

1 [COUNSEL LISTED ON SIGNATURE PAGE]

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

HARRISON ULRICH JACK; LO CHA THAO
aka Locha Thao; LO THAO, aka President Lo
Thao, aka Xia Lo Thao; YOUA TRUE VANG,
aka Joseph Youa Vang, aka Colonel Youa True
Vang; HUE VANG, aka Chue Hue Vang;
CHONG YANG THAO; SENG VUE; CHUE LO;
NHIA KAO VANG; DAVID VANG, aka Dang
Vang; JERRY YANG, aka Thao Nou Yang; and
THOMAS YANG, aka Pao Yang

Defendants.

Case No. 2:07-CR-0266 FCD

**DEFENDANTS' MOTION TO
DISMISS COUNT FOUR**

Judge: Hon. Frank C. Damrell, Jr.
Date: September 20, 2010
Time: 11:00 a.m.

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NOTICE OF MOTION AND MOTION

TO: BENJAMIN B. WAGNER, U.S. ATTORNEY, S. ROBERT TICE-RASKIN,
ELLEN V. ENDRIZZI, AND JILL THOMAS, ASSISTANT U.S. ATTORNEYS:

PLEASE TAKE NOTICE that on September 20, 2010, at 11:00 a.m., or as soon thereafter as the matter may be heard, Defendants jointly, through counsel, will and hereby do move this Court, pursuant to Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure, to dismiss Count Four of the First Superseding Indictment (the “Superseding Indictment”) for failure to state an offense under 18 U.S.C. §§ 844(d) and (n), because these statutory provisions do not reach the conduct alleged in the Superseding Indictment. All Defendants have joined this Motion.

This Motion is based on this Notice of Motion and the attached Memorandum of Points and Authorities, the files and records in this case, and any other evidence or argument that may properly be presented to the Court.

1 **I. INTRODUCTION**

2 The Court should dismiss Count Four for failure to state an offense under 18 U.S.C.
3 §§ 844(d) and (n), because these statutory provisions do not reach the conduct alleged in the
4 Superseding Indictment. Count Four alleges that Defendants conspired to transport and receive
5 explosives in “interstate or foreign commerce,” in violation of 18 U.S.C. § 844. Under section
6 844, “interstate or foreign commerce” means commerce between a State within the United States
7 and any place outside that State. Because the Superseding Indictment alleges that the purchase
8 and acquisition of weapons was intended to take place in Thailand, Defendants could not have
9 conspired to transport and receive explosives in commerce between a State that is a possession of
10 the United States and any place outside that State. Accordingly, the Court should dismiss Count
11 Four for failure to state an offense under 18 U.S.C. §§ 844(d) and (n).

12 **II. THE SUPERSEDING INDICTMENT**

13 The Superseding Indictment alleges that Defendants participated in a plot to purchase and
14 acquire weapons and supply them to insurgents in Laos to overthrow the government of Laos.
15 (*See* Superseding Indictment at 8, filed on Sept. 17, 2009 [Docket # 460].) Relevant to this
16 Motion, the Superseding Indictment alleges that various Defendants met and discussed the
17 acquisition and transfer of certain explosive devices, engaged in discussions and negotiations with
18 a Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) undercover agent posing as an
19 arms trafficker, and inspected samples of certain explosive devices. (*See id.* at 5, 7-8, 9, 10, 12-
20 13, 14, 15-16.) The Superseding Indictment does not allege that any Defendant ordered any
21 explosive devices from the undercover ATF agent or actually received or transported any
22 explosive devices. The only order that was allegedly placed with the undercover ATF agent was
23 for 125 AK-47 machine guns and related supplies. (*See id.* at 17.) According to the Superseding
24 Indictment, the undercover agent planned to deliver this equipment to Thailand near the border of
25 Laos (*id.* at 15:12-14), where certain Defendants would pay for and acquire the equipment. (*See*
26 *id.* at 10:23-25, 11:26-12:1, 15:12-14, 18:23-26, 21:16-20.) Based on these allegations, Count
27 Four charges Defendants with conspiracy to receive and transport explosives in interstate and
28

1 foreign commerce, in violation of 18 U.S.C. §§ 844(d) and (n). (Superseding Indictment at 25-
2 26.)

3 **III. ARGUMENT**

4 Section 844(d) provides in relevant part:

5 Whoever transports or receives, or attempts to transport or receive,
6 in interstate or foreign commerce any explosive with the knowledge
7 or intent that it will be used to kill, injure, or intimidate any
8 individual or unlawfully to damage or destroy any building, vehicle,
 or other real or personal property, shall be imprisoned for not more
 than ten years, or fined under this title, or both

9 18 U.S.C. § 844(d). Although section 844(d) contains the phrase “foreign commerce,” the statute
10 does not apply to all extraterritorial conduct involving the transport or receipt of explosives.
11 Indeed, in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991), the Supreme Court stated
12 that “we have repeatedly held that even statutes that contain broad language in their definitions of
13 ‘commerce’ that expressly refer to ‘foreign commerce’ do not apply abroad.” *Id.* at 251
14 (emphasis in original).

15 The phrase “interstate or foreign commerce” is defined in 18 U.S.C. § 841(b), which
16 provides in relevant part: “‘Interstate’ or foreign commerce means commerce between any place
17 in a State and any place outside of that State ‘State’ includes the District of Columbia, the
18 Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal
19 Zone).” 18 U.S.C. § 841(b).¹ As applied here, section 841(b)’s definition of “‘interstate’ or
20 foreign commerce” limits the extraterritorial reach of sections 844(d) and (n) to conspiracies to
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22 ¹ Section 841(b) provides in full:

23 ‘Interstate’ or foreign commerce means commerce between any
24 place in a State and any place outside of that State, or within any
25 possession of the United States (not including the Canal Zone) or
26 the District of Columbia, and commerce between places within the
27 same State but through any place outside of that State. ‘State’
28 includes the District of Columbia, the Commonwealth of Puerto
 Rico, and the possessions of the United States (not including the
 Canal Zone).

18 U.S.C. § 841(b).

1 transport or receive explosives in commerce between a State that is a possession of the United
2 States and any place outside that State. 18 U.S.C. § 841(b).

3 Putting aside the fact that Defendants are not alleged to have ordered any explosives,² the
4 Superseding Indictment does not allege that Defendants conspired to transport or receive
5 explosives in commerce between any State that is a possession of the United States and any place
6 outside of that State. Instead, the Superseding Indictment alleges that Defendants planned to
7 travel overseas to Thailand to purchase and acquire the weapons there. (*See, e.g.*, Superseding
8 Indictment at 10:23-25; 11:26-12:1, 21:16-20.) Defendants, allegedly intending to acquire
9 explosives on foreign soil, could not have conspired to transport or receive explosives in
10 commerce between a State that is a possession of the United States and a place outside of that
11 State. Accordingly, Count Four should be dismissed for failure to allege an offense under 18
12 U.S.C. § 844.

13 **IV. CONCLUSION**

14 For the foregoing reasons, the Court should dismiss Count Four of the Superseding
15 Indictment for failure to state an offense under 18 U.S.C. §§ 844(d) and (n).

16 Dated: May 19, 2010

Respectfully submitted,

MORRISON & FOERSTER LLP

By: /s/ James J. Brosnahan

JAMES J. BROSNAHAN
GEORGE C. HARRIS
SOMNATH RAJ CHATTERJEE
MELISSA ANN JONES
Attorneys for Defendant
YOUA TRUE VANG

26 ² All Defendants are alleged to have done with regard to explosives is discuss and inspect them.
27 (*See* Superseding Indictment at 8:2-10; 9:17-26; 10:2-11; 12:22-13:1; 15:23-16:6; 16:12-18.) The
28 only order that Defendants are alleged to have placed with the undercover agent consisted of 125
AK-47 machine guns and related supplies. (*See id.* at 17:15-20.)

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Dated: May 19, 2010

By: /s/ Daniel J. Broderick
DANIEL J. BRODERICK
Federal Defender
JEFFREY L. STANIELS
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Assistant Federal Defenders
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HARRISON JACK

Dated: May 19, 2010

By: /s/ Mark J. Reichel
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LO CHA THAO

Dated: May 19, 2010

By: /s/ William J. Portanova
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LO THAO

Dated: May 19, 2010

By: /s/ Krista Hart
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HUE VANG

Dated: May 19, 2010

By: /s/ Dina Lee Santos
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Dated: May 19, 2010

By: /s/ Michael B. Bigelow
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By: /s/ Danny D. Brace, Jr.
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1 Dated: May 19, 2010

By: /s/ Hayes H. Gable, III
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DANG VANG

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4 Dated: May 19, 2010

By: /s/ Bruce Locke
BRUCE LOCKE
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7 Dated: May 19, 2010

By: /s/ Peter Kmeto
PETER KMETO
Attorney for Defendant
THOMAS YANG

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