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10 Attorneys for Defendant,
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12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14 ROBERT HUNTER BIDEN,
15
16 Plaintiff,

17 vs.

18 PATRICK M. BYRNE,
19 Defendant.

20 Case No.: 2:23-cv-09430-SVW-PD
21 Judge: Honorable Stephen V. Wilson
22 Courtroom: 10A

23 **EX PARTE APPLICATION FOR**
24 **AN ORDER TO COMPEL**
25 **EXCLUDE PLAINTIFF TO**
26 **COMPLY WITH RULE 31 FOR**
27 **CONDUCTING THE DEPOSITION**
28 **OF SPECIAL AGENT DAVID**
SMITH; MEMORANDUM OF
POINTS AND AUTHORITIES

Filed Concurrently with Declaration of Michael C. Murphy and [Proposed Order]

Complaint Filed: November 8, 2023

Date: March 27, 2025
Time: 4:00 p.m.
Ctrm.: 10a

Judge: Hon. Stephen V. Wilson

LAW OFFICES OF MICHAEL C. MURPHY
2625 Townsgate Road, Suite 330
Westlake Village, CA 91361

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendant Patrick M. Byrne (“Defendant”), by and through his attorneys of record, hereby applies ex parte to this Court for an order to compel Plaintiff Robert Hunter Biden’s (“Plaintiff”) to comply with Federal Rules of Civil Procedure 31 for conducting the deposition of Special Agent David Smith. Good cause exists to request this order because Plaintiff, by and through his new counsel, have failed and refused to comply with the provisions of Federal Rules of Civil Procedure 31 for conducting the deposition of Special Agent David Smith. Plaintiff and his counsel have engaged in gamesmanship related to the taking of the deposition of Special Agent David Smith and will not comply with the code but insist that the deposition should proceed forward in a manner that they deem appropriate and in violation of Defendant’s rights under Federal Rules of Civil Procedure 31 that specifically mandate the procedures for the taking of this deposition and to the severe prejudice Defendant.

Pursuant to Central District Local Rule 7-19.1, on March 13, 2025, Defendant’s counsel notified Plaintiff’s counsel, Richard Harpootlian, of his intent to seek this Ex Parte Relief today. Plaintiff’s counsel’s contact information is as follows:

Richard Harpootlian, 1410 Laurel Street, Columbia, South Carolina 29201, (803) 252-4848, rah@harpootlianlaw.com.

His response to Defendant’s counsel after being given advance notice of this Ex Parte Application is that he choses to disagree with Defendant’s counsel and would do nothing to address the issues raised in this Ex Parte Application.

Defendant further requests that the court rule on this Ex Parte Application as soon as possible in that Plaintiff and his counsel intend to proceed with the Deposition of Special Agent David Smith without complying the procedural rules set forth in Federal Rules of Civil Procedure 31 and after being notified of Defendant’s objections to their failure to comply with this code section.

1 This application is based on the accompanying Memorandum of Points and
2 Authorities, the declaration of Micheal C. Murphy, Esq., concurrently filed herein,
3 the pleadings, all exhibits, and all other documents on file with the Court, oral
4 arguments made, and upon such other and further matters that the Court may
5 consider when ruling on this Motion.

6
7 Dated: March 27, 2025

LAW OFFICES OF MICHAEL C. MURPHY

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9 By: /s/ Michael C. Murphy, Esq.

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11 _____
12 Michael C. Murphy, Esq.
13 Michael C. Murphy, Jr., Esq.
14 Attorneys for Defendant,
15 Patrick M. Bryne
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Defendant Patrick M. Byrne (“Defendant”) hereby submits to the court his Memorandum of Points and Authorities in support of his Ex Parte Application for a court order hereby applies ex parte to this Court for an order to compel Plaintiff Robert Hunter Biden’s (“Plaintiff”) to comply with all of the provisions of Federal Rule of Civil Procedure that are applicable to the taking of Special Agent David Smith’s deposition pursuant to said rule. Good cause exists for this request because Plaintiff, by and through his new counsel, have engaged in gamesmanship related to the taking of the deposition by failing and refusing to comply with the code and with their intent to proceed with the deposition in conscious disregard of the Defendant’s right to be involved in the deposition as set forth in the code.

BACKGROUND FACTS.

1. *Discovery*

On December 26, 2024, the Court ordered Plaintiff could conduct the deposition of Agent Smith, but limited it to previously undisclosed information at issue in Plaintiff’s December 19, 2024, ex parte application.

2. *Subpoena and Touhy Request*

On January 7, 2025, Plaintiff served a subpoena and *Touhy* request on the DOJ and FBI. Plaintiff then entered into negotiations with the DOJ to conduct the deposition of Agent Smith by means of “written interrogatories,” but failed to inform the Court and counsel that the interrogatories had been sent on February 21, 2025.

On February 24, 2025, the Court ordered Plaintiff to file the Motion to Compel by March 3, 2025, and *the Court* set the hearing for March 17, 2025. The government’s response deadline was March 13, 2025. The Court vacated the trial date to allow Plaintiff sufficient time to file the motion and take the deposition of Agent Smith.

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1 On March 3, 2025, the government filed a Motion to Quash the subpoena in
2 the District Court of the District of Columbia, *In re Subpoena in Civil Action No.*
3 *2:23-cv-9430*, Case No. 1:25-mc-00027-CRC (D.D.C. Mar. 3, 2025). The
4 government never served a copy of its motion on Defendant’s counsel.

5 On March 7, 2025, Plaintiff’s counsel, Phillip D. Barber, from Richard A.
6 Harpootlian, P.A., sent an email to the DOJ, offering to resolve the subpoena issue
7 by conducting the deposition of Special Agent David Smith via written deposition
8 questions.

9 On March 13, 2025, at 7:43 a.m., Sean Bean, Esq., from the DOJ, sent an
10 email to Mr. Barber, confirming that pursuant to telephone call with Plaintiff’s
11 counsel, the DOJ would agree to make Agent Smith available for a written
12 deposition so long as Plaintiff’s counsel agreed to use the interrogatory questions
13 previously sent by Zachary Hansen, Esq.

14 On March 13, 2025, at 3:42 p.m., Mr. Barber told Mr. Harpootlian to
15 forward the email thread to Defense counsel. Mr. Harpootlian did so, which was
16 received by Defense counsel’s office on March 13, 2025, at 12:52 p.m.

17 On March 13, 2025, Plaintiff filed a Notice of Withdrawal of his Motion to
18 Compel Response to *Touhy* Request because of the secret deal he had made with
19 the government’s counsel and once again with no involvement with Defendant’s
20 counsel.

21 On March 18, 2025 this court issued its ruling that Plaintiff could take the
22 deposition of Special Agent David Smith pursuant to Rule 31 which is a deposition
23 based on written questions.

24 Plaintiff’s counsel served on Defendant’s counsel a Notice of the Taking of
25 the Deposition of Special Agent David Smith with Rule 31 questions. The
26 deposition notice which is attached to the Declaration of Michael C. Murphy, Esq.
27 as Exhibit “A” contains the following defects:

- 1 1. It does not comply with Rule 31(a)(3) in that it does not set forth the
2 address of the deponent Special Agent David Smith.
- 3 2. It does not comply with Rule 31(a)(3) in that it does not set forth the
4 name and address of the court reporter that will be taking the deposition
5 of deponent Special Agent David Smith.

6 On March 26, 2025, Defendant’s counsel brought these defects in the
7 Deposition notice and requested that Plaintiff’s counsel correct the notice and send
8 out a corrected one that complies with the court. This e-mail request is attached as
9 Exhibit “B” to the Declaration of Michael C. Murphy, Esq.

10 On March 26, 2025, Plaintiff’s counsel sent an e-mail to Defendant’s
11 counsel and refused to correct the defective deposition notice so that it complies
12 with Rule 31(a)(3). He also gave defendant’s counsel notice that Plaintiff did not
13 intend to comply with the provisions of FRCP 31(b) and (c) and that Plaintiff
14 intends to go through counsel at the DOJ who is representing the deponent will
15 arrange the court reporter to take the deposition and when it is done the DOJ
16 counsel through the court reporter will send Plaintiff’s counsel the deposition it
17 receives from the court reporter. This e-mail request is attached as Exhibit “B” to
18 the Declaration of Michael C. Murphy, Esq.

19 Defendant’s Counsel then notified Plaintiff’s counsel their procedure for the
20 taking of the deposition of Special Agent Smith pursuant to FRCP 31 including the
21 notice did not comply with the code and requested that they comply with the code
22 before taking the deposition and through its conclusion. Plaintiff’s counsel refused
23 to cooperate.

24 3. *Ex Parte Notice*

25 Pursuant to Central District Local Rule 7-19.1, on March 13, 2025,
26 Defendant’s counsel notified Plaintiff’s counsel, Richard Harpootlian, of his intent
27 to seek this Ex Parte Relief. Plaintiff’s counsel’s contact information is as follows:
28

1 Richard Harpootlian, 1410 Laurel Street, Columbia, South Carolina 29201,
2 (803) 252-4848, rah@harpootlianlaw.com.

3 4. *Time of Hearing*

4 Defendant further requests that the application be heard as soon as possible
5 so that the Rule 31 deposition of special agent David Smith can proceed but only
6 with full compliance with the code. at the same time as Defendant’s Ex Parte to
7 Reopen Plaintiff’s Deposition,

8 **I. LEGAL ARGUMENT.**

9 **A. Plaintiff Failed and Refuses to Comply with Rule 31 in the taking of
10 Special Agent David Smith’s Deposition.**

11 Federal Rules of Civil Procedure, Rule 31(a)(3) *requires* that the deposition
12 notice contain the address of the deponent and the name and address of the court
13 reporter.

14 Federal Rules of Civil Procedure, Rule 31(b) requires that the party who
15 noticed the deposition must deliver to the deposition officer a copy of all questions
16 served and the notice. The officer must then promptly proceed in the manner
17 provided in 30(c),(e) and (f) to take the deposition.

18 Federal Rules of Civil Procedure, Rule 31(c) requires the party who noticed
19 the deposition to notify all parties of when the deposition is completed.

20 It is readily apparent from a review of Exhibits “A” and “B” to the
21 Declaration of Michael C. Murphy, Esq. that the Rule 31 deposition notice of
22 special Agent David Smith is defective. Moreover, Plaintiff’s counsel insists on
23 using procedures to take the deposition that are contrary to the procedures that
24 must be followed for this deposition under the code.

25 Moreover, the United States is also subject to the Federal Rules of Civil
26 Procedure in all civil cases. See *Mattingly v United States* 939 F.2d 816, 818 (9th
27 Cir. 1991); *M.A. Mortenson Co. v United States* 996 F.2d 1177, 1181 (Fed. Cir.
28

1 1993); See also *United States v Sumitomo Marine v Fire Ins. Co., Ltd.* 617 F.2d
2 1365, 1370-1371 (9th Cir. 1980).

3 A deposition notice that does not comply with Federal Rule of Civil
4 Procedure 31 is invalid. (*Riser v. Wash State Univ.* 2019 U.S. Dist. Lexis 182651;
5 2019 WL 52580490)

6 The DOJ and Plaintiff’s counsel have no legal right to waive the provisions
7 of Federal Rules of Civil Procedure Rule 31. Defendant has never waived those
8 provisions of the code.

9 Under Federal Rules of Civil Procedure 26(b)(1), the court may issue any
10 orders to protect a party from oppression relating to a discovery issue. The court is
11 requested to assist with this matter by suspending the deposition of special agent
12 David Smith as noticed by Plaintiff, order Plaintiff to send out a new deposition
13 notice that complies with FRCP 31(a)(3) and that Plaintiff is to fully comply with
14 all of the procedures for the taking of the deposition that are set forth in FRCP
15 31(b) and (c). Plaintiff is not to use the DOJ as its proxy and avoid compliance
16 with these rules.

17 **B. Ex Parte Relief is Appropriate Here.**

18 Ex parte relief is warranted under the circumstances here. Ex parte
19 applications are limited to requests warranting extraordinary relief. (See this
20 Court’s New Case Order, Docket 14, ¶5.) They are typically limited to genuine
21 emergencies. (See *In Re: Intermagnetics America, Inc.*, 101 Bankr. 191, 193-194
22 (C.D. Cal. 1989.)

23 Here, ex parte relief is appropriate. As demonstrated above, Plaintiff’s
24 counsel has violated the clear provisions of FRCP 31(a)(3) in noticing the
25 deposition of Agent Smith. Plaintiff is also failing and refusing to fully comply
26 with FRCP (b) and (c) as to the conduct of the deposition of Agent Smith utilizing
27 a procedure with DOJ counsel as its proxy and over the objection of Defendant.
28

1 Should the Court view this ex parte application merely as an improperly
2 noticed motion to compel Plaintiff and his counsel full compliance with the
3 deposition rules set forth in FRCP 31, the Court may still allow the motion to
4 proceed on the merits, and the Court’s decision will be viewed as an order
5 shortening time. (*Professional Programs Group, supra*, 29 F.3d at p. 1353.)

6 **II. DEFENDANT GAVE NOTICE TO PLAINTIFF’S COUNSEL**
7 **OF THIS APPLICATION**

8 Pursuant to Central District Local Rule 7-19.1, on March 26, 2025,
9 Defendant’s counsel notified Plaintiff’s counsel, Richard Harpootlian, of his intent
10 to seek this Ex Parte Relief. Plaintiff’s counsel’s contact information is as follows:

11 Richard Harpootlian, 1410 Laurel Street, Columbia, South Carolina 29201,
12 (803) 252-4848, rah@harpootlianlaw.com. (See Declaration of Michael C. Murphy
13 in support of this application, ¶10.)

14 **III. CONCLUSION**

15 Based on the foregoing, Defendant respectfully requests that the court grant
16 Defendant’s request, suspend the deposition of special agent Smith as improperly
17 noticed, order Plaintiff’s counsel to re-notice the deposition which notice must
18 comply with FRCP(a)(3) and order Plaintiff’s counsel to fully comply with the
19 provisions of FRCP(b) and (c) without using the DOJ counsel as its proxy in
20 complying with these code sections.

21
22 Dated: March 27, 2025

LAW OFFICES OF MICHAEL C. MURPHY

23
24 By: /s/ Michael C. Murphy, Esq.

25 _____
26 Michael C. Murphy, Esq.
27 Michael C. Murphy, Jr., Esq.
28 Attorneys for Defendant,
Patrick Byrne

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