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Attorneys for Ryan Hee

United States District Court

District of Nevada

United States of America,

Plaintiff,

v.

Ryan Hee,

Defendant.

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

Defendant Ryan Hee's Motion to Dismiss
or in the Alternative Motion to Suppress¹

Memorandum of Points and Authorities

Defendant Ryan Hee, by and through his attorneys of record, Richard A. Wright Esq. and Sunethra Muralidhara Esq., Wright Marsh & Levy, move to dismiss the charges brought 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
26

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