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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

11 THE PEOPLE OF THE STATE OF
12 CALIFORNIA,

13 Plaintiff,

14 vs.

15 EUGENE WEI YU,

16 Defendant.

CASE NO. BA509784

**NOTICE OF DEMURRER AND
DEMURRER TO FELONY
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES**

*[Filed Concurrently with Request for
Judicial Notice]*

Date: November 7, 2022

Time: 8:30 a.m.

Dept.: 30

1 **TO THE PEOPLE OF THE STATE OF CALIFORNIA AND TO THEIR**
2 **ATTORNEYS OF RECORD:**

3 PLEASE TAKE NOTICE that on November 7, 2022, at 8:30 a.m., or as soon
4 thereafter as the matter may be heard, in Department 30 of the above-entitled Court,
5 located at 210 West Temple Street, Los Angeles, California 90012, Defendant Eugene Wei
6 Yu will and hereby does demur to, move to set aside, and move to dismiss the Felony
7 Complaint in this matter. The grounds for the Demurrer are as follows:

8 1. Count 1 of the Complaint is barred pursuant to Penal Code § 1004(4)
9 because the facts stated do not constitute a public offense.

10 2. Count 2 of the Complaint is barred pursuant to Penal Code § 1004(4)
11 because the facts stated do not constitute a public offense.

12 3. The Complaint does not substantially conform to the provisions of California
13 Penal Code sections 950, 951, and 952.

14 Defendant further moves to dismiss the Complaint based upon the United States and
15 California Constitutions, including their respective Due Process clauses, as well as on non-
16 statutory grounds based on the deprivation of Defendant's substantial rights. See *Murguia*
17 *v. Mun. Ct.*, 15 Cal. 3d 286, 293 n.4 (1975); *Stanton v. Super. Ct.*, 193 Cal. App. 3d 265,
18 271 (1987).

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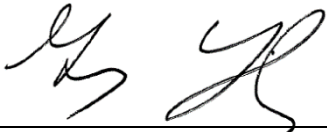
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1 This Demurrer is brought pursuant to Penal Code § 1004 and the Due Process
2 clauses of the United States and California Constitutions and is based on this Notice, the
3 attached Memorandum of Points and Authorities, the files and records in this case, such
4 argument as may be presented at the hearing on this matter, and such other matters of
5 which the Court may take notice.

6
7 DATED: October 27, 2022

Gary S. Lincenberg
Thomas V. Reichert
Alexis A. Wiseley
Bird, Marella, Boxer, Wolpert, Nessim,
Drooks, Lincenberg & Rhow, P.C.

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12 By: 
13 _____
14 Gary S. Lincenberg
15 Attorneys for Defendant Eugene Wei Yu
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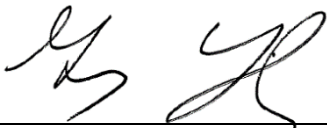
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Demurrer to Both Counts 1 and 2:

Pursuant to Penal Code section 1004(2), the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution, and article I, sections 7 and 15 of the California Constitution, Defendant further demurs to Counts 1 and 2 of the Indictment for the reason that they fail to provide proper notice of the allegations against him in violation of Penal Code section 952 and in violation of the U.S. and California Constitutions.

DATED: October 27, 2022

Gary S. Lincenberg
Thomas V. Reichert
Alexis A. Wiseley
Bird, Marella, Boxer, Wolpert, Nessim,
Drooks, Lincenberg & Rhow, P.C.

By: 

Gary S. Lincenberg
Attorneys for Defendant Eugene Wei Yu

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 This is a deeply misguided prosecution that attempts to criminalize what is, at best,
5 a civil breach of contract claim involving poll worker management software. The People
6 have pointed to a provision in a 150-page contract between the County and third party
7 Konnech, Inc. involving management of confidential data and, based on an alleged
8 violation of this contract provision, attempt to charge Konnech’s owner Eugene Yu with
9 embezzlement. These facts do not make out an embezzlement charge, and the complaint
10 should be dismissed.

11 The charges rest on Penal Code section 503, a 150-year-old statute. Under section
12 503, the prosecution would have to prove that the County entrusted Mr. Yu with its
13 property and that Mr. Yu fraudulently converted that property to his own use and intended
14 to deprive the County of its use. CALCRIM No. 1806. Such an entrustment – the creation
15 of some form of fiduciary relationship that is then abused – is a necessary predicate for an
16 embezzlement prosecution. Accordingly, the embezzlement statute has never been
17 successfully used to criminalize an ordinary breach of contract claim. To the contrary, the
18 caselaw is unanimous in *reversing* such convictions, holding that a simple breach of
19 contract case *cannot* support an embezzlement charge. Here, this is not even a close case.
20 The County entered into a commercial contract with Konnech. The County paid Konnech
21 money in exchange for goods and services in the form of poll worker management
22 software and support. There was no entrustment, and thus no conversion. Whether there
23 was a civil breach of a contract provision or not, this is not a case of criminal
24 embezzlement.

25 **II.**

26 **SUMMARY OF THE COMPLAINT**

27 The Complaint includes two counts. Count 1 alleges a conspiracy to commit the
28 crime of embezzlement of public funds in violation of Penal Code sections 503 and 514.

1 Count 2 alleges that Mr. Yu embezzled public funds in violation of the same two
2 provisions, Penal Code sections 503 and 514. Both Counts are directed to the same actions,
3 which are laid out in the overt acts pleaded as part of Count 1.

4 According to the overt acts, Mr. Yu’s company, Konnech Inc., entered into two
5 contracts, one in 2019 and another in 2020, with Los Angeles County (the “County”), for
6 poll worker management software (i.e., software that would allow the County to easily
7 manage the various tasks involved in supervising election poll workers). A copy of the
8 2020 contract is attached to the concurrently-filed request for judicial notice. Overt Acts 2-
9 5 all refer to, cite and quote verbatim from the 2020 contract between Konnech, Inc. and
10 the County.

11 Overt Acts 2-5 simply recite that Konnech, through Mr. Yu, entered into a contract
12 to provide secure poll worker management software for the County. It then quotes from
13 various provisions in the contract relating to information security requirements and general
14 assurances that Konnech would comply with applicable laws. Overt Act 6 asserts that
15 “Eugene Yu and other employees at Konnech Inc. were providing these services to Los
16 Angeles County using third-party contractors based in China” and that “Konnech
17 employees known and unknown sent personal identifying information of Los Angeles
18 County election workers to third-party software developers....”¹ Overt Act 7 alleges that a
19 project manager for Konnech’s contract with the County stated in a text that the Chinese
20 contractors had “superadministration” privileges and that this was a “huge security issue”.
21 Overt Act 8 alleges that the same project manager told Konnech employees in an internal
22 email that Konnech was “moving to a new stage in the company maturity” and that
23 “personal identifying information would no longer be included in the fixing of Konnech’s
24 software.”

25 While the complaint is misleadingly cryptic in its brevity, it is plain that the
26

27 ¹ It does not allege that this information was sent to contractors in China, but that seems
28 presumed.

1 prosecution arises from allegations that Konnech did not comply with certain provisions in
2 its County contract. It summarily suggests that Mr. Yu can be prosecuted for
3 embezzlement based on Konnech’s failure to comply with a data security provision of its
4 contract with the County Registrar. No California court has ever upheld an attempt to
5 prosecute this type of civil contract claim as criminal embezzlement.

6 **III.**

7 **ARGUMENT**

8 **A. This Is A Simple Civil Breach Of Contract Case, Not Embezzlement.**

9 This is a civil breach of contract case that has been dressed up in a costume that
10 doesn’t fit. The County entered into a contract with a company to provide software and
11 services. The County paid the company under the contract. Now the People allege that the
12 Company violated a provision of the contract, and try to stretch that alleged breach into a
13 crime of embezzlement.

14 Penal Code section 503 states that “Embezzlement is the fraudulent appropriation of
15 property by a person to whom it has been intrusted.” Cal. Penal Code § 503. As one court
16 has stated, mirroring the Judicial Council’s jury instruction for embezzlement:

17 The elements of embezzlement are “1. An owner entrusted his/her property
18 to the defendant; 2. The owner did so because he/she trusted the defendant;
19 3. The defendant fraudulently converted that property for his/her own
benefit; [and] 4. When the defendant converted the property, he/she intended
to deprive the owner of its use.”

20 *People v. Fenderson*, 188 Cal. App. 4th 625, 636, 116 Cal. Rptr. 3d 17, 26 (2010) (*quoting*
21 *CALCRIM 1806*); *accord People v. Selivanov*, 5 Cal. App. 5th 726, 764, 210 Cal. Rptr. 3d
22 117, 151 (2016).

23 The key element in embezzlement is that the defendant must have fraudulently
24 *converted* property that the defendant was holding *in trust* for another. “[E]mbezzlement
25 involves ‘an initial, lawful possession of the victim’s property, followed by its
26 misappropriation.’” *People v. Gonzales*, 2 Cal. 5th 858, 864, 392 P.3d 437, 441 (2017)
27 *accord People v. Vidana*, 1 Cal. 5th 632, 639, 377 P.3d 805, 809 (2016).

28 “The gist of the offense is the appropriation to one’s own use of property held by

1 him for devotion to a specified purpose other than his own enjoyment of it.” *People v.*
2 *Creath*, 31 Cal. App. 4th 312, 318, 37 Cal. Rptr. 2d 336, 340 (1995); accord *People v.*
3 *Sisuphan*, 181 Cal. App. 4th 800, 813-814, 104 Cal. Rptr. 3d 654, 665 (2010) (“The
4 offense of embezzlement contemplates a principal’s entrustment of property to an agent for
5 certain purposes and the agent’s breach of that trust by acting outside his authority in his
6 use of the property.”). As these authorities make plain, the key element is the act of taking
7 property being held in trust for another and converting it into one’s own use.

8 Here, the People have alleged neither an “entrustment” nor a “conversion”.
9 Konnech entered into an ordinary business contract with the County to provide certain
10 goods and services in exchange for payments of funds. The County paid Konnech under
11 the contract. (See Count 2, describing Konnech “as a contractor for Los Angeles County”.)
12 This was not money that was placed in trust with Konnech. At the time Konnech received
13 the payment, the money became Konnech’s money. It was not money that Konnech held *in*
14 *trust* for the County. Because there was no money held *in trust*, there can be no
15 *conversion*, and thus no *embezzlement*.

16 Under the People’s theory, any time a party is alleged to have breached a contract it
17 could be subject to prosecution for embezzlement. That is not the law – nor should it be. A
18 County contractor should not have to live in fear that any alleged breach of a contract can
19 be turned into a criminal prosecution. This case highlights that concern. There can be no
20 doubt that if, for example, the contract had specified that Konnech was required to hire
21 union employees but it was discovered that it hired non-union employees, this would be at
22 most a civil contract dispute. The law plainly does not support charging this as a criminal
23 embezzlement.

24 Cases from the housing/construction industry highlight the difference between
25 when an embezzlement charge will and will not lie, with the difference resting on how the
26 defendant came into possession of the money in question.

27 In *People v. Parker*, 235 Cal. App. 2d 100, 109, 44 Cal. Rptr. 909, 914 (Ct. App.
28 1965), the court *upheld* an embezzlement conviction involving the construction of new

1 homes. In that case, four home buyers each provided money to defendant’s company with
2 the assurance that “all money will be impounded in an escrow in accordance with Section
3 11013.2(a) of the Business and Professions Code.” *Id.* at 107–08, 44 Cal. Rptr. at 913. In
4 fact, “none of the money was deposited with a title company or paid into escrow. All these
5 payments were deposited in the operating accounts of one or another of [defendant’s]
6 building firms and consumed in business expenses.” *Id.* at 108, 44 Cal. Rptr. at 914.

7 The Court of Appeal had little trouble affirming the embezzlement conviction. It
8 first acknowledged that, “[s]ince possession of the property *in some kind of fiduciary*
9 *capacity is an essential element of the offense*, one cannot be guilty of embezzling money
10 when he has acquired title to it by contract or sale.” (Emphasis added.) But those were not
11 the facts here: “Unlike unregulated sellers, Parker did not receive the customers’ payments
12 as his own.” Here, “[t]he money was paid to him as an agent for the restricted purpose of
13 delivery to a title company. In this role, *he was the trustee not the owner of the money; its*
14 *ownership remained in the buyers.*” *Id.* at 109, 44 Cal. Rptr. at 914 (emphasis added).
15 Because there was an entrustment: when Parker exerted dominion and control over the
16 funds by diverting them into his own accounts, he had committed embezzlement.

17 In contrast, in *People v. Holder*, 53 Cal. App. 45, 48, 199 P. 832, 833–34 (Cal. Ct.
18 App. 1921), the Court of Appeal reversed an embezzlement conviction because there was
19 no similar entrustment – there was just an ordinary purchase/sale relationship. There, the
20 defendant, a construction contractor, entered into two contracts “with each of two lot
21 owners for the construction of a house. Each instrument provided for a contract price to be
22 paid [to defendant]. Certain sums, parts of the stipulated contract price, were paid [to
23 defendant] under each contract, but, instead of expending the money for labor and
24 materials, he appropriated to other uses amounts which, the prosecution claims, should
25 have gone for those purposes.” *Id.* at 47, 199 P. at 833.

26 The Court of Appeal held that defendant’s use of these funds, while not in
27 conformity with the terms of his contracts with the two customers, did not constitute
28 embezzlement because there was *no conversion of property* that had been *entrusted* to the

1 defendant; instead, it was an ordinary contractual arrangement where the moneys that the
2 defendant received were his by right, and thus could not be subject to a conversion:

3 The moneys which it is claimed were embezzled were paid to appellant
4 under his respective contracts with the lot owners. No part of the money thus
5 paid to him was the property of another. It was appellant's own property, and
6 his only. Appellant, therefore, could not justly be found guilty under section
7 503, which defines embezzlement as the "fraudulent appropriation of
8 property by a person to whom it has been intrusted." In no true sense of the
9 words can it be said that that which is absolutely one's own is property that
10 "has been intrusted" to him.

11 *People v. Holder*, 53 Cal. App. at 48, 199 P. 832, 833–34 (Cal. Ct. App. 1921).

12 As another appellate decision held in overturning an embezzlement conviction in
13 similar circumstances: "The record being barren of any evidence either to establish a trust
14 or to establish an agency, the most that can be said of it is that nothing more than a breach
15 of debtor-creditor relationship has been shown. ***To hold otherwise would be to conclude***
16 ***that every person who breaches a civil contract wherein the payment of money is***
17 ***involved is guilty of embezzlement.***" *People v. Petrin*, 122 Cal. App. 2d 578, 584, 265
18 P.2d 149, 152 (1954) (emphasis added); accord *People v. Wooten*, 44 Cal. App. 4th 1834,
19 1845, 52 Cal. Rptr. 2d 765, 772 (1996); *People v. Smith*, 155 Cal. App. 3d 1103, 1142, 203
20 Cal. Rptr. 196, 218 (Ct. App. 1984) ("because a breach of trust is essential to finding
21 embezzlement, when money or property is received under a contract of sale without
22 restrictions as to its use, title passes to the recipient and there can be no embezzlement in
23 such a transaction") *disapproved of on other grounds by Baluyut v. Superior Ct.*, 12 Cal.
24 4th 826, 911 P.2d 1 (1996); *People v. Kagan*, 264 Cal. App. 2d 648, 659, 70 Cal. Rptr.
25 732, 740 (Ct. App. 1968) (it is true that "some sort of fiduciary relationship is necessary,
26 and likewise true that if title passes to the taker then the crime is not embezzlement").

27 The warning of the *Petrin* court against criminalizing a simple breach of contract
28 claim was presciently written for these very facts: Konnech is alleged to have breached a
civil contract under which the County paid it money for goods and services. Now, the
People are seeking to make that the basis of an embezzlement prosecution. The law does
not support it. To hold otherwise would be to weaponize every one of the thousands of

1 County contracts – indeed, the People’s theory would reach *every* contract, private or
2 public – and allow them to become the basis for a criminal prosecution. The law does not
3 support this. Common sense does not support this.

4 Count 1 is a conspiracy to commit embezzlement. Count 2 is a claim of
5 embezzlement. Because the essential elements of an embezzlement claim are not present,
6 both Counts 1 and 2 should be dismissed.

7 **B. The Complaint Does Not Allege an Offense Against Mr. Yu Individually.**

8 As set out above, the People’s prosecution arises out of a contract between the
9 County and Konnech Inc. Overt Acts 1 through 5 refer to contracts between the County
10 and Konnech. Mr. Yu is mentioned merely as the individual who signed the agreement “on
11 behalf of Konnech”. Overt Acts 6 through 8 do not allege conduct by Mr. Yu. There is no
12 allegation of any wrongdoing, either in terms of breaching a contract or otherwise, by Mr.
13 Yu individually. To the extent the County paid money under this contract, it was paid to
14 Konnech. To the extent any such money could – wrongly – be characterized as having
15 been *entrusted*, it was entrusted to Konnech. And to the extent any such money could –
16 again, wrongly – be characterized as having been *converted*, it was converted by Konnech,
17 the contracting party.

18 The Overt Acts do not allege any misconduct by Mr. Yu. As a result, the complaint
19 against him should be dismissed.

20 **C. The Complaint Fails To Give Constitutionally-Adequate Notice To Mr. Yu
21 That His Conduct Could Be The Subject Of Criminal Prosecution.**

22 In addition to the grounds enumerated in Penal Code section 1004, a defendant may
23 demur to an accusatory pleading on the basis that it fails to provide constitutionally
24 required notice of the accusations against him. *See People v. Jordan*, 19 Cal. App. 3d 362,
25 369 (1971) (“Does a bare literal compliance with section 952 obviate a demurrer under
26 section 1004? We hold it does not, where such compliance fails to give the accused
27 constitutionally adequate notice.”); *Lamadrid v. Municipal Court*, 118 Cal App. 3d 786,
28 790 (1981) (“[I]t is clear that . . . a pleading which satisfies section 952 will not invariably,

1 when tested by demurrer, satisfy due process notice requirements”). Thus, “where the
2 accusatory pleading is attacked by a demurrer for failure to comply with constitutional
3 requirements of notice and a consideration of the pleading and transcript leads to a
4 conclusion uncertainty puts the accused to a material disadvantage, the court acts within its
5 discretion by sustaining the demurrer and requiring more specific pleading.” *Jordan*, 19
6 Cal. App. 3d at 371.

7 “No one may be required at peril of life, liberty or property to speculate as to the
8 meaning of penal statutes. All are entitled to be informed as to what the State commands or
9 forbids.” *Lanzetta v. State of New Jersey*, 306 U.S. 451, 453 (1939); *see also People v.*
10 *Heitzman*, 9 Cal. 4th 189, 199-200 (1994). This is a constitutional principle based on a
11 policy of fair notice. Laws must “give the person of ordinary intelligence a reasonable
12 opportunity to know what is prohibited, so that he may act accordingly” and must “provide
13 explicit standards for those who apply them.” *Grayned v. City of Rockford*, 408 U.S. 104,
14 108-09 (1972).

15 The canon of strict construction of criminal statutes, or the rule of lenity, ensures
16 fair warning by resolving ambiguity in a criminal statute as to apply it only to conduct
17 clearly covered. *People v. Spurlock*, 114 Cal. App. 4th 1122, 1132 (2003). The rule has
18 been described as “a sort of ‘junior version of the vagueness doctrine’ [under the due
19 process clause].” *Id.* The touchstone of this analysis is “whether the statute, either standing
20 alone or as construed, made it reasonably clear at the relevant time that the defendant’s
21 conduct was criminal.” *Id.* (citing *United States v. Lanier*, 520 U.S. 259, 266–267 (1997);
22 *People v. Castenada*, 23 Cal. 4th 743, 751 (2000)). Courts apply “the rule of lenity [to]
23 ensure[] that criminal statutes will provide fair warning concerning conduct rendered
24 illegal.” *People ex rel. Lungren v. Superior Ct.*, 14 Cal. 4th 294, 313 (1996).

25 Here, as addressed above, the breach of a commercial contract that does not involve
26 a fiduciary relationship has *never* supported a conviction for embezzlement. Mr. Yu would
27 not be on fair notice that a breach of a contract provision could result in a criminal
28 prosecution for embezzlement – particularly when he was not even a party to the contract

1 in question, but merely signed it on behalf of a company. The “touchstone” is not present
2 here: the statute does not make it “reasonably clear at the relevant time that the defendant’s
3 conduct was criminal.” *Spurlock*, 114 Cal. App. 4th at 1132.

4 **IV.**

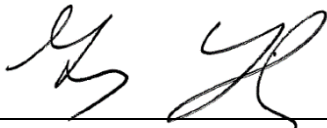
5 **CONCLUSION**

6 The demurrer should be sustained, and the complaint dismissed.

7
8 DATED: October 27, 2022

Respectfully submitted,

9 Gary S. Lincenberg
10 Thomas V. Reichert
11 Alexis A. Wiseley
12 Bird, Marella, Boxer, Wolpert, Nessim,
13 Dooks, Lincenberg & Rhow, P.C.

14 By: 
15 _____
16 Gary S. Lincenberg
17 Attorneys for Defendant Eugene Wei Yu
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PROOF OF SERVICE

The People of the State of CA v. Eugene Yu
Case No. BA509784

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 1875 Century Park East, 23rd Floor, Los Angeles, CA 90067-2561.

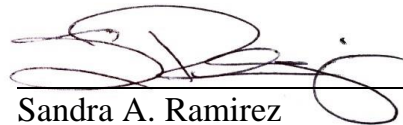
On October 27, 2022, I served the following document(s) described as **NOTICE OF DEMURRER AND DEMURRER TO FELONY COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused the document(s) to be sent from e-mail address sramirez@birdmarella.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on October 27, 2022, at Los Angeles, California.



Sandra A. Ramirez

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SERVICE LIST
The People of the State of CA v. Eugene Yu
Case No. BA509784

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