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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GARY EDWARD KOVALL, DAVID ALAN HESLOP, PAUL PHILLIP BARDOS, AND PEGGY ANNE SHAMBAUGH, Defendants.	Case No. CR-12-441(A)-MWF DEFENDANT HESLOP'S MEMORANDUM REGARDING STIPULATED FACTS

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Defendant David Alan Heslop submits this memorandum in support of his request to enter a conditional guilty plea. While Heslop is willing to admit that he paid money to Shambaugh in an effort to influence Kovall to recommend Bardos/Cadmus for the construction related contracts described in the indictment, he also preserves his right to appeal and his belief that the facts do not support a criminal conviction for the offenses alleged in the indictment for the reasons set forth below.

The Stipulated Facts

The Twenty-Nine Palms Band of Mission Indians is "the Tribe," governed by a General Council. (Ex. A at 3, 6; Ex. Z at 1453-57; 1464-80 (General Council Resolutions))[1] A "Tribal Council" governs aspects of the Tribe (¶ 1(a)), and it also addresses matters for the Spotlight 29 Casino (the "Casino") (*e.g.*, Ex. X at 1348 (considering a proposal for "doing the temporary access road and parking lot for the casino")).

The Tribe owns two corporations:

- Enterprises Corporation ("EC"), a federally chartered corporation that is "distinct and separate from the Tribe" whose "activities, transactions, obligations, liabilities and property … are not those of the Tribe." (Ex. C at 0015) The "rights of the Tribe as owner" of EC "shall be exercised by the Business Committee" and no individual member of the Tribe "shall be recognized as acting as or on behalf of the Tribe as owner." (*Id*. at 16) EC operated as a legal entity completely separate from "the Tribe," with separate resolutions, officers, and directors. (Ex. D (Corporate minutes and resolutions from June 14, 2001 through September 7, 2009)) The Tribe "vested the sole and exclusive right to own, develop, construct, manage and operate the Casino" in EC, and EC owns all related collateral, real property (except for the reservation, which is owned by the US government in trust), and the Casino. (Ex. M Loan

[1] All references are to paragraphs of the Stipulated Facts or to the Exhibits thereto, except where specific reference is made to paragraphs of the Indictment.

Agreement at 227, 179, 196, 234)

- Echo Trail Holdings LLC ("ETH"), a California limited liability corporation formed by the Tribe (its sole member) to purchase real estate. (¶¶ 1(b) and 45; Ex. R at 788) When ETH purchased the 47-acre parcel, it did so with money borrowed by EC expressly for that purpose. (Ex. M at 0189 ("Land Acquisition Real Property"), 223, 226 (Existing Casino Project includes acquisition of 47-acres))

The Tribe has a department called the Tribal EPA, which was funded, in part, by a grant from the U.S. EPA, and the grant funds were deposited directly from the U.S. EPA into the Tribal EPA's separate bank account. (¶ 1(b))

Gary Kovall was a lawyer for both the Tribe and EC, as well as the Tribal Gaming Commission, which was an independent government regulatory agency for the Tribe. (¶ 3, ¶ 1(c); Ex. N at 00336) Kovall billed three separate entities for his legal work: EC, the Gaming Commission, and the Tribe. (Ex. Q, at *e.g.*, 403, 405-08, 410-13, 501-02, 516-19, 525-26, 532-34, 574-75, 605-611) Kovall was not paid from the Tribal EPA's bank account.

Kovall recommended to Tribe members that it retain Heslop for demographic, survey, and real estate advice. (¶ 4) Heslop's role increased in November 2006, when EC retained Heslop's corporation (Diversification Resources or "DR") to provide advice about several projects, including particular work at the Casino. (¶ 7; Ex. J) Every check paid to DR was issued from the EC bank account. (Ex. K at 00159, 00161, 00163) Kovall, Heslop, Bardos, and Shambaugh agreed that money earned by DR would be shared among Heslop, Bardos, and Kovall, with Shambaugh receiving Kovall's share because Kovall wanted to keep his income secret. (¶ 5)

In January 2007, Bardos decided to bid against the Worth Group, which had been performing construction work at, or related to, the Casino. Bardos and Heslop agreed to share profits from the work Bardos obtained. (¶¶ 10, 16) Heslop and Bardos had conversations about bidding on the contracts, and some of the conversations were

reflected in emails between or among Kovall, Shambaugh, Bardos, and Heslop. The emails attached at Exhibit W to the stipulated facts reflect some of the email exchanges.[2]

Cadmus proposals were directed to the Casino: A temporary road access and parking lot proposal was addressed to "Spotlight 29 Casino" (Ex. F); a construction management proposal was "to integrate into the Spotlight 29 facility [] a cogeneration power plant" (Ex. G); the disking and bathroom renovation projects were addressed to "Spotlight 29 Casino" (Ex. H); and (4) a granite purchase was for the "Spotlight 29 Casino" (Ex. H).

The evidence selected by the government in its Memorandum (at 3-4) is incomplete. While some email exchanges reflect that, at times, Heslop and the other defendants referred to "the Tribe" when discussing the potential or existing construction related contracts, as the government notes, the emails also frequently referred to "Casino" and "construction" (or related terms), and the emails among Kovall, Bardos, and Heslop were focused on the construction related projects described in the indictment. (*See, e.g.*, Ex. W at 918-19, 922, 924, 925-26, 930, 932, 938-39, 947, 967, 968, 971, 975)

The government cites to a sequence of events in March 2007 relating to road construction and a related easement, but the actual resolution for the easement and to hire Cadmus was adopted by EC (and not by the General Council). (Ex. D at 63, 65) The Tribal Council minutes of March 30 reflect that the easement was a transaction of

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[2] Shambaugh and/or Kovall produced the emails to the government after they offered to cooperate with the government. For purposes of the plea, Heslop stipulated to their consideration by the Court. If there were to be a trial, however, Heslop may object to admission of the emails because they are not originals as required by FRE 1002, and they are not admissible as duplicates under FRE 1003 and 1004; neither Shambaugh nor Kovall produced the original media or servers on which the emails were stored, and they apparently destroyed their copies of these (and other) emails in bad faith.

EC. (Ex. X at 1351)

The government also focuses on Bardos's use of the phrase "the Tribe" in connection with his cogeneration oversight proposal as proof of a conspiracy to engage in transactions with "the Tribe," but the indictment alleges that the Bardos contract was only to "perform the oversight of the construction *at the Spotlight 29 Casino* cogeneration power plant" (emphasis added). It does not assert that the oversight concerned other transactions "for the Tribe." (Indictment Overt Act ¶ 11) Moreover, Bardos's proposal stated that it was for a "construction management agreement to integrate [a co-generation power plant] into the Spotlight 29 facility." (Ex. G at 121)

Finally, the government refers to a May 7, 2007 Bardos proposal to disk land, which had a signature line for a "tribal representative," but it omits the fact that the contract was addressed to "Spotlight 29 Casino." (Ex. H)

Every check paid to Cadmus for its work – every transaction alleged in the Overt Acts of count one of the indictment – was paid from the bank account entitled "Twenty-Nine Palms Enterprises Corporation d/b/a Spotlight 29 Casino." (Ex. I) (The indictment also includes a bathroom remodel and a co-generation plant shell and casino addition in Overt Acts 14-17; those were not included in the stipulation, but every check charged in the conspiracy count was issued by EC, *see* (¶¶ 30, 37, 41, 42-44 and Ex. I at 150-51).

Echo Trail Holdings, LLC was created to provide an independent corporate vehicle through which the Tribe (which was ETH's sole member) could purchase real property. (¶ 45) ETH appointed Heslop as its General Manager, so that he could sign documents for ETH and keep the Tribe's interest in properties secret. (¶ 45) Darrell Mike described Heslop's role during a meeting as being a signature "dummy" (Ex. X at 1423 ("CHAIRMAN DARRELL: If we go up to somebody and say we want to buy your land and they know who we are and the price goes up so we send a cover dummy and he goes over and says it's for something else and then he looks like any old John Doe and then the price stays") – that is, a straw purchaser. When Heslop was replaced,

the same straw purchaser description was used by the new lawyer representing the Tribe and its companies. (Ex. AA at 1484 ("[Attorney] Freeman suggested that Mr. Heslep [*sic*] be replaced as manager for Echo Trails by George Adams … because he has no affiliation with the Tribe and … no one will conclude that Mr. Adams is part of 29 Palms.") and 1487 ("Anyone researching Echo Trails will only find George Adams as the managing member….")).

Heslop's authority to act for ETH (or the Tribe) was limited to spending no more than $1000. (Ex. S at 800; Ex. R at 791) During the purchase of the 47-acre parcel, the attorney for the seller said the "Manager of Echo Trail Holdings may not enter into an agreement for an amount in excess of $1000 without the unanimous consent of the members of Echo Trail Holdings" and, therefore, requested an ETH resolution providing that authority. (Ex. CC at 1492) Heslop was paid by ETH (not the Tribe) monthly and by the hour for work he performed for ETH. (Ex. U)

In November 2007, ETH purchased a 47-acre parcel of land adjacent to the Tribe's reservation, using money borrowed by EC. (¶ 57; Ex. M (Loan Agreement); Ex. D at 67 (EC Resolution to borrow money; Ex. Z at 1458 (EC Resolution to enter into Loan Agreement)) Heslop was authorized to sign the documents for ETH by a specific resolution of the General Council as the member of ETH. (Ex. Z at 1455-57)

Covered Entities Under Section 666

Section 666 prohibits people from corruptly paying money to any person with the intent to influence an agent of an organization, a State, an Indian tribal government, or any agency of the foregoing entities, that receives more than $10,000 under a federal program in connection with transactions of such entities. 18 U.S.C. § 666(a)-(b). The statute limits its scope to particular entities – those that directly receive federal money – as has been explained by the Ninth Circuit in *United States v. Wyncoop*, 11 F.3d 119, 121 (9th Cir. 1993) ("Congress' intent was to bring conduct that could have an effect *on the administration or integrity of federal funds within the ambit of federal criminal law*. Congress did not intend . . . to make misappropriations

of money from every organization that receives *indirect* benefits from a federal program a federal crime") (first emphasis added; second in original) and *United States v. Simas*, 937 F.2d 459, 463 (9th Cir. 1991) ("By enacting section 666, Congress plainly decided to protect federal funds by preserving the integrity *of the entities that receive the federal funds*, rather than requiring the tracing of federal funds to a particular illegal transaction.") (emphasis added).

Other courts have also construed the statute with the same limitation. *See United States v. Whitfield*, 590 F.3d 325, 345-46 (5th Cir. 2009) (federal funds paid to the administrative arm of the court that funded court operations made only the administrative arm (and not the judicial function) the covered entity); *United States v. Abu-Shawish*, 507 F.3d 550, 555-556 (7th Cir. 2007) ("the statute only mentions one organization, which implies that all three relevant attributes attach to the organization: it has custody of the funds, *its agent committed the fraud*, and it is victimized by the fraud. There is no mention of a second organization that is, instead, victimized by the fraud. . . . In short, the plain meaning of the statute suggests that there must be an individual who acts as an agent of an organization, the individual must have unlawfully obtained funds from this organization, and the organization must receive over $10,000 in federal funds in any one year period"); *United States v. Sabri*, 326 F.3d 937, 942 (8th Cir. 2003) *aff'd and remanded,* 541 U.S. 600, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004) ("The statute applies to all offense conduct involving anything of value of $5000 or more that involves 'any' agency business, transaction, or series of transactions *so long as the relevant agency received the requisite amount of federal benefits*") (emphasis added); *United States v. Bonito*, 57 F.3d 167, 169 (2d Cir. 1995) ("Since the same government whose business had to involve at least $5,000 also had to receive in excess of $10,000 in federal funds, and since New Haven was expressly named as the government that had to receive the requisite federal funds, this part of the instruction also indicated that the bribe had to be in connection with New Haven business.").

For reference, we refer to entities that come within the scope of section 666 as "Covered Entity or Entities."

For example, if someone were to corruptly pay money to the Chairman of the Tribe's General Council with the intent to influence the Chairman's vote on the Council in connection with a transaction of the Council, then that would state an offense under section 666, if the Council received more than $10,000 in federal grants. If someone were to corruptly pay money to the Tribal EPA administrator with the intent to influence that administrator's purchase of equipment for the Tribal EPA, then that would state an offense because the Tribal EPA received more than $10,000 in federal grants.

On the other hand, if a person makes corrupt payments to one agency of a government when a different agency receives federal funding, that does not state an offense. For example, a corrupt payment to the Director of CalTrans (http://www.dot.ca.gov), or someone on his behalf, with the intent to influence the Director's decision on whom to choose for a contract with CalTrans would not state an offense under section 666 if a different California state agency, such as the California EPA (http://www.calepa.ca.gov), received a federal grant (and thus was a Covered Entity). That is because the entity receiving the money (and not some other, related entity) must be the entity connected to the transaction about which a corrupt payment was made. *See United States v. Sunia*, 643 F. Supp. 2d 51, 63, 69 (D.D.C. 2009) ("'government' must be interpreted to refer to such an entity only insofar as that entity is holding federal funds at the 'executive, legislative, [or] judicial' level, 18 U.S.C. § 666(d)(2), and not insofar as the funds are being held by a subdivision of those entities"… . [T]he only plausible interpretation of § 666(a)(1)(A) that gives effect to every provision in the statute is one that restricts criminal liability for the conversion of funds from an agency receiving federal funds to agents of that particular agency…. § 666(a)(1)(A) requires that a defendant be an agent of the state or local government agency receiving federal funds where those funds are allocated to a specific agency

rather than the government in general.").

The Tribal EPA could be a Covered Entity because it is an "agency" of an Indian tribal government under section 666(d)(2), though the indictment did not charge the defendants with, and the stipulated facts do not support, a conspiracy to pay money to an agent of the Tribal EPA in connection with transactions or business of the Tribal EPA.

ARGUMENT

Heslop's Position

Heslop and the government do not dispute many of the facts in this case, and, therefore, a trial to establish the facts to which the parties have stipulated for purposes of the conditional guilty plea is unnecessary. Heslop believes that none of the counts remaining in the indictment state an offense against him, and he is willing to admit that he made payments to Kovall for the purposes described in his conditional plea agreement to preserve his legal arguments.

The substantive construction counts each allege that Heslop paid specific checks (the "transactions") to influence Kovall to award the EC contracts to Cadmus. Count 34 alleges that Heslop was given a specific check to be rewarded regarding ETH's purchase of the 47-acre parcel.

The conspiracy count charges that Heslop and others conspired to corruptly give things of value to Kovall "in connection with a transaction and series of transactions of the Tribe" (Indictment ¶ 9). The defendants are alleged to have accomplished the conspiracy's objects through securing an owner's representative contract "in connection with a number of construction improvements to the Spotlight 29 casino and grounds," after which Kovall recommended that the Tribe accept Bardos's proposals for "additional construction or construction related oversight" (Indictment ¶ 10).

Section 371 of Title 18 provides that one is guilty of conspiracy if he agrees with another "to commit any offense against the United States." That means that the object of the conspiracy must constitute a federal crime. Here, there is no offense

stated because (a) the objects of the conspiracy, as alleged by the grand jury and as reflected in the stipulated evidence, were the contracts with, and payments from, EC; (b) the Tribal EPA – and not EC (or ETH) – was the Covered Entity; and, therefore, (c) payments to influence or reward Kovall for EC's contracts and payments were not in connection with transactions of a Covered Entity. The indirect financial benefits that members of the Tribe (or "the Tribe") reap from EC's contracts do not transform a non-covered entity, like EC, into a Covered Entity.

In *United States v. Gilley*, 836 F.2d 1206 (9th Cir. 1988), the government argued that, in a federal gambling prosecution for conspiracy to violate 18 U.S.C. § 1955, it need only prove "an agreement to violate a state gambling statute and an overt act to that end," and that the "five person/thirty day requirements" of the statute only apply to the substantive offense. *Id*. at 1209-10. The court said that the argument was confused and fallacious: "True the proof need not establish that the alleged conspirators intended to commit or even that they were aware of the substantive offense; however, it must show that they agreed to engage in acts, which, if consummated, would constitute an offense against the United States." *Id*. at 1210.

The *Gilley* court explained that "a conspiracy to commit a substantive offense may exist without actual commission of the substantive offense," but that does not mean that one may be found guilty of a federal conspiracy violation for agreeing to engage in conduct that does not constitute a federal offense. *Id*. at 1211 n. 4 (*quoting United States v. Roselli*, 432 F.2d 879, 892 (9th Cir.1970)); *see Pereira v. United States*, 347 U.S. 1, 12, 74 S. Ct. 358, 364, 98 L. Ed. 435 (1954) (in mail fraud conspiracy, there must be proof that, at some point in time, there was "an agreement to use the mails or transport stolen property"; an agreement to commit fraud is not enough); *Ingram v. United States*, 360 U.S. 672, 677-78, 79 S. Ct. 1314, 1319, 3 L. Ed. 2d 1503 (1959) ("It is fundamental that a conviction for conspiracy under 18 U.S.C. § 371, 18 U.S.C.A. § 371, cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States.'"); *United States v. Feola*, 420 U.S. 671,

695-96, 95 S. Ct. 1255, 1269, 43 L. Ed. 2d 541 (1975) (a conspiracy to assault a federal officer can only exist if the conspirators agreed to assault a person who was, in fact, a federal officer, regardless of whether they knew his profession); *see also United States v. Krasovich*, 819 F.2d 253, 255 (9th Cir. 1987) (A person cannot be guilty of conspiracy where the conspirators have agreed on an object that is not a federal offense: "Not only must the government prove knowledge of the illegal objective, it must also prove an agreement with a co-conspirator to pursue that objective as a common one.").

Because the indictment and stipulated facts support only a finding that the conspiracy was to engage in transactions with EC and ETH, and EC and ETH did not receive federal funds, there is no offense stated against Heslop.

Response to the Government's Position

The government explains that the Court should accept the conditional plea of guilty to the conspiracy count because (a) there was an agreement to "affect businesses and transactions[3] of the Tribe" and that agreement satisfies the elements of the conspiracy count; (b) Heslop may not raise an impossibility defense to the charges; and (c) transactions alleged in the indictment were transactions of "the Tribe" because the phrase "business and transactions" has been given a broad construction. Heslop disagrees.

1. Heslop's Intent to Obtain Contracts "from the Tribe" Does Not Convert EC or ETH into Covered Entities.

The government first contends that, in several emails, proposals, and Tribal

[3] The government refers in its brief to "businesses and transactions of the Tribe." (Br. at 1, 2, 5, 6-10), but Count One of the indictment is limited to "a transaction and series of transactions" (Indictment ¶ 9), as are all of the substantive counts (Counts 2-31 and 34-35). In any event, for the sake of brevity and because the indictment is structured around particular financial transactions (that is, checks in payment for the construction related contract work), we refer to the "businesses, transactions, or series of businesses and transactions" element of section 666 as "transactions" for the rest of this submission.

Council minute entries, people did not distinguish between EC and the Tribe, and that demonstrates Heslop's intent to transact business with the Tribe, rather than EC. There are several faults with this contention.

First, the evidence demonstrates that all of the *transactions* alleged in the indictment (the checks) were transactions of EC and not the Tribal EPA, or the Tribe, or the Tribal Council (or the Tribe's government, the General Council). The Tribal EPA is the only Covered Entity in this case. *See Sunia*, *supra,* at 63 (the word "government" does not apply to a subdivision of government). People's intent and choice of words are irrelevant to whether the *transactions* come within section 666.

Second, none of the evidence demonstrates that any of the *transactions* involved the Tribe as anything other than the owner of EC (or ETH). To the contrary, all of the evidence proves that the Tribe was involved in each of the transactions as the owner of the corporate entities, which did not receive federal funds.

Third, there is no case supporting the proposition that people can modify and enlarge the scope of section 666 transactions through their own descriptions of the counterparty to the subject transactions. If the goal of the conspiracy was to obtain construction related contracts (and payments), then that goal does not change because the conspirators referred to the owners of the corporations entering into the contracts as "the Tribe" or by their individual names or in any other way. The Tribe owned EC and ETH, so referring to "the Tribe" in emails is akin to saying, "I want to enter into a contract with Bill Gates," when referring to a deal with Microsoft.

The references to "the Tribe" in the emails also are irrelevant because "the Tribe" is not an "Indian tribal government." The Tribe is a group of people who have been recognized as members of the Twenty-Nine Palms Band of Mission Indians because of their heritage. "Indian tribal government" is a specific body that governs the Tribe – the General Council. (Ex. A) The difference is as significant as the difference between Congress and the People of the United States, *see* Preamble, Constitution of the United States ("We the People of the United States, in Order to

form a more perfect Union."). Only an Indian tribal government, or its agency, may be covered by section 666 if it receives over $10,000 in federal grants – not "tribes."

Moreover, there is nothing about references to "the Tribe" from which one could infer anything other than that Heslop and the other defendants used the phrase as shorthand to refer to the people making decisions for EC and ETH. As this Court previously noted, the "government has not cited to legal authority showing that the perception of the witnesses and defendants is sufficient to establish that EC, ETH and the Tribe are in fact one and the same for purposes of [666]." MIL Order at 6. The government still has not cited to such a case.

The Tribe's minutes do not alter that analysis. They are summaries, written by Tribe members, of meetings of Tribe members. There is nothing about the "Tribal Council" in the Tribe's Articles of Association, and, while the government has represented (and Heslop has stipulated) that the Tribe "was governed by a Tribal Council" (¶ 1(a)), the General Council is the only Tribal government that issued resolutions. (Ex. Z) The EC resolutions are the relevant documents to determine which entity engaged in the transactions connected to the conduct described in the indictment. Those resolutions, carefully prepared and voted on by EC's Board of Directors (who are also members of the Tribe), reflect a conscious separation of EC (and ETH) from the Tribe, the Tribe members, the General Council, and the Tribal Council. (Ex. D; Z at 1458)

Fourth, the emails and other documents highlighted by the government in its submission do not evidence the defendants' intent to enter into transactions with the Tribe in any capacity other than as the owner of EC and ETH. The documents specifically refer to (1) building a temporary access road and parking lot for the Spotlight 29 Casino; (2) building a cogeneration plant onto the Spotlight 29 Casino; and (3) clearing or "disking" Tribal land near the Casino. The defendants referred to the "Spotlight 29 Casino" in their communications. (¶¶ 23, 31, 37; Ex. F at 117; Ex. H at 125, 127)

Gary Kovall also consistently referred to the Casino when discussing the projects under discussion. For example, when Kovall made a presentation about the temporary access road proposal, the Tribe secretary described it as "the proposal handed out from Cadmus Construction Company for doing the temporary access road and parking lot for the casino." (¶ 24 (emphasis added)) Kovall was similarly specific when presenting the competing cogeneration proposals from Cadmus Construction and Worth Group as a choice for the "Co-Gen, chiller system, solar, Casino space Expansion project." (¶ 34 (emphasis added))

EC owns the Casino, and it is a separate corporation "formed for the purpose of engaging in economic development and to protect the assets of the tribe from business liabilities." (Ex. Z at 1453) The Tribe certainly would *not* agree it waived its corporate separateness because it referred to EC as the "tribe" in Council minutes or other documents. A jury could not convict Heslop of conspiracy to violate section 666 because of the occasional use of similar shorthand by the defendants, particularly when communications with *and by* the Tribe were clear that EC was the entity involved in the transactions.

2. One Cannot be Guilty of a Federal Conspiracy to Violate Section 666 When the Object is a Transaction with a Non-Covered Entity.

The government next contends that Heslop is guilty of conspiracy for paying Kovall to obtain the construction related contracts, even if those contracts were not transactions "of the Tribe," because one can be guilty of conspiracy even if he would not be guilty of the substantive offense. Putting aside that the conspiracy would have to be aimed at transactions of the Tribal EPA and not "the Tribe," the government's contention is mistaken because a conspiracy's object must be a federal offense, even if it is not carried out, and the object here was not a federal offense.

The four cases cited by the government are consistent with the law set out in *Gilley*.

In *United States v. Iribe*, 564 F.3d 1155 (9th Cir. 2009), the court was concerned

with whether a defendant could properly be convicted of both a conspiracy and an attempt to kidnap. In discussing the elements of each crime, the court noted that neither conspiracy nor attempt required *completion* of the crime: "Just like conspiracy, an attempt to commit a crime does not require completion of the crime." *Id*. at 1161. The court did not suggest that the object of the federal conspiracy need not be a federal offense.

In *United States v. Rodriguez*, 360 F.3d 949 (9th Cir. 2004), the defendant argued that he could not be guilty of a Hobbs Act violation because the "victims" were undercover narcotics agents. The court held that "[i]mpossibility is not a defense to the conspiracy charge," *id*. at 957, which Heslop does not dispute, but also made clear that the goal of conspiracy must be a federal crime. For example, it cited *United States v. Bailey,* 227 F.3d 792, 797 (7th Cir.2000), for the proposition that "the Hobbs Act criminalizes attempts as well as completed crimes, the government need not even prove that interstate commerce was affected, only that there exists a 'realistic probability' of an effect on commerce."

United States v. Heron, 323 F. App'x 150 (3d Cir. 2009), was another "impossibility" case. There, the defendant was charged with conspiring with his neighbor to exchange inside information concerning their respective companies. The district judge granted a motion for acquittal because he concluded that the neighbor was not an insider (and thus could not provide inside information) and also never intended to trade on inside information he obtained from Heron. The court of appeals reversed, holding that the neighbor's status did not prevent him from conspiring with Heron because "impossibility is not a defense to a charge of conspiracy." *Id*. at 154. The court noted that the government was required to prove that "Sands and Heron entered into an agreement *to commit securities fraud*." *Id*. (emphasis added). In other words, they had to conspire to commit a federal offense to be guilty.

The government also cites to a case in which defendants argued that they could not be guilty of conspiracy because they were incapable of committing the substantive

offense. In *Salinas v. United States*, 522 U.S. 52, 64, 118 S. Ct. 469, 477, 139 L. Ed. 2d 352 (1997), the defendant argued that he could not be guilty of a RICO conspiracy unless he himself agreed to commit the two predicate acts that RICO requires. The Court rejected the argument, explaining that a conspirator need not agree to commit every part of the substantive offense, and he may be liable for conspiracy even if "incapable" of committing the substantive offense.

The "incapacity" cases only stand for the proposition that a person can conspire to commit a substantive offense that he could not commit himself. Thus, as examples, one can conspire to conceal someone else's assets from a bankruptcy court, even though he could not be guilty of the substantive crime of concealing those assets. *See United States v. Rabinowich*, 238 U.S. 78, 87, 35 S. Ct. 682, 684, 59 L. Ed. 1211 (1915) (cited by *Salinas*) ("an averment that the others were parties to the conspiracy is by no means equivalent to an averment that they were to participate in the substantive offense"). A person may be guilty of conspiracy to suborn perjury even if he cannot be guilty of suborning perjury when the person testifying does not lie. *See Williamson v. United States*, 207 U.S. 425, 447, 28 S. Ct. 163, 170, 52 L. Ed. 278 (1908) (cited by *Rabinowich*) ("although it be conceded, merely for the sake of argument, that an attempt by one person to suborn another to commit perjury may not be punishable under the criminal laws of the United States, it does not follow that a conspiracy by two or more persons to procure the commission of perjury, which embraces an unsuccessful attempt, is not a crime punishable as above stated.") A woman can be guilty of conspiracy to travel in interstate commerce for purposes of prostitution, even if she is not prosecutable for the substantive offense of transporting herself. *See United States v. Holte*, 236 U.S. 140, 145, 35 S. Ct. 271, 272, 59 L. Ed. 504 (1915) (cited by *Rabinowich*) ("a conspiracy with an officer or employee of the government or any other for an offense that only he could commit has been held for many years to fall within the conspiracy section").

A modern day example: a person may be guilty of conspiracy to manufacture

methamphetamine, even if he is incapable of manufacturing methamphetamine.

These cases are inapposite because Heslop does not contend that he was "incapable" of committing a violation of section 666 or that it was "impossible" for him to do so. Rather, Heslop contends that the conspiracy, as alleged in the indictment and as proved in the stipulated facts, was to obtain contracts from EC and not from the Tribal EPA (or the General Council or the Tribal Council). Put simply, people cannot be guilty of a conspiracy to violate section 666 unless they conspire to bribe the agent of a government *that receives federal funds*, *i.e.*, a Covered Entity.

3. A Broad Construction of "Business and Transactions" Does Not Alter the Requirement that the Transactions Directly Involve the Covered Entity.

Finally, the government asserts that the payments were to influence Kovall in connection with the business or transactions "of the Tribe." Because "business and transactions" under section 666 are not limited to "commercial activities," the government reasons that the EC and ETH contracts and payments are business and transactions of the Tribe.

Multiple court decisions foreclose the government's construction that section 666 covers all business and transactions of a government regardless of whether separate corporations engage in the transactions or the federal grant is paid to a discrete agency of the government uninvolved in the charged transactions. *See United States v. Wyncoop,* 11 F.3d 119 (school that benefited from federal student loan program, but which did not receive federal funds directly, was not a Covered Entity); *United States v. Whitfield*, 590 F.3d at 345-46; *United States v. Phillips*, 219 F.3d 404, 413-14 (5th Cir. 2000) (tax assessor for property was independent of the parish and therefore parish's receipt of federal funds did not reach the assessor's misconduct; there must be "some nexus between the criminal conduct [alleged] and the agency receiving federal assistance"); *United States v. Frega*, 933 F. Supp. 1536, 1542 (S.D. Cal. 1996) ("Section 666 contains a jurisdictional element that *the organization*,

government, or agency receive more than $10,000 in federal funding in a year.") (emphasis added); *United States v. Webb*, 691 F. Supp. 1164, 1169-70 (N.D. Ill. 1988) ("Not only does Hill Taylor not receive *direct* benefit from the federal funds which it administers, but it can hardly be said to "receive" anything at all.") (emphasis in original)); *Sunia*, *supra*, 643 F. Supp. 2d at 63, 69.

The government's argument focuses on the word "any" in the statute. "Any" is not at issue; "such," in the phrase "transaction of … *such* organization," is at issue. "Such" refers to the government previously identified – that is, the government or agency thereof that received the federal money, i.e., the Covered Entity. *See* Merriam-Webster, http://www.merriam-webster.com/dictionary/such ("of a kind or character to be indicated or suggested). Heslop has not argued that the allegations in the indictment were not "transactions"; he has argued that these transactions were not transactions of "such" Indian tribal government.

Transactions – however broadly defined – must be transactions of the Covered Entity to fall within section 666. For example, in *United States v. Marmolejo*, 89 F.3d 1185, 1191-92 (5th Cir. 1996), *aff'd sub nom., Salinas v. United States*, 522 U.S. 52 (1997), the court concluded that the benefit conferred on the bribe payer (a prisoner) was a contact visit with his wife. The federal grant to the county was to improve the same county jails where the improper contact visits were permitted by the defendants: "In exchange [for housing federal prisoners in the county jail], the Federal Government agreed to make a grant to the county for improving its jail and also agreed to pay the county a specific amount per day for each federal prisoner housed." *Salinas*, 522 U.S. at 54. If the state or county environmental protection agency received federal money, then there would have been no violation of section 666 for the conduct alleged in *Salinas*.

Indeed, the Court in *Salinas* suggested that it might be unconstitutional to stretch the statute to cover every part of a government, regardless of whether there is a connection between the entity that received the federal funds and the transactions. *See*

Salinas, 522 U.S. at 59, 61 ("We need not consider whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds, for in this case the bribe was related to the housing of a prisoner in facilities paid for in significant part by federal funds themselves. … *Whatever might be said about § 666(a)(1)(B)'s application in other cases*, the application of § 666(a)(1)(B) to Salinas did not extend federal power beyond its proper bounds.") (emphasis added).

While the cases cited by the government address a non-issue (the definition of "any transaction or business"), they also reconfirm Heslop's reading of the statute. In *United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013), the court found that the entity receiving the federal funds (the Commonwealth of Puerto Rico) was the entity of which the defendants were agents, *and* the "legislative acts that constituted the subject of the bribes had a direct 'connection with the business, transaction, or series of transactions' of the Commonwealth of Puerto Rico." *Id*. at 14. The court distinguished *United States v. Whitfield*, 590 F.3d at 344, where the corrupt judges were not acting as agents of the entity that directly received federal funds, but rather for a related administrative agency. *Fernandez*, 722 F.3d at 14.

In *United States v. Robinson*, 663 F.3d 265, 266 (7th Cir. 2011), Robinson "unsuccessfully tried to bribe one of the [Chicago police] officers." The City of Chicago received $4.2 million from the Department of Justice that was "supposed to be used by the Chicago Police Department." *Id*. at 270. The entity receiving the federal money was therefore the same entity that was involved in the transaction connected to the bribe.

In *United States v. McGregor*, 2:10CR186-MHT, 2011 WL 1562882 (M.D. Ala. Apr. 4, 2011) *report and recommendation adopted as modified,* 2:10CR186-MHT, 2011 WL 1988363 (M.D. Ala. May 23, 2011), "the allegations are (roughly) that Alabama state legislators sought bribes and that the state of Alabama receives federal funding in excess of $10,000." Again, there was a direct connection between the Covered Entity and the transaction.

In *United States v. Spano*, 401 F.3d 837, 838 (7th Cir. 2005), the "Director of Public Safety for the Town of Cicero, Illinois" was convicted of accepting a bribe in connection with his investigation of whether police officers employed by the town actually lived in the town. "The parties here stipulated that the Town of Cicero received in excess of $10,000 from the federal COPS ('Community-Oriented Policing Services') program, a program intended to help put more police on the streets in Cicero." *Id*. at 839. There was thus a direct connection between the entity that received federal funding (the town), the grant (the COPS program), and the transaction (the police investigation).

In *United States v. Apple*, 927 F. Supp. 1119, 1120-21 (N.D. Ind. 1996), the defendant was charged with paying a bribe to a person employed by the Indiana Department of Environmental Management ("IDEM") "for the purpose of avoiding *criminal* fines." *Id*. at 1121 (emphasis in original). The indictment identified "IDEM as the requisite state agency that received over $10,000 in federal funds." *Id*. at 1122. The connections that are missing here were present in *Apple*.

The government also cites to *United States v. Bonito*, 57 F.3d at 169, where the defendant bribed "a city of New Haven real estate official to influence the purchase of his 'Bonito Village' by the state-created New Haven Housing Authority." But, as noted above, the court there construed the statute as requiring a connection between the Covered Entity and the transaction, holding that the government must prove that the entity "whose business had to involve at least $5,000 also had to receive in excess of $10,000 in federal funds."

The government concludes by arguing that the construction contracts were "the Tribe's" because the Tribal Council voted on whether to select Bardos for construction contracts. To the contrary, the Tribe and the tribal government created a legal separation between itself and the construction contracts by transferring ownership of the Casino and its construction-related projects to EC. That makes sense because the Tribe did not want to be sued for problems at the Casino or with the construction, and

no bank would lend money to a government that had sovereign immunity. That legal separation means that section 666 does not apply to any of the conduct alleged in this indictment.

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