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3   **UNITED STATES DISTRICT COURT**
4   **NORTHERN DISTRICT OF CALIFORNIA**
5   **SAN JOSE DIVISION**
6

7   UNITED STATES OF AMERICA,   Case No. 18-cr-00259-BLF-1

8   Plaintiff,

9   v.   **ORDER DENYING DEFENDANT'S
                                            MOTION TO DISMISS THE
10   KATHERINE MOGAL,   INDICTMENT**

11   Defendant.   [Re: ECF 144-3]

12   Before the Court is Defendant Katherine Mogal's Motion to Dismiss the Indictment

13   against her. *See* Mot. to Dismiss Indictment ("Mot."), ECF 144-3. The Indictment charges Mogal

14   with six counts of possession of stolen trade secrets in violation of 18 U.S.C. § 1832(a)(3).

15   Indictment at 6-7, ECF 1. In her motion, Mogal argues that the Indictment should be dismissed

16   because the Government presented false testimony to the grand jury that the Government should

17   have known was false and this testimony was material and prejudicial to Mogal. Mot. 11-16. For

18   the reasons stated below, Mogal's Motion to Dismiss the Indictment is DENIED.

19   **I.   BACKGROUND**

20   Defendant Katherine Mogal began working at Jawbone on or about July 17, 2013.

21   Indictment at 2. On March 13, 2015, Mogal received an offer of employment from Fitbit, Inc.

22   ("Fitbit"), which she accepted, and on March 17, 2015, Mogal resigned from Jawbone. Indictment

23   at 2. Prior to the Indictment, on May 27, 2015, Jawbone brought a civil lawsuit against Mogal and

24   others in California Superior Court, County of San Francisco (the "State Court Action"), alleging

25   that Mogal had misappropriated the same trade secrets she is alleged to have misappropriated here.

26   *See Aliphcom, Inc. v. Fitbit*, Case No. CGC-15-546004. In July 2015, Jawbone filed a complaint

27   with the International Trade Commission against Fitbit (the "ITC Action"), alleging nearly

28   identical trade secret claims as those raised in the State Court Action. *See In the Matter of Certain*

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1   *Activity Tracking Devices, Systems, and Components Thereof*, Case No. 337-963; Decl. of Walter

2   F. Brown ("Brown Decl."), Ex 7, Initial Determination of ITC Action, ECF 144-5.

3   On June 29, 2017, a federal grand jury seated in San Jose, California began hearing

4   testimony about the allegations in the instant Indictment. *See* Brown Decl., Ex. 16, Testimony of

5   Waseem Iqbal on June 29, 2017 ("Iqbal June 2017"), ECF 144-13; Gov't Opp. to Mot. ("Opp.") 2,

6   ECF 181. On September 21, 2017, the Government presented testimony by Homeland Security

7   Investigations ("HSI") Special Agent Jason Engelbertson, who testified about what Daniel Garrie,

8   the state court-appointed neutral at Law & Forensics tasked with reviewing the produced

9   materials, presented to him in August 2017. Opp., Ex. E, Testimony of Jason Engelbertson on

10   Sept. 21, 2017 ("Engelbertson Tr."), at 5, ECF 181-5; *see* Opp., Ex. K, Aug. 2017 Report of

11   Investigation ("Aug. 2017 ROI"), at 2, ECF 181-11. HSI Special Agent Engelbertson then

12   testified that Mogal failed to identify her CrashPlan account when she was asked to identify all of

13   her devices and accounts that might contain Jawbone documents in September and October of

14   2015 for the State Court Action. *See* Engelbertson Tr. at 28; Brown Decl., Ex. 20, Testimony of

15   Waseem Iqbal on May 31, 2018 ("Iqbal May 2018") at 8-9, ECF 144-17; Mot. 4-6. HSI Special

16   Agent Engelbertson also testified that Mr. Garrie found "it . . . hard to understand why [Mogal]

17   would not provide [her CrashPlan account] on the initial request because up through January of

18   2016 she was getting automatic updates from CrashPlan notifying her [of her account]." *See*

19   Engelbertson Tr. at 29-30. In addition, HSI Special Agent Waseem Iqbal testified that he believed

20   these repeated failures by Mogal to identify her CrashPlan account could not have been a mistake

21   and that a "theft or intentional theft . . . occurred." Brown Decl., Ex. 16, Testimony of Waseem

22   Iqbal on June 29, 2017 ("Iqbal June 2017") at 21, ECF 144-13.

23   On June 14, 2018, the grand jury returned an indictment charging Mogal with six counts of

24   possession of stolen trade secrets in violation of 18 U.S.C. § 1832(a)(3). *See generally*

25   Indictment. The Indictment alleges that Mogal "knowingly received and possessed [six Jawbone

26   user research studies], knowing them to have been stolen and appropriated, obtained, and

27   converted without authorization with the intent to convert the trade secrets, which were related to

28   and intended to be included in products to be produced for and placed in interstate and foreign

1   commerce, to the economic benefit of someone other than Jawbone, and intending and knowing

2   that the offense would injure Jawbone." Indictment at 6-7.

3   On August 22, 2019, Mogal and the Government entered into a stipulation (the

4   "Stipulation"), which states that the alleged trade secrets, as well as any version of the documents

5   that the Government may introduce at trial, were on Mogal's CrashPlan account. Brown Decl.,

6   Ex. 22, Stipulation ("Stip."), ECF 144-19.

7   On December 7, 2019, Mogal filed the instant motion to dismiss the Indictment, arguing

8   that HSI Special Agent Engelbertson's testimony was false because Mogal identified her

9   CrashPlan account during both the September and October 2015 productions. Mot. 8-11. In

10 addition, Mogal argues that the Government should have known that the testimony was false, the

11 false testimony was the "centerpiece of the [G]overnment's presentation about Ms. Mogal's *mens*

12 *rea*," and thus the material testimony was prejudicial. Mot. 13-16. The Government opposes,

13 arguing that the Government did not knowingly engage in misconduct before the grand jury, and

14 there is "no support for [Mogal's] claim that the grand jury attributed any particular significance to

15 the claimed misstatement." Opp. 18-21. Moreover, the Government argues that even if Mogal's

16 accusations of Government misconduct are true, she cannot show prejudice. Opp. 21-22.

17 **II.   LEGAL STANDARD**

18   "The Court's power to dismiss an indictment on the ground of prosecutorial misconduct is

19 frequently discussed but rarely invoked." *United States v. De Rosa*, 783 F.2d 1401, 1404 (9th Cir.

20 1986) (internal quotation marks omitted). "A district court may dismiss an indictment on the

21 ground of outrageous government conduct if the conduct amounts to a due process violation," or,

22 "[i]f the conduct does not rise to the level of a due process violation, the court may nonetheless

23 dismiss under its supervisory powers." *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091

24 (9th Cir. 1991). "Dismissal of an indictment is considered a drastic step and is generally

25 disfavored as a remedy." *United States v. Fuchs*, 218 F.3d 957, 964 (9th Cir. 2000) (internal

26 quotation marks omitted).

27   For a due process violation, "defendants must show conduct that violates due process in

28 such a way that it is so grossly shocking and so outrageous as to violate the universal sense of

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1   justice." *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011) (internal quotation marks

2   omitted); *see United States v. Ganesh*, No. 16-CR-00211-LHK, 2017 WL 11439293, at *1 (N.D.

3   Cal. Oct. 20, 2017) (listing same standard for claims of prosecutorial misconduct based on

4   government presenting misleading testimony to grand jury). That is, the burden is on the

5   defendant to show that the government's conduct was "so excessive, flagrant, scandalous,

6   intolerable, and offensive as to violate due process." *United States v. Edmonds*, 103 F.3d 822, 825

7   (9th Cir. 1996) (internal quotation marks omitted). "Constitutional grounds for dismissal are

8   limited, however, because the grand jury's determination is a preliminary one and because the full

9   panoply of constitutional protection will be available at trial." *De Rosa*, 783 F.2d at 1405. "Th[is]

10   defense is therefore limited to extreme cases in which the government's conduct violates

11   fundamental fairness," *Stinson*, 647 F.3d at 1209 (internal quotation marks omitted), such that it

12   "significantly infringe[s] upon the grand jury's ability to exercise its independent judgment," *De*

13   *Rosa*, 783 F.2d at 1405. "The relevant inquiry focuses on the impact of the prosecutor's

14   misconduct on the grand jury's impartiality, not on the degree of the prosecutor's culpability." *Id.*

15   "Dismissal under the court's supervisory powers for prosecutorial misconduct requires (1)

16   flagrant misbehavior and (2) substantial prejudice." *United States v. Kearns*, 5 F.3d 1251, 1253

17   (9th Cir. 1993). "Although an indictment may be dismissed only in flagrant cases of prosecutorial

18   misconduct, even unintentional misconduct may be sufficient." *De Rosa*, 783 F.2d at 1406. In

19   addition, a defendant is prejudiced such that dismissal of the indictment is "appropriate only if it is

20   established that the violation substantially influenced the grand jury's decision to indict, or if there

21   is grave doubt that the decision to indict was free from the substantial influence of such

22   violations." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988) (internal quotation

23   marks omitted) (holding, "that, as a general matter, a district court *may not* dismiss an indictment

24   for errors in grand jury proceedings unless such errors prejudiced the defendants." (emphasis

25   added)).

26   **III.   DISCUSSION**

27   Mogal argues that the Indictment should be dismissed because "Agent Engelbertson's

28   testimony that Ms. Mogal failed to identify the CrashPlan in her productions was demonstrably

1 false," the Government "should have known it was presenting false testimony," the false

2 testimony was material, and the false testimony was prejudicial because "there was little else

3 before the grand jury to suggest that Ms. Mogal had *intentionally* misappropriated the six

4 documents in her CrashPlan." Mot. 13-16.

5   Mogal argues that the agent's testimony was false because a media summary report

6 indicates that her CrashPlan account had been produced on May 31, 2015. *See* Brown Decl.,

7 Ex. 11, Decl. of Aaron Read ("Read Decl."), Ex. B ("Media Summ. Rpt."), ECF 144-8 (listing

8 Mogal's CrashPlan account as a device produced because it was believed to contain Jawbone

9 material). In addition, in August 2016, Jawbone presented a slide deck to the Government, which

10 contained an excerpt from an email stating that Mogal's September 2015 production "included

11 some, but inadvertently did not contain all of the files from [her CrashPlan] account." Brown

12 Decl., Ex. 15, Tracing Jawbone Docs. Stolen by the Indiv. Defendants ("Jawbone Pres."), at 2,

13 ECF 144-12. Moreover, Mogal argues that Mr. Garrie received an email indicating that Mogal's

14 CrashPlan account had been produced during the October production. Mot. 10-11; *see* Brown

15 Decl., Ex. 1, at 5, ECF 144-5. Therefore, Mogal argues, HSI Special Agent Engelbertson's grand

16 jury testimony regarding the production of her CrashPlan account is false because she did in fact

17 produce her CrashPlan account for the September and October productions. Mot. 9-11, 13.

18   Next, Mogal argues that the Government should have known that it was presenting false

19 testimony because of (1) Jawbone's February 2017 presentation to the Government that states that

20 Mogal produced some, but not all, of her CrashPlan account in the September 2015 production,

21 *see* Jawbone Pres. at 2; Mot. 13-14; and (2) the Government's January 2017 Report of

22 Investigation discusses the declaration of Aaron Read, *see* Brown Decl., Ex. 5, January 2017 Rpt.

23 of Investigation ("Jan. 2017 ROI"), at 5, ECF 144-5, and Read's declaration identified Mogal's

24 CrashPlan account as one of thirty devices that were provided by Mogal and others in May and

25 June 2015, *see* Read Decl. ¶ 7; Media Summ. Rpt.; Mot. 14. Because the Government had the

26 presentation and Report of Investigation prior to HSI Special Agent Engelbertson's grand jury

27 testimony in September 2017, Mogal argues that the Government "should have known it was

28 providing false testimony regarding Ms. Mogal's production of the CrashPlan to Mr. Garrie."

1   Mot. 14.

2   Lastly, Mogal argues that the false testimony is material because the Government's

3   "repeated emphasis and heavy reliance on the false evidence created more than a reasonable

4   likelihood that the false testimony could have affected the grand jurors' decision to indict."

5   Mot. 14 (internal quotation marks omitted). Furthermore, Mogal argues that "there was little else

6   before the grand jury to suggest that Ms. Mogal had *intentionally* misappropriated the six

7   documents in her CrashPlan" because the Government "did not focus on whether . . . other devices

8   and accounts contained any of the alleged trade secrets," and the Government "has stipulated that

9   the only versions of the alleged trade secrets it intends to offer into evidence at trial all came from

10   Ms. Mogal's CrashPlan." Mot. 15; *see generally* Stip. While there is more than 500 pages of

11   grand jury testimony, Mogal argues that only 152 pages of testimony pertain to her and "the

12   portion probative of her intent spans only a handful of pages." Reply 10. Without the false

13   testimony, Mogal argues, the Government's other evidence of intent "lose their luster" and only

14   impacted the jury "because the evidence was offered *together with* the false CrashPlan evidence,

15   not in lieu of it." Reply 10.

16   The Government opposes, contending that "[t]here was no [G]overnment misconduct in

17   the grand jury presentation" and, even if Mogal's accusations are true, Mogal cannot show

18   prejudice or a due process violation. Opp. 18-22. Specifically, the Government argues that there

19   was no misconduct because Mogal has identified only a single misstatement, which was "a very

20   small part of one agent's testimony, and an even smaller part of the overall grand jury

21   presentation," and the "grand jury had previously been presented with evidence by no less than

22   three witnesses . . . consistent with [Mogal's] theory that the existence of the CrashPlan was

23   known to [Jawbone] prior to [Mr. Garrie's] review in the state civil action." Opp. 18-19.

24   Moreover, the Government argues that HSI Special Agent Engelbertson's testimony was "entirely

25   consistent" with the August 2017 Report of Investigation that formed the basis of his testimony.

26   Opp., Ex. K ("Aug. 2017 ROI") at 2, ECF 181-11. The August 2017 Report of Investigation

27   states that Mr. Garrie identified Mogal as a CrashPlan user and "noted it was not originally

28   identified . . . as a repository in connection with the [September production]." Aug. 2017 ROI

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1   at 2. The report further states that Mogal continued to receive emails about her CrashPlan to a

2   non-Jawbone email, and so Mr. Garrie found it "hard to believe" that she "would have been

3   unaware of this account, but [that] it was not submitted during the original production response

4   period." Aug. 2017 ROI at 2. The Government also argues that given the totality of the evidence

5   presented to the grand jury there is "no support for [Mogal's] claim that the grand jury attributed

6   any particular significance to the claimed misstatement." Opp. 20.

7   The Government further argues that even if there was misconduct, Mogal has not shown

8   (and cannot show) that she was prejudiced or that there was a due process violation because there

9   is "no evidence in the over 500 pages of grand jury transcripts that the isolated misstatement from

10   Special Agent Engelbertson on less than 5 pages of testimony and exhibits formed a 'centerpiece'

11   of the [G]overnment's presentation, or that it was this information that was the 'substantial

12   influence' on the grand jury's decision to indict the defendant." Opp. 22. The Government also

13   argues that Mogal cannot show that there is a constitutional violation because the proceedings

14   were not rendered fundamentally unfair, or that there was a history of prosecutorial misconduct

15   that affected the fundamental fairness of the proceeding or substantially infringed on the grand

16   jury's independence. Opp. 22.

17   The Court agrees with the Government. Under each of Mogal's theories – due process

18   violation and supervisory powers – Mogal has not met her burden. Mot. 12. The Court addresses

19   each theory in turn.

20   **A.   Due Process Theory**

21   Here, the Government's conduct simply does not rise to the requisite level of "outrageous"

22   misconduct to violate the universal sense of justice. The parties agree that, to establish a due

23   process violation, "the defendant must show that (1) the testimony was actually false, (2) the

24   prosecution knew or should have known that the testimony was actually false, and (3) that the

25   false testimony was material." *United States v. Houston*, 648 F.3d 806, 814 (9th Cir. 2011)

26   (brackets and internal quotation marks omitted); *see United States v. Basurto*, 497 F.2d 781, 785

27   (9th Cir. 1974) (applying post-conviction standard to false testimony before grand jury); *United*

28   *States v. Harmon*, No. 08-CR-00938-LHK, 2014 WL 2465504, at *2 (N.D. Cal. May 30, 2014),

1   *aff'd*, 833 F.3d 1199 (9th Cir. 2016) (applying same standard). In addition, Mogal notes that the

2   Court must find that Mogal has been prejudiced by the false testimony presented to the grand jury

3   to dismiss the Indictment. Mot. 12 (citing *Bank of Nova Scotia*, 487 U.S. at 255).

4   As to falsity, it is clear that the Government was in possession of information that showed

5   that Mogal had produced her CrashPlan account before HSI Special Agent Engelbertson testified

6   that she had not produced her account. *See* Jan. 2017 ROI at 2; Jawbone Pres. at 2. Therefore, the

7   statements of HSI Special Agent Engelbertson regarding whether Mogal produced her CrashPlan

8   for the September and October 2015 productions were incorrect, and thus false.

9   With regard to whether the Government knew or should have known about the false

10   testimony, Mogal concedes that the Government did not knowingly present false testimony.

11   Indeed, Mogal states that "her Motion raise[s] no allegations of prosecutorial misconduct or

12   intentional wrongdoing," and she confirms that "[n]owhere does [she] ever allege 'prosecutorial

13   misconduct,' 'perjury' 'intent to mislead,' [or] 'knowledge of falsity.'" Reply to Mot.

14   ("Reply") 1, 5-6, ECF 184. And there is no evidence that to suggest that HSI Special Agent

15   Engelbertson's testimony was anything other than a mistake. *See* Reply 1.

16   Instead, Mogal argues that the Government "should have known [HSI Special Agent

17   Engelbertson's] testimony was false" and that, had the Government "performed even the most

18   basic investigation before presenting this testimony . . . [,] it would have readily discovered the

19   falsity." Neither Mogal, nor the Government, nor the Court have found any case that applies the

20   "should have known" standard at all – let alone to dismiss an otherwise valid indictment. Here,

21   HSI Special Agent Engelbertson testified to the grand jury about what Mr. Garrie presented to

22   him, which was captured in the August 2017 Report of Investigation. *See* Aug. 2017 ROI at 2.

23   That presentation by Mr. Garrie concerned his review of over 11 million files from 35 different

24   repositories of data. *See* Aug. 2017 ROI at 2. HSI Special Agent Engelbertson accurately

25   reported the information contained in the August 2017 Report of Investigation, but he did not

26   crosscheck that information with the entire case file. Thus, although the testimony was false, the

27   Court cannot find that the Government should have known that. Mogal urges the Court to apply a

28   "should have known" standard that would have the Court dismiss an otherwise valid indictment

1   based upon a single misstatement during a 12-month long grand jury investigation. This cannot be

2   the case. The Court agrees with the Government that the "should have known" standard cannot

3   create an absolute obligation for agents and prosecutors to crosscheck every statement proffered

4   by a witness to the grand jury against the entire case file to guarantee each statement's accuracy.

5   Regardless of whether HSI Special Agent Engelbertson, and thus the Government, should

6   have known that his testimony about the production of Mogal's CrashPlan account was false,

7   Mogal has failed to show that she was prejudiced by the false testimony. That is, Mogal has not

8   shown that HSI Special Agent Engelbertson's testimony "substantially influenced the grand jury's

9   decision to indict" or that "there is grave doubt that the decision to indict was free from the

10   substantial influence of [his testimony]." *Bank of Nova Scotia*, 487 U.S. at 256. Mogal argues

11   that without HSI Special Agent Engelbertson's false testimony "there was little else before the

12   grand jury to suggest that Ms. Mogal had *intentionally* misappropriated the six documents in her

13   CrashPlan." Mot. 15. And Mogal argues that the Government's other evidence "lose[s] [its]

14   luster" without HSI Special Agent Engelbertson's false testimony. Reply 10.

15   The Government, however, points to additional grand jury testimony as to Mogal's intent.

16   Opp. 2-14. For example, HSI Special Agent Iqbal testified that employees received multiple

17   warnings about taking proprietary information. *See* Iqbal June 2017 at 15-16. HSI Special Agent

18   Iqbal testified that Mogal was warned about taking proprietary information during her exit

19   interview, and Mogal signed her initial and exit employee agreements which also contained these

20   warnings. *See* Iqbal June 2017 at 16. Moreover, Mogal, under penalty of perjury, signed a

21   declaration stating that she had personal knowledge that she had returned everything to Jawbone,

22   and documents were later found in her possession. *See* Iqbal June 2017 at 17. In addition,

23   Jawbone IT Manager Cameron Baillie testified that Jawbone had an enterprise account with

24   CrashPlan, such that it had over 100 licenses for individuals to back up their Jawbone devices.

25   Opp., Ex. C, Testimony of Cameron Baillie ("Baillie Tr."), at 28-29, ECF 181-3. Mr. Baillie also

26   testified that, while there were no restrictions against using a non-enterprise version of CrashPlan,

27   he would consider it to be a breach of security and "immediately and swiftly deal with those

28   situations." Baillie Tr. at 29. Mogal does not contest the existence of such evidence, and the

1   Court "ha[s] no authority to review the sufficiency of the evidence supporting an indictment."

2   *United States v. Leverage Funding Sys., Inc.*, 637 F.2d 645, 649 (9th Cir. 1980).

3   Additionally, the grand jury investigation lasted for twelve months and there is no

4   evidence that HSI Special Agent Engelbertson's isolated statements substantially influenced the

5   grand jury or overshadowed all other testimony. *See Harkonen*, No. CR08-0164MHP, 2009 WL

6   5166246, at *6 (finding no prejudice where isolated statements came during 10-month grand jury

7   investigation, the isolated statements were "neither widespread nor flagrant," and the bulk of the

8   testimony came after the erroneous statements). Nor has Mogal "demonstrate[d] a reasonable

9   inference of bias on the part of the grand jury resulting from [the Government's] actions." *De*

10   *Rosa*, 783 F.2d at 1406. Indeed, HSI Special Agent Iqbal testified on May 31, 2018, and June 14,

11   2018 – the day the grand jury returned the Indictment – to summarize and review the testimony

12   the grand jury had heard over the prior 12 months. *See* Opp., Ex. I, Testimony of Waseem Iqbal

13   on May 31, 2018 ("Iqbal May 2018"), ECF 181-9; Opp., Ex. J, Testimony of Waseem Iqbal on

14   June 14, 2018 ("Iqbal June 2018"), ECF 181-10. During his summary and review, HSI Special

15   Agent Iqbal did not mention that Mogal failed to disclose her CrashPlan account to Mr. Garrie.

16   *See* Iqbal May 2018, at 9-13; Iqbal June 2018, at 5-11. In fact, HSI Special Agent Iqbal affirmed

17   that one of the alleged trade secrets "was found in the CrashPlan as it was turned over to Law &

18   Forensics." Iqbal June 2018 at 8.

19   At most, then, the grand jury was presented with inconsistent, or even contradictory,

20   testimony over twelve months about whether Mogal in fact produced her CrashPlan account

21   during the State Court Action. It is telling that nowhere in HSI Special Agent Iqbal's concluding

22   testimony does he summarize or repeat HSI Special Agent Engelbertson's testimony that Mogal

23   twice-failed to disclose her CrashPlan account.   Mogal does not contest this fact.

24   Accordingly, the Court finds that Mogal cannot prevail on a due process argument.

25   **B.   Supervisory Powers Theory**

26   The Court also finds that Mogal cannot prevail under a supervisory powers theory because,

27   as stated above, she has not provided evidence that the Government's misconduct was flagrant, or

28   shown that Mogal was prejudiced by the false testimony – let alone "substantially prejudice[d]."

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See Kearns 5 F.3d at 1253 (requiring flagrant misbehavior and substantial prejudice for dismissal of an indictment under the court's supervisory powers). Indeed, because Mogal does not argue that prosecutorial misconduct occurred, *see* Reply 1, and "[b]ecause the record does not reveal any prosecutorial misconduct [in presenting HSI Special Agent Engelbertson's testimony], [the testimony] provide[s] no ground for dismissing the indictment. *Bank of Nova Scotia*, 487 U.S. at 260 ("To the extent that a challenge is made to the accuracy of the summaries, the mere fact that evidence itself is unreliable is not sufficient to require a dismissal of the indictment.").

Accordingly, the Court finds that Mogal cannot prevail on a supervisory powers theory.

IV.   CONCLUSION

For the foregoing reasons, Mogal's Motion to Dismiss the Indictment is DENIED.

IT IS SO ORDERED.

Dated: January 17, 2020

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BETH LABSON FREEMAN
United States District Judge

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