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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

RYAN HEE; and VDA OC, LLC, formerly ADVANTAGE ON CALL, LLC,

Defendants.

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

OPPOSITION TO DEFENDANT RYAN HEE'S MOTION TO DISMISS OR IN THE ALTERNATIVE TO SUPPRESS

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INTRODUCTION

Defendant Hee's Motion to Dismiss makes sweeping, legally and factually unsupported accusations of prosecutorial misconduct arising from purported ethical and constitutional violations. Defendant's arguments are facially invalid and legally meritless. The government violated no ethical rules or constitutional requirements.

The government did not violate Nevada's Rule 4.2 because Defendant was not represented at the time of his interview. In addition, the ABA's Model Rule 4.2 (and California's) contains an express exception for law enforcement investigative activities, which is incorporated by reference in Nevada and which Defendant ignores. Defendant also ignores countless Ninth Circuit precedents. The law is clear: even if Defendant was represented by counsel in connection with the government's investigation (he was not), preindictment, noncustodial interviews of represented persons for a law enforcement purpose do not violate Rule 4.2.

Similarly, the government did not violate Rule 8.4. The Ninth Circuit has routinely found that a prosecutor's supervision of otherwise lawful investigatory techniques—including those involving subterfuge or deceit—do not constitute a violation of her ethical obligations. And the ABA's Standing Committee on Ethics and Professional Responsibility has endorsed surreptitious recordings under circumstances akin to those here, including for counsel not engaged in law enforcement. Given the seriousness of the purported violations he is seeking to remedy, Defendant's failure to acknowledge this substantial authority to the contrary is troubling.

Defendant's attempt to shoehorn the government's authorized preindictment contact with him into a panoply of alleged constitutional violations is similarly unavailing. The Fifth Amendment is implicated only when a defendant is in custody or when his statements are coerced or involuntary; the Sixth Amendment right to counsel does not attach preindictment. Neither right was implicated by Defendant's voluntary, uncoerced, noncustodial preindictment confession. Finally, Defendant's argument that his Fourth Amendment rights were violated

when the FBI imaged his personal cell phone and work computer is undermined by his voluntary, oral and written, consent to that search. Defendant's motion provides no factual support for his claim that the consent was involuntary, and any resulting search did not violate the Fourth Amendment.

Finally, while the government's interview of Defendant and search of his devices were lawful, there is no prejudice arising from any actions of the government. The government did not process or review the documents on Defendant's work computer. Further, as set forth below, the details of the illegal agreement to which Defendant admitted during the interview can be established through Defendant's email correspondence and the government does not intend to offer the Defendant's admissions.

Under any applicable factual and legal analysis, the government's conduct here was both lawful and ethical. Defendant's accusatory and wide-sweeping claims rely on a contorted and misleading reading of the law, ignore binding law, tarnish the names and actions of the prosecutors on this case without factual or legal support, and are meritless. Defendant's motion to dismiss should be summarily denied.

FACTUAL BACKGROUND

A. The Government's Investigation Into Defendants' Collusive Agreement

In 2019, the Antitrust Division of the Department of Justice began an investigation into a collusive agreement entered into in October 2016 between two medical staffing companies operating in the Las Vegas, Nevada region. The object of the conspiracy was to depress the wages of nurses assigned to work at the Clark County School District ("CCSD"). To achieve that end, the companies, by and through their respective Regional Managers, agreed not to recruit or hire each other's active nurses to reject requests for wage increases from those nurses. The conspiracy was memorialized in a 2016 email written by Defendant, who was at the time the Regional Manager of a company then-known as Advantage on Call, LLC (Ohio) ("AOC, Ohio"):

[redacted]

[redacted]

His counterpart at his competitor responded just minutes later:

[redacted]

His competitor then forwarded this email exchange to most of the Las Vegas office staffing employees and his supervisor.

During the conspiracy, neither company hired a nurse from their rival and wages for the nurses subject to the agreement remained at $25 per hour. The conspiracy continued for at least ten months through July 2017, when Cross Country Healthcare ("CCH"), a larger national staffing agency, purchased substantially all of AOC, Ohio's assets and instituted compliance and vertical non-compete policies. Pursuant to the purchase agreement, CCH purchased only the assets of AOC, Ohio; the existing liabilities of the company remained with AOC, Ohio. In conjunction with the purchase, CCH created a new subsidiary called Advantage On Call, LLC (Delaware) (hereinafter "AOC, Delaware") to acquire the assets previously owned by AOC, Ohio.[1] After selling its assets, AOC, Ohio changed its name to VDA OC, LLC ("VDA").

B. Defendant's Consensual Interview

On October 31, 2019, as part of the government's investigation, an FBI Special Agent went to Defendant's office and, after advising him about the fact and nature of the investigation, asked if he would be willing to be interviewed.[2] Defendant agreed to be interviewed, and, in the

[1] At all times, AOC, Ohio and AOC, Delaware were separate entities, operating separately, formed in different states and with entirely separate ownership, management and corporate structure.

[2] Defendant's Motion makes multiple references to the FBI agent having conducted his interview "in violation of FBI policy which requires two FBI agents to attend witness

course of the approximately 30-minute consensual conversation, made admissions that corroborated what he had previously memorialized in his October 21, 2016 email: that Defendant and a competitor had reached a "gentlemen's agreement" to restrain nurses' employment mobility and suppress their wages.

During the course of the interview, the agent asked Defendant about the communications in the October 21, 2016 email thread authored by Defendant, quoted above, which is at the heart of the government's investigation. At no point during the interview did Defendant request to have an attorney present, or indicate that he was represented by individual counsel or that he believed himself to be represented by CCH's counsel.

During the interview, three Antitrust Division prosecutors had real-time audio access to the interview through a livestream link provided by the agent. Defendant was not informed that the prosecutors could listen to, or that they were listening to, the interview. However, the agent did not claim he was not transmitting the interview, or represent that no other persons were listening in.

The software that was used to transmit the interview of Defendant in October 2019 was an FBI proprietary application installed on the agent's smartphone. The application had recording capabilities if selected by the user.[3] The software did not have a default setting. Rather, the user had to select between two options: (1) transmit only, or (2) record and transmit. If the user selected the transmit only option, the application would generate a link that could be

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interviews." This allegation contains no factual or legal citation. The government is unaware of any case finding a constitutional or ethical violation arising from failure to adhere to this purported policy.

[3] The following information regarding the capabilities of the system used to livestream Defendant's interview, as well as the specifics of the October 31 livestream, were recently obtained by the prosecutors in an attempt to respond the questions raised in Defendants' August 3 letter. It was not provided to the defense earlier because the government had not finalized its investigation at the point at which Defendant filed the subject motion.

used to access a webpage to stream the audio transmission using a standard web browser. In addition, the application would automatically create a backup copy of the transmission in a compressed file format that was temporarily stored on a remote server. The backup was saved at this location for 30 days, after which it was automatically deleted. If the user selected the record and transmit option, a full, high-fidelity recording would be stored on the smartphone, in addition to the remotely-stored, temporary backup.

When he selected the transmit only option at the time of the interview, the agent was aware that the application would create a backup of the transmission. However, based on his training on the use of the application, his understanding was that a backup should not be used as evidence. The agent did not know for how long the backup would be maintained on the remote server and did not listen to, download, or confirm the existence of the backup before it was automatically deleted. The prosecutors were unaware that the application would create a temporary, automatic backup file until they began investigating the operation of the application in response to the defendants' recent discovery requests. By the time the prosecutors learned this fact and sought to download the file, it was no longer available on the FBI's system. Consequently, the backup of the October 31 interview between the agent and Defendant was inadvertently not preserved. The application does not generate any log files relating to live transmissions or backup files, only the date that the user last logged into the application. This was the only instance in which the application was used during the investigation.

The prosecutors could not communicate in real time with the agent through the application. The prosecutors were located in their San Francisco offices and did not communicate with the agent through any means (telephone, text, or other real-time chat program) while he was questioning Defendant in Las Vegas.

C. Consensual Copying of Defendant's Devices

At the conclusion of the questioning, the agent left the room and briefly conferred with the prosecutors by telephone. Following his conversation with the prosecutors, the agent asked for and obtained consent from Defendant to the imaging of his personal cell phone and work computer. (*See* Exs. A & B)

Defendant's personal cell phone was his personal property—not that of his then-employer AOC, Delaware or its parent company CCH—and he had authority and control to consent to its search.

With respect to Defendant's work laptop, although the Defendant had common authority and control of the laptop and, therefore, the authority to consent to the search, ultimately, prosecutors agreed not to search the laptop if CCH's counsel agreed to search the laptop and produce documents on the laptop that were responsive to the subpoena. CCH's counsel did so. Defendants were informed in the government's initial discovery letter, sent on May 13, 2021, that an image of Defendant's laptop was never processed or searched but was available for review.

Because the government never processed or searched the laptop, no evidence from the image of the laptop obtained on October 31st, 2019 was ever obtained by the government.[4]

D. The Grand Jury Subpoenas

On October 30, 2019, the day before Defendant's interview, the government served a subpoena on "Advantage On Call Staffing." The prosecutors also had a call with the General Counsel of CCH, who advised them that she represented CCH. In that call, she did not inform

[4] Other copies of the inculpatory email excerpted above were obtained from other sources, including from CCH, but not from any search by the government of the October 31st image of Defendant's laptop.

prosecutors that she purported to represent Defendant. A summary of that call is contained within a letter received from outside counsel for CCH, received on November 1:

> On October 30, 2019, Ms. Ball and you had a phone conversation ***in which she identified herself to you as the Company's General Counsel***. You emailed Ms. Ball a copy of the Subpoena shortly thereafter, that same day. As a result of those communications the day prior to the FBI's search at the Premises, the government, including the FBI, officially was on notice *that the Company was represented by counsel* with respect to the Investigation.

(*See* Ex. C, (emphasis added).)

In the same letter, outside counsel for CCH claimed that Defendant "lacked the authority to give consent" to the FBI's search of his company laptop, and accordingly, that any such consent "was not voluntary[.]" (*See* Ex. C.)

In a separate communication on November 1, outside counsel for CCH clarified that Advantage On Call Staffing was not a subsidiary or affiliate of CCH, and that the appropriate entity was AOC, Delaware. Following this clarification, the Division subpoenaed AOC, Delaware and CCH on November 4.

Neither AOC, Delaware nor CCH is a party to this Indictment. The Indictment alleges that Defendant, while employed by AOC, Ohio, now entitled VDA, entered into an anticompetitive agreement to allocate and fix the wages of nurses with a competitor. On October 31, 2019, VDA had not received a subpoena, and did not receive one until nearly a year later, on October 20, 2020. Defendant and VDA—not AOC, Delaware—were charged by the subject Indictment on March 30, 2021, over sixteen months after Defendant was interviewed.

E. The Government's Disclosure

The prosecutors produced the FBI 302 of Defendant's consensual interview on May 13, 2021, as part of its initial discovery production. That 302 contains the following statements:

[redacted]

On July 15, 2021, as part of its continuing discovery obligations, the government disclosed that three prosecutors had listened to a livestream of Defendant's consensual interview with the agent. Defendants responded with a five-page letter on August 3, raising over two dozen additional questions about the details and capabilities of the livestream as well as other, unrelated discovery questions. The government began further investigation into the capabilities of the livestream software in order to respond to the questions raised by the defendants. While the investigation was ongoing, on August 13, the government sent a letter, providing responses to many of defendant's discovery requests that were readily available and unrelated to the livestream but indicating that "a separate letter addressing your requests for information related to the FBI's interview of defendant Ryan Hee is forthcoming."

On September 3, without meeting and conferring in advance (and before the government was able to complete its investigation and provide its response to counsel's questions about Defendant's interview), Defendant filed the subject motion.

In response to Defendant's request, prosecutors are producing the rough notes of the agent's interview with Defendant. Those notes corroborate the inculpatory statements made by Defendant in the interview that were captured in the FBI 302, including the description that

[redacted]

LEGAL ANALYSIS

The FBI's livestreaming of Defendant's voluntary interview to three prosecutors did not violate Rule 4.2's restriction on contacts with represented persons. Defendant was not represented by counsel, and, in any event, the contact was authorized by Rule 4.2's law enforcement exception.

The livestream also did not violate the prosecutors' obligations under Rule 8.4 to refrain from misrepresentations. Neither the attorneys nor the agent made any misrepresentations, and the Ninth Circuit has made clear that prosecutors may supervise agents and witnesses in investigative activities involving surreptitious recordings of targets, and other acts of subterfuge.

Nor did the conduct violate Defendant's constitutional rights. Neither his Fifth nor Sixth Amendment rights were triggered by Defendant's voluntary participation in a preindictment, noncustodial, consensual interview. And Defendant's consent to allow the FBI to image his cell phone and work laptop was knowing and voluntary, and did not violate his Fourth Amendment rights (or that of his employer, who has made no such claims).

In addition, the remedies Defendant seeks—dismissal of the indictment, forced recusal of the prosecutors, or, in the alternative, suppression of Defendant's volunteered inculpatory statements—are not warranted. Defendant was not prejudiced in any way by the government's conduct, and the government is not seeking to use Defendant's inculpatory statements or texts or emails seized from his devices.

A. The Prosecutors' Conduct Did Not Violate Rules of Professional Conduct

1. Nevada's Rules of Professional Conduct Govern

The Nevada Rules govern the analysis of the government's conduct in this case. Although the prosecutors are barred in California, California Rule of Professional Conduct 8.5(b) provides:

> In any exercise of the disciplinary authority of California, the rules of professional conduct to be applied shall be as follows: […]
>
> (2) the rules of the jurisdiction in which the lawyer's conduct occurred, or, ***if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct.*** A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

(emphasis added.) Here, Defendant's interview occurred in Nevada and the subpoenas in question were issued by a Nevada grand jury.

Nevada and California have adopted substantially similar versions of ABA Model Rule 4.2, prohibiting a lawyer in a matter from communicating with a person that lawyer knows to be represented by another lawyer in the matter, and Rule 8.4, prohibiting attorney "dishonesty, fraud, deceit, or reckless or intentional misrepresentation." Nevada Rule 4.2, 8.4(c); California Rule 4.2, 8.4(c).[5] The prosecutors violated no ethical rules under the application of either state's rules of professional conduct.

2. The Prosecutors' Conduct Did Not Violate Rule 4.2

The prosecutors' conducts did not violate Rule 4.2 because Defendant was not represented at the time of his interview. Even if he was, his voluntary, preindictment, noncustodial contact was authorized by the law enforcement exception.

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[5] Nevada Rule 4.2 is identical to the ABA Model Rule, and provides "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter"; California Rule 4.2 precludes a lawyer representing a client from: "communicat[ing] directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter."

a. Defendant Was Not Represented by CCH's Counsel for the Purposes of Rule 4.2

As a threshold matter, at the time of his interview, Defendant was not a represented employee for purposes of Rule 4.2.[6] "[N]ot every current employee of a represented organizational entity is a 'represented' person for purposes of Rule 4.2[.]" *Fitzgerald v. Mercedes Benz USA, LLC*, 2021 WL 3620429 (C.D. Cal. April 5, 2021). Such a finding would allow companies to effectively preclude opposing counsel from investigating their cases or claims. *See G.K. Las Vegas LP v. Simon Prop. Group, Inc.*, 204CV01199DAEGWF, 2008 WL 11388585, at *2 (D. Nev. June 18, 2008) ("The policy underlying this rule balances the organizational party's legitimate interest in protecting its representatives from overbearance, while also preserving the opposing attorney's legitimate interest in conducting an adequate [pre-litigation] investigation."); State Bar of Nevada Standing Committee on Ethics and Professional Responsibility, Formal Opinion No. 27, p.2, 9 ("Interviews [of represented company employees] are one method of satisfying an attorney's obligations under Rule 11 to conduct a reasonable inquiry to ensure that a claim is well grounded in fact."). *See also Doe v. Superior Ct.*, 36 Cal. App. 5th 199, 207 (2019) ("The purpose of the Rule is not to wall off every employee with firsthand knowledge of the relevant facts and prevent them from being asked questions.").

Instead, for the purposes of the relevant ethical rules in both Nevada and California, a company's counsel represents only "managing-speaking agents" of the company. *See Palmer v. Pioneer Inn Associates, Ltd.*, 59 P.3d 1237 (Nev. 2002); *Snider v. Superior Ct.*, 113 Cal. App.

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[6] Neither CCH nor AOC, Delaware claims before this Court that Defendant was represented by company counsel at the time of his interview. Instead that claim is asserted retroactively by Defendant (and VDA through its joinder to defendant's motion). At the time of his interview, Defendant was unaware of the government's investigation, did not claim that he was represented by CCH's General Counsel, that he had individual representation, or that he would like a lawyer present.

4th 1187, 1208 (Cal. 2003).[7] Under Nevada's managing-speaking agent test, opposing counsel is allowed *ex parte* contact with an adverse entity's employees where those employees do not have supervisory control or authorization to speak for the entity as to the matter that is the subject of the dispute. *Palmer*, 59 P.3d at 1238, 1244-45, 1248. *See also Snider*, 113 Cal. App. 4th at 1208. "[A]n employee does not 'speak for' the organization simply because his or her statement may be admissible as a party-opponent admission [or . . .] because his or her conduct may be imputed to the organization." *G.K. Las Vegas LP*, 2008 WL 11388585, at *2, *citing Palmer*, 59 P.3d at 1247-49. Instead, in Nevada, an employee is a represented person with "speaking authority" only if he or she "ha[s] the ***legal authority*** to 'bind' the corporation in a legal evidentiary sense[.]'" *Rebel Commc'ns v. Virgin Valley Water Dist.*, No. 2:10–cv–00513–LRH–GWF, 2011 WL 677308, at *7 (D. Nev. Feb. 15, 2011) (quoting *Palmer* at 1241-42) (emphasis added); State Bar of Nevada, Formal Opinion No. 27, p.1. ("speaking authority" requires "supervisory control or authorization to speak for the entity as to the matter that is the subject of the dispute[.]").

Because Defendant was not a managing-speaking agent of CCH, he was not a represented person and Rule 4.2 did not apply. First, it is Defendant's burden to demonstrate that he was a "managing-speaking-agent," and he has made no attempt to meet that burden. *Marina Dist. Dev. Co., LLC v. AC Ocean Walk, LLC*, No. 220CV01592-GMN-BNW, 2020 WL 5821836, at *3 (D. Nev. Sept. 30, 2020). And, he cannot. In *Marina*, the court found that a represented company's employee was not a managing-speaking-agent where the company did not establish how the employee had authority to speak for and bind the company under state agency or evidence law.[8]

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[7] *G.K. Las Vegas LP* notes that the "managing-speaking-agent" tests in California and Nevada are "substantially similar." 2008 WL 11388585, at *3.

[8] Similarly, in *Snider*, the Court found an employee of a represented company was not a managing agent because the employee could not set corporate policy and could not bind the

The same is true here. Defendant has made no attempt to demonstrate (and he cannot) that he had authority from the company to speak on its behalf concerning the grand jury investigation. And, again, CCH has made no such claim before this Court. First, Defendant was not an employee of CCH; he was employed by its subsidiary AOC, Delaware. The notion that Defendant, a sales manager at a regional office of a CCH subsidiary, had the authority to bind the parent company with respect to a grand jury subpoena served a day earlier by, for example, agreeing to waive privilege over certain documents, is absurd. Indeed, CCH claimed on November 1 that Defendant lacked the authority to consent to the FBI's search of his company laptop, which supports the claim that he lacked the authority to speak on its behalf concerning the investigation. (*see* Ex. A.) Therefore, Defendant was not a managing-speaking-agent under Nevada's Rule 4.2, and was not "represented" by CCH counsel at the time of his interview.[9]

The policy underlying Rule 4.2 supports a finding that Defendant was not a represented person:

> The primary purpose of the rule is to protect the attorney-client relationship from intrusion by opposing counsel. It protects parties from unprincipled attorneys and safeguards the attorney-client privilege. […] [T]he managing-speaking agent test, […] best balances the policies at stake when considering what contact with an organization's representatives is appropriate. The test protects from overbearance by opposing counsel those representatives who are in a position to speak for and bind the organization during the course of litigation, while still providing ample opportunity for an adequate [pre-litigation] investigation. "It is not the purpose of the rule to protect a corporate party from the revelation of prejudicial facts. Rather, the rule's function is to preclude the interviewing of those corporate employees who have the authority to *bind* the corporation."

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organization because no evidence was presented that the sales manager had authority from the company to speak concerning the dispute or any matter. 113 Cal. App. 4th at 1208.

[9] At the time of his interview, Defendant was also not represented by AOC, Delaware's counsel for the same reason he was not represented by CCH's counsel. Nor was he represented by VDA's counsel, as VDA was not served with a subpoena for another eleven months and has never claimed to represent Defendant at the time of his interview or at any other point. Nor did Defendant claim that he was represented in his capacity as an employee by either AOC, Delaware or VDA at the time of his interview.

Palmer, 59 P.3d at 1240, 47-48. Application of Rule 4.2 to Defendant would not serve the balance of interests the Nevada Supreme Court articulated in *Palmer*. Defendant makes no allegation that he had a relationship with company counsel that was obstructed by his contact with the FBI agent—Defendant was wholly unaware of the investigation, and did not claim that company counsel represented him. At the same time, Defendant's voluntary interview allowed the government to conduct a reasonable, lawful, preindictment investigation without improperly imposing upon an employee in a position to speak for and bind the organization.

Further, Rule 4.2 applies to contacts where the communicating lawyer has "***actual knowledge***" of the representation—and the prosecutors in this case had no actual knowledge that any lawyer purported to represent Defendant. Nevada Rule 1.0(f) ("knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.");[10] ABA Model Rule 4.2 [cmt. 8] (emphasis added); *Snider*, at 113 Cal. App. 4th at 1215-16 ("[A] bright line rule [requiring actual knowledge] is necessary because attorneys 'should not be at risk of disciplinary action for violating [Rule 4.2] because they "should have known" that an opposing party was represented or would be represented at some time in the future.'") (internal citations removed).

At the time of Defendant's October 31 interview, the prosecutors (and the agent) did not know of—and had no reason to infer—CCH's purported representation of Defendant. The prosecutors' conversation with CCH's General Counsel on October 30 established only that she was counsel ***for CCH***; which would establish only that CCH and certain of its employees would be deemed represented for purposes of Rule 4.2. CCH's General Counsel did not inform the

[10] *See* Nevada Rule 4.2 ("a person the lawyer ***knows*** to be represented by another lawyer"; (emphasis added); California Rule 4.2 ("a person the lawyer ***knows*** to be represented by another lawyer").

prosecutors that she purported to represent Defendant, he was not an employee of CCH, and he was not otherwise in a position to qualify as a represented party under Rule 4.2. The communication in which CCH's counsel attempted to establish a blanket representation of all employees came by letter on November 1—the day after Defendant's interview. At the time of Defendant's interview, neither the prosecutors nor the agent had reason to believe Defendant was represented—and he was not.

b. Even If the Defendant Were a "Represented Person," The Government's Contacts Were Authorized Under Rule 4.2's Law Enforcement Exception

Even if he were a "represented person" at the time of his interview, the government's contact did not violate Rule 4.2 because the rule "does not apply to preindictment, noncustodial conversations with a suspect." *United States v. Powe*, 9 F.3d 68, 69 (9th Cir. 1993).

ABA Model Rule 4.2, and California's, contain express law enforcement exceptions, to which Defendant fails to cite. Model Rules of Prof'l Conduct R. 4.2 cmt. 5 ("Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings."); Cal. Rules Prof'l Conduct R. 4.2 cmt. 8 ("[P]rosecutors and other government lawyers are authorized to contact represented persons, either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. The rule is not intended to preclude communications with represented persons in the course of such legitimate investigative activities as authorized by law.").

Although Nevada's Rule 4.2 does not contain an express law enforcement exception, it allows contact with represented persons where the attorney ***"is authorized to do so by law***[.]"

(emphasis added). The law enforcement exception is authorized by law both under significant Ninth Circuit precedent, as well as by reference to the ABA Model Rule's law enforcement exception.[11]

The law enforcement exception has been upheld through a forty-year line of binding Ninth Circuit precedent that Defendant largely ignores. *See United States v. Carona*, 660 F.3d 360, 365-66 (9th Cir. 2011) (no violation of Rule 4.2 where prosecutors provided undercover informant fake subpoena attachments, and had him meet with and surreptitiously record a represented witness preindictment); *Powe*, 9 F.3d at 69 (no violation of Rule 4.2 where a cooperating witness for the prosecution met with the represented witness before he was charged, and secretly recorded the conversation); *United States v. Kenny*, 645 F.2d 1323, 1337-38 (9th Cir. 1981) (no ethical violation where a codefendant cooperated with the Government by surreptitiously recording a telephone conversation with a represented witness preindictment).

Instead, Defendant argues, in a cursory attempt to distinguish *Powe*—the single precedential case he cites—that the law enforcement exception applies only to *covert* preindictment contacts, and does not exempt *overt* preindictment law enforcement contacts.[12]

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[11] The Nevada courts look to the "the comments to the ABA Model Rules of Professional Conduct . . . for guidance in interpreting and applying the Nevada Rules of Professional Conduct, unless there is a conflict between the Nevada Rules and the [the ABA comments]." *See* Nev. Rules Prof'l Conduct R. 1.0A. Here, there is no such conflict, so the law enforcement exception should be incorporated by reference into the analysis of Nevada's Rule 4.2.

[12] Defendant also argues that *Powe* is somehow inapposite because it "dealt with a single defendant and his right to counsel versus a corporation and its right to counsel[, and] [t]he analysis as to who is a covered person for attorney-client purposes is a different analysis and one not contemplated by *Powe*." (Mot. at 11:14-17.) It is unclear what distinction Defendant believes this makes. *Powe*—and all the other Ninth Circuit cases cited herein—address the law enforcement exception to Rule 4.2, which is applicable regardless of whether an individual is represented in his individual capacity or as a covered employee of a represented company. No case has held that an individual represented by virtue of his employment is somehow entitled to additional protections under Rule 4.2 or its exceptions.

No such distinction appears in the plain language of the rule, in the cases interpreting the exception, or in the policy underlying the law enforcement exception to the no-contact rule.

First, the ABA Model Rule—incorporated by reference into Nevada's Rule—explicitly acknowledges that communications that are "authorized by law" may include the investigative activities of government lawyers either "*directly or through investigative agents*." Model Rules of Prof'l Conduct R. 4.2 cmt. 5; *see also* Cal. Rules Prof'l Conduct R. 4.2 cmt. 8 (same). That language does not restrict the law enforcement exception to covert investigative activities, and it would be illogical to do so. The policy underlying the law enforcement exception is to facilitate legitimate, preindictment law enforcement investigations. *See Kenny*, 645 F.2d at 1339. It would be counterintuitive if the law allowed a prosecutor to obtain information about the subject of a criminal investigation through covert means, including through deception, *see Carona*, 660 F.3d at 365-66, but precluded the prosecutor from obtaining the same information through overt investigatory techniques. The law makes no such distinction. A preindictment interview is a standard, legitimate investigation tool, and it is covered by the plain language of the rule and the binding authority interpreting that rule.

Other jurisdictions have reached the same conclusion. In *United States v. Joseph Binder Schweizer Emblem Co.*, the court found that an AUSA did not violate Rule 4.2 by directing a federal agent to interview an employee of a represented organization in connection with an ongoing criminal investigation. 167 F. Supp. 2d 862, 864-67 (E.D.N.C. 2001). The court noted that "most of the decisions approve pre-indictment contacts in categorical terms," and reasoned that to hold otherwise and preclude the government from overt communications "would tie the hands of prosecutors to the extent that they would not be able to conduct significant pre-indictment investigations." *Id.* at 866-67. And, in *In Disciplinary Proceedings Regarding Doe*, the court found that "[Rule 4.2] does not apply to non-custodial communications with corporate

employees during criminal investigations (including grand jury investigations) that have not become formal proceedings[.]" 876 F. Supp. 265 (M.D. Fla. 1993). In *Doe*, an AUSA directed an agent to interview employees of a corporation that was the subject of an ongoing grand jury investigation, where those employees were represented by counsel concerning the subject of that investigation but counsel was not given notice and did not consent to the interview. The court rejected the company's argument that Rule 4.2 applies to the government in a preindictment investigative setting, reasoning:

> The weightiest of all arguments against the appellant's position is the one based upon simple common sense. If the law were as the appellant urges it upon us, there could be little effective investigation of any sophisticated and organized criminal enterprise. A successful case, for instance against insider trading on Wall Street may depend upon hundreds of confidential interviews of employees, many of whom will insist upon anonymity. It would be difficult to maintain anonymity if the boss's lawyer were present at the interview.

Doe, 876 F. Supp. at 269 (citations omitted). Applying those principles, the *Doe* court found the conduct did not violate Rule 4.2. The same is true here.[13]

The fact that the agent provided a livestream of the interview to the prosecutors does not in any way change the analysis. It is well-settled that an agent or cooperating witness's surreptitious, preindictment recording of a represented person does not violate Rule 4.2. *See Powe*, 9 F.3d at 69; *Kenny*, 645 F.2d at 1337-38. *See also, e.g., United States v. Grass*, 239 F. Supp. 2d 535, 542 (M.D. Pa. 2003) (AUSA did not violate no-contact rule by arranging covert, preindictment recording of represented targets); *United States v. Scozzafava*, 833 F. Supp. 203,

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[13] The broad language of other courts interpreting the law enforcement exception supports this conclusion as well. *See, e.g., United States v. Balter*, 91 F.3d 427, 436 (3d Cir. 1996) ("[P]re-indictment investigation by prosecutors is precisely the type of contact exempted from the Rule as 'authorized by law.'"); *United States v. Johnson*, 68 F.3d 899, 902 (5th Cir. 1995) ("Such professional disciplinary rules do not apply to government contact prior to indictment[.]"); *United States v. Ryans*, 903 F.2d 731, 739-40 (10th Cir. 1990) (Rule 4.2's "proscriptions do not attach during the investigative process before the initiation of criminal proceedings.").

210 (W.D.N.Y. 1993) (in the absence of egregious misconduct, no violation of the no-contact rule occurs "where a prosecutor proposes the wiring of an informant for the purpose of recording conversations with a represented target of a criminal investigation, or even suggests the topics to be discussed, such actions being inherent in the exercise of the Government attorney's authority to investigate effectively and prosecute crimes.")

Defendant's brief offers no distinction between surreptitiously recording a conversation and surreptitiously allowing prosecutors to listen to a conversation in real time. That is because there is none. Indeed, a covert recording (or covert livestream) is exactly the sort of surreptitious undercover investigation Defendant claims is authorized by law. (Mot. at 11:1-9 (*Powe* authorizes "covert investigation technique[s]").)

Moreover, allowing government prosecutors to listen in on agent interviews furthers, rather than inhibits, public policy. In *United States v. Guerrerio*, 675 F. Supp. 1430 (S.D.N.Y. 1987), the court denied suppression of a represented person's statement because "the rights of a criminal defendant, or in this case a potential criminal defendant, are more likely to be preserved by a prosecutor than by investigative personnel." *Id*. at 1435. The court further found that, because "the disciplinary rule applies only to attorneys[,] investigative personnel may be tempted not to inform the AUSA in charge of the case prior to conducting such eavesdropping" such that "the practical result of exclusion may ironically be to promote rather than inhibit the type of investigative tactics complained of herein." *Id*. Here, the live transmission to prosecutors can only have deterred agent misconduct (if there had been any) and provided the prosecutor with an opportunity to intervene if such misconduct occurs. Defendant's motion highlights this very policy issue. Defendant makes the unsupported (and unclear) allegation that he "asserts there are serious questions about whether he invoked the right to counsel during the interview"—a serious allegation to make without any factual support. But, the prosecutors listening to the interview—

who are licensed attorneys and bear the responsibility as prosecutors of complying with their constitutional obligations—can attest to Defendant that he did not invoke his right to counsel during the livestream.

3. The Prosecutors' Conduct Did Not Violate Rule 8.4

Similarly, the prosecutors' conduct is not a violation of Rule 8.4's prohibition on misconduct, including "dishonesty, fraud, deceit, or reckless or intentional misrepresentation." Nev. Rules Prof'l Conduct 8.4(c); Cal. Rules Prof'l Conduct 8.4(c).

First, California Rule 8.4 provides expressly that it does not constitute dishonesty, fraud, deceit, or reckless or intentional misrepresentation for a lawyer to "advise[] [] others about, or ***supervise[], lawful covert activity in the investigation of violations of civil or criminal law***[.]" Cal. Rules Prof'l Conduct R. 8.4 cmt. 5. Once again, Defendant conceals from the Court this relevant disclaimer, which, given the seriousness of his allegation, is unacceptable. Although Nevada's Rule 8.4(c) does not include the law enforcement exception, the Ninth Circuit and other courts have repeatedly held that a prosecutor does not violate his ethical obligations where she or he supervises an agent or cooperating witness engaging in otherwise lawful investigatory techniques—including surreptitious recording of conversations and other techniques involving subterfuge and deceit. Indeed, the government may even arrange for an agent to use false paperwork "in order to induce suspects into making incriminating statements" without running afoul of the no-contact rules. *Carona*, 660 F.3d at 366 (undercover witness's use of a false subpoena to elicit incriminating statements from represented person not a violation of Rule 4.2); *see also Grass*, 239 F. Supp. 2d at 537 (authorizing surreptitious recording of a represented person where the AUSA signed a fake letter addressed to the defendant's lawyer).

Defendant fails to cite a single case supporting his allegation that the prosecutors here somehow engaged in fraud or deceit under Nevada, California, or any other law. The

prosecutors did not speak to or question Defendant, and therefore did not and could not have misrepresented who they were. Again, Defendant fails to distinguish the livestream provided by the agent in this case from a surreptitious recording made by an agent, and, again, there is no relevant distinction.

Defendant similarly evades the relevant issue with his allegation that the prosecutors' (and agent's) conduct somehow amounts to misconduct because it is analogous to improper, secret recording without two-party consent. First, the federal electronic surveillance statutes, codified at Title III, supersede state law and authorize the recording of an interview by an agent who consented to the recording. *See* 18 U.S.C § 2511(2)(c); *United States v. Bynum*, 362 F.3d 574, 582 (9th Cir. 2004) (federal law, not state law, determines the propriety and admissibility of evidence in a federal prosecution). The agent—not the prosecutors—livestreamed his consensual interview with Defendant. His conduct was in compliance with federal law, and no further analysis is needed.[14]

In addition, however, the Ninth Circuit and the ABA have recognized that surreptitious recording is an effective and valuable law enforcement technique. *See supra Section A. b. ii.* In fact, the ABA, in assessing Model Rule 8.4's prohibition on attorney fraud and deceit, noted that

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[14] Because they are superseded by federal law, the state statutes are irrelevant. However, Nevada (where the interview took place) is a one-party consent state, Nev. Rev. Stat. § 200.650—another dispositive issue ignored by Defendant. California, a two-party-consent state for private parties, contains an exception allowing law enforcement to record conversations without consent of the other party to the conversation. Cal. Penal Code § 633. Moreover, Defendant's citations on this matter are both misleading and entirely inapposite to the situation presented here. *Nissan Motor Co., Ltd. v. Nissan Computer Corp.*, 180 F. Supp. 2d 1089 (C.D. Cal. 2002), is to a non-criminal case not subject to the law enforcement exception, and relies on an irrelevant California criminal statute. *People v. Walker*, 145 Cal. App. 3d 886 (Cal. Ct. App. 1983), suppressed the covert recordings on the basis that they were obtained after the incarcerated defendant was represented by counsel, and because the recordings invaded the attorney-client privilege by obtaining legal strategy and trial tactics. The suppression in no way related to (nor was it argued to be) any purported violation of Rule 8.4 or the California dual-party consent law.

"***[s]urreptitious recording of conversations is a widespread practice by law enforcement***, private investigators and journalists, and the courts universally accept evidence acquired by such techniques," and concluded that "the mere act of secretly but lawfully recording a conversation ***inherently is not deceitful***." ABA Comm. on Ethics and Prof'l Resp., Formal Op. 01-422 (2001), at 1, 4 (emphasis added). *See also id*. at 4 ("Where nonconsensual recording of conversations is permitted by the law of the jurisdiction where the recording occurs, a lawyer does not violate the Model Rules merely by recording a conversation without the consent of the other parties to the conversation.").

Once again, Defendant made the concerning decision to cast serious and unsupported allegations against the ethics and integrity of the prosecutors in this matter, while ignoring the substantial authority supporting their conduct in this case.

4. Violation of a Rule of Professional Conduct Does Not Give Rise to the Sanctions Sought by Defendant

Even if a violation of a rule of professional conduct had occurred (which it did not), the caselaw makes clear that a suppression remedy—much less dismissal—would not be available. The Ninth Circuit has rejected similar attempts by defendants to suppress evidence, disqualify a prosecutor, dismiss a case, or reverse a conviction as a remedy to a violation of a rule of professional conduct. That is because the Ninth Circuit has recognized that the professional conduct rules are directed at regulating the conduct of attorneys, not creating rights for litigants. *See, e.g.*, *Talao*, 222 F.3d at 1138 ("[Rule 2-100] is a rule governing attorney conduct and the duties of attorneys, and does not create a right in a party not to be contacted by opposing counsel."); *Lopez*, 4 F.3d at 1462 (no-contact rule "is fundamentally concerned with the duties of attorneys, not with the rights of parties").

Thus, in *Lopez*, the Ninth Circuit found that the district court abused its discretion in dismissing the indictment as a sanction for violation of the no-contact rule. *Id*. Courts outside of the Ninth Circuit are in accord. Indeed, "the prevailing view is that while a violation of a rule such as 4.2 may justify the imposition of sanctions against a prosecutor either by a trial judge or by a disciplinary body, a criminal defendant is not entitled to exclude evidence obtained as a result of an ethical violation." *Joseph Binder Schweizer Emblem Co.*, 167 F. Supp .2d at 867 (denying motion to dismiss indictment or suppress evidence for a preindictment Rule 4.2 violation). That is "because to do so would tie the hands of prosecutors to the extent that they would not be able to conduct significant pre-indictment investigations." *Id*. Similarly, in *Grass*, the court found that suppression of a statement obtained in violation of the no-contact rule would not be appropriate where an alternative, and more appropriate remedy, would be for an aggrieved party to file a complaint before the disciplinary board. 239 F. Supp. 2d at 549. And in *Guerrerio*, the court found that "in cases of ethical violations by a prosecutor," the appropriate enforcement mechanism is referral to the New York Bar for review and discipline. 675 F. Supp. 1430, 1435-36.

The disciplinary rules and regulations support this approach. The Nevada Rules of Professional Conduct caution that "violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation." Nevada Rule 1.0A(d). *See also* California Rule 1-100(A) ("Nothing in these rules shall be deemed to create, augment, diminish or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty."). Similarly, 28 C.F.R. § 77.5 provides that regulations promulgated pursuant to 28 U.S.C. § 530B:

> are intended solely for the guidance of attorneys for the government. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States, including

> criminal defendants, . . . and shall not be a basis for dismissing criminal [] charges or proceedings or for excluding relevant evidence in any judicial [] proceeding.

Accordingly, this Court should reject Defendant's contention that any violation of Rules 4.2 or 8.4 can or should result in any litigation consequences other than referral to the relevant disciplinary committee, if that were warranted.

B. The Government Did Not Violate Defendant's Constitutional Rights

1. The Government's Conduct Did Not Implicate Defendant's Constitutional Rights

Defendant appears to contend that the prosecutors' alleged violation of Rule 4.2 somehow rose to a violation of his Fourth, Fifth, Sixth, and Fourteenth[15] Amendment rights. (Mot. at 9:7-10, 13-22 (his constitutional rights were violated by the agent's approach and interview request; the agent's obtaining written consent to image Defendant's devices & real time audio stream of the interview and failure to announce the prosecutors).) As an initial matter, the Court can reject this contention out of hand since the prosecutors' (and agent's) actions did not violate any professional rules of conduct.[16] Nor do any cases cited by Defendant come close to supporting such a claim. The same is true of Defendant's other purported

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[15] Although Defendant asserts—but does not argue—that his Fourteenth Amendment rights were somehow infringed by the prosecutors' conduct, the it is elementary that the Fourteenth Amendment does not apply to the federal government and is therefore inapplicable. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *United States v. Navarro*, 800 F.3d 1104, 1112 n.6 (9th Cir. 2015).

[16] "Rule 4.2 is not simply coextensive with the Fifth and Sixth Amendments. While the Fifth and Sixth Amendments provide protections to individuals in the context of a criminal case, the Constitution establishes only the 'minimal historic safeguards' that defendants must receive rather than the outer limits of those they may be afforded. Ethics rules, on the other hand, seek to regulate the conduct of lawyers according to the standards of the profession quite apart from other laws or rules that may also govern a lawyer's actions. ***Consequently, by delineating a lawyer's duties to maintain standards of ethical conduct, ethical rules like Rule 4.2 may offer protections beyond those provided by the Constitution***." ABA Comm. on Ethics & Prof'l Resp., Formal Op. 95-396, Section III (1995) (emphasis added).

constitutional violations: Defendant's unsupported allegation that the agent failed to inform him of "the true nature and scope of the investigation"; and the alleged (but unexplained) "inaccurate" and misleading discovery produced by the government. (Mot. at 9:11-13, 22-24.)

The government's conduct did not violate Defendant's Fifth Amendment due process right or privilege against self-incrimination. First, *Miranda* is not implicated because Defendant was not in custody at the time of his voluntary interview. *See Grass*, 239 F. Supp. 2d at 542 (the defendant's Fifth Amendment *Miranda* rights were not implicated where a cooperating witness recorded a represented person because the recorded person was not in custody). Second, Defendant's Fifth Amendment due process rights were not implicated because his statements were made voluntarily. *Chavez v. Robinson*, No. 18-36083, --- F.4th ---, 2021 WL 4075369 (9th Cir. Sept. 8, 2021) ("[Fifth Amendment due process] is not implicated if statements are made voluntarily."). Here, Defendant, a man with a college education, voluntarily participated in a consensual interview with an FBI agent at Defendant's place of business. Defendant was free to leave or to stop answering questions at any time. Defendant does not allege that the agent made any threats—express or implied—or that he was coerced in any way. The fact that three prosecutors could hear the interview but not participate in it, does not convert a consensual interview into compelled testimony and Defendant cites no case to the contrary.[17]

The government's conduct also did not violate Defendant's Sixth Amendment right to counsel, which had not attached. "The Sixth Amendment right of the 'accused' to assistance of counsel in 'all criminal prosecutions' is limited by its terms: 'it does not attach until a prosecution is commenced,'" defined as "the initiation of adversary judicial criminal

[17] Each of the cases cited by Defendant (Mot. at 7:13-21) involve coerced, custodial statements, which are not relevant to Defendant's incriminatory statements made in the course of a voluntary, noncustodial, preindictment interview.

proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment[.]" *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 198 (2008) (citing precedent).

Here, no prosecution had been commenced when Defendant was interviewed. Instead, Defendant participated in a voluntary, preindictment interview in which he never indicated he wanted to speak to or was represented by counsel, and during which he had no constitutional right to an attorney. To the extent Defendant attempts to conflate the Rule 4.2 prohibition on contact with represented persons with a Sixth Amendment right to counsel, any such attempt is unsupported and unavailing. A defendant's Sixth Amendment right to counsel is not implicated where contact (including a surreptitious recording) is made with a represented person, but "at the time the recording was made, [the person] had not yet been charged, arrested or indicted." *Kenny*, 645 F.2d at 1338. *See also Grass*, 239 F. Supp. 2d at 542 (a represented witness's Sixth Amendment rights were not implicated where an AUSA allowed a cooperating witness to record him preindictment). No authority cited by Defendant supports an argument that the constitutional right to counsel attaches under the circumstances of this case.[18]

Indeed, it is hard to imagine a starker contrast to the reasonable, noncoercive actions of the prosecutors and agent in this case than by comparison to the cases cited by Defendant in which courts found the defendants' pretrial confessions to be unvoluntary or coerced, or where the right to counsel was violated. In *Mincey v. Arizona*, a police officer conducted a custodial interrogation of a gravely injured suspect for four hours after the suspect repeatedly invoked his right to counsel; the resulting confession was coerced. 437 U.S. 385 (1978). In *Reck v. Pate*, a

[18] The cases cited by Defendant regarding the right to counsel involve post-arrest, custodial requests for counsel that were ignored by the government or improperly waived by the defendant. At no time in his interview did Defendant request that the interview be terminated or that he be allowed to consult with counsel. The fact that he may now wish that he had done so is irrelevant to a constitutional inquiry.

confession obtained after the in-custody defendant was repeatedly beaten by the police over a several-day period was coerced. 367 U.S. 433, 440 (1961). In *Malinksky v. New York*, a confession obtained during a custodial interrogation of a defendant who had been stripped naked, denied his clothes for hours, and denied his repeated requests for an attorney, was coerced. 324 U.S. 401, 404 (1945). And in *United States v. Tingle*, the confession of an employee made in the back of a police car after over an hour of interrogation was coerced where the agents told her that she would never see her two-year-old child again if she did not confess. 658 F.2d 1332, 1335 (9th Cir. 1981).

Here, by contrast, Defendant was approached at his place of business by an FBI agent, who informed him of the fact and nature of the government's investigation and asked if Defendant would consent to a voluntary interview. He agreed. Because Defendant was not subject to custodial interrogation, and because his statements were not coerced or in any way involuntary, his Fifth and Sixth Amendment rights were not implicated or violated.

Additionally, the government's conduct did not violate Defendant's Fourth Amendment rights against unreasonable search and seizure. The FBI agent requested and received permission from Defendant to image his personal cell phone and his laptop; Defendant consented and executed written consent for each device. That consent provides expressly that Defendant was "advised of my right to refuse to consent to this search, ***and I give permission for this search, freely and voluntarily, and not as the results of threats or promises of any kind***"[19]—far more than is required by the Fourth Amendment. That he may now wish he had not given his consent to the search is again irrelevant. Defendant does not and cannot argue that his personal

[19] Exs. A & B (emphasis added).

cell phone was not his own property or that his consent was not voluntary. With respect to his laptop, the government never processed or searched the image obtained from that device.

Indeed, the very cases cited by Defendant make clear that the Supreme Court has found that "knowledge of a right to refuse is not a prerequisite of a voluntary consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 234 (1973). That is because "[c]onsent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, or ***in a person's home or office***, and ***under informal and unstructured conditions***." *Id*. at 232 (emphasis added). Here, the government has done more than *Schneckloth* requires to obtain voluntary consent—it first established that Defendant was aware of his knowledge of a right to refuse, before obtaining a voluntary waiver of that right. Thus, Defendant's Fourth Amendment right was not violated.

Finally, it is unclear what discovery the government produced "to the defense that contained inaccurate information and misrepresentations," or how any such inaccuracies or misrepresentations rise to the level of a constitutional violation of any kind. The government disclosed the FBI livestream on July 15—over four months before the November 30, 2021 deadline to file pretrial motions (90 days in advance of trial), over seven months before trial, and only two months after the stipulated protective order was issued on May 11. (*See* Dkt. 32.) The insinuation that the government was not transparent or acted inappropriately by not disclosing the information preindictment, or until July 15, 2021, is not supported by the Constitution, Federal Rules of Criminal Procedure, federal statute, or relevant case law.

C. Defendant Was Not Prejudiced

Finally, Defendant has not and cannot demonstrate that there was any prejudice stemming either from the prosecutors' having listened to Defendant's consensual interview with an agent, or the prosecutors' inadvertent failure to have retained the backup of that interview.

See United States v. Tucker, 8 F.3d 673, 675 (9th Cir. 1993) (en banc) (district court may not exercise supervisory power to dismiss an indictment for government misconduct absent a showing of "actual prejudice" to the defendant). First, with respect to the highly inculpatory statements made by Defendant in the interview (which are memorialized both in the FBI 302 and in the agent's notes of that interview), the prosecutors have agreed not to use those statements.

Second, with respect to the failure to retain the backup of the interview, contrary to the defendant's contention, the interview was not exculpatory and in fact occurred after the charged crime was already complete. Likewise, Defendant cannot show that the government acted in bad faith. The prosecutors were unaware that the FBI's proprietary technology created a low-quality automatic back up of the livestream until they began researching responses to the defendants' discovery requests from last month. In addition, had the backup been preserved and produced, it would have served as additional proof that defendant both committed the charged crime and that he had a motive to do so. Finally, given the government's decision not to offer the recording in its case, any recording of the interview would be inadmissible hearsay if offered by Defendant.

Accordingly, as there is no prejudice to Defendant there is no basis for the Court to take the extraordinary and unprecedented step of dismissing the criminal charges.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss should be denied. The motion is facially invalid and lacks any factual support for its sweeping claims of misconduct. The prosecutors did not violate the relevant no-contact rules because Defendant was not represented by his company's counsel. In any event, the contact fell within the well-established law enforcement exception. The prosecutors' conduct also did not violate the proscription on attorney misconduct, including fraudulent and deceitful conduct. California Rule 8.4 contains an

express exception for supervision of valid law enforcement activity, and the ABA and Ninth Circuit have found such conduct to be lawful and ethical.

The prosecutors also did not violate Defendant's constitutional rights: Defendant's Fifth and Sixth Amendment rights were not implicated by a voluntary, non-custodial, preindictment interview, and there was no Fourth Amendment violation because he voluntarily provided written and oral consent to allow the FBI to image his telephone and computer. Finally, there is no prejudice arising from the prosecutors' valid actions, as they do not intend to use Defendant's statements (or evidence obtained from the image of his phone). Accordingly, Defendant's motion to dismiss, to disqualify the prosecutors, and/or to suppress evidence should be denied.

September 21, 2021

Respectfully Submitted,

/s/ Mikal J. Condon

MIKAL J. CONDON
ALBERT B. SAMBAT
CHRISTOPHER J. CARLBERG
PARADI JAVANDEL
Trial Attorneys
Antitrust Division
U.S. Department of Justice

Exhibit:	**Description:**
Exhibit A	Under Seal
Exhibit B	Under Seal
Exhibit C	Cross Country Healthcare Letter to Lem

EXHIBIT A

(UNDER SEAL)

EXHIBIT B

(UNDER SEAL)

EXHIBIT C – CROSS COUNTRY HEALTHCARE LETTER TO LEM

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November 1, 2019

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San Francisco, CA 94102

Re: Grand Jury Investigation

Dear Ms. Lem:

This firm represents Cross Country Healthcare, Inc. and its affiliates (the "Company") in connection with your office's healthcare staffing investigation (the "Investigation"), including both the grand jury subpoena (the "Subpoena") sent by you to the Company's General Counsel, Susan Ball, Esq., on October 30, 2019 and the interview and seizure conducted yesterday by FBI agents at 8925 W. Russell Road, Suite 150, Las Vegas, NV 89148 (the "Premises"). While the Company is eager to cooperate with the Investigation, the procedures followed by your office thus far have raised concerns that should be brought to your attention and addressed at the outset.

As a result of yesterday's search, FBI agents and technical personnel seized data files belonging to the Company. Based on our current understanding of events, we believe this seizure violated Department of Justice policy and applicable ethical rules prohibiting contact with a represented person. Further, although we also understand the government contends that a Company employee consented to the seizure, it is our position that the employee in question, Ryan Hee, lacked authority to give consent, and that any consent supposedly provided by Mr. Hee was not voluntary, as should have been apparent to the FBI agents on the scene. Accordingly, for all of these reasons, we believe that the seizure was invalid and that all of the seized material should be returned or destroyed immediately. We also respectfully request that you provide us with copies of any consent forms signed by Mr. Hee.

A brief recitation of the chronology is appropriate. On October 30, 2019, Ms. Ball and you had a phone conversation in which she identified herself to you as the Company's General Counsel. You emailed Ms. Ball a copy of the Subpoena shortly thereafter, that same day. As a result of those communications the day prior to the FBI's search at the Premises, the government, including the FBI, officially was on notice that the Company was represented by counsel with respect to the Investigation. Despite this knowledge and unbeknownst to Ms. Ball, FBI agents appeared at the Premises on October 31, interviewed Mr. Hee, and obtained his permission to copy the contents of his cellphone and Company-issued computer. These actions on the part of the FBI were improper and arguably illegal.

Proskauer

As you know, Section 296 of the DOJ Criminal Resources Manual cites Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct, which provides that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so by law or a court order." Rule 4.2 of Nevada's Rules of Professional Conduct contains an analogous prohibition against communications with represented persons. This prohibition extends to communications made through law enforcement, where, as here, law enforcement acts as the Antitrust Division's alter ego in carrying out its investigation.

Finally, in accordance with the instructions given yesterday by your office, Mr. Hee now is represented by Anthony Pacheco, Esq. of Vedder Price with respect to the Investigation. Mr. Pacheco's contact information is as follows:

Email: apacheco@vedderprice.com
Telephone: 424-204-7773

Until further notice, this firm represents all of the Company's employees in their capacity as employees with respect to this matter. If you wish to contact any of them, please let me know.

Sincerely,

/s/ Dietrich L. Snell

Dietrich L. Snell