Six were so maintained and thus had trade secret status.

Finally, the government argues that “even if some Korn/Ferry employees did not comply with the terms of their confidentiality agreements (*see* AOB at 48), these agreements still constituted a reasonable measure because Korn/Ferry was entitled to rely on its employees to honor their contractual obligations.” (Govt. Brief at 43.) The government may be correct that the *reasonableness* of a KFI measure should be assessed apart from whether its employees faithfully observed it, but the disclosure of information by KFI employees to third parties, “even if inadvertent or accidental,” stripped that information of actual secrecy and thus of its trade secrets status. *Defiance Button Machine*, 759 F.2d at 1063.

In sum, the government effectively maintains, as Peter Dunn did at trial, that as a matter of law, KFI source lists could remain trade secrets even if disclosed to third parties not subject to confidentiality agreements, as long as they were not readily available to the general public. That legal position is untenable in the light of *Monsanto*. The government did not carry its burden of proof on the Count Five and Six trade secret counts.

V. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN ADMITTING IRRELEVANT OPINION EVIDENCE CONCERNING THE NON-COMPETE COVENANT BUT EXCLUDING CONCLUSIVE EVIDENCE THAT THE PROVISION WAS LEGALLY VOID

All evidence of the non-compete provision was irrelevant and should have been excluded from admission. Nevertheless, over Mr. Nosal’s objection (*see*

Dkt. 344 at 1-5), the district court issued a ruling that (1) permitted government witnesses to “tell the story” of how Nosal’s perceived violation of the provision triggered the government’s investigation of the charged offenses but (2) prohibited any evidence as to the provision’s validity under California law. (See AOB, at 52-54.) As became apparent at trial—and as Nosal had predicted—the ruling effectively permitted the government to suggest a sinister connection between Nosal’s “breach” of the provision and his intent to commit the charged offenses.

To be sure, the court’s related instructions purported to forbid jurors from making that connection. But the court prevented Mr. Nosal from dispelling the government’s improper suggestion in the most meaningful way, i.e., by demonstrating that the provision was void *ab initio*—a proposition that the government does not, and cannot, persuasively dispute. *See, e.g., Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 945 (2008).

As Mr. Nosal contends, the court’s evidentiary rulings constituted an abuse of discretion because they permitted the introduction of inflammatory evidence that simply was not relevant to proof of the charged offenses. *See, e.g., United States v. Walker*, 673 F.3d 649, 658 (7th Cir. 2012) (“The government repeatedly hides behind its asserted needs to provide ‘context’ and relate the ‘course of investigation.’ These euphemistic descriptions cannot disguise a ploy...”); David F. Binder, *Hearsay Handbook*, § 2.10 (4th ed. 2012), and cases cited therein (“In criminal cases the prosecution is fond of offering evidence of inculpatory out-of-court assertions as ‘background’ to explain why law enforcement agents

decided to investigate a defendant. Such evidence is seldom relevant.”).

Additionally, the district court’s rulings provided the jury with a damning and one-sided picture of defendant that he was not allowed to effectively challenge. (See AOB, at 55-56 (citing *United States v. Waters*, 627 F.3d 345, 357 (9th Cir. 2010).)³ Thus, while the legal status of the provisions was *not* relevant to the charged offenses at the outset, the court’s erroneous ruling and the use to which the government put it placed that status squarely in issue. (Compare Govt. Brief at 68-69.)

Tellingly, the government neither demonstrates the relevance of its evidence concerning the non-compete provision nor responds to Mr. Nosal’s reliance on *Waters*. Instead, the government chiefly argues that no prejudice appears because the court instructed jurors to disregard opinions asserting that the provision was valid. But “limiting or curative instructions cannot always und[o] the damage of prejudicial evidence.” *United States v. Awadallah*, 436 F.3d 125, 134 (2d Cir. 2006). See also *United States v. Davenport*, 753 F.2d 1460, 1463 (9th Cir. 1985). Certainly those instructions did nothing to ameliorate the government’s prejudicial argument linking Mr. Nosal’s conduct vis-a-vis the non-compete agreement to the supposed presence of criminal intent—an argument that a correct evidentiary ruling would have foreclosed.⁴ Reversal is in order.

³ This citation corrects an error in the citation to *Waters* contained in the opening brief (at 55).

⁴ The government defends its closing argument as proper on the grounds that it did not expressly mention the employment agreements or argue that Mr.

VI. THE RESTITUTION ORDER WAS EXCESSIVE AND ILLEGAL

The district court ordered restitution in an amount approximately twenty times its calculated “actual loss” under the Guidelines. The government cannot point to any federal case approving such a disproportionate award. That is because none exists.

This Court held in *United States v. Stoddard*, 150 F.3d 1140 (9th Cir. 1998) that restitution cannot exceed Guidelines loss. The government suggests that *Stoddard* is no longer good law because it interpreted a different restitution statute, and intervening statutory amendments allow higher restitution awards. But since those amendments, this Court has continually cited *Stoddard* as good law. *United States v. Xu*, 706 F.3d 965, 994 (9th Cir. 2013). And since those amendments, other circuits have similarly ruled that restitution cannot exceed actual Guidelines loss. *United States v. Dokich*, 614 F.3d 314, 320 (7th Cir. 2010).

The government is asking this Court not only to abandon the *Stoddard* rule, but also to allow restitution awards that have absolutely no relationship to actual loss. The government’s argument has no limiting principle. It would erode the fundamental principle that “we award restitution to make the victim whole.”

Nosal had violated the non-compete provision. (Govt. Brief at 69.) Nosal simply asks that the Court consider the substance of the argument in context. So considered, the argument (1) plainly connected “subterfuge” and criminal intent to the formation and operation of “Nosal Partners” and (2) falsely suggested that the only reason for Nosal’s concealment, e.g., his use of the pseudonym David Nelson, was his participation in the charged conspiracy rather than his pursuit of what was, in fact, a lawful effort to compete.

United States v. Carter, 742 F.3d 440, 447 (9th Cir. 2014).

The source of the grossly disproportionate restitution award in this case was the district court's decision to award hundreds of thousands of dollars of attorneys' fees, paid by a corporation to a large law firm. These fees were not a direct and reasonably foreseeable result of the offense conduct, and they did not follow as an immediate consequence of that conduct. Most of those fees were incurred years after the alleged crimes. Even assuming the validity of the convictions, no employee who steals \$46,000 worth of property from his employer would reasonably foresee that his employer would spend \$600,000 on attorneys over ten years in response. Nor were the fees necessary. As the Second Circuit recently reiterated, if legal fees are incurred for the dual purpose of civil litigation and assisting the prosecution, they are not incurred as a "necessary" result of the latter. *United States v. Cuti*, 778 F.3d 83, 94-95 (2d Cir. 2015).

The extraordinary and disproportionate attorneys' fees were not incurred to make KFI whole for its \$46,000 actual loss. However one characterizes KFI's motives in the years since the offense, that is not the sort of expense that Congress sought to cover when it enacted the MVRA to protect victims of sexual violence.

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CONCLUSION

For the reasons stated above and in the opening brief, defendant Nosal should be acquitted on all six counts of conviction, or a new trial should be ordered on all six charges. Alternatively, the district court's restitution award should be vacated and remanded for reconsideration.

Dated: April 20, 2015

Respectfully Submitted,

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CERTIFICATION REGARDING BRIEF FORM

I, Donald M. Horgan, hereby certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 6,652 words.

Dated: April 20, 2015

/s/ Donald M. Horgan
DONALD M. HORGAN

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