

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA

|                             |   |                               |
|-----------------------------|---|-------------------------------|
| UNITED STATES OF AMERICA,   | ) |                               |
|                             | ) | Criminal No. 4:09-CR-004      |
| Plaintiff,                  | ) |                               |
|                             | ) |                               |
| v.                          | ) |                               |
|                             | ) | GOVERNMENT’S BRIEF IN SUPPORT |
| VISION SYSTEMS GROUP, INC., | ) | OF RESISTANCE TO DEFENDANT’S  |
|                             | ) | MOTION TO DISMISS COUNTS TWO  |
| Defendant.                  | ) | AND THREE AND STRIKE          |
|                             | ) | PORTIONS OF COUNT ONE         |

The United States of America, by and through its undersigned counsel, files its brief in resistance to defendant Vision Systems Group, Inc.’s motion to dismiss Counts 2 through 9 and to strike portions of Counts 1 and 10 of the Indictment filed April 1, 2009 (Clerk’s No. 19).

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## FACTS

On January 22, 2009, this defendant was charged by indictment with conspiracy (18 U.S.C. § 371; Count 1), mail fraud (18 U.S.C. § 1341; Counts 2 through 9), and forfeiture (18 U.S.C. §1341; Count 10). The indictment contains extensive details setting forth the essential facts constituting the offenses that were charged, including nine pages of details and facts on Count 1 (conspiracy).

Although the indictment does allege a conspiracy to obtain immigration documents by fraud, and alleges specific ways in which such documents were, in fact, obtained by fraud, the indictment is much more broad than a document fraud case. The allegations contained within the indictment also identify that one of the purposes of the conspiracy, as well as the mail fraud schemes, was to displace U.S. citizen workers and obtain the wages and benefits which should have been made available to U.S. citizens.

In paragraph six of the introductory allegations (Clerk's No. 1, p.2), the indictment specifically identifies the steps that employers must take within the H1B program "in order to avoid displacing workers within the United States". Similarly, in paragraph eight of the introductory allegations of Count 1 of the indictment (Clerk's No. 1, p.2), the indictment again identifies the steps which the employers must take within the H1B program to inform U.S. workers of the intent to hire foreign workers "in order to avoid displacing workers within the United States".

In alleging the manner and means of the conspiracy (Clerk's No. 1, p. 6, ¶ C. 2.) the indictment specifically alleges that Vision Systems Group regularly caused workers to enter the

United States when the company “did not have positions open to employ the worker”. Similar allegations are set forth within the indictment in the “manner and means” section of the mail fraud allegations (Clerk’s No. 1, p. 19, ¶ C. 2.)

On April 1, 2009, the defendant filed a motion to dismiss counts “two through nine” of the indictment and to strike certain allegations of counts 1 and 10 of the indictment. The motion focuses primarily upon the allegations of the indictment relating to the defendant’s conduct in obtaining immigration documents by fraud, and ignores the other allegations of the indictment.

#### **STANDARD OF REVIEW**

Fed. R. Crim. P. 7 provides that an indictment “must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government”. Fed. R. Crim. P. 7(c)(1). Rule 7 also provides that a count “may allege that the means by which the defendant committed offense are unknown or that the defendant committed it by one or more specified means”. *Id.*

Although Fed. R. Crim. P. 12(b)(3) allows a defendant to file a motion “alleging a defect in the indictment”, Rule 12(b)(3) does not specify which defects should authorize the court to dismiss charges in the indictment in their entirety. In this regard, the Eighth Circuit Court of Appeals has held that an indictment need only contain those facts and elements of the alleged offense necessary to inform the accused of the charge so that he or she may prepare a defense in the case. *United States v. Henderson*, 416 F.3d 686, 692-93 (8th Cir. 2005). In *Henderson*, the

indictment was found sufficient despite not alleging materiality as an element of wire fraud because the concept was intended in the common law definition of a scheme to defraud. *Id.*

It is true that an indictment is not sufficient if it fails to state a material element of the offense. *United States v. Zangger*, 848 F.2d 923, 925 (8th Cir. 1988). However, an indictment is not insufficient for failure to use specific terms which are not essential elements of the crime. *United States v. Pennington*, 168 F.3d 1060, 1065 (8th Cir. 1999). In this regard, it should be noted that neither the mail fraud statute nor Fed. R. Crim. P. 7 specifically require that an indictment include the specific identification of victims. In determining whether an indictment sufficiently informs the defendant of the offense charged, the courts give the indictment a common sense construction. *United States v. Henderson, supra* at 693. In this regard, an indictment that tracks the statutory language in defining an offense is usually deemed sufficient. *United States v. Donahue*, 948 F.2d 438, 440-41 (8th Cir. 1991).

### **SUFFICIENCY OF THE MAIL FRAUD CHARGES**

The mail fraud statute, Title 18, United States Code, Section 1341, provides in relevant part as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier...shall be fined under this title or imprisoned not more than 20 years, or both.

In this regard, the phrase “scheme to defraud” includes any plan or course of action intended to deceive or cheat another out of money, property or property rights. Eighth Circuit Model Criminal Jury Instructions 6.18.1341 (2007). A scheme to defraud need not be fraudulent on its face, but must include some sort of fraudulent misrepresentation or promise reasonably calculated to deceive a reasonable person. *Id.*; *United States v. Goodman*, 984 F.2d 235, 237 (8th Cir. 1993).

It is also generally recognized within the Eighth Circuit that the term “intent to defraud” means to act knowingly and with the intent to deceive someone for the purpose of causing some financial loss or loss of property or property rights to another or bringing about some financial gain to ones self or another to the detriment of a third party. *United States v. Casperson*, 773 F.2d 216 (8th Cir. 1985); Eighth Circuit Model Criminal Jury Instructions 6.16.1341 (2007). (emphasis added)

Within the Eighth Circuit, it is also generally recognized that it is not necessary that the government prove all the details alleged in the indictment concerning the precise nature and purpose of the scheme, that the alleged scheme actually succeeded in defrauding anyone, or that the use of the mail was intended as the specific or exclusive means of accomplishing the alleged fraud. Eighth Circuit Model Criminal Jury Instructions 6.16.1341, citing *United States v. West*, 549 F.2d 545, 552 (8th Cir. 1977); *United States v. Gross*, 416 F.2 1205, 1210 (8th Cir. 1969); *Atkinson v. United States*, 344 F.2d 97, 98 (8th Cir. 1965); *United States v. Calvert*, 523 F.2d 895, 912 (8th Cir. 1975).

As previously mentioned, the defendant's motion unduly focuses on certain allegations of the indictment, while ignoring the remaining allegations setting forth the additional manner in which the scheme was conducted. While the defendant did obtain immigration documents by fraud, the immigration fraud is separately charged as an object of the conspiracy in the indictment.

The defendant correctly notes that "permits" or "licenses" issued by the State or municipalities do not qualify as "property" within the scope of 18 U.S.C. § 1341. *Cleveland v. United States*, 531 U.S. 12 (2000). However, the Court in *Cleveland* reaffirmed the broad interpretation of the term "property" in the Court's previous decisions in *McNally v. United States*, 483 U.S. 350, 360 (1987) and *Carpenter v. United States*, 484 U.S. 19, 25 (1987). *Cleveland, supra* at 19.

In this regard, it is generally recognized that employment contracts are "property" within the confines of the mail fraud statute. *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990).

As set forth within the indictment in this case, there are numerous federal statutes and regulations which are specifically designed and intended to protect the employment rights of U.S. citizens. As also set forth within the indictment, the scheme alleged in the conspiracy and mail fraud charges allege that the defendant and co-conspirators intended to displace U.S. workers and thereby deprive them of employment opportunities, employment contracts, wages, and other valuable benefits.

Although the sufficiency of an indictment is generally determined by the four corners of a document, the government is prepared to demonstrate to the Court the manner in which the defendant's schemes, along with similar schemes by similar companies have substantially deprived U.S. citizens of employment. In January of 2009, the total number of workers employed in the information technology occupation under the H1B program substantially exceeded the 241,000 unemployed U.S. citizen workers within the same occupation.

In addition to the general intent to deprive U.S. citizens of employment contracts, wages and benefits, the government also has evidence from seized records demonstrating the manner in which specific U.S. citizens were denied meaningful opportunities for employment. Vision Systems Group and other related companies repeatedly advertised information technology jobs within the United States as a "mere formality", and never acted upon any of the resumes' submitted by U.S. citizens seeking such employment. In fact, Vision Systems Group and related companies consistently hired only foreign workers in order to fill information technology positions within the United States.

There is no question that the scheme of the defendant and the defendant's co-conspirators was intended to bring financial gain to the defendant "to the detriment of a third party". Eighth Circuit Model Criminal Jury Instructions 6.18.1341 (2007). Although the exact amount of loss to U.S. citizen workers has not yet been determined, there is no question that the amount of lost wages and benefits to U.S. citizens has been substantial.

### MOTION TO STRIKE

While a motion to strike surplusage is a matter within the Court's discretion, the Eighth Circuit has cautioned that such a motion "should be granted only where it is clear that the allegations contained therein are not relevant to the charge made or contain inflammatory and prejudicial matter." *Dranow v. United States*, 307 F.2d 545, 558 (8th Cir. 1962); accord *United States v. Figueroa*, 900 F.2d 1211, 1218 (8th Cir. 1990) (reiterating this standard and concluding that overt acts not required to be proved in drug case not stricken even though surplusage). Thus, "[m]otions to strike surplusage are not lightly granted and required the defendant to meet a significant burden of proof." *United States v. Augustine Medical, Inc.*, 2004 WL 502183, at \*4 (D. Minn., March 11, 2004) (citations omitted). This "exacting standard . . . is met only in rare cases." *United States v. Eisenberg*, 773 F. Supp. 662, 700 (D.N.J. 1991); see also *United States v. Watt*, 911 F. Supp. 538, 554 (D.D.C. 1995) (characterizing motions to strike surplusage as "highly disfavored"). Additionally, "in factually and legally complex cases," the courts have observed that alleging "background information is particularly helpful for contextualizing the criminal conduct alleged." *Augustine Medical, Inc.*, 2004 WL 502183, at \*4 (citing *Watt*, 911 F. Supp. at 554).

**CONCLUSION**

The motion to dismiss Counts 2 and 9 filed by defendant, Vision Systems Group, Inc., (Clerk's No. 19) should be denied. In as much as the indictment properly charges mail fraud, the related motion to strike portions of Counts 1 and 10 should also be denied.

Respectfully submitted.

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**CERTIFICATE OF SERVICE**

I hereby certify that on I electronically filed the foregoing with the Clerk of Court using the ECF system which will send notification of such filing to the attorney(s) of record.

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