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12 Attorneys for Ryan Hee

13 United States District Court
14 District of Nevada

15 United States of America,
16 Plaintiff,
17 v.
18 Ryan Hee,
19 Defendant.

20 Case No. 2:21-cr-00098-RFB-BNW

21 Defendant Ryan Hee’s Motion to Dismiss
22 or in the Alternative Motion to Suppress¹

23 **Memorandum of Points and Authorities**

24 Defendant Ryan Hee, by and through his attorneys of record, Richard A. Wright Esq.
25 and Sunethra Muralidhara Esq., Wright Marsh & Levy, move to dismiss the charges brought
26 against Mr. Hee in the Indictment, or alternatively, to suppress the statements illegally obtained
by law enforcement on October 31, 2019.

Mr. Hee contends that his Fourth, Fifth, Sixth, and Fourteenth Amendment rights were
violated necessitating dismissal of the Indictment or suppression of his statements and any
inculpatory evidence found through a search of his computer and personal cellular phone.

¹ Certification: This Pretrial Motion is timely filed. ECF 32.

1 Additionally, Mr. Hee asserts that there was unethical conduct by the prosecutors that requires
2 dismissal or suppression, and that meets the threshold for prosecutorial misconduct. Because of
3 their misconduct and the result that they may be witnesses, three Antitrust Division attorneys²
4 should be disqualified.³

5 What did the government do that was unconstitutional, unethical, and amounted to
6 prosecutorial misconduct? In sum—the government directed a solo FBI agent to interview Mr.
7 Hee, a represented party, without counsel present and without informing his counsel, and further
8 provided access to three Antitrust Division attorneys by a real-time audio livestream link of Mr.
9 Hee’s interview without informing Mr. Hee that his interview was being broadcasted or that
10 these prosecutors could be surreptitiously listening to his interview. This conduct makes Mr.
11 Hee’s consent involuntary. The government should not be rewarded with the fruits of its
12 transgressions. The indictment should be dismissed, or in the alternative Mr. Hee’s statements
13 suppressed.

14 **I. Introduction and Pertinent Factual History**

15 Ryan Hee is a 37-year-old man with no criminal history. He has always been a law-
16 abiding person and a rule-follower. He has a bachelor’s degree and has maintained consistent
17 employment through his adult life.

21 ² The three Antitrust Division Attorneys who Mr. Hee seeks to disqualify are Albert B.
22 Sambat, Paradi Javandel and Ken Sakurabayashi. A more thorough analysis for disqualification
and their unethical conduct is provided herein.

23 ³ Typically, a motion to dismiss for prosecutorial misconduct and a motion to disqualify
24 are filed as separate pretrial motions. However, because of the nature of the prosecutorial
25 misconduct alleged and how deeply intertwined the facts are with Mr. Hee's separate request
26 for dismissal or suppression under the Fourth, Fifth, Sixth, and Fourteenth Amendments, he
provides the arguments herein for the Court to consider as additional basis for dismissal or
suppression.

1 VDA OC, LLC, formerly Advantage on Call, LLC (“AOC”)⁴ was a medical staffing
2 company that employed nurses who were assigned to certain facilities to provide medical care
3 to individuals. In October of 2016, Mr. Hee was the Regional Manager at Advantage on Call,
4 LLC. In 2016, Individual 1 was the accounts manager at Company A, a medical staffing
5 company that also employed nurses who were assigned to certain facilities to provide medical
6 care to individuals. There were times where nurses from AOC and Company A would work
7 side-by-side within the same facility.

8 On March 30, 2021, the government filed an indictment against Ryan Hee and VDA
9 OC, LLC formerly Advantage on Call, LLC for allegedly violating 15 U.S.C. § 1, Conspiracy
10 in Restraint of Trade. ECF 1. Trial is currently set for February 28, 2022. ECF 32.

11 **The government’s investigation**

12 The government alleges that beginning in or around October 2016 and continuing at
13 least until in or around July 2017, AOC, Mr. Hee, and others known and unknown to the Grand
14 Jury knowingly entered into and engaged in a conspiracy to suppress and eliminate competition
15 for the services of nurses by agreeing to allocate nurses and to fix the wages of those nurses.
16 ECF 1 at 4. As part of the government’s investigation into the alleged conduct, the government
17 served a grand jury subpoena on Successor AOC on October 30, 2019. In fact, the government
18 had a telephone conversation with the general counsel for Cross Country, the parent company
19 of Successor AOC, on October 30, 2019. The government emailed her a copy of the subpoena.
20 At this time, the government, including the FBI, was on notice that Cross Country, the parent
21 company of Successor AOC, was represented by counsel with respect to this investigation.

22
23 ⁴ VDA OC, LLC was previously known as and did business as Advantage On Call,
24 LLC. In 2017, Advantage On Call was sold to Cross Country Healthcare, Inc. In October of
25 2019, Cross Country was the parent company of a reconstituted Advantage On Call. In this
26 brief, to differentiate the AOC entities before and after the sale, AOC as a subsidiary of Cross
Country will be referred to as “Successor AOC” while AOC, the original company subsequently
known as VDA OC, will be referred to only as “AOC.”

1 Despite this knowledge and unbeknownst to Cross Country's General Counsel, a solo
2 FBI agent named Cody Fryxell (Agent Fryxell) appeared at Ryan Hee's home and subsequently
3 traveled to Cross Country's office on October 31, 2019, interviewed Mr. Hee, and obtained his
4 permission to copy the contents of his cellphone and company-issued computer. Allegedly
5 during this October 31, 2019 interview, Mr. Hee made incriminating statements. The
6 conversation between Mr. Hee and the solo FBI agent is memorialized in a 2-page FD-302. *See*
7 *Bates LVNP-FBI_00000033*. Despite counsel's written request, no additional or underlying
8 notes or recordings of this meeting have been provided to defense counsel in discovery. The
9 FD-302 states that Agent Fryxell advised Mr. Hee of his identity as the interviewing Agent and
10 of the nature of the interview. Agent Fryxell did not indicate that three Antitrust Division
11 attorneys, two of whom now serve as prosecutors in this case, had real-time audio access to the
12 interview through a livestream link provided by Agent Fryxell.

13 On November 1, 2019, counsel for Cross Country sent correspondence to the
14 Department of Justice, Antitrust Division raising concerns about the government's investigation
15 and the interview of Mr. Hee the previous day. Counsel for Cross Country complained and
16 objected that the FBI had approached Mr. Hee directly and interviewed him at the Company
17 without counsel's knowledge and without Mr. Hee knowing of the existence of a criminal
18 investigation and grand jury subpoena.

19 On November 5, 2019, DOJ Antitrust Attorney Albert Sambat responded to Counsel's
20 objection. The government stated that Mr. Hee's interview did not violate any contact-with-
21 represented-party rules because, in the government's view, Cross Country's counsel could not
22 simultaneously represent both the company and Mr. Hee. In the government's opinion, such
23 joint representation would create a conflict of interest as both the company and Mr. Hee could
24 implicate one another in the criminal conduct under investigation. The government cited to
25
26

1 *United States v. Powe*, 9 F.3d 68 (9th Cir. 1993) stating that contact with a current employee of
2 a company pre-indictment, in a non-custodial setting is authorized by law.

3 **The government’s unconstitutional and unethical conduct finally disclosed to the**
4 **defendants on July 15, 2021—almost two years later**

5 On July 15, 2021, post-indictment and almost two years after Mr. Hee’s interview with
6 the FBI, the government responded to a discovery request from the defendants who had asked
7 the government, among many things, for “notes, including contemporaneous notes, by FBI
8 Agents related to interviews in the investigation of this case and otherwise relevant to this case.”

9 In partial response to this request the government simply stated:

10 [T]he government is advising you that while the FBI’s interview of
11 Mr. Hee on October 31, 2019 was not recorded, three Antitrust
12 Division Attorneys, Albert B. Sambat, Paradi Javandel, and Ken
13 Sakurabayashi, *had real-time audio access to the interview through*
14 *a livestream link* provided by FBI SA Cody Fryxell. Mr. Hee was
not informed that the attorneys could listen to the interview. No
other notes were prepared by anyone of this interview other than SA
Fryxell.” (Emphasis added).

15 This belated disclosure raises serious concerns as to the accuracy of the information
16 contained in the FD-302. Mr. Hee asserts that the FD-302 is neither accurate nor complete and
17 omits important details of his interview with FBI Agent Fryxell. To start and at minimum:

- 18 • The FD-302 provided regarding the October 31, 2019 interview with Mr. Hee fails to
19 state that three Antitrust Division Attorneys *had real-time audio access to the interview*
20 *through a livestream link* provided by FBI SA Cody Fryxell; It further fails to state that
21 these three Antitrust Division Attorneys could listen to the interview;
- 22 • The FD-302 fails to explain why a single FBI agent interviewed Mr. Hee in violation of
23 FBI policy which requires two FBI agents to attend witness interviews;
- 24 • There are other statements that were made during this interview that were not accurately
25 memorialized or are completely absent from this report; and

- Mr. Hee was a represented party at the time of the interview. Even if he were not, Mr. Hee asserts that there are serious questions as to whether he invoked the right to counsel during the interview on October 31, 2019.

On August 3, 2021, Mr. Hee and VDA OC, LLC jointly responded by letter to DOJ's shocking disclosure expressing concern and requesting additional information about the "livestream link" that provided "real-time audio access." To date, the defendants have not received a response. Unanswered questions include whether or not the attorneys with real-time access also had the ability to communicate in real-time with Agent Fryxell. Given the government's lack of response, the instant motion is being filed.

Because of the government's recently disclosed egregious, unethical, and unconstitutional conduct during the October 31, 2019 interview, the indictment should be dismissed or alternatively Mr. Hee's statements suppressed. By hiding the true nature and scope of the interview and having prosecutors surreptitiously listen to the interview, the government diminished Mr. Hee's understanding of the context of the interview and further undermined his right to counsel. Had Mr. Hee known that three Antitrust Division Attorneys were listening to his interview, that there was an ongoing criminal investigation (as evidenced by the grand jury subpoena), or that the government had contacted general counsel for his employer a day prior, he would have invoked his right to counsel sooner or potentially asserted his rights against self-incrimination and refused to answer questions or allow the FBI to copy the contents of his cell phone and company-issued computer without proper process.

This unconstitutional governmental conduct gives rise to numerous constitutional and ethical violations requiring dismissal or alternatively suppression.

1 **II. The Legal Landscape of Voluntary Consent and the Government's Burden**
2 **in showing Mr. Hee's Consent to Speak With the FBI Was Voluntary.**

3 There is an intimate relationship between the Fourth Amendment's guarantee against
4 unreasonable search and seizure, the Fifth Amendment's right against self-incrimination and
5 the Sixth amendment's right to counsel. "They throw great light on each other. For the
6 'unreasonable searches and seizures' condemned in the [F]ourth amendment are almost always
7 made for the purpose of compelling a man to give evidence against himself, which in criminal
8 cases is condemned in the [F]ifth amendment; and compelling a man 'in a criminal case to be
9 a witness against himself,' which is condemned in the fifth amendment, throws light on the
10 question as to what is an 'unreasonable search and seizure' within the meaning of the fourth
11 amendment." *Boyd v. United States*, 116 U.S. 616, 633, 6 S. Ct. 524, 534, 29 L. Ed. 746 (1886).
12 All of this is compounded when a person invokes the right to counsel or is considered a
13 represented party, yet the government tramples on these constitutional guarantees.

14 Statements that are coerced, or given involuntarily, violate due process and cannot be
15 used at trial for any purpose. *Mincey v. Arizona*, 437 U.S. 385, 398, 98 S.Ct. 2408, 2416, 57
16 L.Ed.2d 290 (1978). The appropriate test for the voluntariness of a statement is whether a
17 defendant's will was overborne by the totality of the circumstances. It requires an examination
18 of the characteristics of the accused and the interrogation itself. *Dickerson v. United States*, 530
19 U.S. 428, 434 (2000). *See e.g. Reck v. Pate*, 367 U.S. 433, 440 (1961)("[A]ll the circumstances
20 attendant upon the confession must be taken into account"); *see also Malinski v. New York*, 324
21 U.S. 401, 404 (1945)("If all the attendant circumstances indicate that the confession was
22 coerced or compelled, it may not be used to convict a defendant"). The burden is on the
23 government to prove by a preponderance of the evidence that a confession is voluntary. *United*
24 *States. v. Tingle*, 658 F.2d 1332, 1335 (9th Cir. 1981). Furthermore, if a suspect is interrogated
25 in the absence of an attorney, the government must affirmatively prove not only that the waiver
26 was voluntary, but also that it constituted "a knowing and intelligent relinquishment or

1 abandonment of a known right or privilege.” *Edwards v. Arizona*, 451 U.S. 477, 482 (1981)
2 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). The voluntariness analysis focuses on the
3 coercive actions of law enforcement and the mental condition of the defendant, to determine
4 whether the defendant’s will was “overborne” by the environment in which he was questioned
5 and the interrogator’s actions. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). In order
6 to be “knowing and intelligent,” a waiver must have been “made with a full awareness of both
7 the nature of the right being abandoned and the consequences of the decision to abandon it.”
8 *Moran v. Burbine*, 475 U.S. 412, 421 (1986). This analysis likewise depends “upon the
9 particular facts and circumstances surrounding the case, including the background, experience,
10 and conduct of the accused.” *Edwards*, 451 U.S. at 482; *see also United States v. Morning*, 64
11 F.3d 531, 533 (9th Cir. 1995) (“although we have established these factors to aid in the decision
12 making process, the full richness of every encounter must be considered ... Every encounter has
13 its own facts and its own dynamics. So does every consent”).

14 When reviewing a government actor’s conduct under the context of a Fourth and Fifth
15 Amendment violation, it may be an

16 obnoxious thing in its mildest and least repulsive form; but
17 illegitimate and unconstitutional practices get their first footing
18 in that way, namely, ***by silent approaches and slight deviations***
19 from legal modes of procedure. This can only be obviated by
20 adhering to the rule that constitutional provisions for the security of
21 person and property should be liberally construed. A close and
22 literal construction deprives them of half their efficacy, and leads to
23 gradual depreciation of the right, as if it consisted more in sound
24 than in substance. It is the duty of courts to be watchful for the
25 constitutional rights of the citizen, and against any ***stealthy***
26 ***encroachments thereon***. [The government’s] motto should be *obsta*
principiis.

24 *Boyd*, 116 U.S. at 635; (***emphasis added***).

1 **III. Dismissal or suppression is also required because the government cannot**
2 **show that Mr. Hee's consent was voluntary**

3 The government overstepped the constitutional protections afforded to Mr. Hee under
4 the Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution. The government had
5 issued a grand jury subpoena to Successor AOC and knew Cross Country's General Counsel
6 was representing the company, Mr. Hee's employer. Yet the government contacted Mr. Hee
7 without advising counsel. The constitutional violations occurred when:

8 1. FBI Agent Fryxell, at the direction of the DOJ Antitrust Division, approached Mr.
9 Hee on October 31, 2019 to discuss the exact same investigation and the subjects of the grand
10 jury subpoena, knowing or in reckless disregard of the fact that he was represented by counsel
11 by virtue of his employer's representation;

12 2. FBI Agent Fryxell conducted an extensive interview of Mr. Hee and failed to inform
13 him as to the true nature and scope of the investigation;

14 3. FBI Agent Fryxell obtained Mr. Hee's written consent to download the contents of
15 his personal cell phone and work-issued computer knowing or in reckless disregard of the fact
16 that he was represented by counsel and the computer was corporate property;

17 4. FBI Agent Fryxell provided access to a real-time audio livestream link to three
18 Antitrust Division Attorneys and failed to inform Mr. Hee that the prosecutors could listen to
19 the interview;

20 6. The Antitrust Division Attorneys failed to announce their presence or require Agent
21 Fryxell to inform Mr. Hee that Agent Fryxell had provided a real-time audio access to three
22 prosecutors.

23 7. The government knowingly produced discovery to the defense that contained
24 inaccurate information and misrepresentations.

25 Under the totality of the circumstances, Mr. Hee's consent to the October 31, 2019
26 interview and search was involuntary as he was unable to make a knowing and informed

1 decision to speak with the FBI and government attorneys. In order for Mr. Hee's consent to be
2 knowing and intelligent, a waiver must have been made with a full awareness of both the nature
3 of the right being abandoned and the consequences of the decision to abandon it. Mr. Hee
4 consented to speak with a single FBI agent but was not even informed that his interview also
5 involved DOJ attorneys and that he was the focus of a criminal investigation. Without that
6 crucial information, he was not apprised of the nature of the rights he was abandoning and the
7 consequences of the decision to abandon those rights.

8 The Court should dismiss the indictment or alternatively suppress Mr. Hee's statements
9 because his participation in the October 31, 2019 interview was involuntary.

10 **IV. Mr. Hee was represented by counsel at the time of the October 31, 2019**
11 **interview and the government violated his Fifth, Sixth and Fourteenth**
12 **Amendment rights by engaging with this represented party**

13 Mr. Hee was a represented party but was questioned outside the presence of his counsel
14 and unbeknownst to his counsel. The government has the burden of showing that Mr. Hee
15 knowingly and intelligently relinquished or abandoned his right to counsel. The FD-302 gives
16 no indication that he did so. Despite knowing that Cross Country and Successor AOC had
17 counsel, the government skirted the provisions of the Fifth and Sixth Amendment and spoke
18 with an employee of the company to obtain information it sought in an active investigation
19 about an alleged antitrust violation. The government later represented that it believed Cross
20 Country's General Counsel could not simultaneously represent the company and Mr. Hee
21 because such representation created a conflict of interest. To defend that belief, the
22 government, after the interview, informed the defendants that it relied on Ninth Circuit
23 precedent in *United States v. Powe*, 9 F.3d 68 (9th Cir. 1993).

24 The government's reliance on *United States v. Powe*, is misplaced. Mr. Powe and his
25 co-defendants were deputy sheriffs with the Los Angeles County Sheriff's department charged
26 with conduct related to drug theft. One of his co-defendants agreed to become a cooperating

1 witness for the prosecution. At the request of the government, the co-defendant met with Mr.
2 Powe before he was charged or arrested and secretly recorded their conversations. While the
3 conduct in *Powe* was later approved by a court, the holding in *Powe* is inapplicable in the case
4 at bar for one main reason: the government in *Powe* used an *undercover* cooperating witness
5 who was also a co-defendant to execute a covert investigative technique. The Court reasoned
6 that the “most effective law enforcement techniques for investigating complex crimes” is to use
7 undercover contacts. *Id.* at 70.

8 Here, the government wasn’t using an undercover agent or cooperating witness nor was
9 it using any covert investigative technique. Rather, the day before the interview it served a
10 subpoena on Cross Country and its affiliate, Successor Advantage On Call, had a conversation
11 with General Counsel of Cross Country, knew Mr. Hee was the regional manager of Advantage
12 On Call, and that he could have information about the company that could bind or be imputed
13 to the organization for purposes of criminal liability. This is precisely the situation that the
14 Rules of Professional Conduct were meant to address. Additionally, *Powe* dealt with a single
15 defendant and his right to counsel versus a corporation and its right to counsel. The analysis as
16 to who is a covered person for attorney-client purposes is a different analysis and one not
17 contemplated by *Powe*.

18 The government is in no position and has no authority to determine when a conflict of
19 interest occurs in the representation of a defendant. That ethical obligation and analysis rests
20 upon the defense attorney to discern and the government’s attempted usurpation of that role is
21 suspect. *See McPhearson v. Michaels Co.*, 96 Cal. App. 4th 843, 849–50, 117 Cal. Rptr. 2d
22 489, 495 (2002) (noting that “where. . . the persons who are personally concerned with the
23 alleged conflict of interest are not objecting, and disqualification is sought by a litigation
24 adversary who is not personally interested in the alleged conflict, courts must be skeptical”).

1 On this basis, the Court should dismiss the indictment or suppress Mr. Hee’s statements
2 made during the October 31, 2019 interview. The government knew or proceeded in reckless
3 disregard of the fact that Mr. Hee was a represented party. Statements obtained in violation of
4 the Constitution require dismissal or suppression.

5 **V. The Three Antitrust Division Attorneys’ unethical conduct requires**
6 **dismissal of the indictment or suppression of Mr. Hee’s statements**

7 In order to warrant dismissal for prosecutorial misconduct, the misconduct must be “so
8 grossly shocking and so outrageous as to violate the universal sense of justice.” *United States*
9 *v. King*, 200 F.3d 1207, 1213 (9th Cir. 1999) (citation and internal quotations omitted); *United*
10 *States v. Green*, 962 F.3d 938, 941 (9th Cir. 1992) (citation omitted). To warrant dismissal on
11 this ground, a defendant “must prove that the government’s conduct was ‘so excessive, flagrant,
12 scandalous, intolerable, and offensive as to violate due process.’” *United States v.*
13 *Edmonds*, 103 F.3d 822, 825 (9th Cir.1996) (quoting *United States v. Garza–Juarez*, 922 F.2d
14 896, 904 (9th Cir. 1993).

15 The Ninth Circuit has indicated that suppression of evidence may be an appropriate
16 remedy for prosecutorial misconduct amounting to a Fifth Amendment due
17 process violation. See *United States v. Rogers*, 751 F.2d 1074, 1078 (9th Cir.
18 1985). Furthermore, the Supreme Court noted that when there have been searches and seizures
19 in violation of the Fourth Amendment, the remedy has been to deny the prosecution the fruits
20 of its transgression by suppressing the evidence at trial. *United States v. Morrison*, 449 U.S.
21 361, 364, 101 S.Ct. 665, 668-69 (1981).

22 Here, the Antitrust Division’s conduct justifies either remedy.

23 **A. Obtaining real-time audio access to Mr. Hee’s interview without**
24 **disclosing that access to Mr. Hee is tantamount to recording the**
25 **interview without consent and violates counsel’s ethical obligations.**

26 Prosecutors have a legal and ethical duty to announce their presence and identify
themselves as attorneys when questioning a person in connection with an investigation. The

1 three Antitrust Division Attorneys failed to meet their ethical obligation to announce that they
2 each had real-time audio access through a livestream link provided by Agent Fryxell during
3 Mr. Hee’s October 31, 2019 interview. At minimum, the prosecutors had an obligation to direct
4 Agent Fryxell to make this disclosure to Mr. Hee. Their failure to do so was fraudulent and a
5 reckless or intentional misrepresentation by omission. While law enforcement may use
6 disinformation when questioning a suspect, prosecutors must never engage in disinformation.

7 Title 28 U.S.C. § 530B promulgates the ethical standards for attorneys for the
8 Government. It states that prosecutors are “subject to State laws and rules, and local Federal
9 court rules, governing attorneys in each State where such attorney engages in that attorney’s
10 duties, to the same extent and in the same manner as other attorneys in that State.” 28 U.S.C.
11 § 530B. Mr. Hee submits that in this case, the three Antitrust Division attorneys are subject to
12 the professional rules of the states in which each are licensed, the State of California where the
13 attorneys are practicing law, the State of Nevada where the contact took place, and where the
14 instant case is pending.⁵ As a result, the prosecutors in this case must follow the Professional
15 Rules of Conduct in at least both California and Nevada. Any misconduct in either state may
16 rise to an ethical violation.

17 Under the California Rules of Professional Conduct, 8.4(c) “[i]t is professional
18 misconduct for a lawyer to...(c) engage in conduct involving dishonesty, fraud, deceit, or
19 reckless or intentional misrepresentation.” “Fraud” or “fraudulent” means conduct that is
20 fraudulent under the law of the applicable jurisdiction and has a purpose to deceive. *See* CA
21 ST RPC Rule 1.0.1(d). Under the Nevada Rules of Professional Conduct, 8.4(c), it is

22
23 ⁵ The indictment in this case establishes that DOJ attorney Albert B. Sambat and Paradi
24 Javandel are licensed to practice attorneys in the State of California. A search of the State Bar
25 of California also confirms that Ken Sakurabayashi is licensed in California. *See*
[http://members.calbar.ca.gov/fal/LicenseeSearch/QuickSearch?FreeText=Ken+Sakurabayashi
&SoundsLike=false](http://members.calbar.ca.gov/fal/LicenseeSearch/QuickSearch?FreeText=Ken+Sakurabayashi&SoundsLike=false)

1 professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit
2 or misrepresentation. Nevada Rules of Professional Conduct, 8.4 (d) provides that “fraud” or
3 “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the
4 applicable jurisdiction and has a purpose to deceive. *See* NRPC § 1.0(d).

5 On June 24, 2001, the ABA adopted Formal Opinion 01-422. ABA Comm. on Ethics
6 and Prof'l Responsibility, Formal Op. 01-422 (2001). Formal Opinion 01-422 permits an
7 attorney to secretly record conversations with non-clients in states allowing recording on one-
8 party consent. The opinion's two prohibitions are that an attorney cannot secretly record a
9 conversation in a jurisdiction in which recording with only one-party consent is illegal and an
10 attorney may not falsely say that the conversation is not being recorded. *Id.*

11 In *Nissan Motor Co., Ltd. v. Nissan Computer Corp.*, 180 F.Supp.2d 1089 (C.D. Cal.
12 2002), the Court stated that “[e]thical problems are clearly presented by an attorney’s tape
13 recording of another party without his or her knowledge or consent.” The Court further found
14 that “[i]nherent in the undisclosed use of a recording device is an element of deception, artifice,
15 and trickery which does not comport with the high standards of candor and fairness by which
16 all attorneys are bound.” *Id.*

17 Nevada Rules of Professional Conduct Rule 8.4 is substantially similar to the California
18 rule. Under either rule, the government’s conduct was fraudulent. By failing to announce their
19 presence, the government’s conduct was intentionally misleading as to the nature of the
20 interview. This unethical conduct, which is tantamount to recording a conversation without
21 consent, requires that, at a minimum, Mr. Hee’s statements to Agent Fryxell should be
22 suppressed. *See People v. Walker*, 145 Cal. App. 3d 886, 895, 193 Cal. Rptr. 812, 817 (Ct.
23 App. 1983) (suppressing statements by a defendant when a prosecutor authorized a murder
24 victim’s sister to tape record conversations with a represented defendant).

1 **B. The government’s unconstitutional intrusion upon a represented**
2 **party violates ethical standards**

3 The Antitrust Division attorneys’ conduct further violated their ethical responsibilities
4 because Mr. Hee was a represented party at the time of the October 31, 2019 interview.⁶ Under
5 California’s Rules of Professional Conduct 4.2, a lawyer shall not communicate directly or
6 indirectly about the subject of the representation with a person the lawyer knows to be
7 represented by another lawyer. Additionally, this rule states that for cases of a represented
8 corporation, this rule prohibits communications with managing agents of the organization or a
9 current employee if the subject of the communication is an act or omission of such person in
10 connection with the matter, which may be binding upon or imputed to the organization for
11 purposes of criminal liability.

12 The Nevada Rule of Professional Conduct 4.2 states:

13 **Communication With Person Represented by Counsel.** In
14 representing a client, a lawyer shall not communicate about the
15 subject of the representation with a person the lawyer knows to be
16 represented by another lawyer in the matter, unless the lawyer has
17 the consent of the other lawyer or is authorized to do so by law or a
18 court order.

19 In Nevada, the law is clear, ex parte contact with managerial employees of a corporation
20 is prohibited by the Rule. Even non-managerial employees of a corporation may still be

21 _____
22 ⁶ The Antitrust Division is also facing allegations in another case that their attorneys
23 improperly contacted represented parties by seeking interviews with executives of a represented
24 company without notifying counsel. *See United States v. Teva Pharmaceuticals, USA, et al.*,
25 Crim. No. 2:20-cr-200-RBS (E.D. Pa.) at EC 117, 120, 133, 139. The court in that pending
26 criminal case ordered briefing on defendant Glenmark’s Emergency Motion for Relief from
Compulsory Interviews and Related Misconduct by the Antitrust Division. (ECF 120). There,
as here, the Antitrust Division asserted that it relied on its independent determination that the
company and its employees had a conflict that prohibited counsel’s representation of the
individuals. (*See* ECF 133 at 4,9; ECF 139 at 7-8.)

1 considered a represented party for purposes of NRPC 4.2 in certain circumstances. The Nevada
2 Supreme Court addressed the application of Rule 4.2 in *Palmer v. Pioneer Inn Associates, Ltd.*,
3 59 P.3d 1237 (Nev. 2002), and it adopted the “managing-speaking agent test.” The function of
4 this rule “is to preclude the interviewing of those corporate employees who have the authority
5 to bind the corporation. [Employees should be viewed as within the anti-contact rule where they
6 have] managing authority sufficient to give them the right to speak for, and bind, the
7 corporation.” See *Palmer v. Pioneer Inn*, 59 P.3d at 1248 (citing this excerpt of *Wright v. Group*
8 *Health Hospital*, 691 P.2d 564 (Wash. 1984).

9 Thus, under either states’ definition, Mr. Hee was a represented party at the time of the
10 interview. Mr. Hee was the regional manager of Advantage On Call and a managing agent under
11 California and Nevada’s definition of represented party. Alternatively, and at minimum, Mr.
12 Hee was an employee who had information that could be binding upon or imputed to the
13 organization for purposes of criminal liability. The DOJ Antitrust Division knew that his
14 employer was represented by counsel and that representation included Mr. Hee. The
15 government admitted as much in its November 5, 2019 correspondence to counsel for Cross
16 Country, asserting that they could speak with Mr. Hee because Mr. Hee could provide
17 information that could implicate the company.

18 The Antitrust Division Attorneys violated their ethical obligations by contacting Mr.
19 Hee and conducting or authorizing an interview despite knowledge that he was a represented
20 party. This conduct requires dismissal of the indictment or, alternatively, suppression of Mr.
21 Hee’s statements.

1 **VI. This Court Should Disqualify the Three Antitrust Division Attorneys Who**
2 **Had Real-Time Audio Access Through a Livestream Link Provided By FBI**
3 **Agent Fryxell**

4 The three DOJ Antitrust Division attorneys must be disqualified from prosecuting this
5 case. Citing from the State Bar of Nevada's Standing Committee on Ethics and Professional
6 Responsibility Formal Opinion No. 27 (Revised and Reissued September 2019) at p. 8-9:

7 [w]hen analyzing a potential breach of Rule 4.2, the court will not
8 automatically disqualify counsel even if the ex parte contact fails the
9 managing-speaking agent test. *See Rebel Commc'ns, LLC v. Virgin*
10 *Valley Water Dist.*, No. 2:10-CV-00513-LRH-GW, 2011 WL
11 677308, at *9 (D. Nev. Feb. 15, 2011). Rather, if an attorney is
12 determined to have contacted a managing-speaking agent ex parte,
13 the court will conduct an additional analysis weighing the prejudices
14 that the parties will suffer from disqualification against the public
15 interest in the administration of justice. *See Rebel Commc'ns, LLC*
16 *v. Virgin Valley Water Dist.*, at *9 (D. Nev. Feb. 15, 2011). Some
17 courts have found that the information gained through breach of the
18 Rule must be material to the disposition of the case for
19 disqualification. *See Stevens v. Wal-Mart Stores, Inc.*, No.
20 217CV00970JCOMPAL, 2018 WL 2766876, at *7 (D. Nev. June 8,
21 2018); *See also Faison v. Thornton*, 863 F. Supp. 1204, 1213 (D.
22 Nev. 1993). Sanctions may also include exclusion of information
23 obtained by ex parte contact and prohibition on the use of such
24 information at trial. *Bonaventura v. Bd. of Cty. Comm'rs*, No. 65898,
25 2015 WL 8187534, at *2 (Nev. Dec. 2, 2015).

18 Here, the three Antitrust Division attorneys had real-time audio access via a livestream
19 link of Mr. Hee's interview. The information obtained from Mr. Hee is material to the
20 disposition of the case. Additionally, this Court may take into consideration the extent of the
21 ethics violation when determining whether to disqualify prosecutors. *See Rebel*
22 *Communications, LLC*, 2001 WL 677308 at * 9. The parties had been in preindictment
23 discussions for months and the issue of the government's surreptitious eavesdropping of Mr.
24 Hee's interview was never disclosed until recently. Given the government's unethical conduct,
25 the three Antitrust Division attorneys should be disqualified, as required by Justice Department

1 policy. *See* Justice Manual § 1-4.330, *available at* [https://www.justice.gov/jm/jm-1-4000-](https://www.justice.gov/jm/jm-1-4000-standards-conduct)
2 standards-conduct (Department attorney who is found to have engaged in professional
3 misconduct in a particular case shall not continue to represent the United States in that case
4 unless approval is obtained from the responsible United States Attorney or Assistant Attorney
5 General.).

6 Disqualification is even more imperative given the inaccurate and incomplete FD-302.
7 In case of any dispute or discrepancy between Mr. Hee and the FBI agent's testimony, there are
8 no other witnesses to that interview other than the three Antitrust Division attorneys. By
9 surreptitiously listening to his interview, these three Antitrust Division attorneys made
10 themselves potential witnesses at trial.

11 **VII. Conclusion**

12 Mr. Hee's purported consent to speak with the FBI on October 31, 2019 and provide
13 access to his and his company's electronic devices was involuntary. The government cannot
14 show otherwise. The government's stealthy conduct overstepped the bounds of the Fourth,
15 Fifth, Sixth and Fourteenth Amendments because the government hid the nature and scope of
16 the interview, failed to disclose the prosecutors' real-time audio access to a livestream of the
17 interview and unconstitutionally searched and seized property. Had Mr. Hee known the true
18 nature and scope of the interview or that three Antitrust Division attorneys had real-time audio
19 access through a livestream link, he would have invoked his right to counsel sooner, declined
20 to answer any questions, or terminated the interview. Moreover, regardless of whether Mr. Hee
21 may have invoked his right to counsel during the October 31, 2019 interview, Mr. Hee was a
22 represented party as of October 30, 2019. The government should not have interviewed him or
23 searched and seized his personal property and company issued property without counsel
24 present.
25
26

1 For the reasons stated above, the government's conduct in this matter must be addressed
2 by either dismissal of the indictment or suppression of Mr. Hee's statements made during the
3 October 31, 2019 interview and disqualification of the three Antitrust Division attorneys must
4 occur.

5 DATED: September 3, 2021.

6 Wright Marsh & Levy

7
8 By:

/s/ Richard A. Wright

Richard A. Wright

Sunethra Muralidhara

Attorneys for Ryan Hee

CERTIFICATE OF ELECTRONIC SERVICE

The undersigned hereby certifies that she is an employee of Wright Marsh & Levy and is a person of such age and discretion as to be competent to serve papers. That on **September 3, 2021**, she either served **Defendant Ryan Hee’s Motion to Dismiss or in the Alternative Motion to Suppress** either via the Court’s CM/ECF electronic filing system addressed to all parties on the e-service list, emailed, hand delivered, facsimile, or placed in the United States mail, postage prepaid, to the following persons at their last known address:

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