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FILED
DISTRICT COURT OF GUAM

NOV 02 2015 *JPB*

JEANNE G. QUINATA
CLERK OF COURT

6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE TERRITORY OF GUAM**

8 UNITED STATES OF AMERICA,

9 Plaintiff,

10 v.

11 ANTHONY T. NGIRAROIS and
12 RODERICK Y. NGIRMEKUR,

13 Defendants.

Criminal Case 15-00052

DEFENDANT NGIRAROIS'
MOTION TO DISMISS FOR
PROSECUTION OF ACTS BEYOND
STATUTE OF LIMITATIONS and
PREJUDICIAL PREINDICTMENT
DELAY BY THE GOVERNMENT;
CERTIFICATE OF SERVICE

14
15 Anthony T. Ngirarois ("Defendant") moves the Court to dismiss the specific charges in
16 the indictment on the grounds that they were not prosecuted within the time allowed under the
17 applicable statute of limitations and to dismiss the entire indictment because of the prejudice
18 arising from the government's preindictment delay in bringing this action. This motion is made in
19 accordance with Rule 12(b)(3), Fed. R. Crim.P.

20
21 **FACTUAL SUMMARY¹**

22 On September 16, 2015, the grand jury indicted the Defendant on three counts arising out
23 of his involvement years ago in the Guard Recruiting Assistance Program ("G-RAP"), an activity
24 developed by the United States Army National Guard Bureau ("NGB") and Document &

25
26
27 ¹ Factual allegations that are taken from reports provided by law enforcement agencies are
not to be taken as Defendant's admission unless otherwise noted.

1 Packaging Brokers, Inc. ("Docupak"), a private for-profit business. Its purpose was to induce or
2 foster enlistments in the Army National Guard ("ANG") in order to boost its number of
3 uniformed personnel. G-RAP offered monetary incentives to ANG personnel categorized as
4 Active Guard Reserve ("AGR") soldiers. The AGRs involved in G-RAP were known as Recruiter
5 Assistants ("RA") whose objective was to recruit individuals to serve in the ANG. Indictment, p.
6 1, line 23, through p. 2, line 3. The first sentence of the indictment acknowledges that the
7 USANGB "entered into a contract with Document & Packaging Brokers, Inc. ("Docupak") ... to
8 administer" G-RAP.
9

10 The counts lodged against the Defendant are:

- 11 1. Count 1: Theft of government property, specifically alleged to have occurred "from on or
12 about August 27, 2007 until on or about September 30, 2011," in violation of 18 U.S.C. §§
13 641, 2 and 3287.
- 14 2. Count 2: Theft of government property "from on or about May 20, 2008 until on or about
15 May 31, 2011, acting in concert with Co-Defendant Roderick Y. Ngirmekur, in violation
16 of 18 U.S.C. §§ 641, 2 and 3287.
- 17 3. Count 3: Wire fraud, specifically alleged to have occurred "from on or about August 27,
18 2007 until on or about September 30, 2011," in violation of 18 U.S.C. §§ 1343, 2 and
19 3287.
- 20 4. Count 4: Wire fraud, specifically alleged to have occurred from "on or about May 20,
21 2008, until on or about May 31, 2011, acting in concert with Co-Defendant Roderick Y.
22 Ngirmekur, in violation of 18 U.S.C. §§ 641, 2 and 3287.
- 23 5. Counts 5-14: Aggravated identity theft, alleged to have occurred on sundry dates running
24 from August 30, 2007, until September 29, 2011, in violation of 18 U.S.C. §§ 1028A(c), 2
25 and 3287.
26
27
28

1 6. Counts 15-24: Aggravated identity theft, alleged to have occurred on sundry dates running
2 from May 27, 2008, until May 31, 2011, and in concert with Roderick Y. Ngirmekur, in
3 violation of 18 U.S.C. §§ 1028A(c), 2 and 3287.

4 **Applicable Statute of Limitations**

5 The indictment charges offenses that are punishable in accordance with the general statute
6 of limitations of five years. The general statute of limitations provides:
7

8 Except as otherwise expressly provided by law, no person shall be prosecuted,
9 tried, or punished for any offense, not capital, unless the indictment is found or
10 the information is instituted within five years next after such offense shall have
11 been committed.

12 18 U.S.C. § 3282.

13 None of the criminal statutes that the Defendant is alleged to have violated expressly
14 includes a specific time for commencement of the prosecution; hence those prosecutions must be
15 commenced in accordance with 18 U.S.C. § 3282.

16 In this case, the indictment filed September 16, 2015, alleges that some of the acts
17 complained of occurred on or before September 17, 2010, which is more than five years before
18 the indictment was filed. Those acts occurring before September 17, 2010, ought to be dismissed.

19 As explained in *U.S. v. Cunningham*:

20 As a general rule, statutes of limitation normally begin to run when the crime is
21 complete. *Pendergast v. United States*, 317 U.S. 412, 418, 63 S.Ct. 268, 270-71,
22 87 L.Ed. 368 (1943). A criminal offense is generally complete and the limitations
23 period begins to run when each element of the offense has occurred.

24 *U.S. v. Cunningham*, 891 F.Supp. 460, 462 (N.D. Ill. 1995).

25 **Statute of Limitations Challenge**

26 The Defendant contests all aspects of the indictment that allege wrongful acts occurring
27 before September 17, 2010, that date being five years prior to September 16, 2015, the date that
28 the indictment was filed. The basis for the challenge is that the statute of limitations for all of the

1 counts in the indictment must be measured according to 18 U.S.C. § 3282, the general law
2 limiting the period during which the government may prosecute an alleged offender. In this case,
3 a number of the charges are shown as having occurred more than five years prior to the filing of
4 the indictment on September 17, 2010. Specifically:

5
6 **Count 1**

| 7 <u>Nominee</u> | 8 <u>Date</u> |
|------------------|---------------|
| 9 S.J.M. | 08/09/2010 |
| 10 R.Y.N. | 08/14/2008 |
| 11 R.F.S. | 02/18/2010 |
| 12 R.F.S. | 03/28/2010 |
| 13 R.L.P.S. | 03/09/2010 |
| 14 R.L.P.S. | 07/01/2010 |

15 **Count 2**

| 16 <u>Nominee</u> | 17 <u>Date</u> |
|-------------------|----------------|
| 18 A.M.C. | 07/22/2008 |
| 19 A.M.C. | 09/18/2008 |
| 20 B.A.G. | 8/29/2009 |
| 21 B.A.G. | 09/09/2009 |
| 22 S.D.H. | 05/27/2009 |
| 23 S.D.H. | 09/03/2009 |
| 24 N.F.M. | 07/08/2008 |
| 25 N.F.M. | 08/08/2008 |
| 26 J.J.M. | 11/18/2009 |
| 27 A.D.O. | 10/14/2009 |

| | | |
|---|--------|------------|
| 1 | A.D.O. | 12/04/2009 |
| 2 | W.P.W. | 03/30/2009 |
| 3 | W.P.W. | 06/08/2009 |
| 4 | R.M.W. | 03/31/2009 |

Count 3

Unlike the specifications alleged in Counts 1 and 2, the prosecutor has alleged in Count 3 only that the wrongful acts occurred "from August 27, 2007, until on or about September 30, 2011. It is impossible for the Defendant to know what discrete acts are alleged to have occurred within that time. The indictment should more clearly set forth the specifics of the alleged wrongdoing. The Defendant should not have to defend against conduct that is alleged to have occurred prior to September 17, 2010.

Count 4

Unlike the specifications alleged in Counts 1 and 2, the prosecutor has alleged in Count 4 only that the wrongful acts occurred "from May 20, 2008, until on or about May 31, 2011. It is impossible for the Defendant to know what discrete acts are alleged to have occurred within that time. The indictment should more clearly set forth the specifics of the alleged wrongdoing. The Defendant should not have to defend against conduct that is alleged to have occurred prior to September 17, 2010.

Counts 5-24

| <u>Count</u> | <u>Nominee</u> | <u>Date</u> |
|--------------|----------------|-----------------------|
| 7 | S.J.M. | 06/30/2010-08/09/2010 |
| 9 | R.Y.N. | 08/30/2007-08/21/2008 |
| 13 | R.F.S. | 12/30/2009-05/28/2010 |
| 14 | R.L.P.S. | 01/05/2010-07/01/2010 |

| | | | |
|---|----|--------|-----------------------|
| 1 | 16 | A.M.C. | 05/27/2008-09/18/2008 |
| 2 | 18 | B.A.G. | 07/08/2008-09/09/2009 |
| 3 | 19 | S.D.H. | 02/19/2009-09/03/2009 |
| 4 | 20 | N.F.M. | 06/03/2008-08/08/2009 |
| 5 | 21 | J.J.M. | 09/08/2009-11/18/2009 |
| 6 | 22 | A.D.O. | 09/10/2009-12/04/2009 |
| 7 | 23 | W.P.W. | 02/17/2009-06/08/2009 |
| 8 | 24 | R.M.W. | 01/30/2009-03/31/2009 |

10 The last act alleged in Counts 7, 9, 13, 14, 16, and 18 through 24 occurred more than five
11 years before the September 17, 2010, the date that is five years before the date of the indictment,
12 September 16, 2015. On the basis of the general statute of limitations act, 18 G.C.A. § 3282,
13 each of those counts should be dismissed.
14

15 **Indictment Should Be Dismissed Because No Act Committed Against United States**

16 For this case to proceed, the government must prove that the acts alleged were crimes
17 committed against the United States. But, in fact, no crime was committed against "the United
18 States or any agency thereof." As an RA, the Defendant was not working for the United States or
19 any agency thereof. Rather, he had a contract with Docupak, which is not "the United States or
20 any agency thereof."
21

22 The word "agency" is defined at 18 U.S.C. § 6 as follows:

23 As used in this title:

24 ...

25 The term "agency" includes any department, independent establishment,
26 commission, administration, authority, board or bureau of the United States or any
corporation in which the United States has a proprietary interest, unless the
context shows that such term was intended to be used in a more limited sense.

27 18 U.S.C. § 6. "Agency" is identically defined in 28 U.S.C. § 451.
28

1 The last clause of the definition--"unless the context shows that such term was intended to
2 be used in a more limited sense"--suggests that the word "agency" should be used in a narrow
3 sense, not an expansive one. Accordingly, a private organization that has a contract with the
4 United States does not become an agency thereof.

5 Case law supports this conclusion.

6 In a case dealing with the Equal Access to Justice Act, 28 U.S.C. § 2412, the Court of
7 Appeals for the Fifth Circuit denied the lower court's award of attorney fees to the plaintiff in an
8 action brought against Fidelity National Property and Casualty Insurance Company. In doing so,
9 the court relied on 28 U.S.C. § 451, observing:

10 In analyzing the definition of "federal agency" under the Federal Tort Claims Act,
11 the Supreme Court admonished that although "[b]illions of dollars of federal
12 money are spent each year on projects performed by people and institutions which
13 contract with the Government" and "the Government may fix specific and precise
14 conditions to implement federal objectives," such contracts and regulations do not
15 transform private actors into federal agencies. *United States v. Orleans*, 425 U.S.
16 807, 815-816, 96 S.Ct. 1971, 1976-77, 48 L.Ed.2d 390 (1976). Likewise, serving
as a fiscal agent and a participant in a heavily regulated federal program did not
transform Fidelity into a federal agency under the EAJA.

17 *Dwyer v. Fid. Nat'l Prop. & Cas. Ins. Co.*, 565 F.3d 284, 289 (2009).

18 Similarly, the Court of Claims held:

19 Moreover, although plaintiff correctly asserts that [Western Intelligence Narcotics
20 Group] is federally funded, WING fails to qualify as a federal agency. The United
21 States must have a proprietary interest in the agency, not merely grant it funds.
22 *See G-Lam Corp v. United States*, 227 Ct.Cl. 764, 766 (1981) ("It is clear ... that
23 no agency relationship is created between the United States and state or local
24 governments thorough the grant of federal funds to such entities."); *D.R. Smalley
25 & Sons, Inc. v. United States*, 372 F.2d 505, 507, 178 Ct.Cl. 593 (Ct.Cl. 1967)
26 (finding federal grants insufficient to warrant agency relationship, regardless of
27 accompanying performance standards). WING may be federally funded, but the
Amended Complaint does not allege that the United States has a say in the
internal operations of the agency. Even if Officer Hart committed a wrongful act,
as to which plaintiff has not alleged sufficient facts, Officer Hart is not an agent of
the United States, and thus the Court of Federal Claims may not assert jurisdiction
over plaintiff's claims under the "bad Men" clause.

28 *Hernandez v. United States*, 93 Fed.Cl. 193, 200 (Ct.Cl. 2010).

1 In a scathing audit entitled Contracts for the Guard Recruiting Assistance Program issued
2 August 1, 2013, by the U.S. Army Audit Agency it was found that:

3 As adaptation of civilian contract recruiting, G-RAP leveraged Soldiers,
4 families, and Military Retirees to identify, mentor, and refer potential candidates
5 for enlistment. **Individuals eligible to participate in the program used the**
6 **contractor's online system to register as a recruiter assistant (RA). After**
7 **completing training requirements, RAs became civilian subcontractors.**
8 RAs were eligible to receive a payment for referring citizens who later enlisted
9 in the ARNG. RAs used the contractor's online system to enter names of
potential enlistees. Using Army personnel systems, **the contractor verified the**
10 **new Soldier's enlistment and accession. The contractor made two electronic**
11 **funds transfer payments to RAs--half after enlistment and half after**
12 **accession. (Emphasis supplied.)**

13 Audit Report A-2013-0128-MTH, p. 3, www.hsgac.senate.gov/download/?id=6F841AEE-CFF9-4299-B5B;
14 also recoverable by Google search for A2013-0128-MTH Contracts for the Guard
15 Recruiting Assistant Program_Redacted.pdf (Hereafter "Audit").

16 The Audit also noted that in a Task Order the NGB issued to Docupak in conjunction with
17 the G-RAP contract, the NGB agreed:

18 **Contractor shall provide compensation to RAs as per the attached**
19 **performance work statement in support of the 2006 G-RAP for the ARNG.**
20 **(Emphasis supplied.)**

21 Audit, p. 15.

22 Clearly it was Docupak that employed the Defendant, ran G-RAP and determined who
23 and how much would be compensated for referring potential soldiers to Docupak.

24 **Indictment Should Be Dismissed Pursuant to Rule 12(b)(3)(A)(ii) and Fifth Amendment**

25 Rule 12(b)(3)(A)(ii), Fed.R.Crim.P., permits the court to dismiss a case when there has
26 been significant preindictment delay. In *U.S. v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d
27 468 (1971), the court acknowledged that the primary protection against the prosecution of stale
28 criminal charges is found in statutes of limitations, 404 U.S. at 322, but that the Due Process
Clause of the Fifth Amendment also requires that an indictment be dismissed when "the

1 preindictment delay caused substantial prejudice to an accused's right to a fair trial and that the
2 delay was an intentional device to gain tactical advantage over the accused." 404 U.S. at 324.

3 The delay in prosecution is egregious because, as noted at p. 32 of the Audit:

4 [Army Strength Maintenance, an entity within the NGB] knew from the onset that
5 there was a risk of abuse or fraud related to G-RAP. The operations order issued
6 by the Director, ARNG on 18 November 2005 discussed potential areas of risk
7 within the program, going as far as describing potential schemes. One example
8 from the order was:

- 9 • Recruiter provides the RA with a potential Soldier's information.
- 10 • RA claims credit for the accession under G-RAP.
- 11 • Recruiter and RA split the payment.

12 The operations order also discussed methods to mitigate the risks identified. They
13 included:

- 14 • Using the contractor's G-RAP Web portal to start the accounting process.
- 15 • Making payments to RAs after the Army's personnel systems reported the
16 new accession.
- 17 • Ensuring Active Guard Reserve Soldiers, military technician Soldiers, and
18 individuals on active duty for special work weren't eligible to receive a
19 payment under G-RAP.
- 20 • Ensuring that members or family members of the full-time recruiting and
21 retention force weren't eligible to receive payment under G-RAP.

22 However, the NGB didn't use this information to establish a quality assurance
23 program to make sure that the measures discussed in the operations order were in
24 place and operating. The G-RAP contract files contained no evidence that NGB
25 developed or used a [Quality Assurance Surveillance Plan. There was a copy of
26 the contractor's QASP from the 2007 G-RAP contract in files we reviewed;
27 however, NGB didn't formally accept it, implement it, or use it. In addition, NGB
28 didn't use its own resources to develop or implement a QASP. Several
[Contracting Officer Representatives] that we interviewed stated that they were
former recruiters and could have provided valuable input on potential fraud and
abuse risks.

21 Audit, pp 32-33. In short, the government ignored red flags and let the G-RAP fester for years
22 until, under the heat of media pressure, investigations were begun, but not of the top brass who
23 had orchestrated the program but of rank-and-file soldiers years after the fact when records and
24 memories were no longer fresh. *See* Fraud Investigation Targets Recruiting Programs for Army
25 National Guard, Reserve, Washington Post, March 13, 2012 (online at
26 www.WashingtonPost.com); Recruiting fraud 'pervasive across Army, Guard advocacy group

1 says, <http://archive.militarytimes.com/article/201404507/NEWS/3051900020/Recruit-fraud->
2 pervasive; Facts at Odds with Army Story on Referral Bonus Fraud,
3 <http://www.ngaus.org;newsroom/news/facts-at-odds-army-story-referral-bonus-fraud.>
4

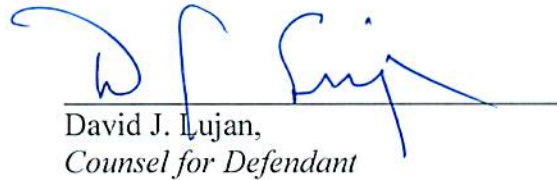
5 **Conclusion**

6 For the reasons stated, the Defendant respectfully prays that the indictment be dismissed.

7 November 2, 2015

8 Respectfully submitted,

9 LUJAN & WOLFF LLP,

10 
11 _____
12 David J. Lujan,
13 *Counsel for Defendant*

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CERTIFICATE OF SERVICE

I, David J. Lujan, certify under penalty of perjury of the laws of the United States that I have caused to be served a true and correct copy of the Defendant's Motion to Dismiss upon the following counsel on November 2., 2015, by having that copy delivered to the office identified:

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Executed in Hagatna, Guam, November 2, 2015.



David J. Lujan