UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 08-364(1)(RHK/AJB)

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	GOVERNMENT'S RESPONSE
	)	TO DEFENDANT'S PRETRIAL
v.	)	MOTIONS
	)	
THOMAS JOSEPH PETTERS,	)	
	)	
Defendant.	)	

The United States of America, by and through its attorneys Frank J. Magill, United States Attorney for the District of Minnesota, and Joseph T. Dixon, III and John R. Marti, Assistant United States Attorneys, hereby submits the following response to defendant's pretrial motions.

I. DEFENDANT'S MOTION TO CHANGE VENUE

Defendant moves to change venue, blaming the government for pretrial publicity. This motion is premised on a factually inaccurate assertion and misapplied legal analysis. If granted, a change of venue would impose additional costs on taxpayers and victims due to pretrial publicity the defendant himself fostered and promoted. It should be denied.

A. Factual Background

1. The Defendant Has Intentionally Fostered Pretrial Publicity

It is ironic that the defendant blames the government for the pretrial publicity in this matter. Perhaps the unfounded attack

simply reflects a tactical choice to cover the defendant's own active media campaign and extra-judicial statements, through counsel and others, that are partially responsible for the pretrial publicity of which he now complains.

Immediately following the execution of the search warrants, the defendant began to characterize the government investigation to the media as an "unnecessary situation." See Liz Fedor and David Phelps, "Tom Petters gets back to business day after raid," Minneapolis-St. Paul Star Tribune (Sept. 25, 2008) (Gov't Ex. 1, p. 1)); see also KAALtv.com, "Tom Petters meets with employees after federal raid." (Sept. 26, 2008) (quoting defense counsel, "We want to find out what's going on. We just don't know.") (Gov't Ex. 1, p. 4).

After the defendant's arrest, as early as October 16, 2008, defense counsel began an affirmative campaign of extra-judicial statements to the media. See, e.g., Dave Phelps, "Petters sits in jail 'mortified' yet positive," Minneapolis-St. Paul StarTribune, (Oct. 16, 2008) ("the criminal defense attorney for Tom Petters went on the offensive Wednesday . . .," noting "nothing the government does to him will cause more pain than the loss of his son John four years ago when he was murdered in Italy.") (Gov't Ex. 1, p. 5); KSTP.com, "Petters' attorney: "There's been a rush to judgment," (Oct. 15, 2008) (Id. at p. 6); mndaily.com, "Petters donated money to the University" (Oct. 23, 2008) (quoting defense

counsel regarding the defendant's "extensive donations to universities") (Id. at p. 10).

Defendant's media offensive continued in November when the defendant's girlfriend gave an interview to a WCCO-TV reporter that resulted in a two-part series on the local news. During the interview, the defendant's girlfriend attempted (i) to explain away criminal statements made by the defendant, (ii) to cast doubt on the credibility on those who had pleaded guilty to the fraud, and (iii) to offer her opinion of the defendant's innocence. See WCCO, "Petters' Girlfriend Opens Up About Sons, Jail," (Nov. 18, 2009) (Id. at p. 11); and WCCO, "Girlfriend: Petters Felt Betrayed By Whistleblower," (Nov. 19, 2008) (Id. at p. 15). On November 18, 2008, the defendant spoke with his girlfriend in a recorded phone call as she was driving to WCCO for the interview (the government will submit the recording and transcript at the motions hearing). He encouraged her to disparage the cooperating defendants, to describe him as a family man and to confirm that his defense counsel could review and approve the interview to be sure it did not "backfire" on the defense. (Notably, such extra-judicial statements to the media regarding the credibility of prospective witnesses violate Local Rule 83.2.) Still prior to indictment, on November 16, 2008, the Associated Press ran a story entitled "Petter's star rose quickly, fell faster." Defense counsel was quoted as follows:

> It's a spectacular fall from grace. One of the most spectacular falls you will ever see.

Amy Forliti and Steve Karnowski, Post-Bulletin, "Peter's star rose quickly, fell faster (Nov. 16, 2008) (Gov't Ex. 1, p. 17). This sensational statement further fed the media coverage of which defense counsel now complain.

The media campaign continued following the indictment. See, e.g., WCCO, "Esme's Blog," (Dec. 2, 2008) (quoting defense counsel as having said the indictment was "a good thing because now we finally get to see the evidence.") (Id. at p. 22); Joe Kieser, "Petters pleads not guilty to 20-count federal indictment," MN Sun, (Dec. 3, 2008) (reporting that defense counsel was not surprised by the indictment) (Id. at p. 27); Britt Johnson, "Family supports Petters," St. Cloud Times, (Dec. 31. 2008) (quoting Petters family members and noting defense counsel's statement that he would seek a change of venue due to pretrial publicity) (Id. at p. 29); David Phelps, "Prosecutors say Petters should not be let out of jail," Minneapolis-St. Paul Star Tribune, (Jan. 23, 2009) (reporting on the government's filing with the court and quoting defense counsel criticizing the Receiver's efforts to preserve assets for victims) (Id. at p. 32); Associated Press, "Update: Petters attorneys say assets used before order not to," sctimes.com, (Jan. 23, 2009) (reporting on defense counsel criticizing the Receiver) (Id. at p. 34).

In addition to numerous direct contacts by the defendant's counsel, family, and friends with the press, the defendant, though counsel, has issued at least three press releases. See Gov't Ex. 2.

The media campaign continued even as the defendant filed his pretrial motion seeking a change of venue based on the pretrial publicity. See Defendant's press release, "Tom Petters Defense Files Pretrial Motions Regarding Change of Venue, Conditions of Confinement, and Identification of Informants," (Feb. 25, 2008) (Gov't Ex. 2, p.1).

As part of the morning story covering the defense motions, MPR played over the air the following "sound bite" provided by defense counsel:

> The press, feeding off statements made by the government in their search warrant affidavit and in court, has made Mr. Petters a pariah. We hope the trial will be moved because we feel we cannot get a fair trial anywhere in Minnesota on this case.

MPR, Morning Edition (Feb. 26, 2008).

Indeed, as recently as March 13, 2008, defense counsel reaffirmed their commitment to trying this matter in the media when they spoke with reporters and issued yet another statement to the media, responding to a court filing made by the government in the parallel civil proceedings. See David Phelps, "Feds seek to limit legal fees in Petters case," Minneapolis - St. Paul StarTribune (Mar. 13, 2009) (reporting that defense counsel expressed outrage

that their legal fees – which already exceed $580,000 – might be limited to the defendant's legitimately obtained assets).[1] Gov't Ex. 1, p. 36. As previously indicated to the Court, in accordance with Local Rule 83.2(c), the government does not oppose an order precluding the parties (and their agents) from making extra-judicial statements regarding the case until the completion of the trial.

Since the search warrants were executed on September 24, 2008, the defendant and his agents have actively fostered and promoted a pretrial publicity campaign in this case. As such, he cannot now be heard to complain of the very situation he himself has enabled and promoted. Moreover, as set forth below, the legal framework established for change of venue motions militates against the defendant's motion.

2. The Government Acted Properly

The heart of defendant's motion is that the government improperly "leaked" the federal investigation of the defendant, thereby causing unfair pretrial publicity:

> What the Court should do is find out why, when the search warrant was initially sealed, it was released two days later. Who authorized that, should be the first question at the Motions hearing. We hope it's asked. It should be. The Government is made up of leakers.

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[1]The United States Attorney's Office requested that defense counsel's law firm provide it with any statements issued regarding the defense (and offered to reciprocate with any press releases issued by the United States Attorney's Office). To date, the government has received no response.

Defense counsel indicated in their statements to the press they may file additional pretrial motions. Rather than responding to the defense's arguments raised in extra-judicial statements made to the media, the government will respond to the defendant's filings appropriately made to the court.

Def.'s Mem. in Support of Mot. for Transfer of Venue dated Feb. 25, 2009 at 13.

This factual assertion – and ad hominem name calling – is simply wrong. The search warrants that were executed on September 24, 2008 were never sealed. The district court issued the search warrants on September 19, 2008. Law enforcement executed the search warrants on September 24, 2008. In accordance with Federal Rule of Criminal Procedure 41, law enforcement returned the search warrants on September 26, 2008, and they were filed with the Clerk of Court, as the government is required to do. Contrary to the defendant's claim that "the Government did the inexplicable, an unsealing,"(id. at 2), the search warrants were never sealed, and thus were never unsealed.

The fact that search warrants are publicly available comes as no surprise. While it is true that the government from time to time does seek Court permission to seal search warrants during covert investigations, the government does not do so automatically or unilaterally. Instead, sealing may be done only with Court permission, and the government must have a legitimate reason to seek sealing. See, e.g., In re Search of Eyecare Physicians of Am., 100 F.3d 514, 517 (7th Cir. 1996) ("noting that common law recognizes a "general right to inspect and copy public records and documents, including judicial records and documents," which is weighed against an identifiable state interest to seal).

Immediately following execution of the search warrants, the defendant's own statements to the media indicated he preferred to

minimize and to conceal the massive fraud uncovered at Petters corporate headquarters:

> In his first public comments since his home and business offices were raided by federal agents Wednesday, businessman Tom Petters called the government's investigation an "unnecessary situation."

Liz Fedor and David Phelps, "Tom Petters gets back to business day after raid," Minneapolis-St. Paul Star Tribune (Sept. 25, 2008) (Gov't Ex. 1, p.1).

The defendant's contention now – that the government was somehow required to move the Court to file its search warrants under seal – is without any legal support and gives no consideration to the creditors and investors of PCI and PGW (and potential investors) who had a substantial interest in knowing of the substantial and credible evidence the government obtained regarding the massive ongoing fraud that had been uncovered at Petters headquarters. The defendant can have no complaint with the government for following the legal requirements for returning the search warrants to the Court.

The defendant also mistakenly argues that the government violated its own regulations regarding disclosures to the media. This too is inaccurate. Although not quoted in the defendant's submission, provision (a) of 28 C.F.R. § 50.2, which is consistent with this Court's local rules, makes plain that the provision pertains to releases of information to the media. It does not – and cannot – address filings with the Court or in-court statements. (Were it otherwise, the government could not make a closing argument "expected to influence the outcome of a pending or future trial.") The defendant's suggested interpretation of the regulation is absurd. With regard to extra-judicial statements, the

government issued limited press releases following the public filing of charges in this matter and the guilty pleas of other defendants. See Gov't Ex. 3. The defendant contends the government's press releases are "inflammatory." A review of the government's press releases themselves demonstrates that defendant's rhetoric is wholly disconnected from reality. To the contrary, the press releases are limited to publicly-available facts, consistent with DOJ policy and the Local Rules, in stark contrast to the inflammatory language used in the defendant's press releases. See Gov't Ex. 2 at 2 ("The defense has moved that the collective perfidy of the Government's witnesses be bathed in the light of our adversarial system").

It is not uncommon for the media to report on search warrants that are executed by law enforcement during the course of an investigation. Obviously, the defendant in this case would have preferred special treatment, but that is not a legitimate basis upon which the government may seek to seal a search warrant. Indeed, the government has often faced public criticism and scrutiny for filing too many documents under seal.

In any event, defendant's claims that the government "leaked" its investigation or acted improperly are simply false. At core, the defendant is simply unhappy with the factual reporting of the guilty pleas of five defendants who implicated themselves and the defendant in a massive criminal fraud.

B. Legal Analysis

The Sixth Amendment to the United States Constitution guarantees to criminal defendants the right to be tried by an impartial jury. This

concept is embodied in Rule 21(a) of the Federal Rules of Criminal Procedure which provides:

> The court upon motion of the defendant shall transfer the proceeding as to that defendant to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

Federal Rules of Criminal Procedure 21(a). The standard imputed to Rule 21(a) by the Eighth Circuit is the same as that imposed by the Sixth Amendment. See Pruett v. Norris, 153 F.3d 579, 584-85 (8th Cir. 1998) (stating that a defendant must demonstrate corrupting pretrial publicity to receive a change of venue under the Sixth Amendment).

"In determining whether adverse pretrial publicity precludes a fair trial, the trial judge must consider the totality of the circumstances." Patton v. Yount, 467 U.S. 1025 (1984). However, it is not surprising when those charged with substantial crimes receive attention in the media. "One who is reasonably suspected of [murder] ... cannot expect to remain anonymous." Dobbert v. Florida, 432 U.S. 282, 303 (1977).

Moreover, the Eight Circuit has expressly addressed cases in which, as in this case, the defendant sought pretrial publicity:

> An individual's expectations of privacy and media restraint are lessened when he has resolved to invite the very attention and generate the very publicity of which he later complains.

Pruett, 153 F.3d at 585 (noting that the defendant elected to make several statements to newspaper and television reporters).

In United States v. Blom, the Eighth Circuit Court of Appeals recognized a two-tiered analysis when assessing pretrial publicity:

> At the first tier, the question is whether 'pretrial publicity was so extensive and corrupting that a reviewing court is required to 'presume unfairness of a constitutional magnitude' . . . in all other cases, the change-of-venue question turns on the second tier of our analysis, whether the voir dire testimony of those who became trial jurors demonstrated such actual prejudice that it was an abuse of discretion to deny a timely change-of-venue motion.

242 F.3d 799, 803 (8th Cir. 2001).

1. The First Tier

"Just because, however, there has been wide spread or even adverse publicity is not in itself grounds to grant a change of venue." United States v. McNally, 485 F.2d 398, 403 (8th Cir. 1973); United States v. Allee, 299 F.3d 996, 1000 (8th Cir. 2002) ("The mere existence of press coverage, however, is not sufficient to create a presumption of inherent prejudice and thus warrant a change of venue."). "Because our democracy tolerates, even encourages, extensive media coverage of crimes such as murder and kidnaping, the presumption of inherent prejudice is reserved for rare and extreme cases." United States v. Blom, 242 F.3d at 803. The formation of a tentative impression about the case by some jurors is not enough. United States v. Bliss, 735 F.2d 294, 298 (8th Cir. 1984) (quoting United States v. Brown, 540 F.2d 364, 378 (8th Cir. 1976)). Typically, a presumption is applicable in the context of small rural communities where inflammatory coverage is pervasive. See CVS v. U.S. Dist. Ct. S.D. of California, 729 F.2d 1174, 1181-1182 (9th Cir. 1983).

To create a presumption of inherent prejudice in the pretrial publicity, the coverage must be inflammatory or accusatory. United States v. Allee, 299 F.3d 996, 1000 (8th Cir. 2002). Isolated incidents of "intemperate commentary" about the crime and the perpetrator are not sufficient to demonstrate that the coverage was inflammatory or

accusatory when the majority of the reporting was "objective and unemotional." Id. Objective, straightforward reporting about a criminal case does not tend to arouse lingering ill-will or vindictiveness in the local community. Bliss, 735 F.2d at 299. As long as the reporting is factual and describes the defendant as having "allegedly" commit the crime or refers to him as being "accused" of committing the crime, the publicity is not inflammatory or accusatory. Simmons v. Lockhart, 814 F.2d 504, 509 (8th Cir. 1987).

The defendant has filed numerous newspaper articles with his motion regarding the case. An examination of the media coverage itself does not substantiate the defendant's overblown and unsupported rhetoric describing the coverage (e.g., "Mr. Petters became a punching bag swinging to and fro"). Stripped of the rhetoric, the essence of the defendant's complaint is that there has been extensive media coverage of the case. While that may be true, it is insufficient as a basis to require the Court, the parties and the witnesses to move to another venue. Simply put, the defendant has failed to demonstrate "a trial atmosphere that had been utterly corrupted by press coverage."

B. The Second Tier

Because he is unable to satisfy the first tier, the defendant must demonstrate actual prejudice in the jury-selection process. Given the early stage of these proceedings, the defendant cannot do so.

Given the record in this case, the Court should deny defendant's motion for change of venue.

II. DEFENDANT'S MOTION FOR COOPERATING WITNESS DISCLOSURES

First, the defendant seeks the identity of the government's confidential informant. The identity of the informant was publicly disclosed in court during her guilty plea. Defense counsel have long been aware of her identity.

Second, the defendant seeks the identities of "cooperating witnesses" who are working with law enforcement. To the extent the government calls cooperating individuals at trial, it will produce all Rule 26.2 materials, all Jencks materials and all Giglio materials relating to the individual, including all promises and incentives for testimony.

III. DEFENDANT'S MOTION FOR "WITSEC" INFORMATION

To the extent the government calls any witness at trial, it will produce all Rule 26.2 materials, all Jencks materials and all Giglio materials relating to the individual, including all promises and incentives for such testimony.

IV. DEFENDANT'S MOTION REGARDING HIS INCARCERATION STATUS

Two magistrate judges and two district court judges have already addressed the defendant's incarceration status, including Judge Richard Kyle. The defendant now seeks a fifth opinion.

Defendant's wild assertions of "government meddling" are unsupported and unsubstantiated. They are inaccurate. There has been no showing that the jail is doing anything other than following its procedures. The defendant simply wants special treatment.

Following the defendant's motion, the government inquired with the Sherburne County Jail and provided a report to the Court.

V. DEFENDANT'S MOTION FOR DISCOVERY

The defendant seeks discovery beyond that authorized under Rule 16 of the Federal Rules of Criminal Procedure. The government responds to each request in seriatim:

Requests 1 and 12: The defendant requests Rule 16(a)(1)(E) discovery. The government has more than fulfilled its Rule 16 obligations, and will continue to do so. The government does not object to this request to the extent the request is consistent with the rule (notably, co-defendant statements are not required by Rule 16). Prior to indictment, the government began providing the defendant with recordings, interview reports, and documents. After the indictment, the government has continued to provide the defendant with discovery, including images of all records seized from the corporate offices.

Although trial is still three months away, the government has already begun to provide the defendant with (i) summary schedules and (ii) recordings that will be used at trial and transcripts. The government has solicited any objections or corrections to these exhibits.

Requests 2, 3 and 4: The defendant requests disclosure of the government's witness and exhibit list 60 days prior to trial. The government objects to this request as without legal authority. Criminal defendants have no right in noncapital cases to require disclosure of the list of government witnesses under Fed. R. Crim. P. 16(a); United States v. White, 750 F.2d 726, 728 (8th Cir. 1984).

The government does not oppose, however, an order that requires a mutual exchange by the parties of a witness and exhibit list 30 days prior to trial.

Request 5: The defendant requests disclosures of expert evidence 60 days prior to trial. Expert disclosures are reciprocal under Rule 16.

The government does not oppose an order that requires both parties to exchange expert disclosures 60 days prior to trial and any rebuttal expert disclosures 30 days prior to trial.

Request 6: The defendant requests all oral, written, or recorded statement of the defendant. The government has provided discovery as required by Rule 16(a)(1)(A) and (B). The government objects to the defendant's request as overbroad to the extent it exceeds Rule 16(a)(1)(A) and (B).

Request 7 and 13: The defendant requests copies of all recordings related to the defendant or co-conspirators and transcripts. The government provided copies of all recordings in its possession involving the defendant. Although not required to do so, the government has undertaken the task of creating transcripts and has begun producing those to the defendant on a rolling basis. Moreover, although not required to do so under Rule 16, the government has disclosed numerous recordings involving co-conspirators. United States v. Manthei, 979 F.2d 124, 126 (8th Cir. 1992).

Request 8: The defendant requests any and all documents signed by the defendant and his co-conspirators. To the extent a document constitutes a "written statement" by the defendant or an exhibit the government intends to use at trial, it has been produced. It is also

worth repeating that the defendant has had full access to the documents seized from his residence and Petters corporate headquarters. Unless the government has determined to use a document signed by a co-conspirator as an exhibit, it is not required to disclose the document under Rule 16. United States v. Manthei, 979 F.2d 124, 126 (8th Cir. 1992).

Request 9: The defendant requests search warrants, arrest warrants and affidavits utilized in this case. The government has disclosed the search warrants, arrest warrants and affidavits executed in this case.

Request 10: The defendant requests documents related to the defendant's criminal record. The government has disclosed all records it has been able to obtain related to the defendant's prior criminal history, including recordings obtained from the States of Minnesota and Colorado, and records obtained from the client file of the defendant's prior defense counsel. As the government obtains additional documents, we will makes those available to the defendant.

Request 11: Results of laboratory tests performed, whether or not the government intends to utilize the results at the time of trial. This request is beyond what Rule 16 requires and should be denied.

Request 14: The defendant requests access to the personnel files of each Government agent witness. The government objects to this request, but will comply with its Brady and Giglio obligations.

Request 15: The defendant requests any documents, electronic files or the like regarding the regulation or lack thereof of hedge funds in general, and the hedge funds at issue in this case in particular. The government objects to this request as overbroad and beyond the scope of Rule 16.

Request 16: The defendant requests the identity of government employees who provided information about this matter to the news media or to like third parties. The government objects to this request as beyond the scope of Rule 16. The government has attached the press releases issued in this case. The defendant also has access to the publicly-available filings made with the court.

While defendant contends there are government "leakers," defense counsel has already acknowledged on the public airwaves that the pretrial publicity that the defendant attributes to the government is derived from judicial filings:

> The press, feeding off statements made by the government in their search warrant affidavit and in court, has made Mr. Petters a pariah.

Furthermore, the defendant does not identify a single governmental statement that does not come from a court filing or in-court statement.

Request 17. The defendant requests disclosure of exculpatory material 60 days prior to trial. The government will comply with its obligations under Giglio and Brady, as further discussed below.

Request 18. The defendant requests statements of government witnesses 60 days prior to trial. Rule 16(a)(2) & (3) make plain that Rule 16 does not require early disclosure of witness statements. The government opposes the motion as unlawful. United States v. White, 750 F.2d 726 (8th Cir. 1994) ("Although in many cases the government freely discloses Jencks Act material to the defense in advance of trial, the government may not be required to do so"); United States v. Alexander, 736 F.Supp. 968, 981 (D. Minn. 1990)(Rosenbaum, J.) ("Rule 16(a)(2). .

.specifically excludes statements made by government witnesses from pre-trial discovery, except as provided in the Jencks Act').

That said, the government has inquired with defense counsel regarding an early, reciprocal exchange of witness statements. To date, the government has received no reply. The government remains open to an early, reciprocal exchange.

VI. DEFENDANT'S MOTION TO COMPEL FAVORABLE EVIDENCE

The defendant compares looking for exculpatory evidence to looking for a needle in the haystack. The government has made substantial disclosures. To date, the government is not aware of any exculpatory evidence.

In fairness, it is difficult for the government to fully assess what the defendant might consider to be exculpatory as the government does not know what the defendant's defense could be, and defense counsel have refused to reveal it.

The government understands its obligations under Brady v. Maryland, 373 U.S. 83 (1963), and has complied with those obligations. In Brady, the Supreme Court held that the government's failure to produce evidence that is both favorable to the defense and material to guilt or punishment violates a defendant's due process right to a fair trial. Brady, 373 U.S. at 87. Brady, however, is not a rule of discovery. "'The rule of Brady is limited to the discovery, after trial, of information which had been known to the prosecution but unknown to the defense.'" United States v. Kime, 99 F.3d 870, 882 (8th Cir. 1996) (quoting Nassar v. Sissel, 792 F.2d 119, 121 (8th Cir. 1986)).

The government respectfully requests the Court issue its standard order for Brady evidence.

VII. DEFENDANT'S MOTION FOR EARLY JENCKS MATERIALS

Defendant moves the Court for an order compelling early Jenks disclosure. As set forth above, the government opposes the motion as unlawful. United States v. White, 750 F.2d 726 (8th Cir. 1994) ("Although in many cases the government freely discloses Jencks Act material to the defense in advance of trial, the government may not be required to do so"); United States v. Alexander, 736 F.Supp. 968, 981 (D. Minn. 1990)(Rosenbaum, J.) ("Rule 16(a)(2). . .specifically excludes statements made by government witnesses from pre-trial discovery, except as provided in the Jencks Act').

That said, the government has already offered to discuss with defense counsel a reciprocal early exchange of Rule 26.2 statements and Jenks materials. Defense counsel has not responded to the offer. Without such an agreement, the government represents to this Court that, at a minimum, it will provide the defendant with witness statements (as defined by Rule 26.2 and Jencks) no later than 3 days prior to trial.

VIII. DEFENDANT'S MOTION FOR ROUGH NOTES

Without conceding such notes exist or are discoverable, the government agrees to preserve any such rough notes.

IX. DEFENDANT'S MOTION FOR 404(B) EVIDENCE

The government understands its obligations under Rule 404(b) of the Federal Rules of Evidence to provide reasonable notice in advance of trial and will do so.

X. DEFENDANT'S MOTION FOR A BILL OF PARTICULARS

While spending much of his effort complaining the government filings say too much, the defendant also complains they say too little and moves for a Bill of Particulars. The motion is a plain effort to force the government to define the evidence it will introduce at trial. The government has complied with its discovery obligations as established by the rules of procedure, statute and otherwise.

In this case, the Indictment complies with Rule 7(c) in that it contains a plain, definitive statement of the essential facts and elements constituting the offenses charged and from which the defendants are sufficiently able to prepare their defense. Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. Fleming, 8 F.3d 1264 (8th Cir. 1993). (A copy of the Indictment is attached hereto as Gov't Ex. 4)

A Bill of Particulars is ordered only when necessary to inform the defendant of the charges against him with sufficient clarity to enable him to prepare his defendant, to minimize the element of surprise at trial, or to enable him to protect himself against a second prosecution for an inadequately described offense. United States v. Stephenson, 924 F.2d 753, 762 (8th Cir. 1991); United States v. Miller, 543 F.2d 1221, 1224 (8th Cir. 1976).

An opinion from this District, United States v. Finn, 919 F.Supp. 1305, 1325 (D. Minn. 1995), is particularly instructive. As in the case at bar, defendants sought additional detail regarding mail fraud, conspiracy, and money laundering charges. The district court observed that "a Bill of Particulars is not intended to be a substitute for discovery, nor is it designed to provide information which the defendant might regard as generally helpful, but which is not essential to his defense." Id. at 1325 (citing United States v. Wessels, 12 F.3d 746, 750 (8th Cir. 1993)); Matlock, 675 F.2d at 986 ("Acquisition of evidentiary detail is not the function of the bill of particulars.")

Defendant's motion should be denied.

XI. DEFENDANT'S MOTION TO PARTICIPATE IN VOIR DIRE

This motion should be addressed to the District Court. The government defers to the Court as to how it should conduct voir dire.

XII. DEFENDANT'S MOTION FOR ADDITIONAL PEREMPTORY STRIKES

This motion should be addressed to the District Court. There is no need for additional strikes. To the extent a prospective juror needs to be stricken from the panel due to pretrial publicity, the District Court may do so for cause.

XIII. DEFENDANT'S MOTION FOR A JURY QUESTIONNAIRE

This motion should be addressed to the District Court.

Any questionnaire would identify the case and the defendant. As noted by the defendant, the case received media coverage that will

require inquiry by the Court. The government agrees that jurors who indicate that they have heard about the case should have additional inquiry at side-bar. However, identifying the case and defendant to the potential jurors weeks prior to trial, without the benefit of a personal admonition from the Court, potentially could make the issue of pretrial publicity worse: prospective jurors might be tempted to do research or have discussions regarding the issues. This would result in a more difficult jury selection. While in certain cases such a risk is necessarily undertaken because of the particularly sensitive nature of the issues, in this case that risk is not justified.

The District Court has been involved in numerous high-profile cases. Given the facts of this case, the government believes the fairest and most expeditious method of voir dire is the Court's standard in-court inquiry modified to reflect the particular issues involved in the case.

XIV. DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED FROM CORPORATE HEADQUARTERS AND HIS RESIDENCE

Defendant moves to suppress evidence taken during the search warrant executed on September 24, 2008 at (i) Petters Group Worldwide, LLC ("PGW") and Petters Company, Inc. ("PCI") corporate headquarters, 4400 Baker Road, and (ii) his residence on 655 Bushaway Road. Defendant concedes the searches were conducted pursuant to search warrants signed by United States District Court Judge Ann D. Montgomery. The government acknowledges that at the time of the search warrants, the defendant was the owner and an officer of both companies, and the owner and occupant of the residence.

A. The Defendant Has No Expectation of Privacy to Challenge the Search at Corporate Headquarters.

Beyond asserting that he owns PCI and PGW, the defendant makes no attempt to show that he has a reasonable expectation of privacy in a specific space located within the commercial offices at 4400 Baker Road.[2] He appears to erroneously conclude that his ownership of the businesses is sufficient to confer standing. In support of this proposition, the defendant cites an unreported case from the Eastern District of Michigan, Hooper v. Steelplank Corp., 1981 WL 48163 (E.D. Mich. Oct. 14, 1981) (addressing attorney-client privilege). Furthermore, the defendant makes bald factual assertions that have no support, and then mistakenly conflates issues of expectation of privacy under the Fourth Amendment with the holder of a corporate attorney-client privilege.

Prior to considering the defendant's claims related to the search at 4400 Baker Road, the defendant "has the burden of showing a legitimate expectation of privacy in the area searched." United States v. James, 534 F.3d 868, 872-73 (8th Cir. 2008)(citing United States v. Pierson, 219 F.3d 803, 806 (8th Cir. 2000)). In this case, the premises at 4400 Baker Road were a commercial property occupied by numerous employees and businesses. "Property used for commercial purposes is treated differently for Fourth Amendment purposes than residential property." Minnesota v. Carter, 525 U.S. 83, 89 (1998). The "expectation of privacy in commercial premises ... is different from, and indeed less than, a similar expectation in an individual's home." New York v. Burger, 482 U.S. 691, 700 (1987).

[2]The government agrees that the defendant has a reasonable expectation of privacy in his residence.

The question is not whether the defendant owned the businesses, but whether, as a corporate officer, the defendant has a reasonable expectation of privacy such that he can challenge a search of a specific area within the business premises. "[T]he less private a work area - and the less control a defendant has over that work area - the less likely standing is to be found." United States v. Hamdan, 891 F.Supp. 88, 95 (E.D.N.Y. 1995); United States v. Judd, 889 F.2d 1410, 1413 (5th Cir. 1989) (president, sole shareholder and chief operating officer of the company did not have standing to challenge the seizure of corporate records from the corporate bookkeeping office).

Until such time as the defendant establishes that he maintained his privacy over a specific space within corporate headquarters, he has not established standing with respect to that space. See United States v. Najarian, 915 F.Supp. 1441, 1453-54 (D. Minn. 1995) (J. Kyle, R.) (standing existed only where partner took substantial steps to secure records from official and unofficial review).

B. The Searches Were Valid

1. The Search Warrants Signed by the District Court were not Unconstitutional General Warrants.

The warrants, were based on an extensive affidavit describing an enterprise permeated by fraud.[3] Gov't. Ex. 5. The affidavit describes a stunningly broad and pervasive scheme beginning in the mid-1990s, which caused as much as $2,000,000,000 in losses to over 20 identified investor groups. Affidavit, ¶¶4, 12f. The affidavit alleged that the fraud scheme was the "venture capital arm of numerous PETTERS enterprises," and the

[3]An affidavit of Special Agent Timothy Bisswurm was submitted in support of both warrants that the defendant seeks to suppress.

defendant used the fraud proceeds for "for his other business ventures and to support his extravagant lifestyle." Id. at ¶7a. The Combined Balance Sheet for the defendant's businesses indicated total current liabilities of $3.5 billion, the amount that is now alleged to be outstanding in the Ponzi fraud scheme. Id. at ¶8a. Furthermore, the affidavit described numerous recordings captured in the offices located at 4400 Baker Road wherein the defendant and his conspirators repeatedly describe executing the fraud scheme. Id. at ¶12. Lastly, the affidavit described numerous records that were related to the fraud scheme, and relevant to the investigation. Id. at ¶15 - 20. In sum, the affidavit establishes that the defendant's business entities were permeated by fraud, that this fraud was executed at 4400 Baker Road and his residence, and that substantial and varied records related to this scheme could be found at both locations. The affidavit further established that the defendant routinely possessed records related to the fraud at his residence. ¶24.

The affidavit then describes items to be seized, limiting those items to documents relevant to the fraud scheme. By necessity and because of the expansive nature of the defendant's fraud, the list of items to be seized is extensive. But extensive is not synonymous with overbroad, especially when the defendant used his businesses to execute the multi-billion dollar fraudulent Ponzi scheme that permeated and funded his business empire.

When the agents arrived at the corporate headquarters, they found, as had been represented to them by the cooperating witness, that the defendant's corporations all occupied the same premises, and that the

operations of the corporations were intermingled. To search for evidence of fraud related to PCI and its affiliates required the agents to search every space in the building. PCI shared its legal, accounting, human resources, marketing, and other services with PGW and the other entities.

Conversely, at the defendant's residence, agents located and seized only one box of items and records. Certainly this does not support the defendant's claim that the warrant was a general warrant executed in an overbroad manner.

The Application and Affidavits submitted in support of the Search Warrants "should be examined under a common sense approach and not in a hypertechnical fashion." United States v. Williams, 10 F.3d 590, 593 (8th Cir. 1993). This Court must accord great deference to the decision of the Judicial Officer who issued the warrants. United States v. Maxim, 55 F.3d 394, 397 (8th Cir. 1995). "The degree of specificity required will depend on the circumstances of the case and on the type of items involved." United States v. Horn, 187 F.3d 781, 788 (8th Cir. 1999). The particularity requirement "is a standard of 'practical accuracy' rather than a hypertechnical one." United States v. Peters, 92 F.3d 768, 769-70 (8th Cir. 1996).

"The Supreme Court has recognized that effective investigation of complex white-collar crimes may require the assembly of a 'paper puzzle' from a large number of seemingly innocuous pieces of individual evidence: 'The complexity of an illegal scheme may not be used as a shield to avoid detection....'" United States v. Wuagneaux, 683 F.2d 1343, 1349 (11th Cir. 1982), quoting Andresen v. Maryland, 427 U.S. 463, 481 n.10, 96 S.Ct. 2737, 2749 n.10 (1976). When a search warrant is related to a

scheme to defraud, a list of items to be seized is sufficiently particular "if it is as specific as the circumstances and nature of activity under investigation permit." Id.; United States v. Kail, 804 F.2d 441, 445 (8th Cir. 1986). When the scheme is complex and pervasive, a list of items to be seized and the manner in which a search is executed may be broader. Id. (in fraud case, court concluded that "it would not be possible through a more particular description to separate those business records that would be evidence of fraud from those that would not since there was probable cause to believe that fraud permeated the entire business operation").

The defendant focuses on the inclusion of the clause "but not limited to" in the items to be seized to argue that the warrant was a general warrant. The defendant glosses over the fact that this clause is limited by the paragraphs set forth above the clause as well as the specific descriptions of documents set forth below, all of which relate to the scheme to defraud. Placed properly in context, this clause did not transform otherwise specific warrants into a general warrants. Andresen, 427 U.S. at 481-82 (warrant with catch all clause "together with" not a general warrant); United States v. Moser, 123 F.3d 813 (5th Cir. 1997) (warrant with catch all clause "but not limited to" not a general warrant).

Given the pervasive fraud alleged in the affidavit, the warrants were limited both on their face, and in the manner in which they were executed. The warrants were limited in time and permitted seizure of only those document for the period 1995 to the date of the warrants, and

only to the extent the documents related to specific entities and transactions.

The defendant points to certain documents that he claims exceeded the scope of the fraud, claiming, wrongly, that these documents were beyond the scope of the warrant. To the contrary, the affidavit alleged that the defendant used fraud proceeds to fund his other businesses and his lavish lifestyle. Furthermore, in the list of items to be seized, the warrant authorizes the seizure of records related to the disposition of investor funds, and the expenditures of monies. Each item identified in the defendant's motion that he claims demonstrates that agents seized items beyond the scope of the warrant was one of the defendant's businesses, and as set forth, probable cause existed to believe that these businesses received proceeds of the fraud. Therefore, these records fell within the scope of the warrant.

Even if the Court were to conclude that isolated parts of the warrant were overbroad, warrants are severable, and only those documents seized pursuant to any invalid parts (if there are any invalid parts, which we do not concede) are suspect. These seizures must then be evaluated under the good faith and inevitable discovery doctrines. Those documents seized pursuant to the valid parts should not be suppressed. Marvin v. United States, 732 F.2d 669, 674 (8th Cir. 1984) ("Unlawful seizure of items outside a warrant does not alone render the whole search invalid and require suppression and return of all documents seized, including those lawfully taken pursuant to the warrant."). If necessary it should be applied here.

2. Defendant's Claims of Improper Invasion of Privilege Are Legally and Factually Unfounded and Incomplete.

The defendant claims, wrongly, that the government improperly intruded into privileged material seized during the search executed at 4400 Baker Road. In making this claim, the defendant does not identify a single document that he claims the government improperly reviewed despite being given access to all of the seized documents. In addition, the defendant relies on broad, unsupported factual assertions – "the in-house legal department represented not just PCI and affiliated entities, but Mr. Petters as an individual." Def.'s Mem. at 7. There is no evidentiary basis for this claim. The proponent of the privilege bears the burden of establishing the relationship. See Hollis v. Powell, 773 F.2d 191, 196 (8th Cir. 1985); Rabushka v. Crane, 122 F.3d 559, 565 (8th Cir. 1997). Finally, and most importantly, the defendant fails to advise this Court of the Irrevocable Proxy he signed on October 5, 2008 and the stipulated Receivership Order dated October 14, 2008 that appointed a Receiver with the authority to assert and to waive the corporations' privileges. See Affidavit of Steven Wolter dated March 11, 2009 (Gov't. Ex. 6).

The crux of defendant's claim is a non-specific assertion that boxes of records preliminarily labeled as "taint" by the government's agents at the search appear to have been reviewed by government agents. The claim appears to be based on a factually incorrect assumption that the government employed its own government "taint team" to discern which documents were privileged. Def's Mem. at 10. While the government was entitled to use a "taint team," it has been unnecessary to do so, as PCI

and PGW, through the court-appointed Receiver, reviewed the documents taken from the corporate offices for privilege. Gov't. Ex. 6.

Under an Order issued by District Court Judge Ann Montgomery (and stipulated to by the defendant)[4], the Receiver was granted the authority to assert and to waive privilege on behalf of PCI and PGW. At the government's request, the Receiver, through his agents, reviewed the documents identified as possibly privileged and asserted privilege as to certain documents. As to certain documents, in accordance with his authority, the Receiver opted not to assert a privilege on behalf of the companies.

With regard to other documents, the Receiver reserved the right to assert privilege. The government has not reviewed those documents. While the government reserves the right to use a "taint team" to review the documents, it will not do so without prior notification to the Receiver.

Based on these facts, the defendant's non-specific allegation claiming that the government wrongfully intruded into privileged material is simply false.

C. The Exclusionary Rule Does Not Apply Because the Search Was Executed in Good Faith, and the Evidence Would Have Been Inevitably Discovered.

Even if the Court were to hold against the government on all the above arguments, suppression and invocation of the exclusionary rule is neither appropriate nor required. United States v. Leon, 468 U.S. 897,

[4]In the defendant's recitation of relevant facts via attorney affidavits, he makes no mention of the stipulated Receivership Order or the Irrevocable Proxy signed by the defendant on October 5, 2008 in favor of Steven Wolter.

922 (1984); United States v. Stelten, 867 F.2d 446, 450-51 (8th Cir. 1989) (good faith doctrine applies to overbroad warrants); see Herring v. United States, 129 S.Ct. 695 (2009) (to trigger the exclusionary role, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system).

The agents conducting the search had reviewed the affidavit prior to executing the warrant. These agents were entitled to rely on the terms of the warrant which was authorized by an experienced and well respected District Court Judge. There was no reason for these agents to believe the warrants were overbroad or otherwise defective. Furthermore, the manner in which the agents executed the searches was reasonable.

Lastly, after executing the warrants, the agents served the defendant's companies with subpoenas seeking documents related to the fraud scheme. Inevitably the investigators would have obtained these same documents regardless of any overbreadth issue. Nix v. Williams, 467 U.S. 431, 444 (1984) (proof of inevitable discovery requires the district court to determine, viewing affairs as they
existed at the instant before the unlawful search, what would have happened had the unlawful search never occurred).

XV. DEFENDANT'S MOTION TO SUPPRESS HIS RECORDED STATEMENT MADE TO ROBERT WHITE ON OCTOBER 1, 2008

Defendant moves to suppress the recorded admissions he made to Robert White on October 1, 2008, claiming (i) government attorneys violated Rule 4.2 of the Minnesota Rules of Professional Responsibility, and (ii) suppression is an appropriate remedy. This claim is an

unfortunate, unworthy ad hominem attack; it is frivolous and without merit as a matter of fact and law. Indeed, Chief Judge Davis has already determined the contact in question occurres after the defendant encouraged witnesses to flee.

Notably, the October 1 recorded statement at issue was introduced by the government and played for Magistrate Judge Keyes at the detention hearing on October 7, 2008 and played again at the detention appeal for Chief Judge Davis on October 31, 2008. Notwithstanding the centrality of the recording to the Courts' respective consideration, the defendant made no suggestion that the recording was improperly obtained and should not be considered.

Prior to the recorded statement, White informed federal agents that the defendant had urged White to flee the country. Transcript, Oct. 7, 2008 Detention Hearing before M.J. Keyes (Document 61), p. 27. The defendant also told White that Larry Reynolds, a co-conspirator, intended to flee the country as well.

The contact with the defendant was at the government's request (and the resulting recording) only after White contacted the government with this evidence of new crimes. Id. at 26. The defendant was not represented with respect to the government's investigation of these new crimes and certainly defense counsel does not claim to have discussed the defendant's plan to flee and to obstruct justice with the defendant prior to the recorded call.[5]

[5]The government agrees that the defendant was represented by counsel at this time, but only for purposes of the underlying fraud investigation, and not the defendant's obstruction.

Based on this information, the agents had White make the recorded call to the defendant. In this call, the defendant made statements confirming the information that White had previously provided to the agents, namely that the defendant was attempting to obstruct the investigation by tampering with witnesses, and also intended to flee the country.

On October 2, 2008, as a result of the defendant's new criminal conduct on October 1, 2008, U.S. Magistrate Judge Jeanne J. Graham authorized a complaint charging the defendant with both fraud and obstruction of justice (18 U.S.C. § 1512). Gov't Ex. 7. The affidavit in support of the complaint states:

> 14. On October 1,2008, PETTERS contacted a subject in this case, and encouraged that person to leave the United States to a country from where he could not be extradited. PETTERS also stated that REYNOLDS was planning to flee. Additionally, PETTERS indicated that he regretted recently turning over his passport to federal law enforcement agents.
>
> 15. Other witnesses and subjects in this case have reported that PETTERS has repeatedly contacted them after the execution of search warrants on September 24, 2008.

U.S. District Chief Judge Michael Davis, in reviewing this recording at the hearing on the defendant's appeal of his detention order, concluded that the evidence established "that Petters initiated the topic of fleeing authorities with both White and Reynolds before the recorded conversation occurred and that he encouraged White and Reynolds to flee themselves. This evidence further supports the Court's finding that Petters seriously began plans to flee and earnestly encouraged his associates to flee." Order of District Court Judge Michael J. Davis (Document 76), filed 11/3/2008, pgs. 6-7.

The defendants cite no cases standing for the proposition that a defendant engaging in new criminal conduct is immune to government investigative techniques targeting the defendant's new crimes. Such a result would be absurd.

To the contrary, the Eighth Circuit has held that Rule 4.2 does not apply to undercover contacts with represented defendants prior to charging. United States v. Plumley, 207 F.3d 1086 (8th Cir. 2000) ("Minnesota's ethical rule does not require government investigatory agencies to refrain from any contact with a criminal suspect because he or she previously had retained counsel"); State v. Miller, 600 N.W.2d 457, 467 (Minn. 1999) ("We interpret the "authorized by law" exception to MRPC 4.2 to mean that legitimate investigative processes may go forward without violating MRPC 4.2 even when the target of the investigation is represented by counsel, but when the process goes beyond fair and legitimate investigation and is so egregious that it impairs the fair administration of justice, it is "not authorized by law.").

The contact by Bob White with the defendant, at the direction of federal law enforcement agents and attorneys, was authorized by law. Government agents and prosecutors are required to investigate new and ongoing crime. There is no indication that in this case that the contact went beyond "fair and legitimate investigation processes." Furthermore, the Sixth Amendment right to counsel did not prohibit the investigators from contacting the defendant, even after charged and represented, when the defendant was engaging in new and ongoing criminal activity by obstructing justice. See United States v. Ingle, 157 F.3d 1147, 1151 (8th Cir.1998) (6th Amendment right to counsel cannot be invoked once for

all future prosecutions); United States v. Kidd, 12 F.3d 30, 32 (4th Cir. 1993) (government investigations of new criminal activity for which an accused has not yet been indicted do not violate the Sixth Amendment).

Furthermore, even assuming that the contact violated Rule 4.2 (which it did not), suppression is not an appropriate remedy. "Absent the implication of a defendant's substantive rights, violation of Rule 4.2 is akin to "harmless error" and should not be enough for a court to grant a substantive remedy affecting a defendant's case. The ethical rules do not state anywhere therein that they create any substantive rights, and courts should not read substantive rights into the rules of legal ethics." United States v. Tapp, 2008 WL 2371422, 18 (S.D.Ga. 2008) (citing United States v. Lowery, 166 F.3d 1119, 1125 (11th Cir. 1999) (holding that state rules of professional conduct do not provide authority for suppression)).

Even were this Court inclined to simply follow Minnesota state court precedent without any federal precedent for the defendant's proposition, suppression is not warranted in this case. In a case not cited by the defendant and issued subsequent to its opinion in State v. Miller, 600 N.W.2d 457, 466-467 (Minn. 1999), the Minnesota Supreme Court made clear that suppression under state law was only a remedy for a 4.2 violation only in egregious circumstances. State v. Clark, 738 N.W.2d 316 (Minn. 2007). Such egregious circumstances do not exist in this case. The agents surreptitiously contacted the defendant through a co-conspirator after being notified by the co-conspirator that the defendant was obstructing the ongoing investigation. The agents limited that contact to investigating that obstruction. Under these circumstances, even if

the contact violated Rule 4.2, the circumstances do not warrant suppression.

XVII. DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENTS MADE TO LAW ENFORCEMENT ON SEPTEMBER 24, 2008

Defendant moves to suppress evidence of the statements he made to law enforcement on September 24, 2008, claiming the interview was custodial. The government will present evidence at the hearing.

XVIII. GOVERNMENT'S MOTION FOR DISCOVERY

Notwithstanding the government's expansive discovery, the defendant has produced not a single document. Indeed, the defendant has not acknowledged his reciprocal discovery obligations under Rule 16(b). The government respectfully requests the Court grant the government's motion for reciprocal discovery under Rule 16(b).

Dated: March 15, 2009

Respectfully Submitted,

FRANK J. MAGILL, JR.
United States Attorney

/s/ John R. Marti

BY:
JOSEPH T. DIXON, III
JOHN F. DOCHERTY
JOHN R. MARTI
TIMOTHY C. RANK
Assistant U.S. Attorneys