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9 Attorneys for United States of America

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION

13 UNITED STATES OF AMERICA,	)	CASE NO. CR 18-00259 BLF
14 Plaintiff,)	
15 v.	)	UNITED STATES' MOTION TO DISQUALIFY
	)	RANDALL LUSKEY, ESQ. AND ORRICK,
16 KATHERINE MOGAL,	)	HERRINGTON & SUTCLIFFE, L.L.P. AS
17 ANA ROSARIO,	)	COUNSEL TO KATHERINE MOGAL
18 PATRICK NARRON,)	
19 PATRICIO ROMANO,	)	Date: September 18, 2018
RONG "AUDREY" ZHANG, and	)	Time: 9:00 a.m.
JING QUI "GEE" WEIDEN,	)	Court: Hon. Beth L. Freeman
20 Defendants.)	

21
22 INTRODUCTION

23 Katherine Mogal ("Mogal") and her co-defendants are accused of Possession of Stolen Trade
24 Secrets, in violation of 18 U.S.C. § 1832. The stolen trade secrets were the rightful intellectual property
25 of AliphCom, Inc., d.b.a. "Jawbone" ("Jawbone"), and the defendants are alleged to have possessed
26 them knowing them to have been stolen, appropriated, obtained, and converted without authorization
27 from their ex-employer, Jawbone, with the intent to convert them for the economic benefit of someone
28 other than Jawbone, and intending and knowing the offense would injure Jawbone. All six defendants

1 resigned from Jawbone and began employment at competitor corporation Fitbit, Inc. (“Fitbit”) within
2 one year, and many are charged with possession of the same stolen trade secrets.

3 In pre-indictment discussions with the government, all the defendants – and Fitbit itself for at
4 least a portion of the period – were represented by the law firm of Orrick, Herrington & Sutcliffe LLP
5 (“Orrick”). Randall Luskey, Esq., a partner in Orrick’s “White Collar, Investigations, Securities
6 Litigation & Compliance, and Litigation & IP” groups was involved in representing all the defendants as
7 well as Fitbit.¹ On multiple occasions, the government expressed concern to Mr. Luskey that this joint
8 representation posed a potential conflict, and, with respect to at least two defendants, an actual conflict,
9 but at that time defense counsel disagreed. Each of the five other defendants have since secured separate
10 representation, but defendant Mogal continues to be represented by Mr. Luskey. Her continued
11 representation presents potential conflicts of interest because it is substantially related to Mr. Luskey’s
12 previous representation of her co-defendants. Mr. Luskey’s decision to continue representing Mogal
13 potentially violates the Sixth Amendment rights of both Mogal and her co-defendants, as well as
14 numerous Standards of Professional Conduct promulgated by the State Bar of California which bind
15 attorneys appearing before this Court.

16 Therefore, to guarantee Mogal an effective advocate, protect the rights of her co-defendants, and
17 maintain the integrity of the judicial system, the United States respectfully requests that this Court
18 disqualify Mr. Luskey, along with Orrick, from continuing to represent Katherine Mogal, or at a
19 minimum, that this Court conduct an on-the-record inquiry into any potential conflicts of interest, and
20 secure knowing and voluntary waivers of conflict-free counsel from each of the defendants.

21 **STATEMENT OF FACTS**

22 Katherine Mogal, Ana Rosario, Patrick Narron, Patricio Romano, Rong “Audrey” Zhang, and
23 Jing Qui “Gee” Weiden were indicted for Possession of Stolen Trade Secrets in violation of 18 U.S.C.
24 § 1832(a)(3). [Indictment, ¶ 12.] Between March 31, 2014 and April 23, 2015, each of the defendants
25 resigned from AliphCom, Inc. (“Jawbone”), a wearable electronic device manufacturer, and began
26

27 ¹ Gibson, Dunn & Crutcher LLP (“Gibson”) was also involved in the period of joint representation of Fitbit and the
28 individuals, but as of approximately June 2017, the government was informed that Gibson would continue to represent Fitbit
while Orrick would handle the individuals. On information and belief, Orrick also continued to represent the individuals with
respect to the corresponding civil matter in the San Francisco Superior Court (*see below*).

1 employment with Fitbit, Inc. (“Fitbit”), a competitor. [*Id.* at ¶¶ 3-8.] After certifying that they had
2 returned all Jawbone property, the defendants took Jawbone trade secrets, including proprietary market
3 data and unreleased product designs, and possessed them while employed at Fitbit. [*Id.* at ¶¶ 3-8, 10.]

4 Starting no later than August 2016, Randall Luskey, a partner at Orrick, indicated to the
5 government that he represented all six individuals in connection with the government’s investigation
6 into allegations of trade secret theft from Jawbone. [*See* Declaration of Assistant U.S. Attorney Amie D.
7 Rooney, attached hereto, at ¶ 1.] Additionally, Orrick represented Fitbit and all of the individuals
8 (except Weiden) in California Superior Court in substantially similar civil proceedings arising from the
9 same nucleus of facts and allegations, from approximately October 2015 until the case settled in
10 December 2017. [*See* Rooney Decl. at ¶ 2.]

11 On May 22, 2017, the government sent Mr. Luskey a letter which detailed the government’s
12 concerns about potential conflicts of interest and requested a suggested resolution by June 2, 2017.
13 [Rooney Decl. at ¶ 3; *see also* Letter to Debra Wong Yang and Randy Luskey from AUSA Rooney,
14 May 22, 2017, attached hereto as Ex. 1, at ¶¶ 6, 10.] The response, delivered by phone, was that Orrick
15 did not believe there was a conflict in representing all six individuals, actual or potential, and that in any
16 case, the clients had waived any perceived conflicts. [Rooney Decl. at ¶ 3.] On December 13, 2017, the
17 government emailed Mr. Luskey to request that he deliver attached target letters to the defendants
18 informing them that they were the targets of a federal grand jury investigation and advising them to
19 secure counsel. [Rooney Decl. at ¶ 4; *see, e.g.*, Mogal Target Letter, December 12, 2017, attached
20 hereto as Ex. 2.] On December 19, 2017, Mr. Luskey related that Orrick was still discussing the conflict
21 issue internally and requested a meeting with the government to discuss his clients’ potential criminal
22 charges. [Rooney Decl. at ¶ 5; Luskey Email, Dec. 19, 2017.] Two days later, Mr. Luskey reiterated
23 that while he saw no actual conflicts, he had begun searching for separate counsel for Ana Rosario
24 because representing her could be perceived as a potential conflict, presumably because she reported
25 directly to Mogal, her supervisor, while at Jawbone. [Rooney Decl. ¶ 6; Luskey Email, Dec. 21, 2017.]
26 The government responded that although it would be limited in the information it could share until the
27 conflict issue had been resolved, it was willing to meet with Mr. Luskey and other attorneys from Orrick
28 on January 26, 2018. [Rooney Decl. at ¶ 7; Gov’t Email, Dec. 21, 2017; Gov’t Email, Jan. 2, 2018;

1 Luskey Email, Jan. 2, 2018.]

2 Because the conflict issue still had not been resolved from the government’s perspective, the
3 government ceased communication with Mr. Luskey between February and June 2018, when every
4 defendant except Mogal had secured new counsel for arraignment on the indictment. [Rooney Decl. at
5 ¶ 8.] On July 9, 2018, the government orally informed Mr. Luskey that it planned to file the instant
6 motion based on our on-going concerns with regard to the conflict issue and the need to protect the
7 judicial process. [Rooney Decl. at ¶ 9.] On July 27, 2018, Mr. Luskey contacted the government by
8 phone and stated that he had secured written waivers from all six defendants. The government has not
9 been provided with copies of these documents. [Rooney Decl. at ¶ 10.]

10 Finally, throughout the entirety of the pre-indictment period, on information and belief, Fitbit
11 paid for the defendants’ legal services. [Rooney Decl. at ¶ 10; *see also* Letter to Luskey, Ex. 1, ¶ 6.]

12 ARGUMENT

13 The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the
14 right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. This right
15 encompasses a “correlative right to representation that is free from conflicts of interest.” *Wood v.*
16 *Georgia*, 450 U.S. 261, 271 (1981) (citation omitted). Rather than ensure that each criminal defendant
17 “will inexorably be represented by the lawyer whom he prefers,” the amendment’s “essential aim” is to
18 “guarantee an effective advocate.” *Wheat v. United States*, 486 U.S. 153, 159 (1988) (citation omitted).
19 Thus, while a criminal defendant may make a “voluntary, knowing, and intelligent waiver” of conflict-
20 free representation, *United States v. Martinez*, 143 F.3d 1266, 1269 (9th Cir. 1998) (citation omitted),
21 district courts retain “substantial latitude” to refuse waivers “not only in those rare cases where an actual
22 conflict may be demonstrated before trial, but in the more common cases where a *potential* for conflict
23 exists which may or may not burgeon into an actual conflict as the trial progresses,” *Wheat*, 486 U.S. at
24 163 (emphasis added); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006) (reiterating
25 that courts have discretion to refuse waivers and affirming that a defendant may not “demand that a
26 court honor his waiver of conflict-free representation”); *United States v. Rewald*, 889 F.2d 836, 858 (9th
27 Cir. 1989) (“[T]he *potential* for a conflict of interest is determinative.”). The right to counsel is so
28 fundamental that if a district court refuses a waiver and disqualifies an attorney because of a conflict of

1 interest, the attorney's firm is disqualified as well. *See Trone v. Smith*, 621 F.2d 994, 999, 1001 (9th
2 Cir. 1980) (disqualifying an attorney's firm even in a civil case, where the Sixth Amendment right to
3 counsel is not implicated, because of conflicts stemming from the attorney's prior representation).

4 Here, Mr. Luskey and Orrick should be disqualified from continuing to represent Mogal. First,
5 Orrick's previous representation of Mogal and her co-defendants throughout substantially similar civil
6 litigation, Mr. Luskey's specific involvement in the defendants' pre-indictment criminal investigation,
7 and Orrick's acceptance of payment from Fitbit present multiple potential conflicts of interest that could
8 deprive the defendants of their rights under the Sixth Amendment. Second, Mr. Luskey's decision to
9 continue representing Mogal implicates numerous Standards of Professional Conduct promulgated by
10 the Bar of the State of California, which bind attorneys appearing before this Court. Furthermore, Mr.
11 Luskey's specific disqualification is sufficient to disqualify Orrick as well. To protect the defendants'
12 rights, this Court should at a minimum conduct an on-the-record inquiry into any potential conflicts of
13 interest and independently secure knowing and voluntary waivers from each of the defendants.

14 **I. Defense Counsel Should Be Disqualified Because Continued Representation of Mogal**
15 **Presents a Strong Potential for Conflict and Threatens to Violate the Sixth Amendment.**

16 Mr. Luskey and Orrick should be disqualified because Mr. Luskey's past representation of
17 Mogal's co-defendants presents a strong potential for conflict. Successive representation, where an
18 attorney represents a party whose interests may be adverse to a past client's, is "sufficient to establish a
19 conflict." *Hovey v. Ayers*, 458 F.3d 892, 908 (9th Cir. 2006); *see also Belmontes v. Brown*, 414 F.3d
20 1094, 1118 (9th Cir. 2005) ("[C]onflicts of constitutional magnitude can arise from cases of successive
21 representation."), *overruled on other grounds by Ayers v. Belmontes*, 549 U.S. 7 (2006). Successive
22 representation results in conflict when the two cases are "substantially related," the attorney reveals
23 privileged communications with the former client, or the attorney otherwise "divides his loyalties."
24 *Mannhalt v. Reed*, 847 F.2d 576, 580 (9th Cir. 1988). In particular, the Ninth Circuit has found conflicts
25 where defense counsel switched representation from one co-defendant to another. *See Sanders v.*
26 *Ratelle*, 21 F.3d 1446, 1452-53 (9th Cir. 1994) (finding conflict even though defense counsel only
27 represented the first client for a "brief period"); *Fitzpatrick v. McCormick*, 869 F.2d 1247, 1252 (9th Cir.
28 1989) (finding conflict where defense counsel represented a different co-defendant in the same

1 prosecution at that co-defendant's retrial).

2 Here, Mr. Luskey's continued representation of Mogal presents an impermissible potential for
3 conflict. First, his and Orrick's prior representation of the defendants and their current representation of
4 Mogal are substantially related. Second, as a result of Mr. Luskey's previous attorney-client
5 relationship with Mogal's co-defendants, he is privy to confidential communications that could force
6 him either to sacrifice Mogal's interest by failing to vigorously cross-examine his former clients, or to
7 violate his obligation to maintain his former clients' confidences in order to zealously represent Mogal.
8 That sort of choice – in this case inescapable for both Mr. Luskey and Orrick – is a classic example of
9 the division of loyalties that *Mannhalt* proscribes. Finally, Mr. Luskey's financial relationship with
10 Fitbit (past and present) divides his loyalties between his client, Mogal, and the company actually
11 paying for his services. Together, these dangers present a serious potential for conflict, which under
12 *Rewald* is “determinative,” meriting his and Orrick's disqualification.

13 **A. Mr. Luskey's Representations Are Substantially Related Because the Defendants**
14 **Were Charged in a Common Indictment on Overlapping Counts.**

15 Mr. Luskey's prior representation of all six defendants and his continued representation of Mogal
16 are substantially related; indeed, the defendants were charged in a common indictment. Successive
17 representations are substantially related if the “factual contexts of the two representations are similar or
18 related.” *Fitzpatrick*, 869 F.2d at 1252. If there is a reasonable probability that a client disclosed
19 information in confidence to an attorney who could use it against the client in a subsequent, adverse
20 representation, a substantial relationship between the two cases is presumed. *Thomas v. Mun. Court*,
21 878 F.2d 285, 288 (9th Cir. 1989) (citation omitted). It “matters not whether confidences were in fact
22 imparted to the lawyer by the client.” *Trone*, 621 F.2d at 999. Rather, it is “the possibility of the breach
23 of confidence, not the fact of the breach, that triggers disqualification.” *Id.* Where a substantial
24 relationship is found, it alone is “sufficient to disqualify.” *Id.*

25 Mr. Luskey's continued representation of Mogal is substantially related to his previous
26 representation of the other five defendants. The factual context underlying the representations is nearly
27 identical. All six defendants in this case were charged in a common indictment with possession of trade
28 secrets stolen from Jawbone before beginning employment at Fitbit. There is a reasonable probability

1 that Mr. Luskey learned confidential information through his attorney-client relationship with Mogal's
2 co-defendants that could be harmful to them. Indeed, it would be odd if his previous clients, Mogal's
3 co-defendants, did not disclose sensitive or even inculpatory information to him over the course of
4 almost two years so that he could develop a defense strategy. Furthermore, Orrick's representation of
5 Fitbit and all of the defendants except Weiden in substantially similar civil litigation all but guarantees
6 that Orrick possesses potentially harmful confidential information. Therefore, under *Thomas*, this Court
7 should presume that a substantial relationship exists between Mr. Luskey's and Orrick's previous
8 representation of the defendants and their current representation of Mogal, which under *Trone* is
9 sufficient to disqualify them.

10 **B. Mr. Luskey Will Be Forced to Choose Between Maintaining His Former Clients'**
11 **Confidences and Zealously Representing Mogal.**

12 If Mr. Luskey continues to represent Mogal, his prior privileged communications with the co-
13 defendants could potentially be exposed or preclude him from effectively cross-examining them at trial.
14 The "mere possession of a former client's and codefendant's privileged communications poses the
15 precise potential for conflict." *Fitzpatrick*, 869 F.2d at 1252. An attorney who receives privileged
16 information from a former client must choose between "exploiting his prior, privileged relationship with
17 the witness or failing to defend his present client zealously for fear of misusing confidential
18 information." *United States v. Baker*, 10 F.3d 1374, 1399 (9th Cir. 1993), *overruled on other grounds*
19 *by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000); *see also Wheat*, 486 U.S. at 164 (finding that
20 defense counsel's prior representation of a co-defendant precluded him from conducting a vigorous
21 cross-examination on behalf of his current client). Indeed, an attorney who cross-examines former
22 clients "inherently encounters divided loyalties." *United States v. Stepney*, 246 F. Supp. 2d 1069, 1083
23 (N.D. Cal. 2003) (quoting *United States v. Moscony*, 927 F.2d 742, 750 (3d Cir. 1991)).

24 Mr. Luskey's previous attorney-client relationship with Mogal's co-defendants presents the
25 scenario articulated by the Ninth Circuit in *Baker*. If Mogal's co-defendants testify at trial, in any
26 capacity, it could be in Mogal's interest for Mr. Luskey to shift responsibility onto them, particularly on
27 Rosario, who worked in the same department at Jawbone and whose representation Mr. Luskey already
28 acknowledged could pose a potential conflict. At the same time, Mr. Luskey could be prevented from

1 effectively doing so because of his obligation to maintain the confidences of his former clients. Even
2 before trial, Mr. Luskey's conflicting obligations could prevent him from effectively counseling Mogal
3 on the merits of cooperating with the government and the risks of going to trial. Mr. Luskey's past
4 attorney-client relationship with Mogal's codefendants has created a situation posing the "precise
5 potential for conflict" the Ninth Circuit warned against in *Fitzpatrick*. Therefore, this Court should
6 disqualify Mr. Luskey and require Mogal to secure new counsel unburdened by conflicts of interest.

7 **C. Fitbit's Payments for the Defendants' Legal Fees Could Divide Mr. Luskey's**
8 **Loyalties.**

9 Fitbit's third-party payments (past or present) for the defendants' legal representation could
10 divide Mr. Luskey's loyalties and deny Mogal conflict-free representation. There are "inherent dangers
11 that arise when a criminal defendant is represented by a lawyer hired and paid by a third party."
12 *Quintero v. United States*, 33 F.3d 1133, 1135 (9th Cir. 1994) (per curiam) (quoting *Wood*, 450 U.S. at
13 268-69). Furthermore, it is "inherently wrong" for an attorney who represents an employee to "accept a
14 promise to pay from one whose criminal liability may turn on the employee's testimony." *Wood*, 450
15 U.S. at 269 n.15 (citation omitted). In these situations, an attorney is incentivized to "prevent his client
16 from obtaining leniency by preventing the client from offering testimony against his former employer or
17 from taking other actions contrary to the employer's interest." *Quintero*, 33 F.3d at 1135 (quoting
18 *Wood*, 450 U.S. at 269).

19 Based on representations made to the United States pre-indictment, Fitbit has paid for the
20 defendants' legal fees, dividing Mr. Luskey's loyalties. Because it is possible that further developments
21 could uncover evidence that Fitbit or someone acting on its behalf coordinated, sponsored, encouraged,
22 or knew of the defendants' actions and could be criminally liable, the potential for conflict extends
23 beyond Mr. Luskey's prior representation of Mogal's co-defendants. It may be in Mogal's interest to
24 offer information against Fitbit in a possible plea negotiation if the company was involved in
25 orchestrating the theft of Jawbone's trade secrets, but because Mogal's counsel is paid by Fitbit, his own
26 interest is at odds with his client's. Furthermore, Orrick's previous representation of Fitbit in
27 substantially related civil litigation only exacerbates the potential for conflict. Even if Fitbit's payments
28 provide only a subconscious incentive to divide Mr. Luskey's loyalties, there remains a potential for

1 conflict which could deprive Mogal of her Sixth Amendment rights.

2 Ascertaining the contours of “nascent conflicts of interest” like those present here is “notoriously
3 hard . . . even for those thoroughly familiar with criminal trials,” and this difficulty is only compounded
4 in the “murkier pre-trial context when relationships between parties are seen through a glass, darkly.”
5 *Wheat*, 486 U.S. at 162. Combined with his prior representation of Mogal’s co-defendants, however,
6 Mr. Luskey’s professional relationship with Fitbit is clear enough to present an impermissible potential
7 for conflict that should prompt this Court to disqualify him now to avoid delay or even error further
8 down the line.

9 **II. Mr. Luskey Should Be Disqualified Because California’s Standards of Professional**
10 **Conduct, Governing Counsel Before This Court, Preclude His Continued Representation.**

11 Mr. Luskey should be disqualified because his continued representation of Mogal violates
12 California’s Standards of Professional Conduct, which govern attorneys appearing before this Court.
13 “Federal courts have an independent interest in ensuring that criminal trials are conducted within the
14 ethical standards of the profession and that legal proceedings appear fair to all who observe them.”
15 *Wheat*, 486 U.S. at 160. If a court binds attorneys by state ethics rules, “litigants may seek
16 disqualification of other parties’ attorneys in the same proceeding for violation of the conflicts
17 provisions of those rules.” *United States v. Mett*, 65 F.3d 1531, 1537 (9th Cir. 1995) (citing
18 *Christensen v. United States Dist. Court*, 844 F.2d 694, 697 & n.6 (9th Cir. 1988) (applying California
19 professional ethics standards adopted by a local rule of the Central District of California to a
20 disqualification motion)). Attorneys appearing before the Northern District of California are bound by
21 the California Standards of Professional Conduct. *See* Crim. L.R. 2-1 (incorporating Civil L.R. 11-
22 4(a)(1), requiring attorneys to comply with the California Standards of Professional Conduct).

23 In particular, California attorneys may not represent a client when they have had a professional
24 relationship with a party or witness in the same matter unless they provide written disclosure. *See* Rules
25 of Prof’l Conduct r. 3-310(B) (State Bar of Cal. 2018). Attorneys also may not accept employment
26 adverse to their former clients’ interests if they have obtained confidential information material to their
27 new employment unless they obtain written consent. *Id.* r. 3-310(E). Finally, attorneys may not accept
28 compensation from a third-party to represent a client unless they maintain their independence and the

1 confidentiality of the client's secrets, and they obtain the client's informed written consent. *Id.* r. 3-
2 310(F); *see also* Cal. Bus. & Prof. Code § 6068(e) (West 2004) (requiring attorney-client confidentiality
3 except in cases where a crime resulting in death or substantial bodily harm may occur).

4 Under the Commentary to Civil L.R. 11-4, California state court decisions interpreting the state's
5 ethics rules apply in federal court. In cases of successive representation, an attorney's "enduring duty to
6 preserve client confidences" precludes him from later representing an adversary of his former client
7 unless the former client gives informed written consent. *City of S.F. v. Cobra Sols., Inc.*, 135 P.3d 20,
8 25 (Cal. 2006). If an attorney possessed a direct professional relationship with a former client in which
9 he provided legal advice on an issue closely related to his present client's representation, he is presumed
10 to possess confidential information. *Id.* Left un rebutted, the attorney is "automatically disqualified
11 from representing the second client." *Id.* Furthermore, this disqualification is "mandatory" and extends
12 "vicariously to the entire firm." *Flatt v. Superior Court*, 885 P.2d 950, 954 (Cal. 1994).

13 Here, Mr. Luskey potentially runs afoul of multiple ethics rules. Under Rule 3-310(B), he must
14 provide Mogal with a written disclosure detailing his previous relationships with her co-defendants.
15 Under Rule 3-310(E), he must obtain informed written consent from all five of Mogal's co-defendants
16 before continuing to represent Mogal because his current representation could be adverse to their
17 interests. Finally, under Rule 3-310(F), Mr. Luskey must obtain Mogal's informed written consent
18 before continuing to represent her while being compensated by Fitbit. The government understands from
19 Mr. Luskey that he has made these disclosures and obtained the requisite waivers, but he has not shared
20 copies of any of these documents. Moreover, his independence could still be compromised if Fitbit later
21 faces criminal liability, which would bar him from representing Mogal even if she consents. Because of
22 his previous representation of Mogal's co-defendants in this case, Mr. Luskey presumptively possesses
23 confidential information and left un rebutted, his disqualification, along with Orrick's, is mandatory.

24 **III. At a Minimum, the Court Should Conduct an On-The-Record Inquiry into Potential**
25 **Conflicts and Secure Knowing and Voluntary Waivers of Conflict-Free Counsel from Each**
26 **Defendant.**

27 While criminal defendants may waive their right to conflict-free counsel, courts must ensure that
28 their waiver is "voluntary, knowing, and intelligent" by inquiring into the "particular facts and
circumstances surrounding that case, including the background, experience, and conduct of the

1 accused.” *Martinez*, 143 F.3d at 1269 (quoting *Edwards v. Arizona*, 451 U.S. 477, 482 (1981)). In
2 making this inquiry, courts must “indulge every reasonable presumption against the waiver of
3 fundamental rights.” *Id.* In particular, defendants must be informed of all of the risks likely to develop
4 by waiving conflict-free counsel, including not only potential conflicts stemming from their attorney’s
5 knowledge of confidential communications shared by a codefendant the attorney previously represented,
6 but also conflicts stemming from the attorney’s continued loyalty to the codefendant. *Lockhart v.*
7 *Terhune*, 250 F.3d 1223, 1232-33 (9th Cir. 2001) (citation omitted). Similarly, when a single attorney
8 represents multiple co-defendants, courts must “promptly inquire about the propriety of joint
9 representation” and “personally advise each defendant of the right to the effective assistance of counsel,
10 including separate representation.” Fed. R. Crim. P. 44(c)(2); *see also Mannhalt*, 847 F.2d at 583-84
11 (encouraging prosecutors to alert the court to potential conflicts early so the court may rule on a
12 disqualification motion or secure a waiver on the record before the conflicts become an issue at trial);
13 *Benchbook for U.S. District Court Judges* § 1.08 (6th ed. 2013) (providing guidance for securing valid
14 waivers resulting from joint representation that pertains to successive representation as well).

15 This Court should conduct a similar inquiry here to safeguard each defendant’s fundamental
16 right to conflict-free counsel. While only Mogal is currently represented by Mr. Luskey, each of the
17 defendants was previously jointly represented by Mr. Luskey in this case. Because of the importance of
18 the right to counsel, this Court should independently determine that each defendant fully comprehends
19 the scope of his or her right to conflict-free representation and the consequences of waiver. Should the
20 defendants decide to waive their rights, doing so on the record will ensure that the “proceedings appear
21 fair to all who observe them” and facilitate any review on appeal for ineffective assistance of counsel.
22 *Wheat*, 486 U.S. at 160.

23 CONCLUSION

24 For the foregoing reasons, in order to safeguard the defendants’ Sixth Amendment rights and
25 uphold the integrity of the judicial system, the United States respectfully requests that this Court
26 disqualify Randall Luskey, along with Orrick, from continuing to represent Katherine Mogal, or at a
27 minimum, that the Court conduct an on-the-record inquiry into any potential conflicts of interest and
28 secure knowing and voluntary waivers from each of the defendants.

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DATED: August 3, 2018

Respectfully Submitted,

ALEX G. TSE
Acting United States Attorney

s/ Amie D. Rooney

AMIE D. ROONEY
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9 Attorneys for United States of America

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION

13 UNITED STATES OF AMERICA,	)	CASE NO. CR 18-00259 BLF
14 Plaintiff,)	
15 v.	)	DECLARATION OF ASSISTANT UNITED
16 KATHERINE MOGAL,	)	STATES ATTORNEY AMIE D. ROONEY IN
17 ANA ROSARIO,	)	SUPPORT OF UNITED STATES' MOTION TO
18 PATRICK NARRON,	)	DISQUALIFY RANDALL LUSKEY, ESQ. AND
19 PATRICIO ROMANO,	)	ORRICK, HERRINGTON & SUTCLIFFE, L.L.P.
20 RONG "AUDREY" ZHANG, and	)	AS COUNSEL TO KATHERINE MOGAL
JING QUI "GEE" WEIDEN,)	
Defendants.)	

21 I, AMIE D. ROONEY, declare as follows:

- 22 1. In August 2016, Randall Luskey, a partner at Orrick, Herrington & Sutcliffe, L.L.P. ("Orrick"),
- 23 informed the government that he was representing all six individuals in connection with the
- 24 government's criminal investigation into allegations of possession of stolen trade secrets from
- 25 AliphCom, Inc., dba Jawbone ("Jawbone").
- 26 2. I have reviewed filings in the case of *Aliphcom, Inc. v. Fitbit, Inc.*, No. CGC 15-546004 (Cal.
- 27 Super. Ct. 2015), where attorneys from Orrick were counsel of record to Fitbit, Inc. ("Fitbit"),
- 28 Katherine Mogal, Patrick Narron, Patricio Romano, Ana Rosario, and Rong Zhang between, on

1 or about October 2015 through December 2017.

- 2 3. On May 22, 2017, the government sent Mr. Luskey a letter expressing the government's
3 concerns about potential conflicts of interest related to joint representation of the six individuals
4 and requested a suggested resolution by June 2, 2017. Mr. Luskey responded via phone that his
5 firm did not perceive any conflicts in representing all six individuals, and that even if there were
6 a conflict, the clients had waived it.
- 7 4. On December 13, 2017, the government emailed Mr. Luskey target letters for each of the six
8 individuals and asked that he deliver them to the individuals. The letters informed the
9 individuals that they were now targets of a federal grand jury investigation and advised that they
10 secure counsel.
- 11 5. On December 19, 2017, Mr. Luskey requested a meeting with the government to discuss his
12 clients' potential criminal charges. He informed the government that Orrick was still discussing
13 the conflicts issue internally and with each of the individual clients.
- 14 6. On December 21, 2017, Mr. Luskey reiterated via email that, while he perceived no conflicts of
15 interest in proceeding with joint representation, he had begun searching for separate counsel for
16 Ana Rosario because continuing to represent her could be perceived as a potential conflict.
17 While at Jawbone, Rosario had reported directly to Katherine Mogal, her supervisor.
- 18 7. In a series of emails between December 21, 2017 and January 2, 2018, the government agreed to
19 a meeting with Mr. Luskey and other attorneys from Orrick, with the caveat that the government
20 would be limited in its ability to disclose information or have substantive discussions until the
21 conflict issue had been resolved.
- 22 8. Between February and June 2018, the government ceased communication with Mr. Luskey
23 because the conflict issue had not been resolved. Following the instant indictment in June 2018,
24 each of the defendants had secured new counsel, except for Mogal, who continued to be
25 represented by Mr. Luskey and Orrick. Because the five other defendants had secured separate
26 representation, and for the purpose of arraignment and bond discussions for Mogal, the
27 government re-opened communications with Mr. Luskey.
- 28 9. On July 9, 2018, the government orally informed Mr. Luskey that it planned to file the instant

1 motion based on our on-going concerns with regard to the conflict issue and the need to protect
2 the process.

3 10. On July 27, 2018, Mr. Luskey stated via phone that he had secured written waivers from all six
4 defendants, but the government has not been provided any copies.

5 11. Throughout the pre-indictment period, on information and belief, Fitbit paid for the defendants'
6 legal services.

7
8 Attached as exhibits hereto are true and correct copies of the following documents which the
9 government respectfully requests the Court to consider in conjunction with the arguments presented in
10 the United States' Motion to Disqualify Counsel:

- 11 1. Government Exhibit 1 is a copy of a letter sent by AUSA Rooney on May 22, 2017 to attorneys
12 Debra Wong Yang of Gibson, Dunn & Crutcher, L.L.P. and Randall Luskey of Orrick.
13 2. Government Exhibit 2 is a copy of Katherine Mogal's target letter sent by AUSA Rooney on
14 December 12, 2017 to Randall Luskey.

15
16
17 DATED: August 3, 2018

Respectfully Submitted,

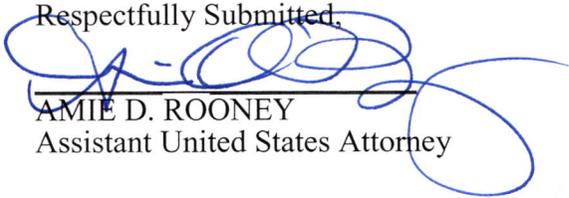

AMIE D. ROONEY
Assistant United States Attorney

EXHIBIT 1



*United States Attorney
Northern District of California*

*150 Almaden Boulevard, Suite 900
San Jose, California 95113*

*(408) 535-5061
FAX: (408) 535-
5066*

May 22, 2017

Via Email

Debra Wong Yang, Esq.
Gibson Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197

Randy Luskey, Esq.
Orrick
The Orrick Building
405 Howard Street
San Francisco, CA 94105-2669

Re: In Re Grand Jury Investigation No. 2016R00949, Fitbit, Inc., et al.
In the Matter of Multiple Representation and Conflict of Counsel

Dear Ms. Yang and Mr. Luskey,

The government writes to advise you of our position with regard to your stated representation of multiple parties in the course of the above-referenced investigation. At our meeting at my office on November 16, 2016, we discussed the issue generally and you requested that I inform you if, in the government's view, the conflict issue ripened. I understood at the time of our meeting, and in connection with the response to the Grand Jury Subpoena issued to Fitbit, Inc. ("Fitbit") issued on February 14, 2017, that you have been representing both Fitbit as the corporate entity, as well as each of the individual subjects of the government's investigation.

Now, the government considers at least two of the individuals to be targets of the Grand Jury investigation, some others to be subjects thereof, and others to be simply fact witnesses. Should you not agree with our analysis and thereon take steps to advise the individuals, we believe there is good cause to identify formally to the Court with specificity the conflicts of interest that are likely to arise and may have already arisen, thus requiring under Fed. R. Crim. Pro. 44 the court to make an inquiry into the propriety of joint representation by the Court and necessitating that the Court "take appropriate measures to protect each defendant's right to counsel." FED. R. CRIM. PRO. 44(c)(2).

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Re: Grand Jury Inv. No. 2016R00949, in the matter of multiple representations
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Barring agreement from you at this time, the government feels obligated to bring these conflicts to the Court's attention. *See generally In re Gopman*, 531 F.2d 262, 265-66 (5th Cir. 1976); *In re Grand Jury*, 446 F.Supp. 1132, 1135 (N.D. Tex. 1978). In *Wheat v. United States*, 486 U.S. 153 (1988), the Supreme Court emphasized that the negative impact of conflicting loyalties of counsel is particularly difficult to assess in the earliest stages of a case. *Id.* at 153. Therefore, the *Wheat* Court held that district courts must enjoy substantial latitude to disqualify counsel because of even potential conflicts of interest. *Id.* at 163. It is "clearly within the discretion of the district judge to nip any potential conflict of interest in the bud." *Tucker v. Shaw*, 378 F.2d 304, 307 (2d Cir. 1967).

The United States is prepared to bring this matter to the Court's attention now to avoid a post-conviction appeal predicated on an ineffective assistance of counsel claim arising from these conflicts. *See, e.g., United States v. Lutz*, 621 F.2d 940, 948 (9th Cir. 1980); *United States v. Canessa*, 644 F.2d 61 (1st Cir. 1988). A convicted defendant can successfully win on appeal on the basis of the mere potential for conflict of interest. *See, e.g., Lopez v. Scully*, 58 F.3d 38, 41 (2d Cir. 1995). He need not show actual conflict of interest, so long as he is able to show prejudice from the potential. *Id. But cf. In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600, 608 (D.C. Cir. 1976); *In re Grand Jury Empaneled January 21, 1975*, 536 F.2d 1009 (3d Cir. 1976).

The targets, subjects, and witnesses in this matter are current or former employees and officers of Fitbit, a publicly traded company, who are being investigated for participation in a conspiracy to engage in theft of trade secrets arising from its hiring of five key employees from a competitor company, AliphCom, Inc., d/b/a Jawbone ("Jawbone"), and the activities of those individuals and others in positions of authority at Fitbit subsequent to the legacy-Jawbone employees' migration to Fitbit in 2015.

You have informed the government that each of these individuals is currently represented by both of you and your respective law firms, hired by Fitbit for that purpose. The government hereby notifies you both that it believes there exists both an actual conflict of interest (based on your representations of each of these individuals in the civil matter, as well as their positions within the company), and a potential conflict of interest (based on your representing these individuals, and others within the company, given their various positions, and the information received to date). The government does not believe you can meet your obligation to represent each of these clients free of compromising loyalties, as well as your simultaneous obligation to preserve the confidences communicated to you by each of these clients.

When counsel represents both subjects as well as other potential witnesses soon to be subpoenaed, certain witnesses may learn that their testimony will be detrimental to the interests of the other witnesses they have represented. "Under these circumstances, [conflicted counsel], would be torn between conflicting loyalties in representation that will have a material impact on their professional recommendations and courses of actions." *Matter of Grand Jury Proceedings*, 428 F.Supp. 273, 277 (E.D. Mich. 1976). The public has a right to an effective grand jury investigation that "uncover[s] the truth free of any potential obstructions arising from a conflict of interest in multiple representation." *Id.* at 278. *See also In the Matter of the Grand Jury*

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Empaneled Apr. 24, 2008, 601 F. Supp. 2d 600 (D.N.J. 2008) (in upholding Magistrate Court's appointment of conflicts counsel in grand jury investigation where one attorney represented four material witnesses in a ship pollution case, the court found the public has an interest in a truth-seeking grand jury investigation unhindered by the obstacles that arise from multiple representation).

This investigation is ongoing and, thus, fluid. It is possible that the status of some of the entities or individuals will change from subject to target. The government need not wait for this problem to materialize; it can approach the Court to exercise its authority to take the prudent course and act on the potential conflict. *In re Grand Jury Investigation*, 2006 WL 2385518 (E.D. Pa. 2006) (granting government's motion to disqualify law firm from representing seven grand jury witnesses in same investigation; witnesses included both current and former employees of same entity; two were potential targets, five were non-target fact witnesses; also finding conflict requiring disqualification in part because legal fees of attorney representing multiple grand jury targets are paid by entity with interests hostile to government cooperation).

Further, U.S. Department of Justice policy, as articulated in the Memorandum issued by then-Deputy Attorney General Sally Yates on September 9, 2015, (the "Yates Memo"), states that the government is obligated to follow certain steps to ascertain the culpability of individuals at the earliest stages of the investigation whenever corporate misconduct is detected or suspected. The first step under the Yates Memo is for the corporation to provide "all relevant facts about the individuals involved in or responsible for the misconduct at issue." Your most recent production of documents withheld, under a claim of privilege, content from individual email accounts of persons who are subjects or targets of the investigation, while still maintaining the proprietary rights of Fitbit over this material. The conflict in this regard seems plain.

The government respectfully requests that you advise me of your position as to a resolution of the issue before June 2, 2017. Should we be unable to agree, I may elect to seek the assistance of the Court to consider our belief that it is no longer feasible for your firms to continue to represent both the company as an entity and each the individuals involved in the investigation.

Finally, would you please advise me as whether your response to the February 2017 subpoena is complete as of your last production on April 7, 2017, or whether we should expect you to provide further responsive materials. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

BRIAN J. STRETCH
United States Attorney

s/ Amie D. Rooney

AMIE D. ROONEY
Assistant United States Attorney

EXHIBIT 2



*United States Attorney
Northern District of California*

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San Jose, California 95113*

*(408) 535-5061
FAX: (408) 535-5066*

December 12, 2017

Ms. Katherine Mogal
c/o Randy Luskey, Esq.
The Orrick Building
405 Howard Street
San Francisco, CA 94105-2669

Dear Ms. Mogal:

This letter is to advise you that you are a target of a Federal Grand Jury investigation of criminal violations of federal laws including Title 18, United States Code, Section 1832 (Theft of Trade Secrets and Conspiracy).

If you are interested in resolving this matter, please have your attorney contact the undersigned at (408) 535-0910. If you cannot afford an attorney, I suggest you call the Federal Public Defenders' Office at (408) 291-7753.

If no contact is made with our office prior to January 11, 2018, the matter will proceed in the ordinary course of prosecution.

Very Truly Yours,

BRIAN J. STRETCH
United States Attorney


AMIE D. ROONEY
Assistant United States Attorney