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IN THE UNITED STATES DISTRICT COURT  
FOR THE TERRITORY OF GUAM

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WAI KAM HO,

Defendant.

CRIMINAL CASE NO. 11-00082

**ORDER RE MOTION TO SUPPRESS  
ORAL STATEMENTS MADE BY THE  
DEFENDANT ON DECEMBER 14, 2010  
AND DECEMBER 15, 2010; AND  
EVIDENCE SEIZED FROM CLUB  
CRAZY HORSE**

The Motion to Suppress filed by Defendant Wai Kam Ho (“Defendant Ho”) came before this court for an evidentiary hearing on December 5, 2012, and December 11, 2012. After hearing the testimony of witnesses and argument from counsel, the court took the Motion to Suppress (ECF No. 149) under advisement. For the reasons discussed more fully herein, the court sets forth the basis for its decision in **DENYING** said motion.

**I. FACTS**

Two federal agents<sup>1</sup> for the Prosecution testified during the evidentiary hearing, and a declaration from Mr. Rico W.G. Omagap was submitted by Defendant Ho. No other testimony

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<sup>1</sup> FBI Special Agent Frank Runles and IRS Special Agent Todd Peterson.

1 was offered. It should be noted that the parties do not dispute the fact that Defendant Ho was not  
2 warned of his *Miranda* rights.

3 Because the court's factual findings in this instant motion are related and similar, if not  
4 the same, to co-defendant Jennie Wen Chin Pau's motion to suppress (ECF No. 142) and  
5 Defendant Ho's motion to dismiss and/or suppress due to alleged violations of the Posse  
6 Comitatus Act (ECF No. 155), the court concurrently held the hearing for all of these motions. It  
7 should be noted that Defendant Ho's motion to suppress incorporates his Posse Comitatus Act  
8 arguments.<sup>2</sup> *See* Reply, ECF No. 158 at 6. During the December 11, 2012 hearing, the court  
9 permitted the parties to submit supplemental briefing no later than December 21, 2012.

#### 10 **A. MGM Spa Building**

11 This court has previously made factual findings of the circumstances surrounding the  
12 execution of a search warrant at the MGM Spa Building on December 14, 2010, wherein the  
13 court issued its order on co-defendant William M. Perez's motion to suppress. *See* Order, ECF  
14 No. 174. Because the interview of Defendant Ho occurred on the same night at the same location  
15 as co-defendant William M. Perez, the court hereby adopts its factual findings from its order  
16 dated July 17, 2012. Below is a summary of the court's factual findings from its July 17, 2012  
17 order.

18 On December 14, 2010, between 10:00 p.m. and 12:00 a.m. of December 15,  
19 2010, approximately ten (10) to fifteen (15) agents from the Federal Bureau of  
20 Investigation ("FBI"), Internal Revenue Service ("IRS"), and Naval Criminal  
21 Investigative Service ("NCIS") executed a search warrant at the MGM Spa Building. The  
22 agents were wearing raid jackets and bullet proof vests.

23 Prior to entering the building, the agents knocked on the door and the knocking  
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<sup>2</sup> The issue of the Posse Comitatus Act will be addressed in a separate order.

1 grew progressively louder (“loud banging”) until someone came to the door. Upon  
2 entering the door, an agent cuffed and frisked co-defendant William M. Perez. The pat-  
3 down search lasted approximately two minutes. While this was going on, the rest of the  
4 agents—with their guns drawn—entered to secure the building. Once the security check  
5 was completed, all weapons were holstered and agents were posted at the exits of the  
6 building to ensure the agents maintained control of the building.

7           Once the agent saw that the “situation had been contained” or that the place had  
8 been secured, the agent removed the handcuffs from Mr. Perez. The total length of time  
9 Mr. Perez was cuffed was approximately two to three minutes. The agent then told Mr.  
10 Perez to wait to be interviewed. In other areas of the game room, interviews were also  
11 being conducted by other federal agents.

12           During the interview of Mr. Perez, Mr. Perez’s cellular phone rang. The  
13 Prosecution failed to provide evidence as to who answered Mr. Perez’s cellular phone.  
14 What is known is that when the phone rang (or “buzzed”), Mr. Perez informed the agents  
15 that it was Defendant Ho calling. Special Agent Runles then asked if he could speak with  
16 Defendant Ho.

17 *See Order, ECF No. 174.*

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19           FBI Special Agent Frank L. Runles recounted similar factual details during the December  
20 5, 2012 hearing. Special Agent Runles stated that he spoke with Defendant Ho on the phone.  
21 Defendant Ho was somehow made aware of the execution of the search warrant at the MGM Spa  
22 prior to his phone call to co-defendant William M. Perez. Special Agent Runles asked Defendant  
23 Ho if he could come down to the MGM Spa building for an interview and Defendant Ho agreed.  
24 It is unknown as to what time Defendant Ho arrived at the MGM Spa building, but it was

1 established that he arrived at the building sometime prior to 12:01 a.m. of December 15, 2010. It  
2 is also clear from the record that Defendant Ho arrived sometime after the agents holstered their  
3 weapons and secured the premises. This is based on the fact that Defendant Ho called co-  
4 defendant William M. Perez while Mr. Perez was already being interviewed, well past Mr.  
5 Perez's short period of being cuffed and frisked.

6 When Defendant Ho arrived at the MGM Spa building, Special Agent Runles was not  
7 immediately available to speak with him. As such, Defendant Ho was told by someone to take a  
8 seat and wait for Special Agent Runles at the main foyer of the MGM Spa building. Defendant  
9 Ho waited alone in the foyer without any agent watching over him. When Special Agent Runles  
10 became available, he met Defendant Ho at the foyer and took him to the poker room for an  
11 interview.

#### 12 **B. Club Crazy Horse**

13 During the interview at the MGM Spa building, Defendant Ho stated that he owns Club  
14 Crazy Horse. Special Agent Runles then asked if Defendant Ho would consent to a search at the  
15 Club Crazy Horse. Defendant Ho gave his consent on or about 12:01 a.m. of December 15, 2010.  
16 *See also* Gov't Exh. Ho 1. The consent form was completed and executed at the MGM Spa  
17 building. Thereafter, Defendant Ho and four agents<sup>3</sup> proceeded to Club Crazy Horse. Defendant  
18 Ho drove himself and the agents followed in their own vehicles.

19 When the agents and Defendant Ho arrived at Club Crazy Horse around 12:34 a.m. of  
20 December 15, 2010, the establishment was still open for business. The agents and Defendant Ho  
21 entered the building without any commotion. There was no evidence that the agents drew their  
22 guns or loud banging or yelling and screaming ever occurred. Defendant Ho led the agents to his  
23 office. There, the interview resumed, which was conducted by Special Agent Runles in the

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24 <sup>3</sup> The agents who went with Defendant Ho to Club Crazy Horse were FBI Special Agents Runles and Michael Gadsden, NCIS Special Agent Joseph H. Twilley, and an agent from the IRS.

1 presence of another agent. At some point during the interview, Defendant Ho brought in his club  
2 manager into his office to assist in explaining his business cash flow. *See* Gov't Exh. Ho 1. The  
3 interview with the club manager ended when she just walked out of the room and never came  
4 back. Meanwhile, the two other agents went to the bar area to talk with the bar manager. The  
5 agents seized spiral ring notebooks and receipts from the bar area. The agents left the club at  
6 approximately 1:35 a.m.

### 7 **C. Exhibits submitted by Defendant Ho**

8 The federal law enforcement agents executed search warrants at three different locations  
9 on December 14, 2010: MGM Spa, Paradise Bingo at the Royal Orchid Hotel, and Isla Bingo at  
10 the Compadres Mall.

11 During the evidentiary hearing on December 5, 2012 and December 11, 2012, counsel for  
12 Defendant Ho introduced *inter alia* exhibits I and Q. Exhibit I is Mr. Rico W.G. Omagap's  
13 declaration dated July 24, 2012. Mr. Omagap was working at the Paradise Bingo on the night of  
14 December 14, 2010, when federal agents executed a search warrant on the business  
15 establishment. *See* Def. Ho's Exh. 1. In the declaration, Mr. Omagap stated that he heard loud  
16 banging and shouting from where he was at. *Id.* When he went to see what was going on, he saw  
17 about thirteen (13) to fifteen (15) armed law enforcement agents wearing either a vest or a jacket.  
18 *Id.* Mr. Omagap observed a fellow co-worker bent over a table and cuffed, with an agent  
19 standing behind and over her. *Id.* Mr. Omagap further stated that he was frisked and then ordered  
20 to sit at one of the tables in the bingo parlor. *Id.* Each of the tables was supervised by law  
21 enforcement agents, and the people were separated and interrogated alone. *Id.* Mr. Omagap also  
22 stated that he was not allowed to get his phone from one of the back offices and that he believed  
23 he was not free to leave the premises. *Id.*

1 Exhibit Q are clips of video footage from Paradise Bingo on the night of December 14,  
2 2010, when federal agents executed the search warrant at the location. In one of the clips, it  
3 shows an individual bent over a table and what appears to be an agent cuffing that individual.  
4 The clips also show what appear to be law enforcement officers in progress of executing a search  
5 warrant and containing or securing the place.

## 6 II. DISCUSSION

7 Defendant Ho contends that he should have been given his *Miranda* rights on December  
8 14, 2010, and December 15, 2010. *See* Mot., ECF No. 149. In addition, Defendant Ho contends  
9 that he did not consent to a search at the Club Crazy Horse. *Id.* As such, Defendant Ho is asking  
10 that the statements he made on December 14, 2010 and December 15, 2010, and all evidence  
11 obtained from the search at the Club Crazy Horse be suppressed. *Id.* Additionally, Defendant Ho  
12 asks that all “fruit of the poisonous tree” be suppressed. *Id.*

13 On a motion to suppress, the controlling burden of proof imposes no greater burden than  
14 proof by a preponderance of the evidence. *See United States v. Matlock*, 415 U.S. 164, 177 n.14  
15 (1974). Moreover, the prosecution, as the proponent of the evidence, must bear the burden of  
16 proving its admissibility. *See United States v. Coades*, 468 F.2d 1061, 1064 (3d Cir. 1972);  
17 *United States v. Colbert*, No. 89-310, 1990 WL 5200 at \*1 (D.N.J. January 23, 1990) (citing *Katz*  
18 *v. United States*, 389 U.S. 347 (1967)).

### 19 A. There was no custodial interrogation on December 14, 2010 and December 20 15, 2010.

#### 21 (i) Miranda Warning and Custodial Interrogation

22 “No person . . . shall be compelled in any criminal case to be a witness against himself.”  
23 U.S. CONST. amend. V. In order to permit a full opportunity to exercise the privilege against  
24 self-incrimination, the U.S. Supreme Court in *Miranda v. Arizona* decided that the accused must  
be adequately and effectively apprised of his rights. 384 U.S. 436, 467 (1966). If a person in

1 custody was questioned without first being apprised of his rights, any statements made at that  
2 time may not be admitted as evidence against him. *Stansbury v. California*, 511 U.S. 318, 322.  
3 (1994); *United States v. Williams*, 435 F.3d 1148, 1152 (9th Cir. 2006).

4 The obligation to administer a *Miranda* warning is triggered “only where there has been  
5 such a restriction on a person’s freedom as to render him ‘in custody’.” *Stansbury*, 511 U.S. at  
6 322 (citations omitted). To determine whether the person is “in custody,” the court must examine  
7 all of the circumstances surrounding the interrogation. *Id.* However, the ultimate inquiry is  
8 whether there was a “formal arrest or restraint on freedom of movement” of the degree  
9 associated with a formal arrest. *Id.* See also *United States v. LeBrun*, 363 F.3d 715, 720 (8th Cir.  
10 2004), citing *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (The critical question is whether  
11 the defendant’s freedom to depart was restricted in any way); *Miranda*, 384 U.S. at 444  
12 (*Miranda* warning applies when a person is questioned by a law enforcement officer after being  
13 “taken into custody or otherwise deprived of his freedom of action in any significant way.”).

14 The court looks “at the totality of the circumstances while keeping in mind that the  
15 determination is based ‘on the objective circumstances of the interrogation, not on the subjective  
16 views harbored by either the interrogating officers or the person being questioned.’” *LeBrun*, 363  
17 F.3d at 720, citing *Stansbury*, 511 U.S. at 322-23. See also *United States v. Craighead*, 539 F.3d  
18 1073, 1082 (9th Cir. 2008). The court asks whether a reasonable person in those circumstances  
19 would “have felt he or she was not at liberty to terminate the interrogation and leave.”  
20 *Craighead*, 539 F.3d at 1082, citing *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). See also  
21 *U.S. v. Revels*, 510 F.3d 1269, 1274 (10th Cir. 2007) (Citing the U.S. Supreme Court in  
22 *Berkemer v. McCarty*, 468 U.S. 420, 441-42 (1984), the court indicates that the only relevant  
23 inquiry is how a reasonable man in the suspect’s position would have understood his situation).

24 This court has previously found that the interrogation conducted on December 14, 2010 at

1 the MGM Spa for co-defendant William M. Perez was custodial. *See* Order, ECF No. 174. In his  
2 case, Mr. Perez was present from the beginning when the agents first entered the premises until  
3 sometime after his interrogation concluded. *Id.* Mr. Perez heard the loud banging on the door. *Id.*  
4 Mr. Perez witnessed an army of federal agents barge into the building with guns drawn. *Id.* Mr.  
5 Perez himself was pushed against the wall, handcuffed and then frisked. *Id.* The agent that  
6 pushed him against the wall had his gun drawn. *Id.* With his hands still cuffed behind his back,  
7 Mr. Perez was then escorted to the game room. *Id.* Clearly, the federal agents exerted complete  
8 control over Mr. Perez. *Id.* A reasonable person in Mr. Perez's position would not have felt free  
9 to leave or terminate the interrogation.

10 Defendant Ho argues that although Ho was not present for the entire duration of the  
11 December 14 search at the MGM Spa, the situation when he was present was police dominated.  
12 *See* Reply, ECF No. 158 at 4. Police domination may be indicative of custodial interrogation. *See*  
13 *Craighead*, 539 F.3d at 1083-84.

14 In deciding Mr. Perez's case, the court used the factors<sup>4</sup> set forth by the Ninth Circuit in  
15 *Craighead*. *Id.* Mr. Perez's situation was similar to the defendant in *Craighead* in that both  
16 defendants witnessed the execution of the search warrant from the very beginning. Specifically,  
17 both defendant Craighead and Mr. Perez saw the presence of a large number of law enforcement  
18 officers unholstering their weapons. *See Craighead*, 539 F.3d at 1085 (“[I]f the suspect sees the  
19 officers *unholstering their weapons* within his home, the suspect may reasonably believe that his  
20 home is no longer safe from the threat of police force. In short, the presence of a large number of  
21 *visibly armed* law enforcement officers goes a long way towards making the suspect's home a

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23 <sup>4</sup> The factors are as follows: (1) the number of law enforcement personnel and whether they were armed; (2) whether  
24 the suspect was at any point restrained, either by physical force or by threats or intimidation; (3) whether the suspect  
was isolated from others; and (4) whether the suspect was informed that he was free to leave or terminate the  
interview, and the context in which any such statements were made. *Craighead*, 539 F.3d at 1084.

1 police-dominated atmosphere.”). *See also United States v. Mittel-Carey*, 493 F.3d 36, 38-40 (1st  
2 Cir. 2007) (finding that the presence of eight officers in the home, *one of whom unholstered his*  
3 *gun*, contributed to a police-dominated environment) (emphasis added).

4 Unlike the defendant in *Craighead*, and unlike Mr. Perez’s ordeal from witnessing an  
5 assembly of federal agents in raid jackets with guns drawn entering and securing the premises of  
6 the building to being physically restrained, Defendant Ho’s experience that evening was different  
7 and far from Mr. Perez’s experience. Based on the testimony provided during the evidentiary  
8 hearing, Defendant Ho came down to the MGM Spa building after speaking with Special Agent  
9 Runles on the phone. The phone conversation occurred sometime during co-defendant William  
10 M. Perez’s interview, as that was the time that Defendant Ho called Mr. Perez’s cellular phone.  
11 Therefore, by the time Defendant Ho arrived at the MGM Spa building, the commotion at the  
12 very beginning of the search warrant execution was over. Defendant Ho did not hear the  
13 progressively loud banging on the door. Defendant Ho did not witness the federal agents in their  
14 raid jackets with unholstered weapons, swarming the building while conducting a security check.  
15 Although there were a large number of agents that remained in the building throughout the  
16 evening of the execution of the search warrant, there was no longer the type of atmosphere of  
17 police domination that Mr. Perez experienced and witnessed. Moreover, Defendant Ho was not  
18 pushed against the wall, was not cuffed and was not frisked. Defendant Ho was not physically  
19 restrained. The law enforcement agents did not exert complete control over Defendant Ho.

20 In fact, when Defendant Ho arrived at the MGM Spa building, the police-domination that  
21 was visible at the beginning of the execution of the search warrant was no longer present.  
22 Defendant Ho was left alone in the foyer as he waited for Special Agent Runles. Defendant Ho  
23 could have sat around, stood up or even left the premises if he wanted to, as testimony was clear  
24 that no one supervised or watched him while he waited to be interviewed. He was left alone. No

1 agent exerted control over him.

2       Going through the *Craighead* factors, there was no evidence that Defendant Ho was  
3 informed that he was free to leave or terminate the interview any time he wanted to. However,  
4 the rest of the factors greatly favor the Prosecution. When Defendant Ho arrived at the MGM  
5 Spa building, there was no longer the police domination that was present at the very beginning of  
6 the execution of the search warrant. The law enforcement officers no longer had their guns  
7 drawn. Weapons were holstered after the building was secured. Defendant Ho was not restrained  
8 at any point in the evening. He was not even frisked. While Defendant Ho argues that he was  
9 isolated because he was left alone in the foyer, being left alone actually further supports the  
10 Prosecution in that it shows that Defendant Ho was not in custody. Had he been in custody, the  
11 agents would not have left him alone in the foyer where he could have easily reached for the  
12 door and left.

13       What is more appropriate in Defendant Ho's case is the application of case law wherein a  
14 defendant was summoned to come into a police station for questioning. Courts have held that  
15 *Miranda* warnings are not required if the suspect is not placed under arrest, voluntarily comes to  
16 the police station, and is allowed to leave unhindered by police after the interview. In *California*  
17 *v. Beheler*, 463 U.S. 1121, 1121-22 (1983), the defendant voluntarily agreed to accompany the  
18 police officers to the police station. *Id.* at 1122. The defendant then agreed to talk and after  
19 talking, he left the police station unhindered. *Id.* The defendant was not arrested after the  
20 interview. *Id.* Based on these facts, the Supreme Court found that "it is beyond doubt that [the  
21 defendant] was neither taken into custody nor significantly deprived of his freedom of action.  
22 [The defendant's] freedom was not restricted in any way whatsoever." *Id.* at 1123.

23       Similar to *Beheler* is *Mathiason*, 429 U.S. 492 (1977). In that case, the Supreme Court  
24 found that the defendant was not in custody, because there was no indication that the questioning

1 took place in a context where the defendant's freedom to depart was restricted in any way. *Id.* at  
2 495. The defendant came voluntarily to the police station, where he was informed that he was not  
3 under arrest, and he left the police station without hindrance. *Id.*

4 Moreover, the Ninth Circuit found in *United States v. Hayden*, 260 F.3d 1062 (9th Cir.  
5 2001), that the defendant cannot be considered "in custody" because the defendant voluntarily  
6 went to the FBI office on two separate occasions, provided her own transportation to both  
7 meetings, was told she was free to leave, and was not placed under arrest or restrained during the  
8 interview. *Id.* at 1063-66.

9 Similarly in this case, Defendant Ho voluntarily went to the MGM Spa building after being  
10 asked to come down by Special Agent Runles and presumably provided his own transportation.  
11 Defendant Ho was not arrested at the end of the interview. Although Defendant Ho was not told  
12 he was free to leave, there was no evidence to show Defendant Ho was restrained or hindered  
13 from leaving the building. Defendant Ho was not subjected to the experience that Mr. Perez was  
14 subjected to.

15 Moreover, when the interview resumed at Club Crazy Horse, there was no evidence that  
16 Defendant Ho was in custody. Defendant Ho took his separate vehicle to get to the Club Crazy  
17 Horse and the four (4) federal agents simply followed. There was no commotion that occurred,  
18 unlike what had occurred at MGM Spa in the very beginning of the execution of the search  
19 warrant. Defendant Ho himself led the agents into his office. At one point during the interview,  
20 Defendant Ho called in his club manager. This demonstrates that Defendant Ho was not isolated.  
21 Also, the club manager walked out in the middle of the interview and never came back to  
22 Defendant Ho's office to finish the interview with the agents. This further demonstrates a non-  
23 custodial interview because the club manager, who was with Defendant Ho in the same interview  
24 and under the same circumstance, felt free to leave and in fact, she did leave.

1           Looking at the totality of the circumstances, a reasonable person in Defendant Ho's  
2 situation—having voluntarily gone to the MGM Spa building and not having witnessed and  
3 experienced the same facts as Mr. Perez—would not have felt he or she was in custody.

4           Defendant Ho urges this court to look at the totality of the circumstances by considering  
5 (1) the experiences of co-defendant Perez on the night of December 14, 2010 at MGM Spa  
6 building; (2) the video clips from Paradise Bingo, wherein it showed what appears to be an  
7 individual being cuffed and federal agents in progress with the execution of a search warrant;  
8 and (3) the declaration of Mr. Omagap, wherein he details his experience and what he witnessed  
9 at Paradise Bingo on December 14, 2010. Defendant Ho asserts that all of these are evidence  
10 demonstrating strong similarities of how the search warrant was executed at MGM Spa and  
11 Paradise Bingo. Further, Defendant Ho asserts that his interview was a part of the same  
12 occurrence and transaction of the evening, and that the agents' behavior early in the evening was  
13 carried forward throughout the night when Defendant Ho was interviewed.

14           What Defendant Ho fails to recognize in his argument is that the court looks at the totality  
15 of the circumstances and what a reasonable person in the defendant's position would conclude.  
16 *See Craighead*, 539 F.3d at 1082. Because it is an objective test—examining whether a  
17 reasonable person in those circumstances would have felt free to leave—this court cannot  
18 possibly consider circumstances that Defendant Ho was not exposed to. Although Defendant Ho  
19 was aware that a search warrant was being executed at the MGM Spa building prior to coming  
20 down to the building, Defendant Ho himself was not at all in any similar circumstance as Mr.  
21 Perez or Mr. Omagap. Thus, Defendant Ho cannot compare himself to the circumstances of Mr.  
22 Perez or Mr. Omagap.

23           Defendant Ho also argues that despite the agents knowing that he was a target of their  
24 investigation, Defendant Ho was not advised of his *Miranda* rights. *See Mot.*, ECF No. 149 at 2.

1 Defendant Ho fails to cite legal authority supporting his argument. The fact that Defendant Ho  
2 may have been the focus of the investigation does not trigger the giving of *Miranda* warnings  
3 unless Defendant Ho is in custody. *See United States v. Eide*, 875 F.2d 1429, 1437 (9th Cir.  
4 1989), citing *Beckwith v. United States*, 425 U.S. 341, 345-56 (1976). *See also Stansbury*, 511  
5 U.S. at 323; *Maine v. Thibodeau*, 475 U.S. 1144, 1145 (1986); *Minnesota v. Murphy*, 465 U.S.  
6 420, 431 (1984)(“The mere fact that an investigation has focused on a suspect does not trigger  
7 the need for *Miranda* warnings in noncustodial settings.”)(citation omitted); *Beheler*, 463 U.S. at  
8 1124 n.2 (The U.S. Supreme Court rejects “the notion that the ‘in custody’ requirement was  
9 satisfied merely because the police interviewed a person who was the ‘focus’ of a criminal  
10 investigation.”)(citation omitted).

11  
12 **(ii) What Constitutes Involuntary Statements**

13 Defendant Ho argues that the statements he made were not voluntary. *See Reply*, ECF No.  
14 158 at 4-5. The Government must prove voluntariness by a preponderance of the evidence.  
15 *United States v. Leon Guerrero*, 847 F.2d 1363, 1365 (1988). An inculpatory statement is  
16 voluntary only when it is the product of a rational intellect and a free will. *Id.* (citations omitted).  
17 In determining voluntariness, “[t]he test is whether, considering the totality of the circumstances,  
18 the government obtained the statement by physical or psychological coercion or by improper  
19 inducement so that the suspect’s will was overborne.” *Id.* at 1366. *See also United States v.*  
20 *Bautista-Avila*, 6 F.3d 1360, 1364 (9th Cir. 1993) (the court considers totality of the  
21 circumstances).

22 There is no evidence that Defendant Ho’s will was overborne. As discussed *supra*,  
23 Defendant Ho voluntarily showed up at the MGM Spa building to be interviewed by Special  
24 Agent Runles. After signing a consent form to search Club Crazy Horse, Defendant Ho  
voluntarily took the agents to the club and resumed the interview there. There was no evidence

1 of physical threat, official pressure or fatigue, that would render his statement the product of  
2 coercion. *See Arizona v. Fulminante*, 499 U.S. 279, 288 (1991); *Spano v. New York*, 360 U.S.  
3 315, 322-23 (1959)(The questioning was done by numerous officials and lasted eight hours  
4 long).

5 **B. The consent form to search Club Crazy Horse is valid.**

6 Defendant Ho claims that federal agents conducted a warrantless search of his office  
7 without his valid consent. *See Mot.*, ECF No. 149 at 4. The Government provided a copy of the  
8 consent form, signed by Defendant Ho. *See Gov't Exh. Ho 2 and 3*. However, Defendant Ho  
9 argues that he did not voluntarily consent to the search, was in custody, was not given *Miranda*  
10 warnings, and was not advised he had the right not to consent to a search. *See Reply*, ECF No.  
11 158 at 5. Accordingly, Defendant Ho asserts that his Fourth Amendment rights were violated and  
12 that evidence obtained from the search and seizure must be suppressed. *Id.*

13  
14 The Fourth Amendment states that “[t]he right of the people to be secure in their persons,  
15 houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and  
16 no warrants shall issue, but upon probable cause, supported by oath or affirmation, and  
17 particularly describing the place to be searched, and the persons or things to be seized.” U.S.  
18 Const. amend. IV. Warrantless searches are unconstitutional with a very few “certain established  
19 and well-defined exceptions.” *United States v. Murphy*, 516 F.3d 1117, 1120 (9th Cir. 2008). A  
20 search conducted pursuant to a valid consent is constitutionally permissible. *Schneckloth v.*  
21 *Bustamonte*, 412 U.S. 218, 219 (1973). The Government has the burden of proving that the  
22 consent was freely and voluntarily given. *Id.* at 222.

23 Whether consent to a search was voluntary or was the product of duress or coercion,  
24 express or implied, is a question of fact to be determined by the totality of all the circumstances.

1 *Id.* at 227. The U.S. Supreme Court overturned a Ninth Circuit holding that the government “was  
2 under an obligation to demonstrate . . . that [the consent] had been given with an understanding  
3 that it could be freely and effectively withhold.” *Id.* at 221-22. The U.S. Supreme Court found  
4 that while knowledge of the right to refuse consent is one factor to be taken into consideration,  
5 the government does not need to establish such knowledge as a necessary prerequisite to  
6 demonstrating a ‘voluntary’ consent. *Id.* at 227.

7         The Ninth Circuit used the following factors to determine voluntariness: (1) whether the  
8 [consenting individual] was in custody; (2) whether the arresting officers had their guns drawn;  
9 (3) whether Miranda warnings were given; (4) whether the [consenting individual] was notified  
10 that he/she had a right not to consent; and (5) whether the [consenting individual] had been told a  
11 search warrant could be obtained. *United States v. Brown*, 563 F.3d 410, 415 (9th Cir. 2009).  
12 “These factors serve merely as guideposts, “not [as] a mechanized formula to resolve the  
13 voluntariness inquiry.” *Id.* (citations omitted). More importantly, no one factor is determinative.  
14 *Id.*

15  
16         In applying these factors, the Ninth Circuit in *Brown* found voluntariness because the  
17 consenting individual was not in custody;<sup>5</sup> guns were subsequently holstered after the defendant  
18 and consenting individual were handcuffed; and *Miranda* warnings were inapposite because  
19 consenting individual was not in custody. *Id.* at 416. Although the consenting individual was not  
20 notified that she had a right not to consent, the court found that this is not an absolute  
21 requirement for a finding of voluntariness per *Schneckloth*. *Id.* Additionally, the consenting

22 <sup>5</sup> Although the consenting individual with defendant were approached by five or six officers with guns drawn—and  
23 both ordered to the ground, handcuffed, and patted down for weapons—all these events occurred in a public setting  
24 and there is no evidence that police continued to display their weapons after the defendant and consenting individual  
were safely secured. *Brown*, 563 F.3d at 415. Also, the consenting individual was uncuffed and was informed she  
was not under arrest. *Id.* Moreover, at the consenting individual’s request, the police removed their insignia before  
joining her at the apartment to conduct the search. *Id.* at 416. The court found that the totality of the circumstances  
“would not have communicated to a reasonable person that she was not at liberty to ignore the police presence and  
go about her business.” *Id.*

1 individual was not threatened that a search warrant could be obtained. *Id.*

2 Similarly in this case, Defendant Ho was not in custody (as discussed *supra*). Because he  
3 was not in custody, *Miranda* warnings were not necessary. Moreover, Defendant Ho himself did  
4 not witness the drawing of guns when he arrived at the MGM Spa building. Defendant Ho claims  
5 he was not advised he had the right not to consent to a search. As discussed by the U.S. Supreme  
6 Court and the Ninth Circuit, this is not an absolute requirement in determining voluntariness.  
7 Moreover, a review of the “Permissive Authorization for Search and Seizure,” which was signed  
8 by Defendant Ho, shows the following statement, “I have been informed of my constitutional  
9 right to refuse to permit this search in the absence of a search warrant. In full understanding of  
10 this right, I have nevertheless decided to permit this search to be made.” *See* Gov’t Ex. Ho 3.

11  
12 Accordingly, there is no evidence that Defendant Ho was coerced into signing the consent  
13 form to search.

### 14 III. CONCLUSION

15 Based on the discussion above, the court finds that there was no custodial interrogation, the  
16 statements made by the Defendant was voluntary, and the consent to search Club Crazy Horse  
17 was voluntarily given by the Defendant. Accordingly, Defendant Ho’s Motion to Suppress oral  
18 statements made by the Defendant on December 14, 2010 and December 15, 2010; and evidence  
19 seized from Club Crazy Horse, is hereby **DENIED**.

20  
21 **SO ORDERED.**



22 /s/ Frances M. Tydingco-Gatewood  
23 Chief Judge  
24 Dated: Jan 22, 2013