UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
No. 08-CR-364 (RHK/AJB)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS JOSEPH PETTERS,

Defendant.

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DISCOVERY AND INSPECTION

BACKGROUND

Defendant Thomas Joseph Petters respectfully submits this memorandum of law regarding his Rule 16 discovery requests.

Mr. Petters is charged by indictment with multiple counts of mail fraud, wire fraud, and money laundering in connection with certain of his business entities, Petters Company, Inc. ("PCI") and Petters Group Worldwide ("PGW"), allegedly over a 13-year period and allegedly involving "billions of dollars." [Docket No. 79.] As the Government has stated on many occasions, a confidential informant ("CI") recorded certain statements by Mr. Petters and others. In addition, as the Government has noted on many occasions, certain associates of Mr. Petters have pleaded guilty to the alleged scheme and have agreed to testify. [10/7/2008 Tr. at 92-94.] Mr. Petters now brings the present discovery motion pursuant to the Rules of Criminal Procedure so that he may be assured of sufficient information with which to defend against these charges.

ARGUMENT

I. Items "Material To Preparing the Defense"

Rule 16 provides in relevant part:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:
> (i) the item is material to preparing the defense;
> (ii) the government intends to use the item in its case-in-chief at trial; or
> (iii) the item was obtained from or belongs to the defendant.

Fed. R. Crim. P. 16(a)(1)(E).

The rule does not impose a heavy burden. An item is "material to preparing the defense" if there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal. United States v. Lloyd, 992 F.2d 348, 350-351 (D.C. Cir. 1993); accord United States v. Lujan, 530 F. Supp. 2d 1224, 1234 (D.N.M. 2008). The items listed in the accompanying motion meet this test. Specific requests are addressed below.

II. Evidence that the Government Intends To Present in Its Case-In-Chief

The rules provide that Mr. Petters is entitled to notice of evidence that the Government intends to present in its case-in-chief:

> At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

Fed. R. Crim. P. 12(b)(4)(B).

The rule requires the Government to set out the evidence it actually intends to present during its case-in-chief, and "open-file" discovery will not satisfy the Government's duty. United States v. de la Cruz-Paulino, 61 F.3d 986, 993, 995 (1st Cir. 1995); United States v. Cheatham, 500 F. Supp. 2d 528, 534-535 (W.D. Pa. 2007); United States v. Anderson, 416 F. Supp. 2d 110, 112 & n.1 (D.D.C. 2006); see also United States v. Barry, 133 F.3d 580, 582-583 (8th Cir. 1998) (affirming district court's decision not to suppress evidence despite Government's violation of rule because district court provided sufficient remedy in holding suppression hearing). In Anderson, the court held that the Government must provide notice of the evidence that will appear on its exhibit list at trial. 416 F. Supp. 2d at 112.

This case involves hundreds of thousands of documents, mountains of computer data, and hours of audio recordings. [Fisher Decl., passim.] Open-file disclosure does not satisfy the Government's Rule 16 obligations; it will take months to review, much less attempt to identify which disclosures the Government intends to use at trial. The rule exists to streamline the trial process. [Fisher Decl. ¶¶ 12, 13.] In this complex and document-intensive case, the Government must provide a detailed listing of evidence it intends to introduce.

III. Witness and Exhibit Lists

The Government contends that Mr. Petters was the mastermind of a multi-billion dollar fraud that spanned at least 13 years, involving an as-yet undisclosed number of investors. [Docket No. 79.] The discovery provided thus far easily numbers in the

hundreds of thousands of documents, and discovery is not yet complete. [Fisher Decl., passim.] Needless to say, trial preparation is unwieldy. Delays are a certainty absent disclosure of witness lists and exhibit lists in a timely manner. The court can and should exercise its docket-management authority to require such a disclosure. United States v. W.R. Grace, 526 F.3d 499, 513 (9th Cir. 2008) (pretrial order requiring Government to disclose finalized list of witnesses where alleged crime occurred over the course of 30 years and involved more than a thousand alleged victims); Anderson, 416 F. Supp. 2d at 112 (requiring disclosure of exhibits to be used at trial); see also United States v. DeCoteau, 186 F.3d 1008, 1010 n.2 (8th Cir. 1999) (district court may exercise such discretionary case-management authority in the appropriate case). The Government's witness lists and exhibit lists should be produced sixty days prior to trial.

IV. Defendant's Statements

Rule 16 specifically requires disclosure of Mr. Petters' statements:

> (A) Defendant's Oral Statement.
>
> Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.
>
> (B) Defendant's Written or Recorded Statement.
>
> Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:
> (i) any relevant written or recorded statement by the defendant if: the statement is within the government's possession, custody, or control; and the attorney for the government knows -- or through due diligence could know -- that the statement exists;

> (ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and
> (iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

Fed. R. Crim. P. 16(a)(1).

The rule contemplates statements of any kind, including but not limited to audio recordings and recordings of conversations that Mr. Petters had with the Government's informants. United States v. Pesaturo, 519 F. Supp. 2d 177, 189 (D. Mass. 2007). The rule also contemplates recorded telephone calls, mail, and like items that the Government has intercepted during Mr. Petters' incarceration. All such materials must be produced.

V. Defendant's Criminal Record

Rule 16 specifically provides that the Government must provide the defense with a copy of Mr. Petters' criminal record, if any. Fed. R. Crim. P. 16(a)(1)(D).

VI. Expert Witnesses and Reports

Rule 16 provides:

> At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

Fed. R. Crim. P. 16(a)(1)(G).

Thus, the Government must make a disclosure of any expert witnesses, opinions, and reports that it intends to introduce. W.R. Grace, 526 F.3d at 513 (requiring government to timely disclose expert witnesses and expert report); United States v. White, 492 F.3d 380, 405-407 (6th Cir. 2007) (government failed to comply with notice requirements as to proffered expert-auditor where opinions to be offered were not disclosed). The disclosure should be made sixty days prior to trial.

VII. Reports of Examination and Tests

The Government must permit inspection and recording of the results or reports of any physical or mental examination and of any scientific test if "the item is material to preparing the defense or the government intends to use the item in its case-in-chief." Fed. R. Crim. P. 16(a)(1)(F). The defense requests the same sixty-day deadline.

VIII. Wiretaps

Federal law authorizes a defendant to obtain access to the content of wire, oral, or electronic communications intercepted by the Government. 18 U.S.C. § 2518(8). The statute further provides the defendant with an opportunity to move to suppress such wiretap evidence. 18 U.S.C. § 2518(10). To the extent that the Government intends to use wiretap evidence at trial, it must be disclosed. 18 U.S.C. § 2510(9).

The Government must provide the defense with any application for wiretaps, any court order regarding same, and the substance of any recordings regarding same. The defense requests that the disclosure, again, be made immediately.

IX. Internal Government Documents Re: Hedge Funds

Some of the alleged victims in this case are hedge funds that provided investment monies to co-defendant Petters Company, Inc.. Publicly-available materials demonstrate that the SEC and other federal governmental agencies have been well aware that hedge funds are largely unregulated, tend to be secretive and opaque, and are at high risk of fraudulent activity. Investors in these same hedge funds have sued for fraud and other improprieties.

One potential defense to the Government's charges is the hedge funds were not victims in the least. See, e.g., United States v. W.R. Grace, 401 F. Supp. 2d 1093, 1102 (D. Mont. 2005) (in criminal action under Clean Air Act, defendant was entitled to discovery of medical records of alleged victims underlying federal study of victim impact). We are entitled to discovery of internal Government documents regarding regulation of hedge funds, and failure to regulate hedge funds.

X. Government Leakers

As discussed in the defense's Motion for Transfer of Venue, an important factor is whether the Government played a role in propagating the prejudicial publicity. The defense is therefore entitled to information about Government contacts and leaks to the news media and other third parties regarding this case. This information bears upon the defense's Motion for Transfer of Venue, which may be renewed up to and during trial.

XI. Personnel Files of Government Witnesses

Law enforcement agents in this case have shown an utter disregard for the attorney-client privilege and prejudicial pretrial publicity. This suggests improper

conduct, which bears upon the quality of the Government's investigation and therefore the credibility of any Government agent. Under these circumstances, the defense is entitled to discovery of the personnel records of any Government agent that will or may testify at trial. United States v. Dominguez-Villa, 954 F.2d 562, 565 (9th Cir. 1992) (court had authority to require court to Government to examine agent's personnel records).

CONCLUSION

For all of these reasons, the Court should order discovery in accordance with the accompanying motion.

Dated: February 25, 2009

s/ Jon M. Hopeman

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