JUDGE MARK SCARSI ORDERS BRIEFING ON WHETHER DAVID WEISS IS DAVID WEISS

I don't think Judge Mark Scarsi is going to be very sympathetic to Hunter Biden's arguments.

But I will give him this: The judge works quickly and attentively.

Just days after Hunter Biden submitted his reply briefs, Judge Scarsi noticed that Hunter's attorney Abbe Lowell raised two issues in his replies to two technical motions to dismiss that Lowell had not raised in his original motions. Scarsi issued an order offering David Weiss the opportunity to file 5-page sur-replies to each and also ordered Lowell to submit three exhibits he mentioned if he wanted those to be considered as part of the record.

One new issue pertains to whether Weiss is estopped (pages 4-6) from arguing that Hunter was a resident in California in 2017 and 2018 after asserting he was a resident of DC in the DE tax information ~~(I'm not convinced the record on that point backs Lowell)~~.

A more interesting — but related one, one I have raised — has to do with whether two tolling agreements that Hunter signed with the US Attorney for Delaware and DOJ Tax Division apply in the case of an indictment obtained by Special Counsel David Weiss.

> I. THE TOLLING AGREEMENTS DO NOT TOLL THE SOL BECAUSE THE SC IS NOT A PARTY TO THOSE AGREEMENTS
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> The SC's reliance upon two tolling agreements with Biden is misplaced because the SC is not a party to those agreements. Those agreements are between Biden and the U.S. Attorney's Office for the District of Delaware and the Tax

> Division at Main Justice (which acts through specific U.S. Attorney's Offices). At the time Biden entered into these tolling agreements, he knew he was being investigated for tax violations by the U.S. Attorney's Office for the District of Delaware, District of Columbia, and the Central District of California, but he entered tolling agreements only with Delaware. Venue and statute of limitations considerations would be unique as to each District.
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> Similarly, Biden did not enter into any tolling agreements with the SC, as no SC had even been appointed to investigate him when these tolling agreements were signed. The fact that the U.S. Attorney for Delaware David Weiss was subsequently appointed as SC—as opposed to someone else—does not mean the SC's Office suddenly became a party to those prior agreements. The agreement is with the office, not the man (who did not sign these agreements in any event; AUSA Leslie Wolf signed on behalf of the Office and she is not a member of the Special Counsel's Office). Weiss's U.S. Attorney team is separate from his SC team, complete with distinct websites, email addresses (which they insist be used in place of their USAO addresses), stationary, and, more importantly, different responsibilities. Surely, the Delaware Office would not claim that such agreements become void whenever the U.S. Attorney leaves the office. Nor could anyone claim the State of Delaware would be a party to such an agreement if Weiss had become Attorney General of the state instead. Similarly, if John Doe had been named SC, instead of Weiss, there would be no basis for Doe to claim he inherited the tolling agreements entered into by Weiss or any other U.S. Attorney.

> Tolling agreements are contracts, and the entry into those agreements by one U.S. Attorney's Office does not typically bind other government entities absent language saying so. See, e.g., United States v. Viola, 562 Fed. App'x 559 (9th Cir. 2014) (Probation not bound by U.S. Attorney's plea agreement); see also SOS Co. v. E-Collar Techs., 2017 WL 5714716, at *5 (C.D. Cal. Oct. 17, 2017) (tolling agreement did not apply to non-party that was not the alter ego of a party); Osman v. Young Healthcare, 2023 WL 2021703, at *7 (E.D. Va. Feb. 15, 2023) (tolling agreement with Department of Labor with respect to certain named plaintiffs' claims did not extent to unnamed plaintiffs); United States v. FedEx Corp., 2016 WL 1070653, at *1 (N.D. Cal. Mar. 8, 2016) (finding tolling agreement with one company did not apply to a related company, even where government believed the agreement covered all related entities); Morning Star Packing v. Crown Cork and Seal, 2004 WL 7339592, at *7 (E.D. Cal. Aug. 3, 2004) (tolling agreements cannot be extended to new parties). The general rule is that agreements entered into by one U.S. Attorney's Office binds only that office, unless stated otherwise. United States v. Annabi, 771 F.2d 670, 672 (2d Cir. 1985) ("A plea agreement binds only the office of the United States Attorney for the district in which the plea is entered unless it affirmatively appears that the agreement contemplates a broader restriction.").2 Federal prosecutors in one office, for example, may prosecute a defendant who is immunized by an agreement with another office. See, e.g., Sertich, 649 F.3d 545, at *1 (ND Ind. Prosecution not barred by CDCA plea agreement); United States v. Laskow, 688 F. Supp. 851, 853 (E.D.N.Y. 1988) (finding EDNY

> prosecution not barred by CDCA plea agreement).3 What is good for the goose is good for the gander. The same rules that hold one U.S. Attorney's Office not bound by plea agreements reached with other Offices mean that one Office cannot seek the benefits of tolling agreements reached by other Offices. Prosecutors should not be allowed to elect whether they are or are not bound by agreements between other Offices and defendants, depending on what suits them. Moreover, as with plea agreements and diversion agreements, any ambiguities in tolling agreements are construed in the defendant's favor. See, e.g., United States v. Spector, 55 F.3d 22, 26 (1st Cir. 1995); United States v. Goyal, 2007 WL 1031102, *3 (N.D. Cal. Apr. 3, 2007).
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> 2 The Diversion Agreement made with respect to Biden illustrates the difference. It provides: "This Diversion Agreement (the 'Agreement') is entered into between the United States of America, by and through the United States Attorney's Office for the District of Delaware, and Robert Hunter Biden ("Biden"), collectively referred to herein as 'Parties,' by and through their authorized representatives." (DA ¶1.) Thus, in the Diversion Agreement, the U.S. Attorney's Office is executing the agreement on behalf of the United States. By contrast, the tolling agreements indicate that the party is the U.S. Attorney's Office, but not the United States as a whole. Compare United States v. Sertich, 649 F.3d 545, at *1 (9th Cir. Oct. 24, 1995) (unpublished) (explaining an agreement that is confined to a particular U.S. Attorney's Office binds only that office, as opposed to a more general agreement that binds the United States as a whole), with Thomas v. INS, 35 F.3d 1332, 1335

> n.1 (9th Cir. 1994) (explaining an agreement made on behalf of the United States government, as opposed to a sub-part, applies to the government as a whole); United States v. Harvey, 791 F.2d 294, 301–03 (4th Cir. 1986) (explaining that an agreement entered into on behalf of the United States, as opposed to just a particular U.S. Attorney's Office, binds the United States as a whole); see also Morgan v. Gonzales, 495 F.3d 1084, 1091 (9th Cir. 2007) ("As a general matter of fundamental fairness, promises made by the government to induce either a plea bargain or a cooperation agreement must be fulfilled. . . . A United States Attorney is authorized to enter into cooperation agreements and, in so doing, to make promises that are binding on other Federal agencies.") (citations omitted).
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> 3 By analogy, Andrea Gacki recently transitioned from her role as Director of the Office of Foreign Assets Control to being Director of the Financial Crimes Enforcement Network. It is difficult to imagine that anyone would think the agreements reached by OFAC under her watch no longer bind OFAC or that FinCEN is now bound by those OFAC agreements.

As I may follow-up, David Weiss is engaged in a number of such shell games, picking and choosing where his legal persons carry over and do not, and where his biological person can avoid accountability.

A far more urgent one than these tolling agreement pertains to discovery: Weiss seems to imagine that by becoming Special Counsel, he avoids discovery into materials held by or known to US Attorney David Weiss, including his conversations with (most pertinently) Los Angeles US Attorney Martin Estrada (who, after

reviewing the merits of the case, decided not to join it), DC US Attorney Matthew Graves, and DOJ Tax Division (the last of which is a party to the tolling agreement). This is actually the opposite of how Jack Smith has operated and how the Crossfire Hurricane to Robert Mueller to Jeffrey Jensen inquiry operated with discovery, which carried over as one legal entity became another. I asked Weiss' office some time ago whether they were adhering to the standard used by other Special Counsels but got no response.

It's an interesting legal question, so I do look forward to Weiss' legal commitment to a shell game.

Lowell did submit the three exhibits, which show Weiss withdrawing the plea offer, Chris Clark asking for time to consider it, and Derek Hines emailing the docket entry showing the request to withdraw the plea offer.

Update: I changed my mind, above. Lowell is absolutely right on the estoppel claim. The tax information filed in Delaware describes that Hunter's residency was in DC in 2017 and 2018. It was signed by Leo Wise, so he can't very well claim that he, personally, has not made that assertion before.