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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

UNITED STATES OF AMERICA,
 Plaintiff,
 v.
 KATHERINE MOGAL, et al.,
 Defendant.

Case No. 18-CR-00259-BLF
**DEFENDANT KATHERINE
 MOGAL'S NOTICE OF MOTION
 AND MOTION TO DISMISS THE
 INDICTMENT**

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TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on December 20, 2019 at 9:00 a.m., or as soon thereafter as this matter may be heard, in the courtroom of the Honorable Beth L. Freeman, United States District Judge, defendant Katherine Mogal will, and hereby does, move this Court to dismiss the indictment against her due to the presentation of false and materially misleading testimony to the grand jury. This motion is based on the United States Constitution, the Federal Rules of Criminal Procedure, the accompanying memorandum of points and authorities, the accompanying Declaration of Walter F. Brown, Jr., the pleadings that have been filed in this matter, and such further argument and evidence as may be presented prior to and during the hearing on this motion.

Dated: December 6, 2019

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: /s/ Walter F. Brown, Jr.

Walter F. Brown, Jr.

Attorneys for Defendant
Katherine Mogal

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1 **I. INTRODUCTION**

2 While Katy Mogal worked at Jawbone, she used a cloud service called CrashPlan to back
3 up her files. CrashPlan made regular, automated copies of her Jawbone computer. After leaving
4 Jawbone, she never accessed her CrashPlan or any of the files it contained.

5 When Jawbone sued Ms. Mogal and her codefendants in San Francisco Superior Court
6 and, later, before the International Trade Commission, the company demanded that Ms. Mogal
7 disclose the devices or locations where Jawbone material might be stored. She complied. She
8 promptly disclosed that she had used CrashPlan, and her attorneys produced to Jawbone files that
9 had been stored there.

10 Jawbone lost its case before the ITC when the administrative law judge found that neither
11 Ms. Mogal nor anyone else had taken any trade secrets. Undeterred, Jawbone presented its
12 allegations to the United States Attorney’s Office in the hope that Ms. Mogal and others would be
13 criminally prosecuted. In its presentation, Jawbone informed the government that it had received,
14 in Ms. Mogal’s initial production, files from “Katy Mogal’s CrashPlan Backup.”

15 Some months later, the government began presenting evidence to the grand jury. To
16 obtain an indictment, it had to convince the grand jury that the presence of Jawbone documents
17 on Ms. Mogal’s CrashPlan was evidence of intentional theft rather than a mere oversight. To
18 meet this element, the government offered testimony that Ms. Mogal had repeatedly concealed
19 the existence of her CrashPlan from Jawbone—something that she would not have done had her
20 possession of these files been innocent. The government told the grand jury that Ms. Mogal was
21 given multiple opportunities to identify devices and accounts that might contain Jawbone
22 documents and that she failed, over and over again, to reveal the existence of the CrashPlan. And
23 the government told the grand jury that this proved Ms. Mogal had intentionally stolen the files.
24 The case agent testified that “there were subsequent attempts, opportunities that documents could
25 have been returned and they weren’t,” that while this “could have been a mistake once,” he did
26 not think “it could be a mistake twice or three times even,” and that Ms. Mogal’s purported
27 repeated concealment of the CrashPlan demonstrated that “a theft or intentional theft” occurred.
28 Simply put, the evidence regarding Ms. Mogal’s failure to return the CrashPlan was the

1 centerpiece of the government’s presentation about Ms. Mogal’s *mens rea*, and it was all false.

2 An indictment must be dismissed if it was obtained through presentation of evidence that
3 (1) was actually false, (2) that the prosecution knew, or should have known, was false, and (3)
4 that was material, such that there is a “reasonable likelihood that the false testimony could have
5 affected” the grand jury’s decision to indict. *United States v. Houston*, 648 F.3d 806, 814 (9th
6 Cir. 2011). The testimony that Ms. Mogal repeatedly hid her CrashPlan backup from Jawbone
7 was false. The government should have known it was false. And there was no evidence to
8 support a finding that she intentionally stole documents from Jawbone without the false
9 testimony. The Court should dismiss the indictment.

10 **II. BACKGROUND**

11 Roughly two months after Katherine Mogal, a user researcher with over two decades of
12 experience in the field, resigned from Jawbone on March 17, 2015, Jawbone brought a civil
13 lawsuit against her and others on May 27, 2015 in San Francisco Superior Court (“State Court
14 Action”) alleging that Ms. Mogal had misappropriated the same trade secrets alleged here, among
15 others. *See Aliphcom, Inc. v. Fitbit, et. al.*, Case No. CGC-15-546004. Shortly thereafter,
16 Jawbone filed another action against Fitbit before the International Trade Commission (“ITC
17 Action”), alleging nearly identical trade secret claims as those raised in the State Court Action.
18 *See In the Matter of Certain Activity Tracking Devices, Systems, and Components Thereof*, Case
19 No. 337-963. Central to the allegations in both cases was that Ms. Mogal had set up a cloud-
20 based back-up service called CrashPlan on her Jawbone computer in December 2014, and that she
21 had failed to return the confidential Jawbone documents stored in the cloud on the CrashPlan
22 when she left Jawbone.

23 The ITC action was heard in May of 2016 before an Administrative Law Judge (“ALJ”).
24 Ms. Mogal submitted written direct testimony and was cross-examined in person under oath by
25 Jawbone’s counsel at the hearing. *See Brown Decl.*, Exs. 2, 3. Ms. Mogal testified that she did
26 not intentionally take any confidential documents from Jawbone, that she had never once
27 accessed a single document from the CrashPlan, and that she had certainly never shared any
28 confidential Jawbone documents with anyone at Fitbit. *Id.* Ex. 2 at 2-6. Ms. Mogal candidly

1 conceded that she should have been more careful about making sure she had returned every
2 Jawbone document from her personal devices and accounts when leaving the company, but she
3 reiterated that she never intended to keep these documents to injure Jawbone in any way. *Id.* at 2,
4 *see also id.* Ex. 3 at 294:21-295:24. Following a two-week trial, the ALJ prepared a written
5 opinion in which she found that neither Ms. Mogal nor Fitbit had misappropriated any trade
6 secrets in violation of 19 U.S.C. Section 1337. *Id.* Ex. 6. This decision was upheld by the ITC on
7 October 26, 2016. *Id.* Ex. 7.

8 Four months after this resounding defeat in the ITC Action, on February 7, 2017,
9 Jawbone’s outside counsel made a presentation to the United States Attorney’s Office for the
10 Northern District of California (the “government”), once again accusing Ms. Mogal and others of
11 intentionally stealing the same trade secrets from Jawbone and advocating for a criminal
12 prosecution. *Id.* Ex. 15. Approximately four months later, on June 29, 2017, the USAO began
13 presenting witness testimony to a grand jury. *Id.* Ex. 16.

14 **A. The Grand Jury Proceedings**

15 The grand jury proceedings against Ms. Mogal focused on six specific user research
16 studies that were found on Ms. Mogal’s CrashPlan after she resigned from Jawbone.

17 The government’s presentation to the grand jury against Ms. Mogal centered completely
18 on the CrashPlan. Agent Iqbal testified that Ms. Mogal used the CrashPlan to back up
19 “everything” on her Jawbone computer, and that she “last synched” her CrashPlan to her Jawbone
20 computer on March 17, 2015, the same day she resigned from Jawbone. *Id.* Ex. 16 at 12. HSI
21 co-lead case agent Jason Engelbertson further testified that Ms. Mogal used the CrashPlan to back
22 up her Jawbone work files and emails and that the CrashPlan contained 589,362 files that were
23 “very responsive to the search terms” being used. *Id.* Ex. 23 at 28. Furthermore, Jawbone’s
24 forensic expert from the ITC Action, Peter Garza, testified that the “*most significant information*
25 we found for Ms. Mogal was that she used a backup program called CrashPlan.” *Id.* Ex. 17 at 30
26 (emphasis added). In testimony immediately before asking the grand jury to return an indictment
27 against Ms. Mogal, Agent Iqbal testified that each of the six alleged trade secrets was “found in
28 her CrashPlan.” *Id.* Ex. 21 at 7-10.

1 The government needed to establish that Ms. Mogal possessed the six trade secret
2 documents *knowing them to have been stolen*, and that she possessed them with the *intent to*
3 *convert them* to the economic benefit of someone other than Jawbone, *intending* and *knowing* that
4 her possession of these six documents would *injure Jawbone*. *Id.* Ex. 24 (Ninth Circuit Model
5 Jury Instructions, Theft of Trade Secrets) at 8.141B. The evidence that Ms. Mogal never once
6 accessed her CrashPlan after leaving Jawbone was undisputed. Therefore, the government
7 solicited case agent testimony that, over the course of discovery in the civil litigation, when
8 Ms. Mogal was required to return all Jawbone-related materials from her personal devices and
9 accounts—Ms. Mogal had *failed to identify the CrashPlan* as a potential repository of Jawbone
10 materials. The grand jury was informed that Ms. Mogal was given *multiple opportunities* to
11 identify all of her devices and accounts that might contain Jawbone documents at various stages
12 of the civil litigation, and that she failed, over and over again, to identify the CrashPlan at each
13 and every juncture: first, on September 28-29, 2015, when her counsel produced documents to
14 Jawbone in connection with the preliminary injunction briefing in the state court action; and yet
15 again when her legal team turned over all of her devices and accounts to Mr. Garrie. *See, e.g., id.*
16 Exs. 16 at 21 and 19 at FITBIT2-010618; Ex. 20 at 8-9; Exs. 23 at 28-30, 18 FITBIT2-010293,
17 and 19 FITBIT2-010308. (The discovery decisions and other litigation activities of Ms. Mogal’s
18 attorneys are, of course, utterly irrelevant, and the introduction of such evidence would unfairly
19 prejudice Ms. Mogal, as argued in the Motion in Limine No. 1 to exclude references to Jawbone’s
20 Civil Trade Secrets Lawsuits filed December 6, 2019.) This, according to the agents, was clear
21 evidence of criminal intent because it suggested that Ms. Mogal affirmatively tried to conceal the
22 existence of the CrashPlan account, thus converting Ms. Mogal’s conduct from a mere “mistake”
23 to an intentional “theft.” *Id.* Ex. 16 at 21. There was just one problem with this testimony: it was
24 completely and indisputably false.

25 **1. Agent Engelbertson Testified That Ms. Mogal Failed to Identify the**
26 **CrashPlan When Producing Documents to Jawbone and Mr. Garrie**

27 Agent Engelbertson’s testimony consisted primarily of summarizing discussions he had
28 with Mr. Garrie. *Id.* at 5. He explained that Ms. Mogal and the other defendants had made two

1 independent productions of Jawbone materials in connection with the state court action. *Id.* at 11-
 2 12. The first production came in September 2015, when counsel for the individual defendants
 3 turned over documents directly to Jawbone in advance of the preliminary injunction hearing, and
 4 the defendants each certified that—to the best of their knowledge and recollection—these
 5 productions contained all Jawbone materials on their personal devices and accounts. *Id.* at 28-30
 6 and 18 at FITBIT2-010308. The second production came in October 2015 when counsel for the
 7 individual defendants turned over the clients’ personal devices and accounts that potentially
 8 contained Jawbone-related materials to Mr. Garrie. *Id.*

9 Agent Engelbertson then testified that Ms. Mogal had omitted the CrashPlan—which he
 10 reminded the grand jury contained 589,362 files that were “very responsive” to Jawbone search
 11 terms—from both productions. *Id.* Ex. 23 at 28. With respect to the initial production, Agent
 12 Engelbertson testified that “this was not provided during the initial . . . review that was done of
 13 this material, this CrashPlan was not one of the items that was provided for review.” *Id.* He
 14 continued:

15 AUSA: So, we have -- when we saw in the timeline that there was
 16 this August 2015 filing –

17 AGENT ENGELBERTSON: Right.

18 AUSE: -- where they said, “I’ve turned everything back over. I’m
 certifying” –

19 AGENT ENGELBERTSON: Right.

20 AUSA: -- “my signed declaration to a court of law” –

21 AGENT ENGELBERTSON: Yes.

22 AUSA: -- “that I’ve turned everything over,” the CrashPlan
 23 materials were not part of that certification?


24 AGENT ENGLEBERTSON: That’s correct . . . [the CrashPlan]
 25 *was not reviewed or turned over as part of that initial, “Hey, here’s
 everything you need to look at.”*

26 *Id.* at 29 (emphasis added).

27 The government used a demonstrative exhibit in its grand jury presentation to re-
 28 emphasize the point that the CrashPlan “was not originally identified as a repository during the

1 initial production of materials for review:"

2

3  CrashPlan Findings - Katy Mogal

4

5 • Mogal utilized the service to backup Jawbone work files

6 and emails.

7 • Review of the 589,362 files from the cloud-based service

8 revealed that it was extremely responsive to keyword

9 search terms.

10 • This item was not originally identified as a repository

11 during the initial production of materials for review.

12 • Mogal continued to receive emails with CrashPlan backup

13 report notifications to a non-Jawbone email account

14 identified as katymogal@gmail.com through January 16,

15 2016, long after her resignation from Jawbone. Garrie

16 noted it was hard to believe that Ms. Mogal would have

17 been unaware of this account, but it was not submitted

18 during the original production response period.

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FITBIT2-010308

U.S. Immigration and Customs Enforcement

17 *Id.* Ex. 18 at FITBIT2-010308.

18 The government next elicited testimony that Ms. Mogal again hid the existence of this

19 critically important CrashPlan repository when producing materials to Mr. Garrie in October

20 2015:

21 AUSA: So, when . . . Fitbit started turning stuff over to Law &

22 Forensics, Mr. Garrie's company, in order to, "These are what we

23 want you to look at," *this CrashPlan was not identified as one of*

24 *the things he was supposed to look at?*

25 AGENT ENGELBERTSON: *That's right.*

26 *Id.* Ex. 23 at 28 (emphasis added). Finally, the government informed the grand jury that Ms.

27 Mogal's failure to identify the CrashPlan was highly concerning because of the many real time

28 reminders she received from CrashPlan that she had the account:

1 AGENT ENGELBERTSON: . . . what [Mr. Garrie] discovered
2 because he had access to e-mail information for her and specifically
3 this Gmail account that’s listed here, he found in his review that it’s
4 hard to understand -- or his take on it was it would be *hard to*
5 *understand why she would not provide that on the initial request*
6 because up through January of 2016 she was getting automatic
7 updates from CrashPlan notifying her that, “You have this
8 CrashPlan account.” So, when the production request came
9 forward, he didn’t understand why she wouldn’t have been aware of
10 this CrashPlan account.

11 *Id.* at 29-30 (emphasis added). In fact Ms. Mogal did know about the CrashPlan account,
12 identified it to her lawyers days after the litigation was filed, and authorized the production of any
13 appropriate materials from it to Jawbone.

14 2. Agent Iqbal’s Testimony

15 Agent Iqbal explained to the grand jury why Ms. Mogal’s failure to identify the CrashPlan
16 was so critical when assessing whether she *intended* to misappropriate trade secrets. Agent Iqbal
17 testified:

18 AUSA: Okay. And so, what sort of things have you done starting
19 in August of 2016 in the name of the Grand Jury to sort of go back
20 and look at what . . . these allegations that are between these two
21 companies involved in a civil matter?

22 AGENT IQBAL: Well, initially I had to review . . . the bulk of the
23 – documents involved in the civil cases to kind of understand what
24 exactly happened. . . .

25 AUSA: Okay. And what did you – what did you learn through
26 focusing on those materials?

27 AGENT IQBAL: Well, it seemed like reviewing the materials, that
28 – that, in fact, something – well, a theft – it seemed to me a theft or
at the very least improper retention had occurred. . . . [T]here was to
me the data verification process meaning that, hey – you know, as I
go through this kind of chain, that documents were taken and *there*
were subsequent attempts, opportunities that documents could have
been returned and they weren’t.

Mainly my concern was that on the September 28th, 2015, at that
point documents could have been returned. And my concern on
this is *could this have been a mistake. And my determination was it*
could be a mistake once. I don’t necessarily think it could be a
mistake twice or three times even.

And then, I did an analysis. I think that education was important,
factoring that into account. They’re all IT kind of business, much
more tech savvy than I am. And the fact that there are very clear

1 guidelines, and all that factored into my analysis of whether there
2 was an actual – a basic line. *Was there a theft or intentional theft*
3 *that occurred? And my determination was yes.*

4 *Id.* Ex. 16 at 19- 21 (emphasis added).

5 **B. The Indictment**

6 On June 14, 2018, the grand jury returned an indictment charging Katy Mogal with six
7 counts of Possession of Stolen Trade Secrets, in violation of Title 18 U.S.C. § 1832(a)(3). The
8 indictment alleged that, after Ms. Mogal resigned from Jawbone on March 17, 2015, she
9 knowingly possessed six Jawbone user research studies that the government contends were
10 Jawbone’s trade secrets, that she possessed these six documents knowing them to have been
11 stolen, and that she possessed them with the intent to convert them to the economic benefit of
12 someone other than Jawbone, intending and knowing that her possession of these six documents
13 would injure Jawbone. Dkt. No. 1. The government contends that all six of these documents
14 were found on Ms. Mogal’s CrashPlan; these are the only versions of these six documents that the
15 government intends to introduce at trial (either during its case-in-chief or as 404(b) evidence).
Brown Decl., Ex. 22.


16 **C. Agent Engelbertson’s Testimony Was False Because Ms. Mogal Identified the** 17 **CrashPlan in Both State Court Productions**

18 **1. Ms. Mogal Identified the CrashPlan in the Initial Return of Materials** 19 **to Jawbone on September 28-29, 2015**

20 Contrary to Agent Engelbertson’s grand jury testimony, the CrashPlan was indeed one of
21 the repositories Ms. Mogal’s counsel identified for Jawbone in connection with the preliminary
22 injunction briefing on September 28-29, 2015. In her declaration attached to the opposition to
23 Jawbone’s preliminary injunction motion in the state court action, Ms. Mogal stated that after
24 Jawbone filed its civil complaint against her on May 27, 2015, she “promptly relinquished control
25 over all accounts and devices in [her] possession that might contain any Jawbone-related
26 materials.” *Id.* Ex. 9. She further stated that she understood “that these devices and account
27 information were provided to Stroz Friedberg, a forensics firm.” *Id.* Also, on that same day,
28 Aaron Read, an Assistant Director of Digital Forensics at Stroz Friedberg, filed a separate
declaration in the state court action which attached a “Media Summary Report” listing each of the

1 devices and accounts included in its document production to Orrick, a production Orrick in turn
 2 reviewed and produced to Jawbone. *Id.* Exs. 11 & 10. Importantly, the *very first repository listed*
 3 on the “Media Summary Report” was Katy Mogal’s CrashPlan:

4

5  STROZ FRIEDBERG
 Δ Digital Forensics

6 **ORRICK, HERRINGTON & SUTCLIFFE LLP : Fitbit**
 Exhibit B - Media Summary Report

7

#	Image Date	Last Name	First Name	Device Type	Ownership	Device Name/Label	Brand	Model	Serial No.	Size (GB)
14	5/31/2015	Mogal	Katy	Backup	personal	Mogal CrashPlan Backup	CrashPlan	N/A	N/A	172
25	6/3/2015	Mogal	Katy	External HDD	personal	Mogal External Drive	Western Digital	N/A	WDBBE0010BBK	1,024
26	6/5/2015	Mogal	Katy	USB	personal	Mogal USB	the Arts)	N/A	N/A	2.0
31	6/5/2015	Mogal	Katy	Cloud Storage	personal	Mogal Dropbox (Logitech)	Dropbox	N/A	N/A	20
32	6/5/2015	Mogal	Katy	Cloud Storage	personal	Mogal Dropbox (Gmail)	Dropbox	N/A	N/A	9.5
35	6/9/2015	Mogal	Katy	External HDD	personal	Mogal-Seagate-External-1	Seagate	BackupPlus for Mac	NASPSF54	1,024
36	6/9/2015	Mogal	Katy	External HDD	personal	Mogal-Seagate-External-2	Seagate	BackupPlus for Mac	NASPOA95	1,024
38	6/11/2015	Mogal	Katy	Laptop	personal	Mogal Personal Laptop	Apple	MacBook Air	CLMPDCT3G944	250 GB
40	6/16/2015	Mogal	Katy	iPhone	personal	Katy's Personal iPhone	Apple	iPhone 5	F17L29V2FH1C	16

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12 *Id.* Ex. 11 at Ex. B. Moreover, the “Media Summary Report” clearly indicated that the CrashPlan
 13 was imaged by Stroz Friedberg on May 31, 2015, just four days after Jawbone sued Ms. Mogal in
 14 state court. *Id.* The notion that Ms. Mogal was somehow hiding or concealing the CrashPlan is
 15 pure fiction—Ms. Mogal handed over her CrashPlan account to her lawyers and forensic experts
 16 to be imaged sometime in the subsequent *four days* after the filing of the civil lawsuit. And Stroz
 17 provided Jawbone-related documents from the devices listed in the “Media Summary Report” to
 18 Jawbone’s outside counsel via email on September 28, 2015. *Id.* Ex. 10.

19 A separate declaration filed on the same day by Michael Weil, a partner at Orrick, stated
 20 that on September 28, 2015, counsel “provided Jawbone with a file transfer portal that contained
 21 Jawbone-related materials copied from ... [the clients’] personal computers, personal cell phones,
 22 personal email accounts, *personal cloud storage*, and other personal devices and accounts.” *Id.*
 23 Ex. 12 at 3 (emphasis added).

24 The government had or should have had the publicly available documents described above
 25 in its possession by the time Agent Engelbertson informed the grand jury under oath that the
 26 CrashPlan “was not originally identified as a repository during the initial production of materials
 27 for review.”

28 Moreover, the government met with Jawbone’s lawyers on August 4, 2016, when

1 Jawbone first presented its allegations to the government, *id.* Ex. 4, and again on February 7,
2 2017, when Jawbone’s lawyers made another presentation accompanied by a 22-page slide deck,
3 *id.* Ex. 15. The deck contained excerpts of an email from Orrick attorney James Thompson to
4 Mr. Garrie, the forensic neutral, copying Jawbone’s attorneys, stating that “Katy Mogal’s
5 CrashPlan Backup [] is essentially a backup of Ms. Mogal’s Jawbone computer.... *Our*
6 *September production included some, but inadvertently did not contain all of the files from this*
7 *account.” Id.* at FITBIT-003446 (emphasis added). The presentation also indicated that
8 “Jawbone had produced [to the government] all of the files produced by the Defendants ...
9 *(including their production prior to entry of the Preliminary Injunction),*” that the accompanying
10 metadata would “indicate on which device or account a given file was found on,” and stated that
11 “[f]or the files with CTRL bates numbers, *those files were contained in the initial September 28,*
12 *2015 production by Defendants.” Id.* at FITBIT-003449. In other words, in a presentation from
13 Jawbone’s attorneys, the government was told, prior to presenting any grand jury testimony, that
14 Ms. Mogal’s counsel had produced documents from the CrashPlan in the initial production to
15 Jawbone in September 2015 and produced the remainder of those documents—the ones that had
16 been inadvertently excluded in the September 2015 production as described by Mr. Thompson, to
17 Jawbone in December 2015. The government should have known the testimony it presented to
18 the grand jury was false.

19 **2. Ms. Mogal Identified the CrashPlan in the Production of Materials to**
20 **Daniel Garrie in October 2015.**

21 Contrary to Agent Engelbertson’s grand jury testimony, the CrashPlan was also one of the
22 repositories Ms. Mogal’s counsel produced to Daniel Garrie in October 2015. On October 29,
23 2015, Mr. Thompson emailed Mr. Garrie, copying Jawbone’s outside counsel, stating: “Daniel,
24 The devices and accounts that you will be receiving are reflected in the attached spreadsheet. The
25 devices are the originals. We will be sending user names and passwords for the accounts once
26 we’ve discussed per your request.” *Id.* Ex. 1. Mr. Thompson attached a spreadsheet to his email
27 that listed Ms. Mogal’s CrashPlan on the *very first row.* *Id.* The next day, Mr. Thompson sent
28 Mr. Garrie via FedEx Ms. Mogal’s physical devices and a printed list of passwords and log-in

1 information for her online accounts, including the CrashPlan account password. *Id.* ¶ 16; *id.* at
 2 Exs. 1 & 14. And if that evidence wasn't sufficiently clear for the government, Mr. Garrie
 3 acknowledged in his draft report, in a section with the description "Repositories Initially Provided
 4 by Individual Defendants and Reviewed by L&F," that the CrashPlan *was* one of the repositories
 5 that Orrick initially provided him:

L&F Evi #	Stroz # ²¹	Custodian	Device Type	Brand	Serial #	Total # of Files ²²	Evi. Received Date
AFE-512	14	Katy Mogal	Backup	CrashPlan	N/A	N/A	11/1/2015
N/A ²³	25	Katy Mogal	External HDD	Western Digital	WDBBEP0010BBK	N/A	11/1/2015
AFE-102	26	Katy Mogal	USB	Generic (CCA)	N/A	13,101	11/1/2015
AFE-502	31	Katy Mogal	Cloud Storage	Dropbox	N/A	119,424	11/1/2015
AFE-503	32	Katy Mogal	Cloud Storage	Dropbox	N/A	50,692	11/1/2015
AFE-505	33	Ana Rosario	Webmail	Google	N/A	104,504	11/1/2015
AFE-506	34	Rong Zhang	Webmail	Google	N/A	12,697	11/1/2015
AFE-202	35	Katy Mogal	BackupPlus External HDD	Seagate	NA5P5F54	828,496	11/1/2015
AFE-201	36	Katy Mogal	BackupPlus External HDD	Seagate	NA5P0A95	884,526	11/1/2015
AFE-402	37	Patrick Naron	Pavilion	HP	5CD3162KPS	918,248	11/1/2015
AFE-204	38	Katy Mogal	MacBook Air	Apple	C1MPDCT3G944	955,172	11/1/2015
AFE-203	39	Ana Rosario	MacBook Air	Apple	C02GHAH3DJYC	642,079	11/1/2015
AFE-302	40	Katy Mogal	iPhone 5	Apple	F17L29V2FH1C	65,630	11/1/2015
AFE-206	41	Katy Mogal	MacBook Pro	Apple	C2QK501ZF69W	2,393,212	11/12/2015

21 *Id.* Ex. 8 at 7-8. There is simply no factual dispute that Ms. Mogal and her counsel identified and
 22 provided Mr. Garrie with access to Ms. Mogal's CrashPlan account in October 2015. Grand jury
 23 testimony to the contrary was false.

24 III. ARGUMENT

25 A. Dismissal is the Appropriate Remedy Where the Government Presents 26 Testimony it Should Have Known Was False to Obtain an Indictment

27 "One of the bedrock principles of our democracy, 'implicit in any concept of ordered
 28 liberty,' is that the [prosecutor] may not use false evidence to obtain a criminal conviction."

1 *Hayes v. Brown*, 399 F.3d 972, 978 (9th Cir. 2005) (quoting *Napue v. Illinois*, 360 U.S. 264, 269
2 (1959)). This same rule applies to false testimony before the grand jury. *United States v.*
3 *Basurto*, 497 F.2d 781, 786 (9th Cir. 1974).

4 To establish a Due Process violation, a defendant “must show that (1) the testimony . . .
5 was *actually false*, (2) the prosecution knew *or should have known* that the testimony was
6 actually false, and (3) that the false testimony was *material*.” *United States v. Houston*, 648 F.3d
7 806, 814 (9th Cir. 2011) (emphasis added) (quoting *United States v. Zuno-Arce*, 339 F.3d 886,
8 889 (9th Cir. 2003)).

9 The standard for determining whether error in the grand jury proceedings justifies
10 dismissal of an indictment differs when the error is considered prior to or after the conclusion of a
11 trial. *People of Territory of Guam v. Muna*, 999 F.2d 397, 399 (9th Cir. 1993). Where, as here,
12 the motion is brought before trial, the court must dismiss if the defendant has been prejudiced by
13 the false testimony presented to the grand jury. *Bank of Nova Scotia v. United States*, 487 U.S.
14 250, 255 (1988). Prejudice is established if “the violation substantially influenced the grand
15 jury’s decision to indict or if there is grave doubt that the decision to indict was free from
16 substantial influence of such violations.” *Id.* at 256. Dismissal is warranted if the false testimony
17 “significantly infringed upon the grand jury’s ability to exercise its independent judgment.”
18 *United States v. DeRosa*, 783 F.2d 1401, 1405 (9th Cir. 1986). In assessing materiality, the court
19 “must determine whether there is *any reasonable likelihood* that the false testimony *could have*
20 *affected*” the decision to indict. *See Hayes*, 399 F.3d at 984 (emphasis added) (internal quotation
21 omitted).

22 The presentation of false testimony need not be intentional to justify dismissal. *United*
23 *States v. Samango*, 607 F.2d 877, 882 (9th Cir. 1979). In *Samango*, the Ninth Circuit affirmed a
24 district court’s dismissal of an indictment based on its supervisory powers because, among other
25 things, the prosecutor had not informed the grand jury of prior inconsistent statements made by
26 grand jury witnesses even though the court found that the prosecution did not intentionally
27 mislead the grand jury. To the same effect, a district court in this circuit in ruling on a motion to
28 dismiss an indictment, found that testimony given by law enforcement agents, “should not in a

1 substantial way misstate relevant and crucial evidence to the extent that the grand jury is so
2 misled that . . . it cannot be deemed the fair and impartial body to which the accused is entitled.”
3 *United States v. Linton*, 502 F. Supp. 861, 871 (D. Nev. 1980). The “relevant inquiry focuses on
4 the impact . . . on the grand jury’s impartiality, not on the degree of the prosecutor’s culpability.”
5 *DeRosa*, 783 F.2d at 1405. “[E]ven unintentional misconduct may be sufficient.” *Id.* at 1406.
6 “A government’s assurances that false evidence was presented in good faith are little comfort to a
7 criminal defendant wrongly convicted on the basis of such evidence. A conviction based in part
8 on false evidence, even false evidence presented in good faith, hardly comports with fundamental
9 fairness.” *United States v. Young*, 17 F.3d 1201, 1203-04 (9th Cir. 1994).

10 **B. The Government Elicited False Testimony from the Case Agents**

11 Agent Engelbertson’s testimony that Ms. Mogal failed to identify the CrashPlan in her
12 productions was demonstrably false. As set forth above, Ms. Mogal and her counsel identified
13 the CrashPlan as a repository of Jawbone-related information in connection with both her initial
14 production of materials to Jawbone on September 28, 2015 (and in fact produced documents from
15 her CrashPlan on that date), and in her subsequent production of devices and accounts to
16 Mr. Garrie in October 2015. Thus, it was patently false for Agent Engelbertson to tell the grand
17 jury that “this CrashPlan was not one of the items that was provided for review” in connection
18 with the initial production, or that the CrashPlan was “not identified as one of the things
19 [Mr. Garrie] was supposed to look at” by Ms. Mogal when she provided her devices and accounts
20 to Mr. Garrie. Brown Decl., Ex. 23 at 28.

21 **C. The Government Should Have Known That it Elicited False Testimony From**
22 **the Case Agents**

23 The government should have known it was presenting false testimony. On February 7,
24 2017—six months prior to eliciting the offending testimony—the government was informed, in
25 no uncertain terms, that Ms. Mogal had included documents from the CrashPlan in her initial
26 production to Jawbone. Brown Decl., Ex. 15 at FITBIT-003446 (“*Our September production [to*
27 *Jawbone] included some ... of the files” from “Katy Mogal’s CrashPlan Backup*) (emphasis
28 added). The government was also informed that Ms. Mogal’s counsel informed Jawbone that

1 some documents from the CrashPlan had been inadvertently omitted from the initial production
2 and were then produced approximately seven weeks later. *Id.* Moreover, Jawbone provided the
3 underlying documents from the September 2015 production to the government, and the
4 government could have confirmed that Ms. Mogal had in fact produced documents from her
5 CrashPlan. *Id.* at FITBIT-003449.

6 Other documents similarly establish that the government should have been aware that
7 Agent Engelbertson’s sworn testimony was false. For example, the government’s Report of
8 Investigation (“ROI”) No. 28, which was “approved” on January 27, 2017—long before the
9 government presented the false testimony—discusses the September 29, 2015 Read Declaration.
10 Brown Decl., Ex. 5. The ROI quotes Mr. Read’s statement that “30 separate devices or accounts
11 [were] provided by MOGAL [and others]” to Stroz in connection with the initial production, and
12 *the first of those repositories listed by Mr. Read is none other than Ms. Mogal’s CrashPlan. Id.*
13 *at 5, id.* Ex. 11. The Weil Declaration similarly stated that on September 28, 2015, Ms. Mogal
14 and the other individual defendants had “provided Jawbone with a file transfer portal that
15 contained Jawbone-related materials copied from their personal computers, personal cell phones,
16 personal email accounts, *personal cloud storage*, and other personal devices and accounts.” *Id.*
17 Ex. 12 at 3 (emphasis added). The government’s meetings with Mr. Garrie and Jawbone’s
18 counsel also provided further opportunities for investigation and clarification of these facts. The
19 government should have known it was providing false testimony regarding Ms. Mogal’s
20 production of the CrashPlan to Mr. Garrie.

21 **D. The Court Should Dismiss the Indictment Because the Proffered False Grand**
22 **Jury Testimony was Material And Prejudiced Ms. Mogal**

23 The government’s repeated emphasis and heavy reliance on the false evidence created
24 more than a “reasonable likelihood that the false testimony could have affected” the grand jurors’
25 decision to indict and was therefore material. *Hayes*, 399 F.3d at 984. The central issue
26 presented to the grand jury as to Ms. Mogal was that her failure to return six purported Jawbone
27 trade secrets from her CrashPlan after resigning from Jawbone was not a simple *mistake* but
28 rather, an *intentional* act of criminal misconduct. The case agents viewed the purported repeated

1 failure to turn over the CrashPlan account as undeniable evidence of criminal intent, a view they
2 shared with the grand jury. Agent Iqbal, who testified that multiple missed opportunities to
3 identify the CrashPlan made it unlikely Ms. Mogal had merely been mistaken or forgetful, drew a
4 connection between this purported evidence and Ms. Mogal’s intent in testimony worthy of a
5 closing argument at trial. He first posed the question to the grand jury (“Was there a theft or
6 intentional theft that occurred?”)—and then answered his own question in the affirmative (“And
7 my determination was yes.”) Brown Decl. Ex. 16 at 20- 21. Agent Engelbertson emphasized to
8 the grand jury that Ms. Mogal’s receipt of periodic email updates from CrashPlan about her
9 account made it especially troubling that she chose not to disclose it after Jawbone sued her to
10 demand its return. *Id.* Ex. 23 at 29-30. The problem was that Agent Iqbal and Agent
11 Engelbertson were both wrong.

12 Without the false testimony, there was little else before the grand jury to suggest that
13 Ms. Mogal had *intentionally* misappropriated the six documents in her CrashPlan and therefore
14 deserved to be charged with a crime. *See United States v. Velasquez*, No. CR 08-0730 WHA,
15 2011 U.S. Dist. LEXIS 134426, at *12 (N.D. Cal., Nov. 21, 2011) (“[C]ourts must inquire
16 whether there was sufficient non-perjurious testimony presented to the grand jury to support the
17 indictment.”). There was some testimony regarding Ms. Mogal’s personal devices and accounts
18 other than the CrashPlan, but the government did not focus on whether these other devices and
19 accounts contained any of the alleged trade secrets. Indeed, the government has stipulated that
20 the only versions of the alleged six trade secrets it intends to offer into evidence at trial all came
21 from Ms. Mogal’s CrashPlan. *See* Ms. Mogal’s Motion in Limine No. 5; Brown Decl. Ex. 22.
22 The focus was always on the CrashPlan.. Brown Decl., Exs. 17 at 30 (the “*most significant*
23 *information* we found for Ms. Mogal was that she used a backup program called CrashPlan”); 18
24 (FITBIT2-010294-95) (leading with and focusing on the CrashPlan evidence in the demonstrative
25 exhibits). Not surprisingly, the CrashPlan is the only repository mentioned in Agent Iqbal’s June
26 14, 2018 testimony—the same date Ms. Mogal was indicted—when he walked the grand jurors
27 through each of the six alleged trade secrets. *Id.* Ex. 21 at 7-10.

28 In addition to what the government presented to the grand jury, it is also important to look

1 at what it intentionally left out. The government chose *not* to present evidence that Ms. Mogal
2 (1) never once accessed a single document in her CrashPlan after leaving Jawbone; (2) never once
3 logged into the CrashPlan after leaving Jawbone; and (3) never downloaded any of the alleged
4 trade secrets from her CrashPlan to her computer at Fitbit. That was the government’s
5 prerogative—the government need not present all exculpatory evidence to the grand jury, even
6 though it is certainly best practice to do so. *See* U.S. Attorney Manual 9-11.233, *Presentation of*
7 *Exculpatory Evidence*. While the government may have had no affirmative obligation to inform
8 the grand jury about these exculpatory details regarding Ms. Mogal’s use of the CrashPlan, it
9 certainly was not allowed to present affirmative falsehoods to the grand jury and then to argue
10 that Ms. Mogal intentionally tried to hide the existence of the CrashPlan from Jawbone. That is
11 what happened here. Ms. Mogal was prejudiced by this testimony and the Court should have
12 “grave concerns” that these falsehoods “substantially influenced the grand jury’s decision to
13 indict.” *Bank of Nova Scotia*, 487 U.S. at 256. They unquestionably “infringed upon the grand
14 jury’s ability to exercise its independent judgment.” *DeRosa*, 783 F.2d at 1405.

15 **III. CONCLUSION**

16 For the foregoing reasons, Ms. Mogal respectfully requests that the Court grant her
17 Motion to Dismiss the Indictment.

18
19 Dated: December 6, 2019

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

21
22 By: /s/ Walter F. Brown, Jr.
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23
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