

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

UNITED STATES OF AMERICA

v.

JOHN RODGERS (2)

NO. 4:20-CR-358-ALM

MOTION TO DISMISS THE SUPERSEDING INDICTMENT

For the reasons that follow, the defendant, John Rodgers, files this motion to dismiss the superseding indictment because the government has breached their oral agreement not to prosecute Rodgers. In addition, Rodgers adopts the arguments set forth in co-defendant Neeraj Jindal's motion to dismiss count one in ECF Document No. 36.

Factual Background

Rodgers owned and operated a physical therapy staffing company called Integrity from 2003 - 2013. In 2013, Rodgers sold Integrity to Neeraj Jindal, and entered into a professional services agreement with Jindal to act as a physical therapist contractor for Integrity. From time to time, Jindal would consult with Rodgers concerning Integrity's operations and therapy related issues; however, Rodgers was only compensated for patient visits that he personally conducted.

On March 7, 2017, Jindal received an email from Bridgeway, who was one of Integrity's largest referral providers, stating that Bridgeway was reducing the rate Bridgeway paid Integrity. Apparently, Bridgeway's rate cut was going to have a substantial impact on Integrity's profitability. As a result, Jindal consulted with Rodgers

on how to handle the situation. Rodgers told Jindal that he had essentially three options: 1) accept the rate cut from Bridgeway; 2) Jindal could find some middle ground with Bridgeway; or 3) Jindal could discontinue business with Bridgeway. *See* Exhibit H at 4 (FBI 302 dated January 13, 2020).

On March 10, 2017, Rodgers contacted Sheri Yarbray, who owned and operated Your Therapy Source (“YTS”), via text message. YTS is a therapist staffing company and a competitor for Integrity. Over the course of a text conversation that occurs between March 10 – 17, 2017, Yarbray agrees to lower therapist rates to Integrity’s rates. However, Yarbray never actually lowers any therapists’ rates. Unbeknownst to Rodgers, Jindal has similar communications with the owners of other therapist staffing companies.

In April 2017, the Federal Trade Commission (“FTC”) began to issue several civil investigative demands seeking information concerning suspected collusion on therapists’ rates. In September 2017, investigators with the FTC depose Rodgers and Jindal concerning allegations Integrity attempted to conspire to fix wages. On December 11, 2017, investigators with the FTC deposed Yarbray with regards to the same issues. On July 1, 2018, the FTC issued a press release stating that Jindal, Yarbray and YTS “agreed to settle the FTC charges that they agreed to reduce pay rates for therapists and invited other competitors to collude on the rates.” *See* Exhibit A (FTC Press Release).¹

On August 1, 2018, the U.S. Department of Justice Antitrust Division contacted the FTC and sought all information and evidence surrounding the FTC’s investigation of

¹ It should be noted that when the FTC settled with YTS, Jindal, and Yarbray, no fine or civil monetary penalty was ordered.

YTS, Jindal, and Yarbray. *See* Exhibit B (August 1, 2018, Letter from Antitrust Division to FTC).

On March 1, 2019, at the direction of the Antitrust Division, a Special Agent with the Federal Bureau of Investigation (“FBI”) contacted Rodgers to gauge his willingness to cooperate with the government’s criminal investigation of the YTS, Jindal, and Yarbray matter. *See* Exhibit C (Email titled “FBI contact with Rodgers”). According to the agent, Rodgers was “receptive to being contacted” and provided the agent with his availability to speak with the government. *Id.*

Between April 15 – 18, 2019, Rodgers communicated directly with DOJ Trial Attorney Katie Stella. *See* Exhibit D (Email titled “Re: Available Times”). During these communications, Stella sought to have Rodgers travel to Washington, D.C. to meet with the Antitrust Division “in person, on a voluntary basis” to discuss the government’s investigation. *Id.* Rodgers ultimately declined to travel to Washington, D.C. because of the hardship it presented “both professionally and personally;” however, Rodgers offered his willingness to participate in a phone call to answer any of Stella’s questions. *Id.*

On July 3, 2019, Rodgers met with an FBI agent at a Starbucks coffee shop in Riverview, Florida,² to discuss the government’s investigation. *See* Exhibit E (FBI 302 dated July 8, 2019). During this meeting, Rodgers answered all the agent’s questions and provided phone numbers and email addresses as requested. *Id.*

² During this period of time, Rodgers was working in Florida Monday through Wednesday each week.

On November 26, 2019, counsel spoke with DOJ Trial Attorney Katie Stella on the phone following a brief email exchange. *See* Exhibit F (Email titled “RE: John Rodgers). During this phone call, Stella stated that the government considered Rodgers to be a “subject” of a criminal investigation, but later confirmed that she did not *anticipate* that Rodgers would be charged if he continued to cooperate with the government’s investigation. *See* Exhibit G (Declaration of Brian Poe). Counsel and Stella then discussed the proffer the government wanted to conduct on December 12, 2019. *Id.* Lastly, Stella agreed to provide counsel (and Rodgers) a copy of the transcript from his FTC testimony. *Id.*; *see also* Exhibit F.

On December 12, 2019, Rodgers (accompanied by counsel) met with the government at the United States Attorney’s Office in Fort Worth for a proffer. During this proffer, the government spent approximately two hours going through in detail the relevant facts in this investigation, including, but not limited to: 1) the text messages between Rodgers and Yarbray; 2) Rodgers’s conversations with Jindal; 3) Rodger’s phone records; and 4) Rodgers’s history with Integrity. *See* Exhibit H (FBI 302 dated January 13, 2020).

On December 20, 2019, DOJ Trial Attorney Stella contacted counsel via email requesting that Rodgers attempt to see if his Apple iCloud account contained a backup of Rodgers’s cell phone. *See* Exhibit I (Email titled “RE: instructions for cloud access”). Despite best efforts on the part of Rodgers, Rodgers was unable to locate any information Stella was seeking to find. *Id.*

On or about January 8, 2020, DOJ Trial Attorney Stella left counsel a voicemail requesting information from Rodgers concerning Integrity’s banking practices. *See* Exhibit J (January 8, 2020 Email). Counsel communicated with Rodgers and relayed the information he had on the subject to Stella. *Id.*

On May 22, 2020, counsel received a phone call from DOJ Trial Attorney Stella concerning Rodgers. During this conversation, Stella confirmed that Rodgers was still considered a “subject” of a criminal investigation. However, Stella further confirmed that Rodgers *would not* be charged criminally if he continued to cooperate with the government’s investigation. *See* Exhibit G at 3 (Declaration of Brian Poe); *see also* Exhibit K (Email titled “Memo to file: Call with Brian Poe”).

On August 17, 2020, counsel received a call from DOJ Trial Attorney Stella requesting that Rodgers attempt to determine his exact location on several dates in March of 2017. Stella followed the call with an email specifying the exact dates and times she was requesting. *See* Exhibit L (Email title “RE: Mr. Rodgers physical location”). Rodgers reviewed his calendar from this timeframe and counsel provided Stella with as much information as Rodgers had for these dates. *Id.*

On or about December 9, 2020, counsel received a call from Megan Lewis, an Assistant Chief in the DOJ Antitrust Division, regarding Rodgers.³ *See* Exhibit G at 4 (Declaration of Brian Poe). Lewis informed counsel that a grand jury had returned an indictment against Jindal in the Eastern District of Texas. *Id.* Lewis confirmed that the

³ It should be noted that Lewis was present for Rodgers’s December 12, 2019, proffer at the U.S. Attorney’s Office in Fort Worth. *See* Exhibit H.

government would need Rodgers to testify against Jindal at trial. *Id.* Counsel specifically inquired about Rodger’s status, and Lewis confirmed that Rodgers *would not* be charged if he continued to cooperate with the government. *Id.*

On January 12, 2021, counsel was contacted by DOJ Trial Attorney Matthew Lunder concerning Rodgers. *See* Exhibit G at 4-5 (Declaration of Brian Poe). Lunder stated that he has taken over as head of the trial team in this case and indicated that he wanted to schedule a meeting with Rodgers. *Id.* Lunder further stated that Rodgers was “still a subject” of a criminal investigation and he had not seen anything in the file to suggest that Rodgers had been told that Rodgers was “purely a fact witness.” *Id.* Counsel affirmed that Rodgers had never been told that he was “purely a fact witness;” however, counsel had been assured that Rodgers would not be charged in this case as long as Rodgers “continued to cooperate” with the government. *Id.* Lunder repeatedly stated that he “would honor whatever the previous trial team said.” *Id.* Before ending the call, Lunder provided counsel with the three main areas he wanted to explore with Rodgers in his next interview. *Id.*

On January 27, 2021, Rodgers proffered with the government virtually. This proffer session lasted approximately one hour. *See* Exhibit M (FBI 302 dated February 17, 2021). The first 50 minutes of the proffer concerned Rodgers’s background and had nothing to do with the “three main areas” Lunder stated he wanted to explore during the proffer. *See* Exhibit G at 5 (Declaration of Brian Poe). However, during the last 10 minutes of the proffer, Lunder did attempt to explore the areas he previously identified,

but given time restraints of counsel, these areas were not given the attention needed in order to explain the areas sufficiently. *Id.*

On March 1, 2021, counsel participated in a conference call with Lunder and other members of his trial team concerning Rodgers. *Id.* During this call, Lunder stated that the government's position on Rodgers has changed, and they were now recommending prosecution for Rodgers. *Id.* After much discussion, Lunder stated that he did not believe Rodgers was being completely truthful with the government. *Id.* Counsel reiterated that Rodgers has been consistent from the beginning and requested the new trial team conduct another interview with Rodgers so any issues could be cleared up, but Lunder ultimately declined. *Id.*

On March 30, 2021, counsel participated in a conference call with Lunder and other members of his trial team concerning Rodgers. During this call, Lunder made a plea offer to counsel concerning Rodgers, but refused to provide any information and/or evidence showing how Rodgers had not been truthful. Counsel again requested that Rodgers be given an opportunity to meet with the government to clear up any misunderstandings. *See* Exhibit N (Email titled "RE: US v Neeraj Jindal").

On April 15, 2021, a federal grand jury returned a three-count superseding indictment against Rodgers and Jindal. Dkt. No. 21.

On May 25, 2021, Jindal filed a motion to dismiss Count One of the superseding indictment. Dkt. No. 36. Rodgers now files a motion adopting Jindal's motion to dismiss and his own motion to dismiss all charges against him based on the government's breach of its oral agreement not to prosecute.

Argument and Analysis

A. Rodgers has maintained his end of the non-prosecution agreement, and the government should be required to bound their promises.

“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). When a defendant keeps his end of the bargain, “the government is bound to perform its promises.” *Id.* “[F]ederal courts have long been cognizant of the responsibility of federal prosecutors to meticulously fulfill their promises.” *United States v. Lilly*, 810 F.3d 1205, 1215 (10th Cir. 2016) (internal citation omitted). One of the most fundamental rights an individual has is the right to remain silent. Rodgers did not have any duty to provide the government with any incriminating evidence. However, the government’s promises of no prosecution induced him to cooperate in this investigation. When Rodgers continuously waived his rights under the Fifth Amendment to the United States Constitution by cooperating with the government, he suffered a detriment. Rodgers’s promise to cooperate with the government “clearly fits the well-established definition of consideration: a promise to act or forbear that is bargained for and exchanged for a return promise.” *United States v. McBride*, 571 F.Supp. 596, 605-06 (S.D. Tex. 1983), *aff’d* 915 F.2d 1569 (5th Cir. 1990) (internal citations omitted).

Even if the government believes a defendant has breached the terms of a non-prosecution agreement, “due process prevents the government from making this determination and nullifying the agreement unilaterally.” *Castaneda*, 162 F.3d at 836.

To rescind a non-prosecution agreement, the government must prove by a preponderance of the evidence that:

1. The defendant actually breached the agreement, and
2. The breach was material to warrant rescission.

Id.

In Rodgers's case, the government repeatedly promised to not prosecute him if he continued to cooperate with the government. Admittedly, the phrase "continue to cooperate" is rather ambiguous. However, any "ambiguities" in a non-prosecution agreement "must be construed against the government." *United States v. McBride*, 571 F.Supp. 596, 605 (S.D. Tex. 1983), aff'd 915 F.2d 1569 (5th Cir. 1990). The government was the party that set the terms, not Rodgers. The government has been unwilling (or unable) to provide any evidence to show that Rodgers materially breached the terms of his non-prosecution agreement. The lack of evidence of any breach falls well short of the preponderance standard required before the government can unilaterally rescind the agreement.

B. Rodgers adopts Jindal's Motion to Dismiss Count One.

Rodgers respectfully adopts the motion and arguments set forth in ECF Doc. No. 36. This motion seeks to dismiss Count One of the superseding indictment.

Conclusion

Based on the foregoing, the defendant respectfully requests the Court to grant this motion and dismiss the superseding indictment in its entirety against Rodgers.

Respectfully submitted,

/s/ Brian D. Poe

BRIAN D. POE

Texas Bar No. 24056908

909 Throckmorton Street

Fort Worth, TX 76102

Telephone: 817-870-2022

Email: bpoe@bpoelaw.com

ATTORNEY FOR JOHN RODGERS

CERTIFICATE OF SERVICE

I certify that on June 18, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States District Court, Eastern District of Texas, using the electronic case filing system of the Court. The electronic case filing system sent a “Notice of Electronic Filing” to all attorneys who have consented in writing to accept this Notice as service of this document.

/s/ Brian D. Poe
BRIAN D. POE