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' MOTION TO QUASH DEFENDANT RODGERS'S SUBPOENAS FOR TESTIMONY BY CURRENT AND FORMER U.S. DEPARTMENT OF JUSTICE ATTORNEYS

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The United States respectfully moves to quash Defendant Rodgers's subpoenas for testimony by three attorneys who are current or former employees of the United States Department of Justice, Antitrust Division: Principal Deputy Assistant Attorney General Doha G. Mekki, Assistant Chief Megan S. Lewis, and former Trial Attorney Katherine Stella (Ex. 1, 2, 3). Defendant Rodgers has sought testimony from these three attorneys pursuant to Department of Justice regulations set forth at 28 C.F.R. §§ 16.21 *et seq.*, commonly known as the "*Touhy*" regulations (Ex. 4). *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). But Defendant Rodgers's *Touhy* request was denied in relevant part, pursuant to 28 C.F.R. § 16.26, because the testimony he seeks is protected by the deliberative process privilege and the work product doctrine, and because the testimony is inadmissible under the Federal Rules of Evidence (Ex. 5). Defendant Rodgers nevertheless subpoenaed the attorneys.[1] The United States therefore respectfully requests that the Court quash the subpoenas at issue.

BACKGROUND

On March 22, 2022, counsel for Defendant Rodgers requested trial testimony from four current or former employees of the U.S. Department of Justice—the Antitrust Division's Principal Deputy Assistant Attorney General Doha G. Mekki, Assistant Chief Megan S. Lewis, and former Trial Attorney Katherine Stella, as well as FBI Special Agent Jeffrey Pollack—pursuant to 28 C.F.R. § 16.23 and *Touhy*, 340 U.S. 462. Defendant Rodgers's *Touhy* request represents that he seeks their testimony "to discuss the analysis of the evidence, interviews with witnesses related to the investigation, and their belief that Rodgers's version of events is the truth" (Ex. 4). The request indicates that Defendant Rodgers seeks this testimony, at least in part, to prove the existence of an

[1] To the United States' knowledge, former Trial Attorney Stella has not yet been properly served with a subpoena.

alleged non-prosecution agreement.[2] Defendant Rodgers's request was referred to the Antitrust Division's *Touhy* officer in accordance with the applicable regulations.

On March 28, 2022, Defendant Rodgers filed a witness list that includes the four individuals named in his *Touhy* request (Dkt. #68). Defendant Rodgers's witness list states that these witnesses "will testify concerning [their] opinion of John Rodgers's truthfulness" (Dkt. #68, at 1).

On March 28, 2022, the United States filed two motions *in limine* that relate to Defendant Rodgers's *Touhy* request: Motion #8: Motion to Exclude Evidence and Argument About Alleged Non-Prosecution Agreement (Dkt. #75, at 9–11) and Motion #9: Motion to Exclude Improper Character Evidence (Dkt. #75, at 11–14). Motion #8 argues that any evidence or argument about an alleged non-prosecution agreement is irrelevant because of the Court's ruling that "no agreement was reached as a matter of law" (Dkt. #75, at 9–10 (quoting Memorandum Opinion and Order Denying Motions to Dismiss ("Order"), Dkt. #56, at 36)). The motion further argues that, even if the testimony sought by Defendant Rodgers were relevant, its probative value would be substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, and wasting time (Dkt. #75, at 10 (citing Fed. R. Evid. 403)).

Motion #9 argues that testimony by current or former U.S. Department of Justice attorneys or agents about Defendant Rodgers's character for truthfulness or specific instances of his truthful conduct is inadmissible under Federal Rules of Evidence 401, 402, 403, and 405 (Dkt. #75, at 12–14). The motion argues: *First*, the testimony is irrelevant because Defendant Rodgers is charged

[2] Defendant Rodgers's request states: "For over a year, the Antitrust Division continued to assert that Rodgers would not be charged as long as he continued to tell the truth and cooperate with the government's investigation. After a new prosecution team was assigned to this matter, Rodgers was determined to be untruthful . . . and was charged." (Ex. 4).

with obstruction of the Federal Trade Commission ("FTC"), not the Department of Justice (Dkt. #75, at 12–13 (citing Fed. R. Evid 402, 403)). *Second*, even if the attorneys' or agent's mental impressions of Defendant Rodgers's truthfulness were relevant, the probative value of such evidence would be substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, and wasting time (Dkt. #75, at 13 (citing Fed. R. Evid. 403)). *Third*, the testimony sought by Defendant Rodgers does not satisfy Rule 405, which limits the allowable methods of proving character (Dkt. #75, at 13–14 (citing Fed. R. Evid. 405)).

On March 31, 2022, Assistant Attorney General Jonathan S. Kanter responded to Defendant Rodgers's *Touhy* request (Ex. 5). As explained in the Assistant Attorney General's letter, after careful consideration, the Department of Justice has determined that Special Agent Pollack is authorized to testify as to interviews with witnesses related to the investigation of this case and of which he has personal knowledge (Ex. 5, at 2). But Special Agent Pollack is not authorized to disclose any of the following:

(1) information protected by privilege, such as the deliberative process privilege and work product doctrine, including any analysis of the evidence (with the narrow exception of summary exhibits to prove content, *see* Fed. R. Evid. 1006) and personal beliefs and mental impressions;

(2) disclosures that would violate a statute or a rule of procedure, such as the grand jury secrecy rule, Fed. R. Crim. P. 6(e);

(3) classified information, unless appropriately declassified by the originating agency;

(4) disclosures that would reveal a confidential source or informant, unless the investigative agency and the source or informant have no objection;

(5) disclosures that would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired; or

(6) disclosures that would improperly reveal trade secrets without the owner's consent

(Ex. 5, at 2).

The Department did not authorize the trial testimony of Principal Deputy Assistant Attorney General Mekki, Assistant Chief Lewis, or former Department attorney Ms. Stella, because "[t]he deliberative process privilege and work product doctrine protect their analyses of the evidence, including interviews with witnesses, and personal beliefs and mental impressions" (Ex. 5, at 2). Assistant Attorney General Kanter further noted that the testimony sought is irrelevant and inadmissible (Ex. 5, at 3). In addition to the arguments made in the United States' motions *in limine*, Assistant Attorney General Kanter noted that the probative value of any non-privileged testimony by Principal Deputy Assistant Attorney General Mekki, Assistant Chief Lewis, or Ms. Stella is substantially outweighed by a danger of needlessly presenting evidence that is cumulative of Special Agent Pollack's authorized testimony (Ex. 5, at 3 (citing Fed. R. Evid. 403)). Finally, Assistant Chief Lewis is unavailable to testify because she is the lead prosecutor in a trial that begins on April 4, 2022, and that is expected to last for several weeks (Ex. 5, at 3).

ARGUMENT

Defendant Rodgers has subpoenaed Deputy Assistant Attorney General Mekki, Assistant Chief Lewis, and former Trial Attorney Stella, notwithstanding the Department of Justice's determination, pursuant to 28 C.F.R. § 16.26(a), that those three individuals are not authorized to testify in this matter. The Department has determined that the testimony Defendant Rodgers seeks from Deputy Assistant Attorney General Mekki, Assistant Chief Lewis, and Ms. Stella is protected

by the deliberative process privilege and the work product doctrine, *see* 28 C.F.R. § 16.26(a)(2), and that the testimony is inadmissible under "the rules of procedure governing" this case, *id.* § 16.26(a)(1), namely, the Federal Rules of Evidence. A federal employee cannot be compelled to comply with a subpoena for testimony when the employee's agency has not authorized the testimony. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467–68 (1951). The United States therefore respectfully requests that the Court quash the subpoenas at issue.

A. The Testimony Sought by Defendant Rodgers is Protected by the Deliberative Process Privilege and the Attorney Work Product Doctrine.

Testimony regarding the mental processes by which government officials arrive at a decision when acting in a judicial, quasi-judicial or administrative capacity is within the heartland of, and protected by, the deliberative process privilege. *United States v. Morgan*, 313 U.S. 409, 422 (1941) (executive officer "should never have been subject to . . . examination" of his mental processes); *Gary W. v. La. Dep't of Health & Hum. Res.*, 861 F.2d 1366, 1368–69 (5th Cir. 1988) (affirming district court's refusal to allow deposition of special master regarding her recommendation because "examination of her mental processes in making that recommendation would have been inappropriate"). This privilege extends to prosecutors' decision-making processes, *see McGoldrick v. Koch*, 110 F.R.D. 153, 157 (S.D.N.Y. 1986), and it is coextensive with the privilege as applied to deliberative documents, *see United States v. Hooker Chem. & Plastics Corp.*, 123 F.R.D. 3 (W.D.N.Y. 1988). The protected mental processes include the mental activities of the official, the methods by which a decision was reached, the matters considered, the contributing influences, and the role played in the decision by the work or expressions of others. Paul F. Rothstein & Sydney A. Beckman, *Federal Testimonial Privileges* § 5:5 (2d ed. 2004 & Supp. 2021). To permit "examination of such matters would be destructive of executive responsibility and the decisional process. 'Just as a judge may not be subjected to such a scrutiny,

so the integrity of the administrative process must be equally respected.'" *Id.* (quoting *Morgan*, 313 U.S. at 422).

The attorney work product doctrine likewise "insulates a lawyer's research, analysis of legal theories, [and] mental impressions." *Adams v. Memorial Hermann*, 973 F.3d 343, 349 (5th Cir. 2020) (quoting *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991)). The work product doctrine protects both tangible and intangible information—including personal recollections, declarations of witnesses, mental impressions, and personal beliefs—when such information reveals, directly or indirectly, an attorney's legal theories or her evaluation of evidentiary matters. *See Hickman v. Taylor*, 329 U.S. 495, 508 (1947); Rothstein & Beckman, *Federal Testimonial Privileges* § 11:3. The doctrine applies to materials "prepared in anticipation of litigation, whether those materials were prepared by the attorney of by agents of the attorney." *Adams*, 973 F.3d at 349.

The testimony that Defendant Rodgers seeks from Principal Deputy Assistant Attorney General Mekki, Assistant Chief Lewis, and former Trial Attorney Stella is protected by the deliberative process privilege and the attorney work product doctrine. Defendant Rodgers has requested that each of these attorneys testify about her "analysis of the evidence" (including "interviews with witnesses related to the investigation") and her personal "belief that Rodgers's version of events is the truth" (Ex. 4). These mental processes, personal recollections, mental impressions, and personal beliefs are at the heart of the deliberative process privilege and the work product doctrine. *See* Rothstein & Beckman, *Federal Testimonial Privileges* §§ 5:5, 11:3. Accordingly, the Department of Justice declined to authorize the testimony of Principal Deputy Assistant Attorney General Mekki, Assistant Chief Lewis, or Ms. Stella (Ex. 5, at 2). *See* 28 C.F.R. § 16.26(a)(2).

Should Principal Deputy Assistant Attorney General Mekki, Assistant Chief Lewis, or Ms. Stella be questioned about any topic for which they have not received express authorization to testify, they will state that they are not authorized to answer (Ex. 5, at 1). And the Court cannot hold them in contempt for doing so. *See Touhy*, 340 U.S. at 468–70. Because the attendance at trial of Principal Deputy Assistant Attorney General Mekki, Assistant Chief Lewis, or Ms. Stella would be futile, the United States requests that the Court quash Defendant Rodgers's subpoenas.

B. The Testimony Sought by Defendant Rodgers is Inadmissible Under the Federal Rules of Evidence.

As explained in the United States' Motion #8: Motion to Exclude Evidence and Argument About Alleged Non-Prosecution Agreement (Dkt. #75, at 9–11) and Motion #9: Motion to Exclude Improper Character Evidence (Dkt. #75, at 11–14), the testimony sought by Defendant Rodgers is inadmissible under Federal Rules of Evidence 401, 402, 403, and 405.

The mental impressions and personal beliefs of Principal Deputy Assistant Attorney General Mekki, Assistant Chief Lewis, and former Trial Attorney Stella as to Defendant Rodgers's truthfulness are irrelevant and, therefore, inadmissible. *See* Fed. R. Evid. 401, 402. Defendant Rodgers is charged with conspiracy to obstruct, and obstruction of, the FTC, not the Department of Justice (Dkt. #21, at 6–15). The period of the charged conspiracy to obstruct the FTC is from April 2017 until October 2017—well before Defendant Rodgers ever met Principal Deputy Assistant Attorney General Mekki, Assistant Chief Lewis, or Ms. Stella. Even if these attorneys' mental impressions or personal beliefs as to Defendant Rodgers's truthfulness were marginally relevant, the probative value of such evidence would be substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, and wasting time. *See* Fed. R. Evid. 403.

Rule 403 provides yet another basis to exclude this testimony, given that the Department of Justice has authorized Special Agent Pollack to testify as to interviews with witnesses related to the investigation of this case and of which he has personal knowledge (Ex. 5, at 2). Rule 403 allows the Court to exclude relevant evidence if its probative value is substantially outweighed by a danger of "needlessly presenting cumulative evidence." Fed. R. Evid. 403. Here, any non-privileged relevant testimony of Principal Deputy Assistant Attorney General Mekki, Assistant Chief Lewis, or Ms. Stella would be cumulative of Special Agent Pollack's authorized testimony.

Finally, the testimony sought by Defendant Rodgers—testimony by Department of Justice attorneys about Defendant Rodgers's character for truthfulness or specific instances of his truthful conduct—is inadmissible under Rule 405. Although Defendant Rodgers may offer evidence of a "pertinent trait," Fed. R. Evid. 404(a)(2)(A), the method of proving that trait must satisfy Rule 405. Principal Deputy Assistant Attorney General Mekki, Assistant Chief Lewis, and Ms. Stella cannot testify to Defendant Rodgers's character for truthfulness by reputation or opinion, *see* Fed. R. Evid. 405(a), because they are not members of Defendant Rodgers's community (nor have they surveyed a general cross-section of his community), *see United States v. Candelaria-Gonzalez*, 547 F.2d 291, 294 (5th Cir. 1977), and because they are not sufficiently acquainted with Defendant Rodgers to have formed an opinion concerning his character for truthfulness, *cf. United States v. Cortez*, 935 F.2d 135, 139–40 (8th Cir. 1991) (rejecting opinion testimony by police officers as to witness's character for truthfulness where testimony "merely expresses [the officers'] belief in the story he told them"). These attorneys interviewed Defendant Rodgers on one occasion. Moreover, Principal Deputy Assistant Attorney General Mekki, Assistant Chief Lewis, and Ms. Stella cannot testify to "relevant specific instances" of Defendant Rodgers's truthful conduct because his character for truthfulness is not "an essential element of a charge, claim, or defense," Fed. R.

Evid. 405(b), as that requirement has been interpreted by the Fifth Circuit. *See United States v. Crinel*, Crim. No. 15-61, 2016 WL 5363091, at *2 (E.D. La. Sept. 26, 2016) ("The Fifth Circuit interprets 'essential element' in the 'strict sense.'" (quoting *United States v. Gulley*, 526 F.3d 809, 819 (5th Cir. 2008))).

Rather than allow Defendant Rodgers to attempt to compel Principal Deputy Assistant Attorney General Mekki, Assistant Chief Lewis, and Ms. Stella to take the stand, only to have them state that they are not authorized to provide the irrelevant and inadmissible testimony that he seeks—a spectacle that would be unfairly prejudicial, confuse the issues, mislead the jury, and waste time—the United States respectfully asks the Court to quash Defendant Rodgers's subpoenas.

CONCLUSION

The United States respectfully requests that the Court quash the three subpoenas at issue.

Dated: March 31, 2022

Respectfully submitted,

/s/ Matthew W. Lunder

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2022, 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
Matthew W. Lunder

CERTIFICATE OF CONFERENCE

I hereby certify that on March 31, 2022, I conferred with Defendant Rodgers's counsel regarding this motion to quash, and counsel indicated that Defendant Rodgers would oppose the motion.

/s/ Matthew W. Lunder
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