IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	No. 4:20-CR-358-2
	§	JUDGE MAZZANT
JOHN RODGERS (2)	§	
	§	

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT JOHN RODGERS' MOTION TO DISMISS THE SUPERSEDING INDICTMENT

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I. INTRODUCTION

Defendant John Rodgers' motion to dismiss the First Superseding Indictment (the "Indictment") is based on a false premise: that the United States orally granted him a non-prosecution agreement in exchange for cooperation. Rodgers fails to inform the Court that he and his counsel ("Counsel") reached two *written* agreements with the United States that specifically acknowledged and preserved the United States' ability to prosecute Rodgers. Each one was an unambiguous no-direct-use agreement—not a non-prosecution agreement—and each contained a merger clause by which Rodgers and Counsel acknowledged that the agreement constituted Rodgers' entire understanding with the United States. Those were the only agreements between the United States and Rodgers. As a result, Rodgers' motion fails.

Rodgers also moves to dismiss Count One of the Indictment, adopting Defendant Neeraj Jindal's arguments (Dkt. #45). Rodgers' motion to dismiss Count One should be denied for the same reasons as Jindal's motion (Dkt. #46).[1]

II. FACTUAL BACKGROUND

A. No-Direct-Use Agreements and Non-Prosecution Agreements

The United States Department of Justice Antitrust Division ("Division") may enter into no-direct-use agreements ("NDU"s), commonly referred to as "proffer letters," with subjects of criminal investigations who sit for voluntary interviews (Ex. 1, at 1). An NDU generally provides, with limits and exceptions, that the United States will not directly use the subject's statements against the subject (*e.g.*, Ex. 2, at 1; Ex. 3, at 1). The limits and exceptions generally include that statements may be directly used to impeach the subject's testimony, to rebut evidence offered on the subject's behalf, and to prosecute the subject for certain offenses (e.g., obstruction of justice)

[1] The United States adopts its response to Jindal's motion (Dkt. #46) in response to Rodgers' motion to dismiss Count One.

(*e.g.*, Ex. 2, at 1; Ex. 3, at 1). While the subject may choose to end the interview or decline to answer a question, an NDU requires the subject to be "truthful, fully candid, and complete" as to any question the subject chooses to answer (*e.g.*, Ex. 2, at 1; Ex. 3, at 1). NDUs are generally executed on a per-interview basis when, as with Rodgers, the subject and the Division have not negotiated or entered into any other agreements that protect the subject from prosecution or direct use of inculpatory statements.

Non-prosecution agreements differ markedly from NDUs. Unlike NDUs, non-prosecution agreements clearly state that, with limits and exceptions, the individual entering the agreement will be protected from prosecution—not merely from direct use of statements (Ex. 1, at 1). Non-prosecution agreements require supervisory approval (Ex. 1, at 1). The Division's general practice is that both NDUs and non-prosecution agreements are to be in writing (Ex. 1, at 1).

B. Rodgers' No-Direct-Use Agreements with the United States

Before Rodgers' first interview with both the Federal Bureau of Investigation ("FBI") and the Division on December 12, 2019,[2] Rodgers, Counsel, and the Division entered into an NDU setting forth the terms that would govern the interview (Ex. 2). The NDU included a provision requiring Rodgers to be "truthful, fully candid, and complete in providing information concerning the matters about which [he was] asked," and chose to answer, during the interview (Ex. 2, at 1). While generally protecting Rodgers from direct use of his statements, the NDU authorized the United States to use Rodgers' statements "in any [legal] proceeding to impeach [his] testimony or to rebut evidence offered on [his] behalf" (Ex. 2, at 1). The NDU also provided that "the United States may use any statements made in the interview in a prosecution of [Rodgers] for making a false statement or declaration (18 U.S.C. §§ 1001, 1623), obstruction of justice (18 U.S.C. § 1503,

[2] The FBI had previously interviewed Rodgers (Ex. 1, at 2).

et seq.), or perjury (18 U.S.C. § 1621)" (Ex. 2, at 1). The NDU specifically contemplated a future prosecution of Rodgers: "The United States is free to use any information directly or indirectly derived from the interview to pursue its investigation and *in any subsequent prosecution of you* or others" (Ex. 2, at 1 (emphasis added)). And the NDU contained a merger clause: "This letter constitutes the entire understanding between the United States and you" (Ex. 2, at 2).

In December 2020, the Grand Jury indicted Jindal for price fixing in violation of 15 U.S.C. § 1 and obstruction in violation of 18 U.S.C. § 1505 (Dkt. #1). The Division contacted Counsel on December 9, 2020, to inform him of the indictment and that the United States anticipated Rodgers would need to testify at trial (Ex. 1, at 2).[3]

On a January 12, 2021 phone call, the Division and Counsel discussed the fact that Jindal had been charged with both antitrust and obstruction offenses, and the Division asked to interview Rodgers in preparation for trial (Ex. 1, at 2). During this call, Counsel inquired as to Rodgers' status, and the Division told Counsel, among other things, that Rodgers was a subject of the investigation and there was no indication that Rodgers or Counsel had ever been told that Rodgers would not be prosecuted (Ex. 1, at 2). Counsel acknowledged Rodgers' status as a subject (Ex. 1, at 2).

Before Rodgers' second interview with both the FBI and the Division on January 27, 2021, Rodgers, Counsel, and the Division executed another NDU requiring Rodgers to be "truthful, fully candid, and complete in providing information concerning the matters about which [he was] asked," and chose to answer, during the interview (Ex. 3, at 1). Like the first NDU, the second NDU generally protected Rodgers from direct use of his statements but authorized the United

[3] Rodgers and Counsel misidentify the attorney who called Counsel on December 9, 2020 (Dkt. #45, at 5–6; Dkt. #45-8 (Ex. G) ¶ 9). The attorney with whom Counsel spoke is a counsel of record for the United States in this case (Ex. 1, at 2).

States to use his statements "in any [legal] proceeding to impeach [his] testimony or to rebut evidence offered on [his] behalf" and "in a prosecution of [Rodgers] for making a false statement or declaration (18 U.S.C. §§ 1001, 1623), obstruction of justice (18 U.S.C. § 1503, *et seq.*), or perjury (18 U.S.C. § 1621)" (Ex. 3, at 1). Also like the first NDU, the second NDU specifically contemplated a future prosecution of Rodgers: "The United States is free to use any information directly or indirectly derived from the interview to pursue its investigation and *in any subsequent prosecution of you* or others" (Ex. 3, at 1 (emphasis added)). And the second NDU also contained a merger clause: "This letter and the attached Addendum [with video teleconference provisions] constitute the entire understanding between the United States and you in connection with this interview" (Ex. 3, at 2).

C. Rodgers' Change in Status

On a March 1, 2021 phone call, the Division notified Counsel that Rodgers' status had changed from subject to target because of Rodgers' culpability and failure to be truthful, fully candid, or complete (Ex. 1, at 3). On a March 30, 2021 phone call, the Division informed Counsel that it would likely recommend prosecution of Rodgers for committing a criminal antitrust offense and for obstructing justice by endeavoring to cover up that offense (Ex. 1, at 3). On that call, the Division gave Counsel an overview of Rodgers' false statements and obstruction, and the Division extended a plea offer (Ex. 1, at 3).

On April 9, 2021, Counsel notified the Division that Rodgers rejected the plea offer (Ex. 1, at 3). Five days later, the Grand Jury returned the Indictment that Rodgers now moves to dismiss (Dkt. #21). Count One of the Indictment charges Jindal and Rodgers with knowingly entering into and engaging in a conspiracy to suppress competition by agreeing to fix prices paid to home-healthcare workers (Dkt. #21 ¶¶ 1–13). Count Two charges Jindal and Rodgers with conspiring to obstruct and make false statements in a Federal Trade Commission ("FTC") investigation of

their conduct (Dkt. #21 ¶¶ 14–20). And Counts Three and Four charge Jindal and Rodgers, respectively, with endeavoring to obstruct the FTC investigation (Dkt. #21 ¶¶ 21–26).

III. LEGAL STANDARD

A defendant claiming to have a non-prosecution agreement bears the burden of "prov[ing] that such an agreement existed." *United States v. Jimenez*, 256 F.3d 330, 347 & n.23 (5th Cir. 2001). "Non-prosecution agreements, like plea bargains, are contractual in nature, and are therefore interpreted in accordance with general principles of contract law." *United States v. Castaneda*, 162 F.3d 832, 835 (5th Cir. 1998). "[Courts] look to the language of the contract, unless ambiguous, to determine the intention of the parties." *In re Conte*, 206 F.3d 536, 538 (5th Cir. 2000). "'[P]arol evidence is inadmissible to prove the meaning of an unambiguous [contractual] agreement.' Thus, when a contract is unambiguous, [courts] generally will not look beyond the four corners of the document." *United States v. Long*, 722 F.3d 257, 262 (5th Cir. 2013) (quoting *United States v. Ballis*, 28 F.3d 1399, 1410 (5th Cir. 1994)).[4]

IV. ARGUMENT

A. Rodgers' Unambiguous Written Agreements with the United States Do Not Constitute a Non-Prosecution Agreement.

Rodgers and Counsel fail to apprise the Court that Rodgers had two written NDUs with the United States; that those agreements constituted the Division's entire agreement with him; and that those agreements were unambiguously not a non-prosecution agreement. These written agreements conclusively establish that Rodgers did not have any non-prosecution agreement, and he and Counsel could not have reasonably believed that such an agreement existed.

[4] The only exception to the parol evidence rule is for "a cover letter attached to the plea agreement," which courts have construed "together." *Long*, 722 F.3d at 263. This exception does not apply here as Rodgers does not point to any cover letter attached to his NDUs (Dkt. #45).

In *Jimenez*, the Fifth Circuit found that "a letter proposing to meet with [the defendant]" and providing that "any statement which [the defendant] makes in this meeting will not be used against him in a future prosecution" was not a non-prosecution agreement. 256 F.3d at 347–48. The Eighth Circuit similarly held that an NDU did not constitute a non-prosecution agreement:

> The proffer letter was not a non-prosecution agreement. The letter contained an agreement to "engage in negotiations involving specific concessions" by the Government in exchange for further cooperation *if* the Government believed the information in the proffer was "truthful, candid and meritorious." The letter also provided use immunity (with some limitations). However, these provisions do not amount to a non-prosecution agreement.

United States v. Hyles, 521 F.3d 946, 953 (8th Cir. 2008) (emphasis in original).

Before each of the December 2019 and January 2021 interviews with the FBI and the Division, Rodgers and Counsel executed a written NDU with the United States (Ex. 2; Ex. 3). Yet neither Rodgers' motion nor Counsel's declaration makes a single mention of these NDUs (Dkt. #45; Dkt. #45-8 (Ex. G)). The NDUs included terms defining Rodgers' obligations and—with specified limits and exceptions—prohibiting the United States from using Rodgers' statements directly against him in a future prosecution (Ex. 2, at 1; Ex. 3, at 1). Each NDU "clearly stated that its terms were conditioned on [Rodgers'] giving complete and truthful information." *Ballis*, 28 F.3d at 1410 (*see* Ex. 2, at 1; Ex. 3, at 1). The NDUs also acknowledged that Rodgers was a subject of the investigation and accordingly defined circumstances under which Rodgers' statements and information could be used, including *in a prosecution of Rodgers* (Ex. 2, at 1; Ex. 3, at 1). The NDUs thus unambiguously contemplated a future prosecution of Rodgers and expressly provided that the United States *could* prosecute such a case.

Rodgers consulted with Counsel before signing each NDU (Ex. 2, at 1; Ex. 3, at 1). Rodgers and Counsel signed the first NDU on December 12, 2019 (Ex. 2). That was after the November 26, 2019 call between Counsel and the Division during which, Counsel declares, the

Division represented that it did not anticipate charging Rodgers if he continued to cooperate (Dkt. #45-8 (Ex. G) ¶ 2). Yet Counsel does not declare that he asked for or negotiated any change or addition to the terms of the first NDU, much less that he requested inclusion of any agreement not to prosecute Rodgers (*see* Dkt. #45-8 (Ex. G)). Counsel and Rodgers signed the second NDU on January 26, 2021 (Ex. 3). That was after the January 12, 2021 call between Counsel and the Division during which Counsel declares that he felt the Division "was threatening that Rodgers could be charged in this case" (Dkt. #45-8 (Ex. G) ¶ 10). Yet Counsel does not declare that he asked for or negotiated any change or addition to the terms of the second NDU, much less that he requested inclusion of any agreement not to prosecute Rodgers (*see* Dkt. #45-8 (Ex. G)). Nor does Counsel declare that he lacked the capacity and experience to know the difference between an NDU and a non-prosecution agreement, to explain the difference to his client, or to understand the NDU terms to which he and his client agreed (*see* Dkt. #45-8 (Ex. G)).

Rodgers points to no terms—because there are none—in his agreements with the United States indicating that the Division was prohibited from re-evaluating Rodgers' status or from prosecuting him (Dkt. #45).[5] Moreover, each agreement included a merger clause.[6] The first NDU stated: "This letter constitutes the entire understanding between the United States and you" (Ex. 2, at 2). The second NDU stated: "This letter and attached Addendum [with video teleconference

[5] Indeed, Counsel acknowledges that on more than one occasion he asked the Division about Rodgers' status, yet these inquiries would have been unnecessary if, as Counsel now declares, a non-prosecution agreement already existed (*see* Dkt. #45-8 (Ex. G) ¶¶ 7, 9, 10).

[6] "A merger clause is a 'provision in a contract to the effect that the written terms may not be varied by prior or oral agreements because all such agreements have been merged into the written document.' A merger clause . . . 'achieves the purpose of ensuring that the contract at issue invalidates or supersedes any previous agreements, as well as negating the apparent authority of an agent to later modify the contract's terms.'" *People's Cap. & Leasing Corp. v. McClung*, No. 4:18-CV-00877, 2020 WL 4464503, at *8 (E.D. Tex. Aug. 4, 2020) (quoting *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 334 (Tex. 2011); *IKON Off. Sols., Inc. v. Eifert*, 125 S.W.3d 113, 126 n.6 (Tex. App. 2003)).

provisions] constitute the entire understanding between the United States and you in connection with this interview" (Ex. 3, at 2). Therefore, each NDU "clearly state[d] that it reflect[ed] the entire agreement of the parties." *Ballis*, 28 F.3d at 1410. The NDUs included nothing indicating that "the government waived its right to prosecute [Rodgers]." *Id.*

The NDUs are the only agreements Rodgers executed with the United States. They are unambiguous, they contemplate Rodgers' potential prosecution, and they contain merger clauses. They do not constitute a non-prosecution agreement. *See Jimenez*, 256 F.3d at 347–48; *Hyles*, 521 F.3d at 953. And they foreclose any contention that there was a non-prosecution agreement at the time of their signing. *See, e.g.*, *United States v. Casares*, No. CR 2:14-653, 2019 WL 1243617, at *4–5 (S.D. Tex. Mar. 18, 2019) (rejecting claim that the government violated movant's Fifth Amendment right to due process when it breached its agreement not to prosecute him, "[b]ecause no such agreement existed," where proffer agreement "merely provided that 'no statements made or other information provided by [the movant] during the proffer will be used directly against [him] in any criminal case'" and "did not preclude the Government from prosecuting him"). In sum, Rodgers' motion fails at its outset because there was *no* non-prosecution agreement between the United States and Rodgers.

B. Rodgers Cannot Meet His Burden to Prove the Existence of a Non-Prosecution Agreement Because There Was None.

Because parol evidence is inadmissible to prove the meaning of the unambiguous NDUs, Rodgers cannot use extrinsic evidence to circumvent their "four corners." *Long*, 722 F.3d at 262. Following "general principles of contract law," *United States v. Cantu*, 185 F.3d 298, 302 (5th Cir. 1999), the NDUs conclusively establish that no non-prosecution agreement existed, *see Long*, 722 F.3d at 262–63; *Ballis*, 28 F.3d at 1410. Moreover, when a formal agreement contains a "merger clause stating that the written . . . agreement constitutes the complete agreement among the

Government, [the defendant], and [the defendant's] counsel," any reliance on alleged external promises is "unreasonable." *Long*, 722 F.3d at 264. Here, as in *Long*, each formal agreement that Rodgers, Counsel, and the Division executed stated that it constituted the entire agreement among the signatories at the time of their signing (Ex. 2; Ex. 3). It would therefore have been unreasonable for Rodgers and Counsel to rely on alleged oral promises external to the agreements. *See Long*, 722 F.3d at 264. Indeed, it is "difficult . . . to accept as true . . . that a seasoned criminal attorney would rely on a 'gentleman's agreement' where his client's liberty . . . w[as] at stake." *United States v. McHan*, 101 F.3d 1027, 1035 (4th Cir. 1996), *abrogated on other grounds by Honeycutt v. United States*, 137 S. Ct. 1626 (2017). And it is impossible to accept as true when, as here, the purported oral agreement conflicts with written agreements. *See Long*, 722 F.3d at 264.

But even if the Court were to accept Rodgers' invitation to disregard the parol evidence rule, Rodgers would remain unable to "demonstrate at least a meeting of the minds that the government would refrain from further prosecuting him in exchange for his cooperation." *McHan*, 101 F.3d at 1034; *accord Jimenez*, 256 F.3d at 347. *McHan* provides an instructive contrast. There, as here, the defendant and his former counsel alleged the existence of an oral non-prosecution agreement. *McHan*, 101 F.3d at 1034–35. Unlike here, in *McHan* the defendant's former counsel "testified that he had told [the AUSA] that [the defendant] would not submit to debriefing *unless the government guaranteed* that there 'wouldn't be any further criminal prosecution'" and "he understood [the AUSA] to *acquiesce in their conditions*." *Id.* at 1034 (emphases added). Even with this testimony, the magistrate judge found counsel's version of events "implausible" because it "'stretch[ed] the bounds of reasonableness to infer' that the government—despite its general practice in that district of reducing all agreements to writings

signed by the parties—'would jeopardize its interest' . . . with an oral agreement." *Id.* at 1035 (alteration in original). Here, the allegation of a non-prosecution agreement is even less plausible because Rodgers and Counsel do not allege that they *ever requested* a non-prosecution agreement, much less that Rodgers refused to be interviewed without a non-prosecution guarantee and that the Division acquiesced to this condition (*see* Dkt. #45-8 (Ex. G)).

Even taken at face value, Counsel's declaration does not show a meeting of the minds that the Division would refrain from prosecuting Rodgers in exchange for his cooperation. Counsel recounts that the Division consistently said that Rodgers was a "subject" of the investigation, not merely a "witness" (Dkt. #45-8 (Ex. G) ¶¶ 2, 7, 10). Counsel admits his understanding that Rodgers' status as "subject" meant that he could be criminally prosecuted, and claims he was "satisfied" with the representation that the Division did not *anticipate* charging Rodgers if he cooperated (Dkt. #45-8 (Ex. G) ¶ 2). Counsel and Rodgers subsequently executed two written agreements with the Division without suggesting that any promise not to prosecute Rodgers should be included (Dkt. #45-8 (Ex. G); Ex. 2; Ex. 3). And it is revealing that in his contemporaneous reaction to Rodgers' change in status, Counsel *did not* assert the change violated any agreement (*see* Dkt. #45-8 (Ex. G) ¶¶ 12–13; Dkt. #45-15 (Ex. N)).

As in *McHan*, here it is "accurate to say that the *only real agreement*" between Rodgers and the Division "was that nothing that [Rodgers] said during the [interviews] would be used against him." 101 F.3d at 1035 (emphasis in original). The NDU provisions were clear that they gave Rodgers certain protections in the event that his status changed: if the United States later prosecuted Rodgers, the United States could not directly use his statements against him, except as specified in the NDU (Ex. 2, at 1; Ex. 3, at 1). But far from guaranteeing against prosecution, the NDUs expressly acknowledged and preserved the possibility of prosecution (Ex. 2, at 1; Ex. 3,

at 1). Thus, the NDUs made it plain that the Division "was unwilling to say that [the United States] would not prosecute." *McHan*, 101 F.3d at 1035.

Rodgers' situation is not unique, and Counsel's declaration reflects this understanding. Counsel does not claim that the Division ever agreed not to prosecute Rodgers, but rather that the Division anticipated Rodgers would remain a subject so long as he cooperated (*see* Dkt. #45-8 (Ex. G)). That *anticipation* does not constitute a non-prosecution *agreement*, and it would be unreasonable to think otherwise. *See Long*, 722 F.3d at 264. As in *McHan*, the "inescapable conclusion" in this case is "that there was no agreement" not to prosecute. 101 F.3d at 1035.

C. Even If There Were a Non-Prosecution Agreement, Rodgers' False Statements and Obstruction Would Preclude Dismissal of the Indictment.

Even if Rodgers had proved the existence of any non-prosecution agreement—which he has not—he still would not be entitled to dismissal of the Indictment. Rather, the United States would then be required to prove that Rodgers violated whatever hypothetical agreement he succeeded in establishing. *See Jimenez*, 256 F.3d at 347 n.23 ("[The defendant] argues that, in order to prosecute him, the government must prove that [he] breached the alleged immunity agreement. *This rule only applies, however, if [the defendant] first proves that such an agreement existed.* (emphasis added)).

If necessary, the United States could readily show a material violation of any non-prosecution agreement. Counsel implicitly admits as much when he declares that Rodgers told the Division and the FBI substantially the same story that he told the FTC (Dkt. #45-8 (Ex. G) ¶ 12), for the Grand Jury found probable cause to believe that much of that story was false, misleading, incomplete, and part of a conspiracy and endeavor to obstruct justice (*see* Dkt. #21 ¶¶ 20(a), (g)–(j), 24–26). Consistently making false statements to different investigators is not cooperation; it is obstruction, as the Division explained to Counsel on March 30, 2021 (Ex. 1, at 3).

V. CONCLUSION

There was no non-prosecution agreement between the United States and Rodgers, and Rodgers' adopted arguments regarding Count One are meritless. The United States accordingly requests that the Court deny Rodger's Motion to Dismiss the Superseding Indictment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2021, I electronically served a true and correct copy of this document on Defendants' counsel of record by means of the Court's CM-ECF system.

/s/ Matthew W. Lunder
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