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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. RYAN McGOWAN, ET AL., Defendant.	No. 2:12-CR-00207 TLN DEFENDANT MCGOWAN'S OBJECTION TO GOVERNMENT'S PROPOSED JURY INTSTRUCTION RE COUNT ONE Courtroom: Hon. Troy L. Nunley

Defendant Ryan McGowan hereby objects to the government's proposed jury instruction as to Count One. (Dkt 200.)

Specifically, the language from line 17 to line 1 of the next page is objectionable because it comes from an instruction used before the law changed in 1986. This language is taken from *United States v. Breier*, 813 F.2d 212, 213 (9th Cir. 1987), fn 1. *Breier* made it clear that such language presents problems and Congress articulated a new definition of "engaged in the business," to make things clear. Unfortunately for Mr. Breier, he was not entitled to the benefit of the new law because it was not retroactive.

Importantly, *Breier* already settled the very issue before the court now. Congress made this change to address the multiple, different and sometimes conflicting definitions given in cases

like this. At pages 213-214, *Breier* lays out the different ways "Court have fashioned their own definitions of the term." The new law simplified the definition and leaves no doubt as to what it means to be "engaged in the business. In short, *Breier* tells us to stop arguing about what it means to be "engaged in the business" because Congress just told us, loudly and clearly, what it means.

Also important, the court should know the Ninth Circuit warned that "Congress enacted new *§§ 921(a)(21)* and *921(a)(22)* in order to limit the conduct deemed to be criminal." *Breier*, at 216. Hence, there are good reasons not to instruct as the government requests. Adding such unnecessary, additional language would subject Mr. McGowan to a much broader range of conduct than the law allows.

Finally, the government's proposed language is inconsistent with the plain meaning of the statute. Each paragraph has a different example of what it means to be engaged in the business. These examples contradict the statute. Some of the language is flat out contrary to the statute (Line 18- "livelihood or profit" when the statute states "principal objective of livelihood and profit."). This is exactly what *Breier* wanted to stop.

The court should simply instruct with the new law. Congress already debated the issue and came up with the language as contained in McGowan's proposed instruction. It comports with the law and will guide the jury with a clear and unambiguous definition. It will also avoid confusion and uncertainty in the deliberation room.

DATED: October 17, 2014

Respectfully submitted,

/s/ Chris Cosca
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