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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS JOSEPH PETTERS,

Defendant.

SUPPLEMENTAL MEMORANDUM REGARDING PRETRIAL MOTIONS

INTRODUCTION

On February 25, 2009, Defendant Thomas J. Petters filed pretrial motions, including motions to suppress statements and to suppress evidence seized from his residence and business. We now submit this supplemental memorandum.

STATEMENT OF FACTS

The following facts are assembled from counsel's notes; there are no funds for a transcript.

I. Interrogation of Mr. Petters in Las Vegas

Three law enforcement officers interrogated Mr. Petters in his Las Vegas hotel room. No Miranda warning was given when it should have been.

Jesse Prieto, a licensed police officer employed by the Nevada Gaming Control Board, met with FBI Special Agents Eileen Rice and Matthew Cortin. SAs Rice and Cortin are assigned to the FBI office in Minneapolis. They convened at the Bellagio

Hotel and Casino, on September 24, 2008, at 6:30 a.m., along with a hotel security officer.

Mr. Petters was a registered guest in Room 23001. Guests needed their own keycard for access not only to the room but the entire floor.

The officers arrived at Mr. Petters' hotel suite, via security elevator. The time: 7:00 a.m., the moment federal agents were executing warrants across the United States.

Mr. Petters answered the door, cell phone in his hand, wearing a robe. Special Agent Rice asked Mr. Petters if she could come in. Mr. Petters assented. Officer Prieto went into the bedroom, looked in the closet, and made sure no one else was there. According to Officer Prieto, SA Rice did not tell Mr. Petters at the beginning of the interview that he did not have to talk. Neither did she state that he did not have to let them in his hotel room.

The situs for the interview became a small table in the suite's anteroom. SA Rice identified herself as an FBI agent for the second time, badge out, credentials shown.

With that visual in mind, Mr. Petters asked if he was going to be arrested. SA Rice stated that he was not, that she just wanted to talk. She did not read him his Miranda rights.

Her tone was accusatory. SA Rice announced that Mr. Petters was involved in a Ponzi scheme. He was "perpetuating a fraud," and that multiple search warrants were being executed at that moment. Mr. Petters' cell phone rang two times. He looked at the screen. According to Officer Prieto, the agents asked if they could silence the telephone. Officer Prieto took it.

SA Rice told Mr. Petters that he had been signing notes. Mr. Petters stated: "I sign a lot of things I don't read."

She stated that he was signing those notes without secured collateral. Mr. Petters responded that the merchandise existed, and if the merchandise was absent at the moment the note was signed, it was expected to arrive. The ship would come in and be docked and unloaded.

Because the FBI refuses to buy digital recorders, there was confusion as to what Mr. Petters exactly said about the collateral, and when. During the interview, SA Rice never showed him an invoice or note. Mr. Petters stated that he had done a lot of legitimate business. She declined to probe further.

Mr. Petters added what any competent executive would: "I'm the guy in charge and I'll bite the bullet if I have to." The jury should hear that on a tape. This Court should too.

At this point, Mr. Petters' hotel room telephone rang. The agents became aware that he was talking to his attorney; Mr. Petters so confirmed. SA Cortin asked him if he wanted to keep talking. Mr. Petters was uncertain as to what to do. He did not say yes and he did not say no. He faced anonymous faces. His agenda was not theirs, his innocence already, and arbitrarily, rejected. A second lawyer called, from Mr. Petters' law firm of long standing. Do not talk, Tom, was the advice given.

SA Cortin stated that to be on the safe side, the interview would be terminated. How nice, how beneficent. The time: 7:20 a.m.

At this juncture, Mr. Petters stated that he wanted to ask questions of the agents, said Officer Prieto. The agents dallied, knowing the lawyers had called to end their interview. They stayed instead, thinking of Socrates, how it is that the inquiry begs the answer.

Twenty minutes later, SA Rice and Mr. Petters exchanged telephone numbers so "they could stay in contact." According to Officer Prieto, the officers left the room at 7:30 a.m. The Agents' report reveals a departure of 7:40 a.m.

SA Rice was available to testify. Instead the Government flew Officer Prieto from Las Vegas to Minneapolis, paying for his airplane flight and hotel. Unlike Agents Rice and Cortin, Officer Prieto wrote no report of the interview.

Officer Prieto carried a nine millimeter Glock handgun. He did not know whether SAs Rice and Cortin were armed. Officer Prieto did not know if the room was rented in Mr. Petters' name. He knew very little, and that's why he was brought in for the hearing, to insult this Court with his naivete.

Officer Prieto did not recall the key passage of SA Rice's report: that Mr. Petters said he had learned of issues with the purchase orders in 2007. That Mr. Petters had gone to his lawyers in 2007 and asked them to launch an investigation.

II. Raid of 655 Bushaway Road (Mr. Petters' Residence)

FBI Special Agent Jean LaPlace (Minneapolis) was assigned to assist in the search warrant for Mr. Petters' residence on September 24, 2008. He read the warrant affidavit as part of the debriefing. All of the agents were supposed to.

On the morning of September 24, SA LaPlace contacted the Wayzata police who sent a uniformed officer to accompany agents to Mr. Petters' home, 655 Bushaway Road. SA LaPlace knocked on the door and a caretaker came out. Other agents contacted the nanny. The caretaker and the nanny were informed that they could stay or leave. They chose the latter.

The different rooms in the home were identified by letter. SA LaPlace logged the items seized on the inventory sheet. The agents took one box, some computers. They also drilled a safe and searched it.

III. Raid of 4400 Baker Road (PCI/PGW Headquarters)

IRS Special Agent Brian Pitzen testified that on September 24, 2008 he was the evidence custodian for the search at 4400 Baker Road.

When entering the building, the 56 agents proceeded to different floors, notifying employees of the warrant. They videotaped the building and put labels on the rooms for purposes of tracking evidence. SA Pitzen also conducted an interview with one employee.

It was a four-story office building with a basement, occupied by many business entities. Tom Petters' office was in the central executive suite, identified by search warrant code 3J.

The searching officers found shared areas among the Petters businesses, including legal, finance, marketing, and executive. The Petters' entities were on the third floor. The second housed Polaroid, the first a cafeteria. The basement was a parking garage where storage areas housed boxes of a blended kind.

The bulk of the records concerning PCI were taken out of the lower level, 40 to 50 boxes. On cross-examination, SA Pitzen stated that he was still on the case. Six or eight agents are actively working on the case in some capacity or other as of the time of the hearing.

Government Exhibit 18 was the Petters Company, Inc. filing with the Minnesota Secretary of State dated April 20, 1994. It lists the person responsible for filing the articles as Thomas Petters.

4400 Baker Road was a private office building. Two receptionists were present at the entrance when the FBI search team entered. SA Pitzen denied needing an electronic key card. The agents simply told the receptionists that they were going in and walked by them.

SA Pitzen was unaware of the policy requiring an escort of visitors, of any restrictions on employees' movement within the building. He had no information on rules in effect at the time that certain employees could not migrate through the building. Mr. Petters did have his own office, of course.

SA Pitzen also admitted searching the office of David Baer, the company attorney.

There were safes in the building, and SA Pitzen remembered seeing none open. The cabinets on the third floor were locked, particularly those with tax documents. Nor would SA Pitzen remember whether the basement locker area was locked. He assumed the computers were secured with passwords.

In response to the Magistrate Judge's questions, SA Pitzen stated that he reviewed the search warrant affidavit and taped phone conversations before the warrant was executed. He did not, however, review the warrant itself.

Defense witness John Jordan, Vice President of Real Estate and Facilities, had been in charge of the physical premises at 4400 Baker Road since 2002. Before that he was with Fingerhut.

Mr. Jordan said that all visitors were required to enter through the front door where there was a lobby staffed by two receptionists. Visitors would have to sign in and then be escorted personally to the person that they wished to see. All employees had electronic access cards used for entrance to the doors. A security guard came in at 3:30 p.m. and stayed until approximately 8:30 p.m. The receptionists left at 5:00 or 5:30 p.m. The guard closed the building in the evening and provided escort to the parking lot.

To visit the legal department, a person had to sign in, be escorted, and go through a secured door on the third floor, which was opened in the morning and closed late in the evening.

Mr. Jordan emphasized the company was private in nature and scope. Electronic card access was set up for each individual, each with limits as to where they could go inside. PGW employees, for example, could not go to the Polaroid floor. Some offices, those of White and Coleman, were locked. There were a number of safes, all locked. Cabinets in the building were locked. The computers were secure. Mr. Petters' card allowed him to go throughout the entire building. He had a master key, but his assistant kept it.

ARGUMENT

I. Mr. Petters' Standing As Aggrieved Party

The Government contends that Mr. Petters has no right to complain about the raid of 4400 Baker Road and concomitant invasion of attorney-client privilege. We begin with the issue of standing.

A. Standing re: Search and Seizure at 4400 Baker Road

It is well-established that one may have a reasonable expectation of privacy and therefore Fourth Amendment standing with respect to one's place of business and business records—well beyond one's "private office." Mancusi v. DeForte, 392 U.S. 364, 368-370 (1968) (union official had standing to challenge unlawful search of shared union office and records).

The Government concedes that Mr. Petters is the owner of the business entities. He maintained an office there, and implemented extensive security protocols specifically aimed at maintaining privacy of company records. The computer system was password-protected and secure. The employees within 4400 Baker Road were secure from one another. Their common link was the owner—Mr. Petters—who had the singular right and authority to access all areas of the building.

Mr. Petters has standing, surely. United States v. Mancini, 8 F.3d 104, 110 (1st Cir. 1993) (city mayor established expectation of privacy in archive attic; mayor maintained office in building, took steps to ensure records could not be accessed without authorization, and "office in question was noteworthy for its extreme security measures"); United States v. Schwimmer, 692 F. Supp. 119, 125 (E.D.N.Y. 1988) ("The

evidence offered by Renda—his ownership and control of First United, his participation in the company's affairs, and his office at the company's suite of offices—is sufficient for the Court to find that the had a legitimate expectation of privacy in the entire suite of First United's offices.").

The legal department, in particular, took extraordinary steps to maintain the privilege and confidentiality. See Mancini, 8 F.3d at 110. Moreover, to the extent any items seized from the office constitute attorney-client privileged material, Mr. Petters likewise has standing to complain. DeMassa v. Nunez, 770 F.2d 1505, 1506 (9th Cir. 1985) ("We hold that clients of an attorney maintain a legitimate expectation of privacy in their client files.").

Certainly Mr. Petters has standing to challenge any search and seizure of his private office and computer workstation. O'Connor v. Ortega, 480 U.S. 709, 719 (1987); see also United States v. Ziegler, 474 F.3d 1184, 1189-1190 (9th Cir. 2007).

B. Standing re: Attorney-Client Privilege

The federal common law of attorney-client privilege applies. Fed. R. Evid. 501; see also In re Bieter Co., 16 F.3d 929, 935 (8th Cir. 1994). The privilege extends to confidential communications made for the purpose of facilitating the rendition of legal services to the client. United States v. Horvath, 731 F.2d 557, 561 (8th Cir. 1984). The power to waive the corporate attorney-client privilege rests with the corporation's management, exercised by its officers and directors. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985). The Receiver now has broad control over PCI, PGW, and every other entity owned by Mr. Petters.

That does not end the inquiry, however. The Receiver cannot waive a privilege that is jointly held by the business entity and a former manager. Diversified Indus. v. Meredith, 572 F.2d 596, 611 n.5 (8th Cir. 1977) ("We need not address at this time the situation where an employee's confidential communications to the corporation's counsel may reveal potential liability of the employee. . . . [C]ircumstances may reveal that the employee sought legal advice from the corporation's counsel for himself or that counsel acted as a joint attorney. Under such circumstances, he may have a privilege.").

1. Joint Clients / Joint Representation

A joint representation privilege exists where one attorney simultaneously represents two or more clients on a matter of common legal interest, and the communications at issue relate to the subject matter of that representation. In re Pearlman, 381 B.R. 903, 910 (Bankr. M.D. Fla. 2007). Put another way:

> [W]here there is consultation among several clients and their jointly retained counsel, allied in a common legal cause, it may reasonably be inferred that resultant disclosures are intended to be insulated from exposure beyond the confines of the group; that inference, supported by a demonstration that the disclosures would not have been made but for the sake of securing, advancing, or supplying legal representation, will give sufficient force to a subsequent claim to the privilege.

In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 386 (S.D.N.Y. 1975). To the extent that in-house counsel jointly represented Mr. Petters and a business entity, the receiver cannot unilaterally waive the privilege for both. John Morrell & Co. v. Local Union 304A, 913 F.2d 544, 556 (8th Cir. 1990); accord In re Grand Jury, 211 F. Supp. 2d 555, 559 (M.D. Pa. 2001).

An assertion of joint representation privilege requires a factual determination by a court, taking into account: (1) the conduct of the attorney and party who is claiming the privilege; (2) whether the party had separate legal counsel; (3) whether the party had engaged in confidential communication with the attorney; (4) whether the attorney regarded the party as a client; (5) representations regarding joint or separate representation; (6) whether there was a sharing of responsibility for legal fees; and (7) the subjective belief of the party. 1 Rice, Attorney-Client Privilege in the United States § 4:31, at 4-203 to 4-204 (2d ed. 2008); see also Sky Valley Ltd. P'ship v. STX Sky Valley, Ltd., 150 F.R.D. 648, 652 (N.D. Cal. 1993). The factors show that Mr. Petters the individual was a joint client with the Petters entities. At the very least, an evidentiary hearing is required.

2. Individual Privilege

Mr. Petters also has an individual privilege.

> [I]f the communication between a corporate officer and corporate counsel specifically focuses upon the individual officer's personal rights and liabilities, then [the privilege may exist] even though the general subject matter of the conversation pertains to matters within the general affairs of the company. For example, a corporate officer's discussion with his corporation's counsel may still be protected by a personal, individual attorney-client privilege when the conversation specifically concerns the officer's personal liability for jail time based on conduct interrelated with corporate affairs.

In re Grand Jury Proceedings, 156 F.3d 1038, 1041 (10th Cir. 1998).

Recent cases hold that when current management of a business entity seeks to waive an individual privilege arguably held by a former manager, the court must balance

the benefit to the business entity with the potential harm to the former manager. In re Foster, 188 F.3d 1259, 1265, 1268-1269 (10th Cir. 1998); Pearlman, 381 B.R. at 910.

The attorney-client privilege is sacred, and this Court should not be eager to minimize its import. It's what makes the legal system workable. Even the Government employees who seek to disregard it may want to use it someday.

Mr. Petters relied on lawyers throughout his career. He reasserts the privilege. This Court should not encourage abandonment.

II. Suppression re: Searches of 4400 Baker Road and 655 Bushaway Road

A. Attorney-Client Privileged Material

We request suppression of all attorney-client privileged materials illegally seized, as well as any fruits. Pending clarification of our future fees, we will provide categories of documents that may contain attorney-client privileged material and examples (an exhaustive listing is a near-impossibility, given the sheer number of documents and files) for in camera review by the Court and/or by special master. As well, this Court may question an attorney-witness in camera to determine whether the privilege applies. In re Green Grand Jury Proceedings, 402 F. Supp. 2d 1066, 1067 & n.3 (D. Minn. 2005).

B. All Items Subject to Search and Seizure

1. General Warrant

The Fourth Amendment proscribes general warrants that permit "exploratory rummaging." Andresen v. Maryland, 427 U.S. 463, 480 (1976). There must be a "particular description" of the things to be seized, with nothing left to the discretion of the officer. Id.

A warrant violates this rule when it calls for a general seizure of business records from a particular date forward but fails to indicate that the material sought pertains to any specific transactions, or where the Government does not confine its search to any particular files. In re Grand Jury Proceedings, 716 F.2d 493, 497 (8th Cir. 1983). A "laundry list of various types of records" is insufficient to save a general search warrant. Id. at 498; see also United States v. Kow, 58 F.3d 423, 427 (9th Cir. 1995) (warrant was unconstitutionally general warrant where it "authorized the seizure of virtually every document and computer file" in the company).

Here, we have just such a laundry list, an invitation to rummage about business records, whether tied to the allegations or not. The warrant allowed for perusal through computers and records from the legal department without a care in the world about attorney-client privilege. The Government relies on the Receiver's blanket waiver after the fact. A waiver that, as noted, doesn't exist.

This is not a "permeated with fraud" type of case where it is permissible to seize everything. See United States v. Kail, 804 F.2d 441, 444-445 (8th Cir. 1986). Rather, the Government's theory, at the point of seizure, was that alleged fraud involved PCI (specifically, the offices of Deanna Coleman and Robert White). Other Petters entities—such as Petters Aviation and Polaroid—had no purported role.

Where, as here, the warrant is limited to one business among many, an open-ended warrant description is flawed. "The description must be as particular as the circumstances reasonably permit. So if the fraud infects only one part of the business, the warrant must be limited . . . ." United States v. Bently, 825 F.2d 1104, 1110 (7th Cir.

1987). No such limitation was imposed, however. The Government's lawyers drafted this warrant without due respect to the rich case law that prohibits generalities.

2. Scope of Search and Seizure

Alternatively, federal agents exceeded the scope of the warrant in violation of the Fourth Amendment. Horton v. California, 496 U.S. 128, 140 (1990). The alleged fraud occurred at PCI—the offices of Coleman and White the epicenter. But the search and seizure extended far beyond PCI. Our prior papers list the numerous Petters entities subject to search.

Certainly the seizure of the entire computer system for all Petters entities was excessive in scope. SA Pitzen testified the different entities shared legal, finance, marketing, and executive areas in the building. The agents made no effort to ensure that they were searching only the offices and files of PCI and affiliated entities named in the warrant. Nor did they even attempt to seize documents pertinent only to those entities. Rather, they simply took everything in sight.

The warrant gave no probable cause with regard to the legal department. Yet the agents had no qualms about rummaging through the legal files. This despite the obvious attorney-client privilege and work product implications.

At Mr. Petters' personal residence, many watches and a gun were seized. Where in the search warrant or affidavit do we find any hint of a crime involving watches and weapons? There is none. These agents took what they wished, without regard to probable cause or legal process.

3. Good Faith

The Government pleads good faith. United States v. Leon, 468 U.S. 897, 926 (1984). The facts say the opposite.

To avoid suppression, the Government must show that its agents relied, in good faith, upon an objectively reasonable warrant. How can Leon be invoked here, where agents rummaged through every paper and computer record at 4400 Baker Road? Where they seized documents and computer files having nothing to do with PCI or its business? Where they looked at the legal files without a thought about attorney-client privilege? Where they took watches and weapons in a white collar investment case?

The Leon good faith exception is unavailable. See Kow, 58 F.3d at 429 ("[W]hen a warrant is facially overbroad, absent specific assurances from an impartial judge or magistrate that the defective warrant is valid despite its overbreadth, a reasonable reliance argument fails.") ("[T]here is absolutely no evidence in this case that the officers who executed the warrant, although instructed to read the affidavit, actually relied on the information in the affidavit to limit the warrant's overbreadth. Indeed, the government concedes that agents seized virtually all of the records and computer files on [the business] premises."); see also United States v. SDI Future Health, Inc., 553 F.3d 1246, 1264-1265 (9th Cir. 2009).

4. Inevitable Discovery

The Government says that its illegal search and seizure is excused because grand jury subpoenas would have turned up the same evidence at some point. The Government's premise is both self-serving and wrong. If the Government had served a

subpoena, then PCI would have responded with the files properly sought and no more. It would not have provided every slip of paper and computer file in the office, as the Government felt entitled to take during its rummaging.

Courts are leery of subpoenas issued after an illegal search. Center Art Galleries-Hawaii, Inc. v. United States, 875 F.2d 747, 755 (9th Cir. 1989) ("[W]e hold that . . . inevitable discovery will not be applied to validate an illegal seizure . . . when inevitable discovery is predicated upon a subpoena served to compel production of the seized items."); United States v. Eng, 971 F.2d 854, 861 (2d Cir. 1992) ("We share the Ninth Circuit's view that subpoenas must not serve as an after the fact 'insurance policy' to 'validate' an unlawful search under the inevitable discovery doctrine."). It is a means to circumvent the Fourth Amendment, which should not be rewarded.

5. Severability

Lastly, the Government says that the Court should simply sever the valid parts of the search and seizure from the illegal ones. A tall order, given the tremendous quantity of papers, computer files, and other information taken. Even if such a thing were possible, the damage is done. The Government has seized items en masse, and has already rifled through them for six months. The only means by which to discourage such conduct is a total suppression. Other courts have reached such a conclusion; so should this one. Kow, 58 F.3d at 428.

III. Mr. Petters' Statements Must Be Suppressed

A. Statements To Police in Las Vegas

The Government concedes that Mr. Petters was not given a Miranda warning during the September 24 interrogation. It argues he was not in custody. We beg to differ.

The session was not recorded. The FBI has a budget to buy a digital machine. They just don't want to. This Court shouldn't tolerate the FBI's nonsense. Write an opinion indicating that, if that agency wants statements to go into evidence, they should be memorialized. Just write that, and the Court will avoid having to decide what it shouldn't have to: what was said, by whom, when, and with what tone of voice.

At any rate, Mr. Petters was in custody. "In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." Stansbury v. California, 511 U.S. 318, 322 (1994) (quotation marks, brackets, and citations omitted). Factors to be considered in the custody evaluation are: (1) whether the suspect was not under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether the police used strong-arm tactics or deceptive strategies during questioning; (5) whether the atmosphere of the questioning was police-dominated; and (6) whether the suspect was arrested at the end of the questioning. United States v. Czichray, 378 F.3d 822, 827 (8th Cir. 2004).

The police used a coordinated strategy, bringing three armed officers to Mr. Petters' hotel room at 7:00 in the morning, and confronting him in his bathrobe, interrogating him for the better part of an hour. This was the type of coercive, police-dominated environment that Miranda seeks to remedy. United States v. Carter, 884 F.2d 368, 372 (8th Cir. 1989) (accused was in custody for Miranda purposes when he was questioned in office of bank president where he worked, was seated between two postal inspectors with a bank security official present, was questioned for nearly an hour, and was confronted with evidence of guilt); see also United States v. Mahmood, 415 F. Supp. 2d 13, 17-18 (D. Mass. 2006) (accused was in custody where officers conducted "sweep" of residence, large number of officers were present, officer blocked access to telephone, and interrogation was lengthy).

He was in custody. The warning should have been given. Because it was not, the remedy is suppression.

Moreover, all statements made by Mr. Petters following the initial telephone call by his attorney must be suppressed. Edwards v. Arizona, 451 U.S. 477, 485 (1981).

B. Statements To Robert White

We persist in our objection to the Government dispatching its de facto agent Robert White, who attempted to extract incriminating statements from Mr. Petters while he was represented by counsel. We rely on our prior submissions and authorities. [Docket Nos. 129, 130.]

Dated: March 27, 2009

__s/ Jon M. Hopeman__________________

Jon M. Hopeman, MN #47065
Eric J. Riensche, MN #309126
Jessica M. Marsh, MN #388353
Felhaber, Larson, Fenlon & Vogt, P.A.
220 South Sixth Street, Suite 2200
Minneapolis, MN 55402-4504
Telephone: (612) 339-6321

Paul C. Engh, MN #134685
Engh Law Office
220 South Sixth Street, Suite 215
Minneapolis, MN 55402
Telephone: (612) 252-1100

Attorneys for Defendant Thomas J. Petters