JOSEPH M. BURTON (SB No. 142105)
STEPHEN H. SUTRO (SB No. 172168)
JON D. RUBIN (SB No. 196944)
JAMES B. DAMRELL (SB No. 201859)
DUANE MORRIS, LLP
100 Spear Street, Suite 1500
San Francisco, CA 94105
Telephone: (415) 371-2200
Facsimile: (415)371-2201

Attorneys for Defendant
ELCOMSOFT CO., LTD.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

UNITED STATES OF AMERICA Plaintiff, v. ELCOM LTD., a/k/a ELCOMSOFT CO., LTD. and DMITRY SKLYAROV, Defendants.		Case No.: CR 01-20138 RMW **NOTICE OF MOTION AND MOTION TO DISMISS COUNT ONE: CONSPIRACY** Date: March 4, 2002 Time: 9:00 a.m. Judge: The Honorable Ronald M. Whyte

NOTICE

___**TO THE UNITED STATES ATTORNEY, PLEASE TAKE NOTICE** that at 9:00 a.m. on Monday, March 4, 2002 or as soon thereafter as the matter can be heard, in Courtroom 6 of this Court, located at 280 South 1st Street, San Jose, California 95113, defendant Elcom, Ltd., a/k/a Elcomsoft Company, Ltd., ("Elcomsoft") will move this Court for an order dismissing Count One of the criminal indictment brought against it by the United States of America ("hereinafter the "Government").

///

///

MOTION

Elcomsoft moves pursuant to Federal Rule of Criminal Procedure 12(b) for an order dismissing Count One, Conspiracy in violation of 18 U.S.C. §371, of the indictment on the grounds that it fails to plead a sufficient cause of action. This motion is based on the Notice of Motion, Memorandum of Points and Authorities in Support of Motion, the files and records of the case, and such other argument as may be offered at the time of the motion.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION

I. INTRODUCTION.

There is no conspiracy in this case. For a conspiracy to exist, the law requires that "two or more persons conspire . . . ." 18 U.S.C. § 371. Even if taken as true, the Government's indictment does not make such an allegation.

This is because the indictment alleges an intracorporate conspiracy. That is the indictment alleges that Elcomsoft, a corporation, "conspired" with its own employee, Dmitry Sklyarov, to violate American law. At the time of this so-called "conspiracy," Sklyarov was acting on behalf of Elcomsoft within the scope of his duties and responsibilities; he was in Moscow developing software for the company to sell on the internet. As such, Sklyarov's acts were, by law, the acts of Elcomsoft.

And because by law Sklyarov's (and any other employee's) acts are the acts of a single entity, it cannot be said that "two or more" persons have conspired here. The required "plurality," for a conspiracy does not exist.

This is the conclusion warranted by the plain reading of 18 U.S.C. § 371 and the doctrine of corporate unity, which recognizes that a corporation can not conspire with its own employees. Many courts have observed this doctrine in the civil setting, *See* section III.B.3.a, and at least two federal appellate courts have applied this analysis in the criminal setting. *See United States v. Suntar Roofing*, 897 F.2d 469, 476 (10th Cir. 1990) (finding that employee's "participation could not support a conspiracy conviction" because he was "an employee of Suntar [the corporate defendant]" and arguing that the "participation [of multiple corporate employees] could not support a conspiracy conviction of [their] employer"); *United States v. Notarantonio,* 758 F.2d 777, 789 (1st Cir. 1985)

///

(finding "the plurality of actors necessary to establish a conspiracy. . . present" because the conspiracy was *not wholly intracorporate*).

Elcomsoft does not quarrel with the longstanding proposition that a corporation may be convicted of criminal conspiracy based upon the acts of its employees for which the corporation is held to "stand in [their] shoes" under the doctrine of vicariously liability. *See, e.g., Gardner v. Equitable Office Bldg. Corp*., 273 F. 441, 447 (2d Cir. 1921) ("[D]uring the agency . . . the agent represents, and stands in the shoes of his principal"). But that analysis simply does not apply here.

Under the indictment in this case, Elcomsoft is not merely converted into one of the conspirators. But because the indictment alleges an intracorporate conspiracy only, Elcomsoft becomes identical to – and stands in the shoes of – all of the conspirators. In other words, there is only one conspirator: Elcomsoft, acting, as it only can, through its employees.

Fortunately for Elcomsoft, the law does not impose criminal liability upon a corporation that conspires with itself. Indeed, as noted earlier, the statutory language unambiguously requires that "two or more persons conspire . . . ." But even if it could be said that some sort of ambiguity was

present which arguably allowed such a prosecution (there is not), under the rule of lenity this Court is "required to give effect to the more lenient interpretation. . . even were [the Court] to prefer the more stringent interpretation." *United States v. Baxley*, 982 F.2d 1265, 1270 (9th Cir. 1992).

Because, as a matter of law no conspiracy has been alleged, Elcomsoft respectfully requests that the Court grant its motion and dismiss Count One of the indictment.

II. BACKGROUND.

The indictment alleges that Elcomsoft is a company headquartered in Moscow, Russia, primarily involved in software development. (Indictment, pg. 1, lines 25-26).

The Government alleges that Dmitry Sklyarov is an employee of Elcomsoft as a software engineer and cryptanalyst. (Indictment, pg. 2, lines 2-3).

The indictment alleges that prior to June 20, 2001, Mr. Sklyarov and "others" wrote the AEBPR. (Indictment, pg. 2, lines 21-22). The indictment alleges that Elcomsoft, Mr. Sklyarov and "other persons" created the AEBPR program to permit users to circumvent copyright protections from ebook files. (Indictment, pg. 3, lines 23-25).

Elcomsoft is alleged to have made the AEBPR program available for purchase on Elcomsoft.com. (Indictment, pg. 3, lines 26-27). Elcomsoft, Mr. Sklyarov and "other persons" are said to have marketed and trafficked the AEBPR program on that website. (Indictment, pg. 3, lines 26-28). Elcomsoft, Mr. Sklyarov and "other persons" then allegedly made the AEBPR program available for download on a computer server in Chicago, Illinois, and for sale for $99. (Indictment, pg. 4, lines 1-3 and 7-11).

III. DISCUSSION.

A. STANDARD OF REVIEW.

A motion to dismiss for failure of the indictment to sufficiently allege a crime is permitted under Federal Rule of Criminal Procedure Rule 12(b). Such a motion can be made at any time during the proceedings. Rule 12(b) provides: "Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. The

following must be raised prior to trial: (1) Defenses and objections based on defects in the institution of the prosecution; or (2) Defenses and objections based on defects in the indictment or information."[1]

The sufficiency of an indictment is determined by three factors: "(1) whether it contains the necessary elements of the crime alleged, (2) whether it informs the defendants of the crime charged with sufficient clarity to allow them to adequately defend against the charges, and (3) whether it is stated with the sufficient clarity to bar subsequent prosecution for the same offense." *United States v. Boone*, 951 F.2d 1526, 1542 (9th Cir. 1991); *United States v. Buckner*, 610 F.2d 570, 573 (9th Cir. 1979), cert. denied, 455 U.S. 961 (1980).

To allege conspiracy under 18 U.S.C. 371, an indictment must show the three elements necessary for conspiracy: "the agreement, the unlawful object towards which the agreement is directed, and an overt act in furtherance of the conspiracy." *United States v. Giese*, 597 F.2d 1170, 1177 (9th Cir. 1979). In analyzing whether an indictment has accomplished these requirements, the

///

allegation should be questioned in a manner "to be construed according to common sense with an appreciation of existing realities." *Id*. at 1178.

B. A CONSPIRACY COULD NOT EXIST UNDER THE ALLEGED FACTS AS A MATTER OF LAW.

As explained below, no conspiracy exists in this case because the law requires that "two or more persons conspire . . . ." and Elcomsoft cannot conspire with its one named employee (Dmitry Sklyarov). Moreover, even if the indictment properly identified other Elcomsoft employees who are allegedly part of the charged "conspiracy," the law would still preclude prosecution because under the doctrine of corporate unity because the acts of Elcomsoft's employees are the acts of Elcomsoft itself.

1. 18 U.S.C. § 371 Requires Two or More Conspirators.

[1] A motion challenging the adequacy of an indictment is in effect the equivalent of a civil demurrer. *United States v. American Oil Company*, 286 F. Supp. 742, 746 (D.N.J. 1968).

Title 18, section 371 of the United States Code provides in pertinent part:

Section 371. Conspiracy to commit offense or to defraud United States

> *If two or more persons conspire* either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, *each* shall be fined under this title or imprisoned not more than five years, or both. . . . (Emphasis added).

Plainly, a conspiracy requires two or more persons, not just a single actor. This is because the danger presented by a conspiracy is the agreement to violate the law – something that simply does not exist if there is only one actor:

> The threat posed to society by [conspiratorial] combination arises from the creative interaction of two autonomous minds. It is for this reason that the essence of a conspiracy is an agreement. The societal threat is of a different quality when one human simply uses the corporate mechanism to carry out his crime. The danger from agreement does not arise.

United States v. Stevens, 909 F.2d 431, 433 (11th Cir. 1990).

2. The Charged Conspiracy Between Elcomsoft and Dmitry Sklyarov Is Legally Insufficient.

It is clear beyond virtually all doubt that a conspiracy can not exist between a corporation and only *one* of its employees. Notwithstanding this, from time to time, the Government has attempted to prosecute such "conspiracies." These prosecutions have not met with success. *See, e.g., Union Pacific Coal Co. v. United States*, 173 F. 737, 744-745 (8th Cir. 1909) (Court precluded the prosecution and held that "the distinction between the commission of an offense and a combination to commit it by a corporation vanishes into thin air; for a corporation can act only by an agent, and every time an agent commits an offense within the scope of his authority under this theory the corporation necessarily combines with him to commit it"); *United States v. Carroll*, 144 F. Supp. 939, 942 (S.D.N.Y. 1956) (Court dismissed the indictment, noting that the actionability of a conspiracy in that case "would mean that any individual corporate officer, who committed an illegal

act within the framework of his corporate duties, also conspired with the corporation to commit that act"); *United States v. Stevens, supra*, 909 F.2d at 434 (one employee conspiracies do not involve "interaction between multiple autonomous actors" and thus no actionable criminal conspiracy); *United States v. Peters*, 732 F.2d 1004, 1008, n. 6 (1st Cir. 1984) (a "corporate officer, acting alone on behalf of the corporation, could not be convicted of conspiring with the corporation"); *United States v. Sain*, 141 F.3d 463 (3rd Cir. 1998) ("a corporation is a conspirator only pursuant to respondeat superior liability. In *United States v. Hughes*, 20 F.3d 974 (9th Cir. 1994) the Ninth Circuit determined that a corporation could be a member of a conspiracy involving only its own employees, but it recognized that in such a case a conspiratorial agreement must *first* exist between at least *two* employees *before* the company may legally be charged and convicted as a co-conspirator.

The indictment in this case alleges a conspiracy between Elcomsoft and only *one* of its employees, Dmitry Sklyarov. This is legally insufficient. While the indictment does refer to "other persons," these "others" are no where identified in the indictment. While the government is permitted to allege the existence of other unindicted or unnamed conspirators, indictments in such circumstances have always alleged identified co-conspirators sufficient enough to legally constitute a conspiracy. That is the charging of unnamed co-conspirators has always occurred where the named conspirators are sufficient to constitute a legal conspiracy. Here, the named co-conspirators are not sufficient in and of themselves to constitute a conspiracy and thus any reliance by the government on the "other" language can not save Count One.

///

///

///

3. Even If the Government Properly Alleged a Conspiracy Between Elcomsoft and Multiple Employees, the Indictment Would be Legally Insufficient.

Federal courts have adopted a "single entity" bar to corporate conspiracy in a variety of civil settings. *See, e.g., Copperweld Corp. v. Independence Tube Corp*., 467 U.S. 752, 769 (1984) (antitrust); *Travis v. Gary Community Mental Health Ctr*., 921 F.2d 108, 109-111 (7th Cir. 1990), *cert. denied* 502 U.S. 812 (1991) (civil rights); *Odishelidze v. Aetna Life & Cas. Co.*, 853 F.2d 21, 23 (1st Cir. 1988) (RICO); *Atkinson v. Anadarko Bank & Trust*, 808 F.2d 438, 441 (5th Cir. 1987) (RICO); *Buschi v. Kirven*, 775 F.2d 1240, 1251-53 (4th Cir. 1985) (civil rights); *Doherty v. American Motors Corp*., 728 F.2d 334, 339-40 (6th Cir. 1984) (civil rights); *Girard v. 94th Street & Fifth Ave. Corp*., 530 F.2d 66, 70-72 (2d Cir. 1976), *cert. denied* 425 U.S. 974 (1976) (civil rights); *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 643 n.9 (9th Cir. 1969) (antitrust).

In the criminal context, the Tenth Circuit has expressed the view that an agreement that involved employees of only a single corporation could not give rise to an actionable criminal conspiracy. *Suntar Roofing, supra*, 897 F.2d 469 (10th Cir. 1990). In *Suntar Roofing*, a conspiracy was charged between a corporation and its president. Three unindicted individuals were the defendants' alleged coconspirators. In analyzing the possible involvement of one unindicted coconspirators, the court held that "his participation could not support a conspiracy conviction" because he was "an employee of [the employer] Suntar" and the "participation [of multiple employees] could not support a conspiracy conviction of [the] employer." *Id.* at 476.[2]

Similarly, although not addressing the issue directly, in *Notarantonio*, *supra,* 758 F.2d 777 (1st Cir. 1985), the First Circuit upheld a conspiracy conviction only because one conspirator (a cousin) was not employed with the corporation. The court held that only for this reason was "the plurality of actors necessary to establish a conspiracy . . . present." *Id*. at 789. This language makes plain that the court would have overturned the conspiracy conviction if the sole conspirators were employees of the company.

---

[2] Indeed, the district court in *Suntar* had instructed the jury that neither the corporation nor its president could be convicted of a conspiracy between each other and that the law required the involvement of another natural person; the Tenth Circuit stated that this instruction accurately summarized the law of conspiracy. *Id.* at 474.

Admittedly, some other courts, including the Ninth Circuit, have reached a different conclusion in the criminal context, relying principally on *United States v. Hartley*, *supra*, 678 F.2d 961 (11th Cir. 1982), a decision that not surprisingly has since been abrogated by the Eleventh Circuit. *United States v. Goldin Industries*, 219 F.3d 1268, 1270 (11th Cir. 2000). *Cf. United States v. Ames Sintering Co.*, 927 F.2d 232, 236 n.2 (6th Cir. 1990) (following Hartley); *United States v. Peters*, 732 F.2d 1004, 1008 (1st Cir. 1984) (same). Indeed, the suspect reasoning of *Hartley* is apparent.

The *Hartley* court apparently based its decision on cases involving civil rights conspiracies that had upheld liability notwithstanding their intracorporate nature. *Hartley, supra*, 678 F.2d at 970-71 (citing *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, rev'd 584 F.2d 1235 (3rd Cir. 1978), 584 F.2d 1235 (3rd Cir. 1978) and two district court 42 U.S.C. § 1985 cases). The *Hartley* court disregarded the fact that the vast majority of civil rights cases had reached the opposite result – expressly rejecting conspiracies that were intracorporate. *Id.* at 971 n.14. Other cases relied upon by the *Hartley* court offered paltry support for the court's holding.[3] In fact, the Supreme Court has embraced the view criticized by *Hartley*. *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-71 (1984). Plainly, more and more courts are viewing the *Hartley* court's reasoning with skepticism.

In light of *Hartley*'s weaknesses, the Government likely will rely upon the Ninth Circuit's decision in *Hughes, supra*, 20 F.3d 974, 979, to justify its charged intracorporate conspiracy. Elcomsoft is aware of the Ninth Circuit's opinion in *United States v. Hughes*, 20 F.3d 974 (9th Cir. 1994) (cert. denied 513 U.S. 987 (1994). However, that case involved and the indictment alleged a conspiracy between the corporation and two other *identified* persons. As discussed earlier, no such allegation is made here. Moreover, the *Hughes* opinion is not well reasoned. In reaching its

[3] The Court cited and relied upon (1) Justice Harlan's policy-related concurrence in *United States v. Wise*, 370 U.S. 405, 417 (1962); (2) the Court's decision in *United States v. Consolidated Coal Co.*, 424 F. Supp. 577, 579-81 (S.D. Ohio 1976) which was based in part upon Justice Harlan's concurrence in Wise, and where the court conceded that at least one district court had held otherwise; and (3) dicta in *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594 (5th Cir. 1981), a case decided under Louisiana antitrust law. *See Hartley, supra*, 678 F.2d at 970-72. None of these cases were controlling.

decision that the corporation could be charged with criminal conspiracy involving only its employees, the *Hughes* court relied primarily on the *Hartley* case, did not consider the legal doctrine of "corporate unity," and jumped to conclusions that simply were not true. For example, the *Hughes* court claimed that the intracorporate conspiracy doctrine had never been applied to criminal cases. *Hughes Aircraft*, 20 F.3d at 979. *Suntar Roofing and Notarantonio* (cases decided before Hughes) disprove this conclusion. The Court in *Hughes,* however, cited cases that relied upon *Hartley* (*e.g., Peters, supra,* 732 F.2d at 1008 and *Ames Sintering, supra*, 927 F.2d at 236), cases that were not decided under federal law (*Dussouy, supra*, 660 F.2d at 603 [decided under Louisiana antitrust law]), or cases that just plain did not stand for the proposition cited. *Stevens*, *supra*, 909 F.2d 431, 434 (11th Cir. 1990) (reversing the intracorporate conspiracy conviction and distinguishing *Hartley*).[4] Accordingly, the *Hughes* decision is weak precedent at best.

The bottom line is that there can be no corporate conspiracy charge when an agreement between a corporation's employees is all that is charged. First, as set forth above, "two or more persons" must conspire under 18 U.S.C. section 371. Under basic agency principles, Elcomsoft is identical to – and stands in the shoes of – each of the alleged conspirators, so plurality is not present.

Moreover, 18 U.S.C. section 371 permits "each" participant to a conspiracy to be convicted. By its terms, of course, a person who is not a party to a conspiracy may be convicted. Accordingly, because Elcomsoft is not "each" of the two or more persons, Elcomsoft cannot be prosecuted under the statute.

Accordingly, 18 U.S.C. 371 does not impose vicarious corporate liability for intracorporate agreements between the corporation's employees. It is fundamental to our system of justice that before a criminal defendant can be convicted, "it must be shown that his case is plainly within the statute." *Fasulo v. United States*, 272 U.S. 620, 629 (1926). The Government has not and cannot do so in this case.

---

[4] The misguided nature of the *Hughes* opinion is apparent based on its cavalier statement that its holding was consistent with "[e]very other circuit to address the issue." *Hughes*, 20 F.3d at 979. That is not true. *See, e.g. Suntar Roofing, supra*, 897 F.2d at 476; *Notarantonio*, *supra,* 758 F.2d at 789.

///

///

C. THE INDICTMENT IS OTHERWISE FLAWED.

Separate and apart from the fundamental deficiencies set forth above, the Government has failed to allege that the participants to the conspiracy had knowledge of the conspiracy involved. Knowledge is an essential element to a finding of conspiracy. *See United States v. Krasovich*, (9th Cir. 1987) 819 F.2d 253, 255; *United States v. Melchor-Lopez*, (9th Cir. 1980) 627 F.2d 886, 891. This is particularly true in the employee/employer context. To find an employee liable for conspiracy in assisting their employer in a criminal enterprise, the Government must show they had knowledge of the illegality of the tasks asked of them by their employer. *Baker v. United States*, (9th Cir.) 393 F.2d 604, 609, cert. denied, 476 U.S. 1186 (1986) Knowledge of the existence of a conspiracy beyond the normal scope of duties is required to find an employee guilty of co-conspiracy. *Baker* at 609.

The Government has not indicated in its indictment whether Sklyarov or any other conspirator had knowledge that their actions in the scope of their employment were illegal or contributing to an illegal enterprise. There is no allegation of that sort, nor is there any basis to allege such knowledge on their part. For that reason as well, the indictment is deficient and the conspiracy count should be dismissed.

IV. CONCLUSION.

For all of the foregoing reasons Elcomsoft respectfully requests that the Court dismiss Count One of the indictment against it.

Dated: January 14, 2001 DUANE MORRIS, LLP

By:

JOSEPH M. BURTON
Attorneys for Defendant
ELCOMSOFT CO., LTD.

SF\28261

United States of America v. Elcom Ltd., a/k/a
Elcomsoft Co., Ltd. and Dmitry Sklyarov
Case No.: CR 01-20138 RMW

PROOF OF SERVICE

I am a resident of the state of California, I am over the age of 18 years, and I am not a party to this lawsuit. My business address is Duane Morris, LLP, 100 Spear Street, Suite 1500, San Francisco, California 94105. On the date listed below, I served the following document(s):

NOTICE OF MOTION AND MOTION TO DISMISS COUNT ONE: CONSPIRACY

_ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date during normal business hours. Our facsimile machine reported the "send" as successful.

_ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as set forth below.

I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. According to that practice, items are deposited with the United States mail on that same day with postage thereon fully prepaid. I am aware that, on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing stated in the affidavit.

John Keker
Keker & Van Nest
710 Sansome Street
San Francisco, CA 94111

_ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, deposited with Federal Express Corporation on the same date set out below in the ordinary course of business; to the person at the address set forth below, I caused to be served a true copy of the attached document(s).

Scott H. Frewing
Assistant United States Attorney
United States District Court
Northern District of California
280 South First Street
San Jose, CA 95113

_ by causing personal delivery of the document(s) listed above to the person at the address set forth below.

_ by personally delivering the document(s) listed above to the person at the address set forth below.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Dated: January ____, 2002 ________________________________

Lea A. Chase

SF-28261