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 SUPPLEMENTAL
v.	)	MEMORANDUM REGARDING PRETRIAL
	)	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, John R. Marti, and Timothy C. Rank, Assistant United States Attorneys, responds to defendant's supplemental memorandum regarding pretrial motions. The government also responds to the defendant's pending Motion for Continuance.

I. THE DEFENDANT DID NOT ESTABLISH STANDING TO CONTEST THE SEARCH AT CORPORATE HEADQUARTERS.

The defendant did not establish an expectation of privacy for **any** location or item (including his assigned corporate computer) within the corporate headquarters. The defendant simply points to his ownership of the business entities, and his possession of a key card giving him access to every area in the building. That is not enough.[1]

[1] "When a man chooses to avail himself of the privilege of doing business as a corporation, even though he is its sole shareholder, he may not vicariously take on the privilege of the corporation under the Fourth Amendment; documents which he could have protected from seizure, if they had been his own, may be used against him, no matter how they were obtained from the corporation.

The record is bereft of any evidence that the defendant took any measures to protect his privacy in any space, any item, or any document at 4400 Baker Road. To the contrary, numerous persons occupied and used all areas of the building, including the defendant's assigned office. Furthermore, the documents seized during the search related to the operations of the defendant's corporate businesses. The Document Retention Policy, issued by the corporate entities, explicitly stated that all records and documents are corporate property. Gov't Exs. 16, 18. The defendant could not have an expectation of privacy in the contents of records that are not his. The defendant did not identify a single document seized from 4400 Baker Road that was personal property.

"[A] defendant can urge the suppression of evidence obtained in violation of the Fourth Amendment only if that defendant demonstrates that *his* Fourth Amendment rights were violated by the challenged search or seizure." United States v. Padilla, 508 U.S. 77, 81, 113 S.Ct. 1936 (1993) (emphasis in original). "'Whether a defendant has a constitutionally protected expectation of privacy involves a two-part inquiry'-the defendant must show that (1) he 'has a reasonable expectation of privacy in the areas searched or

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Its wrongs are not his wrongs; its immunity is not his immunity." Hill v. United States, 374 F.2d 871, 873 (9th Cir. 1967) (quoting Lagow v. United States, 159 F.2d 245, 246 (2d Cir. 1946) (per curiam)).

the items seized,' and (2) 'society is prepared to accept the expectation of privacy as objectively reasonable.'" United States v. James, 534 F.3d 868, 872-73 (8th Cir. 2008) (citing United States v. Hoey, 983 F.2d 890, 892 (8th Cir. 1993)).

An individual's status as a company's owner, president, sole shareholder or business manager is not sufficient in itself to confer upon him or her standing to assert the company's Fourth Amendment Rights. See U.S. v. SDI Future Health, Inc., 553 F.3D 1246, 1254-57 (9th Cir. Jan. 27, 2009) (defendant's ownership and management of business along with corporate security measures for business records is insufficient to establish corporate officer's standing); United States v. Najarian, 915 F.Supp. 1441, 1453 n.10 (D. Minn. 1995) ("We are not persuaded that the managerial responsibilities of a business manager, without more, will satisfy the privacy expectations required for standing"). An employee's privacy expectations in a commercial workplace are, as a matter of law, lower than those for a dwelling. Minnesota v. Carter, 525 U.S. 83, 90, 119 S.Ct. 469, 474 (1998) ("Property used for commercial purposes is treated differently for Fourth Amendment purposes than residential property."); United States v. Hamdan, 891 F.Supp. 88, 95 (E.D.N.Y. 1995) ("the 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. 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).

Absent any evidence that the defendant took steps to exert exclusive control over any specific area, item, or document in 4400 Baker Road, the defendant has not established a reasonable expectation of privacy.

Defendant relies principally on Mancusi v. DeForte, 392 U.S. 364, 88 S.Ct. 2120 (1968), to claim that because he was a corporate officer, he has standing. In Mancusi, agents seized records from a union official's office. The records were in the custody of the official, and the office was shared with other officials. The Supreme Court found standing because the official spent extensive time in the office, had custody of the records, and could reasonably have expected that records would not be touched except with permission of other union officials. Id., 392 U.S. at 369. That is not the case here. Furthermore, Mancusi "has not been read as conferring individual standing upon high corporate officers in all circumstances." 6 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 11.3(d), at 180-81 (4th ed. 2004).

Defendant then points to United States v. Mancini, 8 F.3d 104 (1st Cir. 1993) as support for his claim of standing. In Mancini, a city mayor took substantial steps to protect specific records

from examination by other parties, including by assuring "that no one would have access to his files without his prior authorization," and by clearly labeling and segregating records "from other items in the secured archive attic." Id. at 110. The defendant in this case took no such measures.

The defendant then attempts to bolster his claim of standing by arguing that the corporate legal department took significant steps to protect the privacy of corporate legal records. Def's Memo. at 9. Again, these records (regardless of whether they were privileged) are corporate records. There is no evidence that the defendant took **any** steps protect his personal privacy in these corporate records, or that any of these records are his personal records. Absent such a showing, the defendant has failed to establish his standing to contest the search of any office at 4400 Baker Road.

II. THE DEFENDANT'S CLAIMS ABOUT PRIVILEGE REMAIN UNSUBSTANTIATED AND WITHOUT MERIT.

Prior to the Motions Hearing, the government noted that a party claiming the attorney-client privilege over documents has the burden of establishing it. Hollis v. Powell, 773 F.2d 191, 196 (8th Cir. 1985); Rabushka v. Crane, 122 F.3d 559, 565 (8th Cir. 1997); Bouschor v. United States, 316 F.2d 451, 456 (8th Cir. 1963).

Ignoring this simple principle of law, the defendant continues to make broad, unsubstantiated claims that the government

improperly intruded into privileged communications, and that he possessed a personal privilege in communications with corporate counsel. There is no evidence in the record to substantiate a personal attorney-client relationship between any of the corporate attorneys and the defendant (as an individual). Despite having access to each document seized from corporate headquarters and his residence, the defendant does not identify a single document which he claims the government improperly reviewed.[2] This Court and the government are left to guess at which documents may (or may not) be subject to any claim of privilege, let alone one possessed by the defendant.

The defendant's utter and complete failure to provide any evidence in support of these generalized claims should be rejected. This argument continues to be unsubstantiated and without merit.

III. THE SEARCH WARRANTS SIGNED BY THE DISTRICT COURT WERE NOT UNCONSTITUTIONAL GENERAL WARRANTS EXECUTED IN AN OVERBROAD MANNER.

The defendant, again, claims that the search warrants were general warrants, and that the warrants were executed in an overbroad manner. The defendant's arguments regarding general warrants and overbroad execution were fully addressed in the government's prior submission.

[2]At best, the defendant claims that the seized documents "may contain attorney-client privileged material." Def's Memo. at 12.

The defendant then misconstrues United States v. Eng, 971 F.2d 854 (2nd Cir. 1992) (hereinafter "Eng I") to claim that the inevitable discovery rule should not apply to validate an illegal search when the discovery is based on a the government's service of a subpoena shortly after the search. To the contrary, the Eng Court stated that "where the government can demonstrate a substantial and convincing basis for believing that the requisite information would have been obtained by subpoena ... there is no reason why the government may not rely upon the subpoena power as one way it might meet the burden of proving inevitable discovery ...." Id. at 860.

The Eng Court formulated a two-step analysis to determine when the government may "rely upon the subpoena power" as a means of "proving inevitable discovery." Eng I, 971 F.2d at 860. First, the government must establish that there was an "active and ongoing investigation" of the target of the unlawful search at the time of that search, and that the investigation was not "'trigger[ed]' ... by the information unlawfully gained by the illegal search." United Stated v. Eng, 997 F.2d 987, 992 (2nd Cir. 1993)(quoting Eng I, 971 F.2d at 871) (additional internal quotation marks and citation omitted). "The alternate means of obtaining the [challenged] evidence" was, "at least to some degree, imminent, if yet unrealized," at the time of the unlawful search. Eng I, 971 F.2d at 861 (quotations omitted).

Second, with regard to the evidence that the government asserts would have been inevitably discovered, the district court must "specifically analyze and explain how, if at all, discovery of that piece of evidence would have been more likely than not inevitable absent the [unlawful] search ...." Eng I, 971 F.2d at 862 (citing Nix v. Williams, 467 U.S. 431, 444, 104 S.Ct. 2501 (1984)) (internal quotation marks omitted).

In this case, on September 23, 2008 (one day prior to the search warrant), the Grand Jury issued one subpoena to the defendant's company which demanded the production of numerous records from the defendant's company. Gov't. Ex. 17. The Grand Jury then issued two additional subpoenas on September 26, 2008. Thus, even under the Eng analysis, the subpoenas were independent of any claimed illegality. Furthermore, subsequent to the subpoenas the government continues to obtain evidence from the companies through consent searches. Thus, even under Eng, the inevitable discovery rule (if necessary) applies in this case.

Finally, the defendant claims that the warrant is not severable, and, once again, misconstrues case law in support of this claim. The defendant implies that United States v. Kow, 58 F.3d 423 (9th Cir. 1995), stands for the proposition that suppression is mandated when warrants seek substantial documents but are unlawful in some respect. To the contrary, the Kow court simply held that where no portion of an overbroad warrant is

particularized enough to pass constitutional muster, then total suppression of evidence seized pursuant to warrant is required. Such is not the case here. Again, if necessary, the severability doctrine should apply in this case.

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

The defendant's interview in his luxury suite at the Bellagio Hotel, Las Vegas, was voluntary and non-custodial. The defendant's response is meretricious. Indeed, the defendant's own recitation of the testimony[3] in no way supports his claim that he was in custody. The agents did not restrain the defendant's freedom of movement, allowed the defendant to use the telephone, and informed the defendant that he was not under arrest and that he didn't have to answer questions. After conferring with corporate counsel, the defendant indicated that his counsel advised him that he should not answer questions. The defendant did not state that he wanted counsel present or that he wanted the interview to end. When agents indicated that they would no longer ask him questions, it was the defendant that persisted in attempting to extend the interview. The agents left the luxury suite despite the defendant's repeated requests to continue the interview. Under these circumstances, the interview was both voluntary and non-custodial. See United States v. Czichray, 378 F.3d 822 (8th Cir.

[3]The government's recollection of the testimony was that Special Agent Corten was from Las Vegas, not Minneapolis.

2004) (chiropractor was not in custody during interview in his home by two FBI agents even though agents instructed him not to alert others by telephone to agents' presence, and they escorted him to bedroom and bathroom to check for telephones before he entered those rooms, agents said repeatedly that his participation was voluntary and that he could ask agents to leave).

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

Like the defendant, the government relies on its prior submission. Given that Chief Judge Davis already determined that the contact in question occurred while the defendant was obstructing justice, this motion is without merit.

VI. A CONTINUANCE IS NOT NECESSARY.

On January 8, 2009, at a status conference before U.S. District Judge Richard Kyle, the defendant asked that the trial date be set for late fall 2009. In support of this request, the defendant made the same arguments now presented to this Court with one addition, defense counsel have declared a work stoppage based on the possibility that they might not be paid in the future. Their self-declared work stoppage - effectively granting for themselves what the District Court refused them - is now the principal reason supporting their claim that they will not be prepared for trial on June 9, 2009.

This case is certainly the largest fraud case based on dollar loss in the history of the State of Minnesota, and one of the

largest in the country. Over fifteen years, the defendant and his co-conspirators repeatedly executed a conceptually simple fraud scheme selling non-existent merchandise. As the defendant well knows, Sams Club, Walmart, BJ's, CostCo, and Boscov's have no records of these fictitious transactions. Furthermore, for two weeks in September 2008, the defendant was captured on audio personally directing the fraud scheme. Five of his co-conspirators have now pled guilty.

The public has an interest in a speedy trial. The government also needs to address this case expeditiously. The defendant, it appears, intends to continue to delay this matter so long as he is able. This motion should be denied.

Dated: March 30, 2009

Respectfully Submitted,

FRANK J. MAGILL, JR.
United States Attorney

S/ John R. Marti

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