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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

NO. CR. S-10-061 LKK

Plaintiff,

v.

O R D E R

FREDERICK SCOTT SALYER,

Defendant.

_____/

The government's Second Superseding Indictment charges defendant Salyer with violations of: 18 U.S.C. §§ 1962(c) and (d) (Racketeering Influenced and Corrupt Organizations Act ("RICO")), 1343 & 1346 (Honest Services Wire Fraud), 1519 (alteration of a document in a federal investigation), and 15 U.S.C. § 1 (Sherman Act price-fixing).

Salyer has moved to sever the antitrust counts from the remainder of the indictment. For the reasons that follow, Salyer's motion will be granted.

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1 **I. STANDARDS FOR SEVERANCE.**

2 The indictment or information may charge a
3 defendant in separate counts with 2 or more
4 offenses if the offenses charged - whether
5 felonies or misdemeanors or both - [i] are of
6 the same or similar character, or [ii] are
7 based on the same act or transaction, or
8 [iii] are connected with or constitute parts
9 of a common scheme or plan.

10 Fed. R. Crim. P. 8(a). The joinder of charges "is the rule rather
11 than the exception." U.S. v. Armstrong, 621 F.2d 951 (9th
12 Cir. 1980) "At least one of Rule 8(a)'s three conditions must be
13 satisfied for proper joinder.¹ U.S. v. Jawara, 474 F.3d 565, 573
14 (9th Cir. 2007).

15 The joinder determination is made solely with reference to the
16 allegations in the indictment. Jawara, 474 F.3d at 572-73 ("a
17 valid basis for joinder should be discernible from the face of the
18 indictment").² Because Fed. R. Crim. P. 14 "is available 'as a

19
20 ¹ The Ninth Circuit has criticized joinder based solely upon
21 the "same or similar character" justification, because the
22 efficiency and economy benefit "largely disappear" with this as the
23 sole justification. U.S. v. Jawara, 474 F.3d 565, 575 (9th
24 Cir. 2007). However, it is still the law in this circuit. Jawara,
25 474 F.3d at 575-76 (citing the "handful" of Ninth Circuit cases
26 that "have upheld initial joinder on the basis of 'similar
character'").

² See also, U.S. v. Fiorillo, 186 F.3d 1136, 1145 (9th
Cir. 1999) ("In making an assessment of whether joinder was proper,
this court examines only the allegations in the indictment"), cert.
denied, 528 U.S. 1142 (2000); U.S. v. VonWillie, 59 F.3d 922, 929
(9th Cir. 1995) (in assessing a claim of misjoinder, "we examine

1 remedy for prejudice that may develop during the trial,' Rule 8 has
2 been 'broadly construed in favor of initial joinder' " Jawara,
3 474 F.3d at 573, quoting U.S. v. Friedman, 445 F.2d 1076, 1082 (9th
4 Cir.), cert. denied, 404 U.S. 958 1971).

5 The Ninth Circuit in Jawara requires this court to take
6 seriously its teaching that Rule 8(a) is to be determined solely
7 by reference to the language of the indictment itself. Jawara, 474
8 F.3d at 573. Nevertheless, the government has submitted over
9 seventy pages of witness interviews in support of its opposition
10 to the motion to sever. In explanation, the government asks the
11 court to focus on language in Jawara in which the Court states that
12 the Ninth Circuit has, on occasion, "noted matters outside of the
13 indictment," and that it has applied the "indictment-only" rule "in
14 name, if not always in practice." Jawara, 474 F.3d at 572-73 & 573
15 nn. 2 & 3.

16 Notwithstanding any inward-looking musings appearing in Ninth
17 Circuit opinions, this court is bound by the established law of the
18 Ninth Circuit.³ "[T]he established rule in this circuit is that

19 _____
20 only the allegations in the indictment"); U.S. v. Terry, 911 F.2d
21 272, 276 (9th Cir. 1990) ("the validity of the joinder is
determined solely by the allegations in the indictment").

22 ³ See, e.g., U.S. v. AMC Entertainment, Inc., 549 F.3d 760,
23 771 (9th Cir. 2008) ("when the Ninth Circuit or any of its coequal
24 circuit courts issue an opinion, the pronouncements become the law
of that geographical area"); Zuniga v. United Can Co., 812 F.2d
25 443, 450 (9th Cir. 1987) ("District courts are, of course, bound
by the law of their own circuit"). This court simply will not
26 disregard binding authority; rather it is the task of this court
to be faithful to all the authority that binds it, to the best of
its ability.

1 a valid basis for joinder should be discernible from the face of
2 the indictment" Jawara, 474 F.3d at 573. Unless subsequent
3 authority abrogates that rule, this court is bound by it.

4 In any event, the "indictment-only" rule does not appear to
5 be inconsistent with a rule permitting consideration of certain
6 matters that are not fully and literally contained within the four
7 corners of the indictment, but which are drawn directly from the
8 indictment's allegations. In U.S. v. Goldberg, 549 F.2d 1334 (9th
9 Cir. 1977) (per curiam), for example, the indictment charged
10 defendant with infringing a copyright regarding five movies and
11 also with stealing the same movies. The Ninth Circuit held that
12 joinder of those charges was proper because "the government
13 indicated that it would show at trial that appellee stole the films
14 for the purpose of selling them the next day, and thus that the
15 offenses were part of a common plan." Goldberg, 549 F.3d at 1335.

16 **II. THE INDICTMENT.**

17 Counts 1 and 2 of the Second Superseding indictment charge
18 defendant Salyer with conducting the affairs of SK Foods through
19 a pattern of "racketeering activity," and conspiracy to do so, in
20 violation of the Racketeer Influenced and Corrupt Organizations Act
21 ("RICO"), 18 U.S.C. § 1962(c) and (d). According to the
22 indictment, SK Foods is a grower and processor of tomato paste and
23 other food products. The indictment alleges twenty (20) overt acts
24 in furtherance of the RICO violations, identifying with
25 particularity who conducted which overt act, when, and to what
26 purpose.

1 Specifically, the RICO Counts charge that Salyer, the indirect
2 owner and Chief Executive Officer of SK Foods, in conspiracy with
3 his confederates, bribed specific, named purchasing agents of Frito
4 Lay, Kraft Foods, B&G Foods and Safeway Foods - all of which
5 companies were customers of SK Foods. Salyer bribed these
6 employees - Wahl (Frito Lay), Watson (Kraft Foods), Turner (B&G
7 Foods) and Chavez (Safeway): (i) to get their respective companies
8 to accept the bids of SK Foods over competitors' bids, causing the
9 customers to pay inflated prices to SK Foods; and (ii) to turn over
10 their respective companies' proprietary information to SK Foods.
11 In addition, the RICO count charges that Salyer, together with his
12 confederates, mislabeled SK Foods products that it sold to its
13 customers, resulting in adulterated and falsely labeled tomato
14 paste and other food products entering the stream of commerce.

15 Counts 3-6 charge Salyer with violations of the "honest
16 services" wire fraud statutes, 18 U.S.C. §§ 1343 & 1346.⁴
17 Specifically, those counts charge Salyer with depriving three of
18 the customers (Frito Lay, Kraft Foods and B&G Foods), of the honest
19 services of their respective purchasing agent employees (Wahl,
20 Watson and Turner), by means of the bribes described above in the
21 RICO counts.⁵

22
23 ⁴ A "scheme or artifice to defraud" under the wire fraud
24 statute, 18 U.S.C. § 1343 "includes a scheme or artifice to deprive
25 another of the intangible right of honest services," which includes
26 the use of bribes and kickbacks. 18 U.S.C. § 1346; Skilling v.
U.S., 561 U.S. ___, 130 S. Ct. 2896, 2931-34 (2010).

⁵ There are only three companies described in these four
counts because Counts 4 & 5 both relate to Kraft Foods.

1 Count 7 charges Salyer with altering a document involved in
2 a federal investigation, in violation of 18 U.S.C. § 1519.
3 According to the indictment, Salyer, in the midst of an FBI
4 investigation, altered the minutes of an SK Foods Board meeting to
5 hide Rahal's position at SK Foods. Salyer had learned that Rahal
6 had pled guilty to RICO and price-fixing charges.

7 Counts 8-9 and 11-12 charge Salyer with conspiring with others
8 to fix prices and eliminate SK Foods' competition, in violation of
9 15 U.S.C. § 1. The victims in these counts are McCain Foods and
10 ConAgra, along with un-named others. There is no mention in these
11 price-fixing counts of bribery (nor any other method of depriving
12 McCain Foods or ConAgra of the honest services of their employees,
13 nor of any mislabeling). There is no mention of any names, times
14 or places, other than the general averment that the crimes took
15 place in the Eastern District of California. Rather, the
16 indictment charges that Salyer and his co-conspirators violated the
17 law by meeting, communicating, agreeing and entering into contracts
18 to fix prices and restrain trade.

19 Count 10 charges Salyer with price-fixing in violation of 15
20 U.S.C. § 1. Distinguishing this count from the other price-fixing
21 counts however, Count 10 alleges that Salyer bribed an un-named
22 purchasing agent of the victim, Kraft Foods, "to obtain
23 confidential bid information in order to monitor compliance with
24 the agreements reached."

25 ////

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1 **III. THE SEVERANCE FACTORS**

2 **A. "Same or Similar Character."**

3 In determining whether the counts in the indictment are of the
4 "same or similar character," the Ninth Circuit instructs the court:

5 to consider factors such as [i] the elements
6 of the statutory offenses, [ii] the temporal
7 proximity of the acts, [iii] the likelihood
8 and extent of evidentiary overlap, [iv] the
9 physical location of the acts, [v] the modus
10 operandi of the crimes, and [vi] the identity
11 of the victims in assessing whether an
12 indictment meets the 'same or similar
13 character' prong of Rule 8(a).

14 Jawara, 474 F.3d at 578.

15 Upon careful review of the indictment, the court finds that
16 the antitrust charges are not of the same or similar character as
17 the remaining counts. Looking at the larger picture here, rather
18 than each of these illustrative elements in isolation, the court
19 notes that the "customary justification" for joinder is to promote
20 judicial efficiency and the conservation of judicial resources.

21 See Jawara, 474 F.3d at 575, quoting Halper, 590 F.2d at 429. This
22 goal would be furthered by not trying the same legal and factual
23 issues multiple times in different trials. Keeping this overall
24 picture in mind, the above factors that are most pertinent to this
25 determination in this case are: (i) the elements of the offenses;
26 (ii) potential evidentiary overlap; and (iii) modus operandi.

1 The elements of the offenses here are not the same or even
2 similar, with the possible exception of a common element of
3 interstate commerce.⁶ The only evidentiary overlap even asserted
4 by the government involves (i) the single alleged bribe to the
5 Kraft Foods employee;⁷ (ii) connection to interstate commerce, and
6 (iii) alteration of the SK Foods Board minutes (which the
7 government asserts was done to obstruct both investigations). But
8 even assuming these evidentiary overlaps, they pale in comparison
9 to the evidentiary issues for which no overlap is shown.⁸

10 Finally, the modus operandi of the various offenses suffer
11 from the same lack of overlap as does the potential evidence. The
12 only common modus operandi derivable from the indictment is the one
13

14 ⁶ See, e.g., Kaplan v. Burroughs Corp., 611 F.2d 286, 290 (9th
15 Cir. 1979), cert. denied, 447 U.S. 924 (1980); Salinas v. U.S., 522
16 U.S. 52, 62 (1997) (elements of a RICO violation); U.S. v. Moyer,
17 726 F. Supp.2d 498, 508 (M.D. Pa. 2010) (elements of a claim of
falsification of a document in a federal investigation); U.S. v.
McNeil, 320 F.3d 1034, 1040 (9th Cir.) (elements of wire fraud),
cert. denied, 540 U.S. 842 (2003).

18 ⁷ The RICO, Honest Services and antitrust charges all
19 allege that Salyer bribed a Kraft Foods purchasing agent - Watson
20 in the RICO and Honest Services charges, and un-named in the
antitrust charge - to obtain Kraft's "confidential" or
21 "proprietary" bid information. Even on that point, the parties at
oral argument were in sharp disagreement over whether the bribe of
22 the Kraft Food employee in the RICO and Honest Services counts is
the same bribe as was involved in the price-fixing count. The
23 government, citing materials outside of the indictment, claims that
it is referring to the same bribe in all three counts. The
24 defendant, citing materials outside of the indictment, claims that
these were different bribes.

25 ⁸ The government also asserts that some witnesses will testify
26 about the antitrust counts and the other counts. This is a
pertinent consideration, but it does not outweigh the lack of
commonality between counts that is apparent from the indictment.

1 bribe of the Kraft purchasing agent. The other modus operandi
2 allegations of the antitrust counts have nothing in common with
3 those of the remaining counts. The government argues that the
4 antitrust counts share "bribing purchasing agents" as a modus
5 operandi in common with the RICO counts. But nothing in antitrust
6 Counts 8, 9, 11 or 12 states, or gives rise to an inference, that
7 there was any bribery involved.⁹ The sole bribery of a purchasing
8 agent alleged in the antitrust counts is the one contained in Count
9 10.

10 The remaining factors - time frame, location and identities
11 of victims - are too general in this case to overcome the lack of
12 similarity in elements, evidentiary overlap and modus operandi.
13 The conduct all occurs within the same broad time frame (January
14 1998 to December 31, 2008), and they all occur in the Eastern
15 District of California, among other locations. Two of the victims
16 overlap - ConAgra and Kraft Foods. However, the remaining thirteen
17 alleged victims of the RICO fraud are not victims in the antitrust
18 conspiracy. And, the third antitrust victim (McCain), is not a
19 victim in the RICO fraud.¹⁰

20
21 ⁹ "[T]he similar character of the joined offenses should be
22 ascertainable-either readily apparent or reasonably inferred-from
the face of the indictment." Jawara, 474 F.3d at 578.

23 ¹⁰ The government asserts in its Opposition brief that General
24 Mills, a RICO victim, is also a victim of price-fixing in Counts
25 11 and 12 of the complaint, and that similarly, Frito Lay is a
26 victim of price-fixing in Count 11 and that Nestle and Barilla are
victims of price-fixing in Count 12. Opposition at 7. There is
nothing in the Indictment to indicate that these companies, all
alleged RICO victims, are the victims of a price-fixing conspiracy.
That information appears only in the Declaration of Richard B.

1 The government argues that the counts are of the same or
2 similar character because they were all "designed to accomplish a
3 common goal: to enrich the defendant and his coconspirators by
4 artificially inflating the price of SK Foods' products."
5 Opposition at 8. The government cites no authority for the
6 proposition that a "common goal" makes counts the same or similar
7 in character, nor is the court aware of any.¹¹

8 **B. "Same act or transaction."**

9 The second circumstance that would justify joinder is if the
10 offenses charged are part of the same act or transaction. Fed. R.
11 Crim. P. 8(a). The government argues broadly that Salyer's crimes
12 were part of the same transaction because they were all done with
13 the single goal of increasing his profits. He did so, the
14 government argues, by engaging in RICO violations and committing
15 price-fixing, and by covering up those crimes through the
16 alteration of evidence.

17 The term "transaction" here "is to be interpreted flexibly and
18 'may comprehend a series of related occurrences.'" U.S. v. Terry,
19 911 F.2d 272, 276 (9th Cir. 1990);¹² Friedman, 445 F.2d at 1083

20
21 Cohen (Dkt. No. 420) ¶ 3, submitted in support of the Government's
22 Opposition brief. As noted above, this information will be
23 disregarded under Jawara, since it is not contained in the
24 indictment nor reasonably inferable from the indictment.

25 ¹¹ In any event, the "common goal" argument is addressed below
26 in the "same act or transaction" and "common scheme or plan"
sections.

¹² Quoting U.S. v. Kinslow, 860 F.2d 963, 966 (9th Cir. 1988),
cert. denied, 493 U.S. 829 (1989).

1 ("Transaction' is a word of flexible meaning"). However, it is
2 not infinitely inflexible. See Jawara, 474 F.3d at 573 (terms used
3 in joinder consideration are "are not infinitely elastic").

4 Rather, it is the "logical relationship" between the acts
5 alleged, coupled with "a large area of overlapping proof," that
6 allows them to be seen as "the same act or transaction." U.S. v.
7 Anderson, 642 F.2d 281, 284 (9th Cir. 1981); Friedman, 445 F.2d at
8 1083 (transaction "may comprehend a series of many occurrences,
9 depending not so much upon the immediateness of their connection
10 as upon their logical relationship").

11 The indictment here does not allege that the acts and
12 transactions constituting the antitrust counts are the same acts
13 and transactions that constitute the RICO or other counts. The
14 specific acts involved in the RICO counts involve Salyer's
15 interactions with his customers and their employees. Salyer is
16 alleged to have controlled the customers by bribing their
17 purchasing agents, and got the customers to buy adulterated food
18 products by mislabeling them. The specific acts involved in the
19 price-fixing counts, on the other hand, involve Salyer's
20 interaction with un-named co-conspirators. Other than the single
21 bribe in one of the price-fixing counts, there is simply no
22 allegation in the remainder of the price-fixing counts that the
23 violations had anything whatever to do with Salyer's interactions
24 with his customers or their employees. The indictment thus does
25 not merely fail to suggest that the same activities form the basis
26 for both groups of counts. Rather, the indictment strongly

1 suggests that the activities supporting the price-fixing counts are
2 entirely different from those supporting the RICO counts.

3 The acts and transactions in this case are not the same, and
4 the indictment does not even suggest that they are. Were it not
5 for the government's briefs and submissions in opposition to the
6 severance motion, there would be no basis at all for thinking that
7 the antitrust counts were related to the other charges. The fact
8 that all the counts had the same goals - increasing Salyer's
9 profits at the expense of his customers - is not enough to call the
10 antitrust count the "same act or transaction" as the RICO or other
11 counts.

12 In Friedman, the defendant argued that the perjury and witness
13 tampering counts were misjoined with the counts relating to his
14 theft of a secret grand jury transcript.¹³ The Ninth Circuit
15 affirmed the district court's determination that joinder was proper
16 as a single "transaction" because the indictment alleged "a closely
17 related series of acts all done in pursuit of a single goal."
18 Friedman, 445 F.2d at 1083. Specifically, the defendant stole the
19 secret grand jury transcript and used it to improperly influence
20 witnesses, and to construct his own false testimony.

21 Thus, the existence of a single goal is pertinent, but not
22 sufficient, to justify joinder. Other cases approving joinder
23

24 ¹³ The counts were: conspiracy; contempt "for violating F.R.
25 Crim. P. 6(d) by possessing and disclosing unreleased grand jury
26 transcripts;" receiving and concealing the stolen transcripts; and
obstruction of justice "by use of unreleased grand jury
transcripts." Friedman, 445 F.2d at 1078.

1 involve similarly related series of acts, all done to achieve a
2 single goal. As in Friedman, however, it is not merely the
3 presence of a unifying goal that creates the same "act or
4 transaction." What matters is the logical relation of the acts
5 used to achieve that goal. It is not required that the acts are
6 the same or similar in character, only that they be logically
7 related in some way.

8 In U.S. v. Lopez, 477 F.3d 1110 (9th Cir.), cert. denied, 522
9 U.S. 855 (2007), for example, the weapon possession charge was
10 logically related to the drug charges, because the weapon from the
11 possession count was used in the drug possession and distribution
12 count. Accordingly, the offenses "arose from the same act or
13 transaction." Lopez, 477 F.3d 1117. In Friedman, the stolen grand
14 jury transcript gave the defendant the information he needed to
15 tamper with the witnesses and craft his own false testimony.

16 Here, there is no allegation that the underlying conduct was
17 inter-related, with the possible, disputed, exception of the bribe
18 paid to the Kraft Foods agent. Even in regard to that bribe, the
19 most the government argues is that there was a single, isolated act
20 of bribery that was common to one of the price-fixing counts on the
21 one hand, and one of the RICO and Honest Services counts on the
22 other. That does not create a set of inter-related facts that
23 would give rise to the same act or transaction.

24 Jawara itself, the principal case relied upon by both sides,
25 provides an illustration of how a single goal is insufficient for
26 joinder where the constituent acts are not related. In Jawara, the

1 defendant was charged with two counts of fraud. The first count
2 was for document fraud under 18 U.S.C. § 1546(a), which prohibits
3 the use of fraudulent documents to establish lawful entry or
4 presence in the U.S. The second count was for fraud against the
5 U.S., under 18 U.S.C. § 371, and marriage fraud, under 8 U.S.C. §
6 1325. The marriage fraud section prohibits the use of a fraudulent
7 marriage to evade any provision of the immigration laws. In other
8 words, defendant engaged in two separate frauds with one single
9 goal - to establish a lawful presence in this country. The Ninth
10 Circuit declined joinder, finding that the two different frauds
11 were not the same act or transaction.

12 **C. Connection, or common scheme or plan.**

13 The final circumstance that would justify joinder is whether
14 the offenses charged "are connected with or constitute parts of a
15 common scheme or plan." Fed. R. Crim. P. 8(a). In considering
16 this factor:

17 we ask whether "[c]ommission of one of the
18 offenses [] either depended upon [] or
19 necessarily led to the commission of the
20 other; proof of the one act [] either
21 constituted [] or depended upon proof of the
22 other."

23 Jawara, 474 F.3d at 574, quoting U.S. v. Halper, 590 F.2d 422, 429
24 (2d Cir. 1978).

25 An example of a "common scheme or plan" is provided by U.S.
26 v. Whitworth, 856 F.2d 1268, 1277 (9th Cir. 1988), cert. denied,

1 489 U.S. 1084 (1989). In that case, the government joined
2 espionage counts with tax-evasion counts. The Ninth Circuit held
3 that they constituted a common plan because "the money [defendant]
4 allegedly received in exchange for classified information]" in the
5 espionage count "was the same [money] as that involved in the" tax-
6 evasion count.

7 A counter-example showing a lack of common scheme or plan is
8 Jawara. Neither immigration fraud in that case led to the other,
9 and proof of one fraud would not constitute proof of the other.¹⁴
10 Rather, the frauds were alternate, separate ways of achieving
11 defendant's single goal - lawful presence in this country. The
12 Jawara situation is what is present here. Salyer is alleged to
13 have wanted to unfairly profit at his customers' expense by making
14 them pay inflated prices for his tomato products - his goal. But
15 the indictment alleges that he accomplished this one goal, in two
16 separate schemes. The first was by bribing his customers'
17 purchasing agents into accepting his over-priced bids (on behalf
18 of their defrauded employers), and into buying his adulterated
19 food. The second was by conspiring with un-named co-conspirators
20 to fix prices.

21 **IV. CONCLUSION**

22 Applying the cases, this court must make a "big picture"
23 determination of whether joinder will promote judicial efficiency
24

25 ¹⁴ This was so notwithstanding that there must have been some
26 facts that would have to be proved in both cases, such as the
defendant's actual immigration status.

1 and economy by avoiding multiple trials of essentially the same
2 crime or group of crimes. There is no showing in this case that
3 multiple trials of the same facts will occur if the antitrust
4 counts are severed. At most, based on the showing made here, one
5 single bribe will have to be established in both cases, along with
6 one single instance of document alteration, and the common
7 establishment of the jurisdictional "commerce" element.¹⁵

8 This is insufficient to justify joinder of the antitrust
9 claims in this indictment. The fact that disparate crimes may have
10 isolated facts in common does not mean that those crimes are part
11 of the same transaction, common plan nor that they are similar in
12 character.

13 Accordingly, defendant's motion to sever the antitrust counts
14 is **GRANTED**. The court now sets a hearing for December 20, 2011 at
15 9:15 a.m. for scheduling of the second trial.

16 IT IS SO ORDERED.

17 DATED: December 12, 2011.

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LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

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24 ¹⁵ Of course, this court cannot predict, based upon the
25 limitations on the Rule 8(a) inquiry imposed by the Ninth Circuit,
26 whether other facts will turn out to overlap in a significant way
once this matter actually goes to trial. The court only finds that
based upon the showing made on this motion, the potential overlap
is insufficient to justify joinder.