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Attorneys for Plaintiff
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA	)	CR. NO. 19-00099-DKW-KJM
	)	
Plaintiff,	)	GOVERNMENT'S MOTION
	)	TO RECONSIDER
vs.	)	
	)	
MICHAEL J. MISKE, JR., (01)	)	
	)	
Defendant.	)	
	)	

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GOVERNMENT'S MOTION TO RECONSIDER

I. INTRODUCTION

The United States respectfully moves this Court to reconsider its January 18, 2023 order denying Thomas M. Otake, Esq.'s Motion to Withdraw as Counsel for Michael Miske. *See* Dkt. No. 735. The United States agrees with Mr. Otake's self-assessment that he has a serious and irreconcilable ethical conflict of interest preventing his continued representation of Miske.[1] *See* Dkt. No. 729.[2] Yet, following a 30-minute *ex parte* discussion with Mr. Otake—which also involved Miske's two other attorneys, Lynn E. Panagakos, Esq. and Michael J. Kennedy, Esq.—the Court denied Mr. Otake's motion, finding based on a sealed record that Mr. Otake's withdrawal would work a "substantial hardship." *See* Dkt. No. 735.

The United States cannot discern from the record what critical facts concerning Mr. Otake's conflict were presented to and considered by the Court, but believes in good faith that substantial information not previously in the record must be considered, all to preserve the integrity of the judicial process and to prevent manifest injustice. The United States therefore files this motion to provide

[1] The United States' Motion to Disqualify Defense Counsel, filed on the same day as Mr. Otake's motion to withdraw, sets forth multiple conflicts arising from discrete factual matters that adversely impact both Mr. Otake and co-counsel Lynn E. Panagakos' continued representation of Miske. See Dkt. No. 729. This motion for reconsideration addresses only Mr. Otake's conflicts.

[2] The United States' Motion to Disqualify Defense Counsel is set to be heard by the Honorable Derrick K. Watson at 10:00 a.m. on February 10, 2023.

the Court with those facts and to allow reconsideration of the Court's order denying Mr. Otake's motion.[3] Reconsideration is necessary here because (1) the United States was excluded from the extensive *ex parte* discussion where arguments about non-privileged, factual matters apparently were made by at least one of Miske's other attorneys and (2) compelling Mr. Otake to continue representing a client with whom he has a serious and irreconcilable ethical conflict of interest violates Miske's Sixth Amendment rights, violates the Hawaii Rules of Professional Conduct ("HRPC"), and undermines the integrity of this proceeding, resulting in manifest injustice. Compelling Mr. Otake to proceed under these circumstances would be reversible error. *See Bonin v. California*, 494 U.S. 1039, 1045 (1990) ("a court must presume that counsel's divided loyalties adversely affected his performance on behalf of his client. When the effects of a constitutional violation are not only unknown but unknowable, the Constitution demands that doubts be resolved in favor of a criminal defendant."); *United States v. Moore*, 159 F.3d 1154, 1161 (9th Cir. 1998) ("An irreconcilable conflict undermines confidence in trial proceedings and is reversible error. We reverse and remand to the district court for a new trial.").

[3] The United States has advised Mr. Otake that it will present this information to the Court in a public filing.

II. LEGAL STANDARDS

a. Motions For Reconsideration

The Local Rules of this Court provide that, in the case of non-dispositive pretrial matters decided by a magistrate judge, "[a]ny party may move for reconsideration before the magistrate judge pursuant to CrimLR60.1." CrimLR57.3(a). CrimLR60.1 provides such motions "may be brought only upon the following grounds: (a) Discovery of new material facts not previously available; (b) Intervening change in law; and/or (c) Manifest error of law or fact." CrimLR60.1; *accord Pyramid Lake Paiute Tribe v. Hodel*, 882 F.2d 364, 369 n. 5 (9th Cir.1989) ("[T]he major grounds that justify reconsideration involve an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice."); *Sierra Club, Hawaii Chapter v. City & Cnty. of Honolulu*, 486 F. Supp. 2d 1185, 1188 (D. Haw. 2007, JMS) ("Local Rule 60.1 explicitly mandates that reconsideration only be granted upon discovery of new material facts not previously available, the occurrence of an intervening change in law, or proof of manifest error of law or fact.").

b. Motions To Withdraw and *Ex Parte* Proceedings

"In determining whether an irreconcilable conflict exist[s] . . . we consider (1) the adequacy of the district court's inquiry; (2) the extent of any conflict; and (3) the timeliness of the motion. The district court's denial of counsel's motion to withdraw is reviewed for an abuse of discretion." *United*

*States v. Carte*r, 560 F.3d 1107, 1113 (9th Cir. 2009) (internal citations and quotations omitted). "Before the district court can engage in a measured exercise of discretion, it must conduct an inquiry adequate to create a sufficient basis for reaching an informed decision." *United States v. D'Amore*, 56 F.3d 1202, 1205 (9th Cir. 1995) (internal citations and quotations omitted).

Ex parte proceedings are strongly disfavored because they are less likely to provide courts with a sufficient basis to make informed decisions. *See, e.g., Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968) ("The value of a judicial proceeding . . . is substantially diluted where the process is *ex parte*, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate."); *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1145 (2d Cir. 1978) ("closed proceedings . . . are fraught with the potential of abuse and, absent compelling necessity, must be avoided."); *United States v. Trevino*, 2022 WL 1215782, at *1 (N.D. Tex. 2022), report and recommendation adopted, 2022 WL 1213414 (N.D. Tex. Apr. 25, 2022) (bifurcating hearing to conduct *ex parte* and in camera only that portion necessary to protect attorney-client communications and affording the United States an opportunity to be heard on matters under consideration).

III. PROCEDURAL HISTORY

Prior to the filing of both motions, government counsel engaged in numerous discussions with Mr. Otake and Ms. Panagakos concerning the submission of fraudulent letters to the Court by the defense in support of Miske's argument for pretrial release, and the troubling conflict of interest created by the fact that they were unwitting but percipient witnesses to the submission and subsequent use of those fraudulent letters before this Court. These conversations began in August 2022, and after the filing of the superseding indictment on December 8, 2022, follow on conversations with defense counsel led the United States to conclude it would need to file a formal motion to disqualify counsel.

Then, on December 14, 2022, the United States learned during a witness interview that Mr. Otake was present at an elementary school parking lot meeting between Miske and one of his principal lieutenants, where discussion occurred about the loss of ten kilos of cocaine to law enforcement in California. The United States awaited the FBI's written documentation of the interview session and on January 12, 2022, it informed Mr. Otake of its existence. Mr. Otake references this discussion in his filed Declaration, acknowledging that "[a]fter learning of, and analyzing, the newly disclosed information, I do believe this information creates a genuine conflict of interest that obliges me to withdraw from representation of Mr. Miske." *See* Dkt. No. 727, Declaration of Counsel, ¶ 16.

During the discussions with Mr. Otake on January 12, 2023, he agreed he had a serious and irreconcilable ethical conflict and that he would immediately move to withdraw. Based on this understanding, the United States agreed as a professional courtesy not to include in its motion information about those conflicts affecting only Mr. Otake's representation. *See* Dkt. No. 729, fn. 1. In the absence of *any* disagreement that Mr. Otake's ability to ethically act as Miske's attorney was irretrievably compromised, the United States fully expected the Court to grant Mr. Otake's motion. Alternatively, the United States expected the Court to allow the parties to address and/or brief any disagreements that might arise.

During the hearing on January 18, 2023, and as reflected in the Court's EP, the Court held a sealed discussion with Miske and his three attorneys. *See* Dkt. No. 735 ("Sealed Discussion held between Defendant (01) Michael J. Miske, Jr, Defendant's counsels Lynn E. Panagakos, Michael Jerome Kennedy and Thomas M. Otake and the Court. Court conducted a colloquy with Defendant to determine if there was any breakdown in communication."). Normally, such discussions are sealed if they involve attorney-client communications concerning a breakdown in the relationship, fees, or other attorney-client communication related matters. These discussions normally are not sealed when they concern information known to all parties and which should be the subject of argument, especially if positions differ. *See United States v. Trevino*, 2022 WL 1215782, at *1. Here, the

record does not reflect whether, and if so, to what extent the facts referenced by Mr. Otake in his declaration were discussed during the sealed hearing. *Id.* Accordingly, the United States does not know the extent to which the Court analyzed and assessed this information when it denied Mr. Otake's motion.

The minutes of the hearing also do not reflect the substance of the sealed hearing, or the basis for the Court's denial of the motion. The United States believes, however, that the ruling was based on substantive facts and argument not in the public record. The only question asked of the United States, before the closed portion of the hearing, was how long it had been aware of the newly disclosed information. Inferring from the Court's ultimate and singular finding that withdrawal would work a "substantial hardship," it appears Mr. Otake declared he had a disabling conflict, but after argument that included other defense counsel, the Court determined that the quantum of Miske's hardship was the sole basis for consideration of whether to grant or deny Mr. Otake's motion. Such a ruling—without any record support—leaves the United States in an untenable position, where Mr. Otake's future actions are tainted by his sworn admission that he has a "genuine conflict of interest that obliges me to withdraw from represent[ing]" Miske. *See* Dkt. No. 727, par. 16. In the absence of any open discussion about whether Mr. Otake was in fact conflicted, rather than whether he could voluntarily withdraw, the record does not reflect whether the Court was

aware of or assessed how Mr. Otake's conflicts, including his role as a witness to a critical meeting between two charged racketeering defendants involving the seizure of ten kilograms of Miske Enterprise cocaine, impacted his ability to continue as Miske's attorney.

IV. FACTS

a. Mr. Otake's 2014 Parking Lot Meeting with Miske and Cooperator 1.

The irreparable conflict at issue here, not previously discussed in the public record, arises from the fact Mr. Otake is a percipient witness to a non-privileged and incriminating conversation that allegedly occurred in a parking lot in 2014, between Mr. Otake, Miske, and a now-cooperating Miske Enterprise member ("Cooperator 1") concerning the seizure of ten kilos of Miske's cocaine.

At trial, the United States intends to offer evidence that, in 2014, Cooperator 1 traveled to California to purchase ten kilos of cocaine, which he purchased with $300,000 provided by Miske and which he intended to smuggle back to Hawaii to distribute with Miske.[4] According to Cooperator 1—and verified by law enforcement records—while in California for this operation, Cooperator 1, along with suppliers linked to a Mexican drug cartel, were arrested in possession of the ten kilos of cocaine. Cooperator 1 was subsequently released by mainland authorities and, according to him, upon returning to Hawaii, Miske

[4] This conduct is charged as Count 15 in the Indictment.

learned of the arrest and loss of both his money and the cocaine. Miske, suspicious of Cooperator 1's story of being released following the seizure of ten kilos of cocaine, told Cooperator 1 they needed to meet with Miske's attorney, Mr. Otake, to discuss what happened in California. After this meeting was set up, Miske picked up Cooperator 1 and drove him in his truck to a parking lot near an elementary school in Waikiki, where they were met by Mr. Otake. According to Cooperator 1, during the meeting, he told Mr. Otake what happened, including that he was arrested and released. In response, Mr. Otake stated it was unusual that the cooperator would be released under the relayed circumstances.

b. Miske's Incriminating Statements to Cooperator 2.

The United States also has evidence that Miske disclosed to another now-cooperating Miske Enterprise member ("Cooperator 2") legal advice Mr. Otake allegedly provided to Miske about Miske's federal criminal exposure. Miske told Cooperator 2 that he was "stressing" as a result of the news and that both men needed to not "get into trouble" because "when you do . . . [t]hey quietly pull in your victims and have them testify to assaults, robberies etc and that's where the 50 (example) comes into play."

c. Two of Mr. Otake's Former Clients are Government Trial Witnesses.

Following the January 18, 2023 hearing before this Court, Mr. Otake raised with the United States additional concerns arising from his representation of

two individuals who will be witnesses against Miske at trial. With respect to the first individual ("Client 1"), Mr. Otake represented this witness in a drug prosecution related to this case. The United States anticipates calling Client 1 as a witness to establish evidence of the drug trafficking conspiracy charged in Count 16. Also, Mr. Otake represented an additional associate of Miske ("Client 2") in an assault prosecution. The United States anticipates calling Client 2 as a witness to establish various tactics Miske used to operate the Miske Enterprise.

V. DISCUSSION

The facts identified above, along with the evidence and obstruction charges discussed in the United States' Motion to Disqualify Defense Counsel [*Dkt. No. 729*], create three distinct bases for finding Mr. Otake has an ethical conflict that prevents his continued representation of Miske.

First, the evidence places the interests of Miske at odds with the interests of Mr. Otake, as Mr. Otake's involvement as a witness to these events and statements could cause him to consider his own personal interests—reputational and otherwise—over those of his client.[5] Second, Mr. Otake is an actual percipient witness to the subject of this testimony (and any corroborating evidence), which requires disqualification pursuant to HRPC 3.7(a). Finally, if Mr. Otake somehow

[5] For example, Mr. Otake might urge Miske to adopt a trial strategy whereby he disputes the meeting with Cooperator 1 occurred at all.

continues to represent Miske, the jury will hear witness testimony, view documents and hear argument that Mr. Otake was a first-hand witness to Miske's intense concern about vetting Cooperator 1's story of the seizure of the ten kilos of cocaine in California. The jury will also hear from Cooperator 2 that Mr. Otake rendered advice to Miske that was subsequently shared by Miske to affect the actions of other members of the enterprise. Not only will jurors wonder why Mr. Otake is not testifying about his personal, direct involvement, allowing Mr. Otake to continue as Miske's attorney prejudices the fact-finding process because he could—through argument, cross-examination, innuendo, and other means—put his unsworn testimony about these events before the jury without being subject to cross-examination himself.[6]

a. Mr. Otake is Conflicted Because of the 2014 Parking Lot Meeting.

Because Cooperator 1 will testify about his conversation with Mr. Otake and Miske concerning a major cocaine deal funded by Miske in 2014, Mr. Otake's participation in the conversation will be presented to the jury. Accordingly, it is the United States' intent to subpoena Mr. Otake as a witness at trial. The United States also will argue that Miske arranged the parking lot meeting as a means of

[6] During cross-examination or argument, Mr. Otake also might subliminally focus on his role in events rather than on their import to Miske. Indeed, while not Mr. Otake's client, Cooperator 1 has already asked the United States how Mr. Otake can possibly cross-examine him about information he provided to assist Miske in evaluating the significance of the drug seizure, his arrest, and the lost money Miske had fronted.

furthering his racketeering enterprise: a key participant had been arrested, substantial drugs seized, and Miske's fronted money lost, all of which caused him to seek assistance from Mr. Otake, even if unwitting, in Miske's assessment of: (1) whether he had been ripped off; (2) whether Cooperator 1 was cooperating against him; and (3) his personal exposure. Mr. Otake's involvement in the meeting therefore places him as a critical (and corroborating) percipient witness to a meeting where Miske was actively vetting the story of Cooperator 1 to determine how it impacted the dealings of the Miske Enterprise.

These circumstances plainly and unambiguously require Mr. Otake's disqualification, as lawyers shall not act as advocates at a trial where they are likely to be a necessary witness. HRPC 3.7(a) ("Lawyer as Witness"). While there are three exceptions to Rule 3.7(a), the first two do not apply because Mr. Otake's testimony (1) does relate to a contested issue (indeed, Miske's motivations and participation will be in dispute) and (2) does not relate to the nature and value of legal services provided to Miske. *See* HRPC 3.7(a)(1) and (2). The third exception, which appears to be the basis for the Court's order, permits an attorney to remain notwithstanding Rule 3.7's general prohibition against advocates as witnesses if "disqualification . . . would work substantial hardship on the client." *See* HRPC 3.7(a)(3).

There is no dispute that Mr. Otake is a capable and talented defense attorney whose disqualification will cause, at least temporarily, a hardship to Miske.[7] However, the inquiry does not stop there, as any hardship must be balanced against the nature of the case (large and complex), the import of Mr. Otake's testimony (significant because it is direct proof of Miske's knowledge), and the likelihood that other witnesses may contradict Mr. Otake's testimony (significant). The balancing between client prejudice and other factors is contemplated by the comments to HRPC 3.7, where note 4 plainly states "…paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and of the opposing party." It appears the Court sidestepped this balancing requirement in denying Mr. Otake's motion, summarily concluding following the *ex parte* conversation with defense counsel that Miske would face "substantial hardship" were Mr. Otake allowed to withdraw and ending the analysis there. Even if, *arguendo*, the balancing analysis cut against Mr. Otake's disqualification—though the United States does not believe it does—comment 7 to Rule 3.7 makes clear that Rule 3.7 is not the end of the analysis. Comment 7 provides, in relevant part:

> In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider

[7] It appears Miske used Mr. Otake's legal services for years prior to indictment, and the repercussions of this relationship on Mr. Otake's ability to serve as trial counsel have become more fully evident.

> that the dual role may give rise to a conflict of interest that will require compliance with Rule 1.7 or Rule 1.9 of these Rules. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. ***This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work as a substantial hardship on the client*** . . . . Determining whether or not such a conflict exists is primarily ***the responsibility of the lawyer involved*** . . . . In some cases, the lawyer ***will be precluded*** from seeking the client's consent. *See* Rule 1.7.

(emphasis added).

Mr. Otake's conclusion that he cannot ethically represent Miske because of his involvement in the parking lot conversation is objectively reasonable. *See, e.g.*, HRPC 1.0(j) ("'Reasonable belief'" or 'reasonably believes,' when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."); HRPC 1.7(a)(2) and (b)(1) (permitting conflicted representation only when "the lawyer reasonably believes the lawyer will be able to provide competent and diligent representation"). The mere possibility Mr. Otake might have concerns about his representation, alongside the fact he has signed a declaration outright stating these concerns, counsels overwhelmingly against his continued involvement in this case. *See, e.g.*, HRPC 1.7, cmt. 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.") and cmt. 10 ("For example, if the probity of

a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.").

It is difficult to imagine how Mr. Otake can counsel Miske on the implications of defending against this evidence without thinking about how the evidence affects Mr. Otake, including his reputation, and whatever else might be revealed about his knowledge of Miske's activities as far back as 2014. This evidence creates an actual and serious conflict of interest that warrants disqualification of Mr. Otake, who fully recognizes that he cannot ethically continue his representation under these facts. *See United States v. Jones*, 381 F.3d 114, 119 (2d Cir. 2004) ("An actual conflict of interest exists when the attorney's and the defendant's interests 'diverge with respect to a material factual or legal issue or to a course of action.'") (citations omitted). Evidence of the parking lot meeting is now a significant part of the prosecution's case. Any effort by Mr. Otake to navigate the myriad of complexities spawned by this conflict while acting as (1) trial counsel, (2) witness and (3) advocate would damage the integrity of the trial process and render any conviction of Miske inviable. Mr. Otake himself has told the Court he cannot ethically continue as Miske's attorney, and the Court must take that into consideration when balancing any prejudice.

Even if the Court somehow could find that Miske can be adequately advised of the myriad possible consequences of a waiver,[8] Miske cannot prospectively waive his right to seek review or to pursue a collateral attack arising from a later claim that his actually-conflicted counsel provided ineffective assistance of counsel at trial. *See Rojas v. United States*, 2019 WL 183850 at *2 (S.D. Cal. 2019) ("[A] waiver cannot bar a claim that relates to the validity of the waiver itself, such as ineffective assistance of counsel") (citing *United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994). Thus, any finding that a waiver suffices to allow Mr. Otake to continue representing Miske (notwithstanding their divergent interests), positions Miske well in any post-conviction litigation challenge to Mr. Otake's advice, effectiveness and loyalty. Embedding such risks into this proceeding is unnecessary and unwarranted.

Finally, because Mr. Otake clearly has knowledge about a key set of events related to the criminal acts of Miske, he would be an unsworn witness to these events. *United States v. Locascio*, 6 F.3d 924, 933 (2d Cir. 1993) ("An attorney acts as an unsworn witness when his relationship to his client results in his having first-hand knowledge of events presented at trial."). Given the substance of

[8] Comment 14 to HRPC 1.7 makes clear that "some conflicts make representation impossible, regardless of a client's willingness to consent. In such situations, the conflict cannot reasonably be consented to because the lawyer involved cannot reasonably ask the client for consent and cannot provide independent, objective representation even if the client were to consent." This is such a situation.

the conversation, Mr. Otake's credibility is at issue and his continued representation therefore taints the trial proceedings. *United States v. McKeon*, 738 F.2d 26, 35 (2d Cir. 1984) ("If counsel were to cross-examine the witness as to her conversations with him, argue the credibility of her testimony to the jury, or suggest alternative interpretations of her account of the conversation, he would place himself in the position of an unsworn witness and implicitly put his own credibility at issue."). Were Mr. Otake to remain as counsel, the prosecution then would be placed in the untenable position of navigating the contours of the waiver, potentially running afoul of Miske's Sixth Amendment right to counsel as it attempted to present its case. No lawyer should be required to try a case under such conditions and requiring as much creates ripe grounds for appeal and/or post-conviction litigation.

b. Mr. Otake Is Conflicted Because Cooperator 2's Testimony Will Discuss Mr. Otake's Statements To Miske About Miske's Culpability.

In addition to testimony about statements made by Mr. Otake directly to Cooperator 1, other text communications the United States intends to offer include correspondence between Miske and Cooperator 2 in 2018, where Miske disclosed statements made to him by Mr. Otake concerning imminent criminal charges. These include text messages, also exchanged via WhatsApp, in which Miske responds to Cooperator 2's request for more information about the likelihood of

charges by saying: "I talked to TO.[9] 1 charge can be beatable. They going for 50 charges so they offer to drop 25 and [sic; plea] please to 25." Miske goes on to tell Cooperator 2, "I'm just saying it's not over" and "[t]hat's why I tell you don't get into trouble. Because when you do. They quietly pull in your victims and have them testify to assaults, robberies etc and that's where the 50 (example) comes into play." The cooperator and Miske then discuss how they are "stressing" over the possible criminal charges and their belief that another member of the Miske Enterprise is "ratting."[10]

This evidence raises the same three concerns discussed in the preceding section. Mr. Otake is a percipient witness to statements he made to Miske, which Miske then disclosed to other members of the criminal enterprise who will testify at trial. The extent to which these statements were used by Miske as part of his criminal dealings is an area of inquiry likely to be explored at trial. Again, this creates a situation in which Mr. Otake's interests in his reputation and any implications of his statements place his loyalty to his client in question. The applicable rules of professional conduct address these very concerns and therefore require that the attorney client relationship terminate under such circumstances.

[9] "TO" is presumably Mr. Otake.

[10] Cooperator 2 also is expected to testify about text messages exchanged with Miske concerning Miske's dealings with Ms. Panagakos as well as advice received from Mr. Otake about whether the charges Miske faces are "beatable."

c. **Mr. Otake is Conflicted Because of His Prior Representation of Government Witnesses**

The fact Mr. Otake represented two government witnesses in their respective criminal proceedings related to the same conduct charged here creates additional conflicts that counsel against his continued representation of Miske. These government witnesses will testify against Miske at trial, creating a situation in which Mr. Otake will be required to cross examine them or be a part of the trial team that seeks to challenge their testimony. Each prior attorney-client relationship creates the specter of Mr. Otake cross-examining his former clients about matters within the scope of his prior representation and being put in the position of attempting to impeach their testimony with information they may have disclosed to him in private, protected conversations. *See generally* HRPC 1.9 ("Conflict of Interest: Former Client") (generally prohibiting representation of a former client in the same or substantially related matter). While waivers by current and prior clients might be obtainable, they are not tenable in these circumstances and would threaten to impair the integrity of these proceedings in a significant (but avoidable) way.

d. **The Extent and Nature of Mr. Otake's Conflicts Impinge on the Integrity of These Proceedings and Outweigh Any Substantial Hardship Created by His Withdrawal as Counsel**

If Mr. Otake somehow continued to represent Miske despite these conflicts, his role as an unsworn witness would irreparably impair the truth-seeking

mechanisms of these proceedings. For example, Mr. Otake would be able to present evidence he obtained from both his personal interactions as well as his prior representation of government witnesses without being subject to cross-examination. And it would then be the United States placed in the position of potentially running afoul of Miske's Sixth Amendment rights during the presentation of its evidence. Details about when and how Miske used his attorneys, even unwittingly, to further aspects of his criminal enterprise, including involving proceedings before this Court, are now integral to this case. Government attorneys cannot be restrained in introducing evidence to meet their burden of proof because the facts implicate Miske's trial counsel, who is now both a percipient and unsworn witness.

In short, Mr. Otake's representation is burdened by a conflict stemming from his relationship with Miske concerning material facts. It is inappropriate (and contrary to the HRPC) to require the United States to navigate Mr. Otake's burden by being limited in what it can and cannot present as evidence of Miske's intent, criminal acts and various criminal dealings. It bears repeating that Mr. Otake himself recognizes he labors under a disabling conflict, and voluntarily sought to withdraw. Despite this agreement, what started as a routine sealing to ensure confidentiality of attorney-client communications somehow morphed into a sealed proceeding where facts and arguments about the application of ethical rules were

made, all without a public record or the United States' participation. While sealing may have served a necessary purpose regarding attorney-client communications, when evidence beyond such communications was discussed, i.e., evidence concerning the nature of the conflicts, the hearing should have been opened and the United States' participation allowed to illuminate how the evidence compromises Mr. Otake's representation of Miske.

Whatever "substantial hardship" Miske suffers from Mr. Otake's disqualification is handily outweighed by the prejudice Miske will suffer from being represented by an attorney who has reasonably concluded he cannot provide independent and objective representation to Miske, and who has declared that his continued representation of Miske requires his withdrawal. *See, e.g.,* HRPC 1.16(a) (a "lawyer . . . shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct or other law"); HRPC 1.7, cmt. 15 ("Under paragraph (b)(1), the representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.").

VI. CONCLUSION

To ensure these proceedings, including a lengthy trial with multiple defendants and hundreds of witnesses, are unfettered by conflicts, the United States asks the Court to reconsider its order and grant Mr. Otake's motion to withdraw.

As discussed here, and in the United States pending motion before the trial judge, the conflicts are numerous and cannot be cured by a waiver. To the contrary, a waiver creates more problems, some foreseeable and others impossible to predict but no doubt lurking ahead. These problems can and should be addressed now when trial is months away.[11]

For these reasons, the United States respectfully requests the Court to consider the evidence presented herein, which the United States believes justifies reconsideration to avoid the manifest injustice that would arise from Mr. Otake's continued representation of Miske in this case.

DATED: January 24, 2023, at Honolulu, Hawaii.

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[11] Based on recent conversations with defense counsel, and a stipulation prepared by the defense to continue the trial date, the United States anticipates the Court will adjourn the trial date to September 2023.