March 3, 2014

Thomas J. Petters
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U.S. Penitentiary Leavenworth
P.O. Box 1000
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CLERK OF THE COURT
U.S. District Court
Warren E. Burger Fed. Bldg.
316 North Robert Street
St. Paul, Minnesota
U.S. CERTIFIED MAIL NO. 7008-1830-0004-2648-9107

RE: USA vs. PETTERS, CIVIL NO. 13-1110(RHK)
Criminal No. 08-364

Dear Clerk:

Attached for **FILING** in this above-entitled action, is copy of my:

1. **Subject: Denial of Recusal Motion dated December 28, 2013 (Doc. No. 631)**

   MOTION TO ALTER OR AMEND JUDGMENT OF THIS COURT'S 'MEMORANDUM OPINION AND ORDER' FILED FEBRUARY 10, 2014, PURSUANT TO RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE AS TO THE 'MOTION TO DISQUALIFY THE HONORABLE JUDGE RICHARD H. KYLE IN THIS ACTION. Dated: March 3, 2014.

If possible, please return a filed stamped copy of the first page of this above entitled motion for my file.

Thank you for your continued assistance in this most important matter.

Sincerely,

Thomas J. Petters, Pro Se

CERTIFICATE OF SERVICE

I THOMAS J. PETTERS certify that I mailed a copy of the above-entitled motion within a stamped envelope with correct postage to the following parties on **MARCH 3, 2014**, from the U.S. Penitentiary Leavenworth MAILROOM:

2. Clerk of the Court, as addressed above;
3. U.S. ATTORNEY, 300 South 4th Street, 600 US Courthouse, Minneapolis, Minnesota 55415.

Thomas J. Petters, Pro Se

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	*	
		Criminal No. 08-364 (RHK)
Plaintiff,	*	
		Civil No. 13-1110 (RHK)
vs.	*	
THOMAS JOSEPH PETTERS,	*	
		AFFIDAVIT FORM
Defendant.	*	

SUBJECT: DENIAL OF RECUSAL MOTION DATED DECEMBER 28, 2013 (Doc. No. 631)

MOTION TO ALTER OR AMEND JUDGMENT OF THIS COURT'S "MEMORANDUM OPINION AND ORDER" FILED FEBRUARY 10, 2014, PURSUANT TO RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE AS TO THE "MOTION TO DISQUALIFY THE HONORABLE JUDGE RICHARD H. KYLE IN THIS ACTION".

COMES NOW, Defendant THOMAS JOSEPH PETTERS, Pro Se, (hereinafter Movant) with the assistance of his JailHouse Lawyer John Gregory Lambros, MUNZ vs. NIX, 908 F.2d 267, 268 FootNote 3 (8th Cir. 1990)(JailHouse Lawyer has standing to assert rights of inmates who need help); BEAR vs. KAUTZKY, 305 F.3d 802, 805 (8th Cir. 2002), offering this Court his "MOTION TO ALTER OR AMEND JUDGMENT OF THIS COURT'S "MEMORANDUM OPINION AND ORDER" filed February 10, 2014, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure as to the "MOTION TO DISQUALIFY THE HONORABLE JUDGE RICHARD H. KYLE IN THIS ACTION."

STANDARD OF REVIEW:

1. Rule 59(e) of the Federal Rules of Civil Procedure serves to allow a district court to rectify its own mistakes immediately following the entry of judgment. WHITE vs. NEW HAMSHIRE DEPT. OF EMPLOYMENT SEC., 71 L.Ed.2d 325 (1982).

Moreover the timely filing of a motion under Rule 59(e) gives this Court jurisdiction to amend the judgment for **ANY REASON**, and this Court is not limited to the grounds contained in this motion in granting relief. VARLEY vs. TAMPAX INC., 855 F.2d 696 (10th Cir. 1988). In addition, a motion under Rule 59(e) **SUSPENDS** the finality of the judgment for purposes of appeal. VAUGHTER vs. EASTERN AIR LINES INC., 817 F.2d 685 (11th Cir. 1987).

2. HABEAS CORPUS: Motions to reconsider 28 USC §2255 ruling is available, and it is to be treated as FRCP 59(e) motion filed within 10 days of entry of challenged order. **[28 days, as amended in 2009]** See, U.S. vs. CLARK, 984 F.2d 31 (2nd Cir. 1993); EDWARDS vs. U.S., 266 F.3d 756, 757-58 (7th Cir. 2001) (§2255 case applying rule of habeas corpus procedure that filing of motion pursuant to FRCP 59(e) tolls time for filing notice of appeal). Criminal cases that have applied FRCP 59(e) include: U.S. vs. SIMS, 252 F.Supp. 2d 1255, 1260-61 (D. NM 2003); U.S. vs. THOMPSON, 125 F.Supp. 2d 1297 (D. Kan. 2000); U.S. vs. HECTOR, 368 F.Supp. 2d 1060 (CD Cal. 2005).

3. PRISON "MAILBOX RULE": HOUSTON vs. LACK, 487 US 266 (1988) (Prisoner motion is filed with clerk of court when delivered to prison mailbox and/or mailroom).

FACTS:

4. On or about May 10, 2013, Movant Petters attorney Steven J. Meshbesher filed a motion to vacate or set aside sentence pursuant to 28 U.S.C. §2255. Attorney Meshbesher raised two (2) grounds:

a. Ineffective assistance of counsel in failing to notify Movant Petters of the Government's plea offer; and

b. The sentence imposed being cruel and unusual insofar as it is disproportionate to the crimes of conviction.

5. This Court held an evidentiary hearing on October 23, 2013.

6. The Honorable Richard H. Kyle DENIED Movant Petters §2255 on December 5, 2013.

7. December 30, 2013: Movant Petters filed the following motions dated December 28, 2013 in this action:

> a. Motion to Disqualify the Honorable Judge Richard Kyle in in this action. Defendant Petters requests recusal of Judge Kyle, pursuant to 28 U.S.C. §§§ 455(a), 455(b)(5)(i), and 455(b)(5)(iii). Defendant Petters was Prejudiced. See, **Doc. No. 631.**
>
> b. Motion to alter or amend judgment of this Court's "MEMORANDUM OPINION AND ORDER" filed December 5, 2013, pursuant to Rule 59(e) of the Federal Rule of Civil Procedure. See, **Doc. No. 630.**

8. The government responded to Movant Petters motions filed on December 30, 2013 on January 8, 2014. See, **Doc. No. 633.**

9. January 15, 2014, Movant Petters RESPONDED to the government and also filed a "MOTION FOR BAIL".

10. February 10, 2014, the Honorable Richard H. Kyle issued his "MEMORANDUM OPINION AND ORDER", as to Movant Petters "MOTION TO ALTER AND AMEND JUDGMENT PURSUANT TO RULE 59(e) **(Doc. No. 630) AND "SEPARATELY MOVES THE UNDER-SIGNED TO RECUSE HIMSELF [MOTION] (Doc. No. 631).**

REASONS JUSTIFYING RECONSIDERATION OF "MOTION TO DISQUALIFY JUDGE RICHARD H. KYLE IN THIS ACTION, DATED DECEMBER 28, 2013".

11. As stated above and confirmed by this court, Movant Petters filed a "MOTION TO DISQUALIFY JUDGE KYLE, dated December 28, 2013", as a separate motion. See, Docket No. 631.

12. This Court responded to same within the February 10, 2014, "MEMORANDUM OPINION AND ORDER", pages 5 thru 8. Judge Kyle denied same.

13. Movant believes it may be beneficial for all parties to file this motion for reconsideration to allow this court the opportunity to correct, modify, or add to the record before litigating the appeal, as a motion under Rule

59(e) is a "device to relitigate the original issue decided by the district court, and used to allege legal error." U.S. vs. FIORELLI, 337 F.3d 282, 288 (3rd Cir. 2003)(collecting cases). As stated above, almost any substantive reason justifying reconsideration of this Court's decision may be asserted in a motion premised on Rule 59(e). Rule 59(e) motion may also seek reconsideration of procedural rulings by this Court, such as a denial of an evidentiary hearing that was needed to clarify facts. BROWDER vs. DIRECTOR, 434 U.S. 257, 265-67 (1978).

14. Judge Kyle stated the following facts within his February 10, 2014 "MEMORANDUM OPINION AND ORDER", pages 5 thru 8:

15. **Page 5:** "He notes that my son is a shareholder in the law firm of Fredrikson & Byron, P.A. ("Fredrikson"), which previously provided legal advice to defendant and his companies regarding the **SALE OF SECURITES.** (See, Doc. No. 631, at 4-9.)" **This is not a totally inclusive statement by Judge Kyle.** Pages 6 thru 9 offer facts regarding Richard H. Kyle, Jr. the son of the Honorable Judge Richard H. Kyle. The following facts are clearly offered:

a. Judge Kyle's son Richard is a **SHAREHOLDER [Equity-Partner] in Fredrikson.**

b. From on or about 1992 thru 2008 **Fredrikson** represented Movant Petters and all of his companies, including all companies listed as defendant's within Movant's indictment. Movant paid **Fredrikson** approximately $8 million for legal services during 1992 thru 2008.

c. **EXHIBIT C**, within Movant's "MOTION TO DISQUALIFY JUDGE KYLE" dated December 28, 2013, clearly offered an overview by the **Court-appointed Receiver, Attorney Douglas A. Kelly, in this action, as to the legal services Fredrikson provided to Movant and his indicted companies within this action.** See, USA vs. THOMAS JOSEPH PETTERS, et al., Civil No. 08-5348(ADM/JSM), dated June 6, 2012:

> "AFFIDAVIT OF DOUGLAS A. KELLY IN SUPPORT OF ... SETTLEMENT AGREEMENT ... BETWEEN .. RECEIVER ... TRUSTEE, AND **FREDRIKSON & BYRON, P.A.** ..."

See, Docket Sheet Entry 2264.

5.

d. **EXHIBIT C, Page 3, Paragraph 4,** within the "AFFIDAVIT"

clearly states:

"A. F & B SERVICES AND CLAIMS [F & B is Fredrikson & Byron, P.A.]

4. Prior to the bankruptcy filings, **F & B** represented Petters and the Petters Entities, which include the Debtors, for approximately fifteen (15) years as outside legal counsel engaged on specific matters. During
**** the course of its representation, **F & B PROVIDED VARIOUS LEGAL SERVICES INCLUDING BUSINESS TRANSACTIONAL WORK, SUCH AS REAL ESTATE, CORPORATE, FINANCE AND SECURITES MATTERS, AS WELL AS LITIGATION AND OTHER SPECIFIC MATTERS.** During the course of its representation of Petters and the Petters Entities, **F & B** asserts it provided standard form legal opinions with respect to a number of transactions and received payments from the Debtors in connection with the services that were provided. Petters and the Petters Entities paid **F & B** approximately $8 million during the course of **F & B's** represenation." (emphasis added)

e. **EXHIBIT C, Page 4, Paragraph 6,** within the "AFFIDAVIT"

stated:

"6. In June of 2009, the Susman Godfrey LLP law firm ("Susman"), ..., independently investigated factual and legal issues impacting the the determination of whether the Petters Entities possessed causes of action against **F & B.** ... Susman's investigation was conducted with the cooperation of **F & B,** and included interviews of fact witnesses and reviews of thousands of documents (including billing records, voicemails, e-mails and files produced by **F & B, DOCUMENTS MAINTAINED BY THE RECEIVER**
*** **ON THE STRATIFY DATABASE, AND RECORDS ASSOCIATED WITH THE FEDERAL GOVERNMENT'S CRIMINAL CASES AGAINST PETTERS, PCI AND PGW).** Susman performed a detailed analysis of claims against **F & B AND ITS ANTICIPATED DEFENSES**
*** **AND PRODUCED A PRIVILEGED AND CONFIDENTIAL REPORT FOR ME AND MY LEGAL COUNSEL.**" (emphasis added)

f. **EXHIBIT C, Page 4 & 5, Paragraph 7,** within the "AFFIDAVIT"

stated:

"7. The Freeborn & Peters, LLP law firm ("Freeborn"), ..., performed a supplemental investigation of the relevant facts, which include a review of additional discovery materials and deposition transcripts of a number of **F & B PERSONAL** that provided testimony in connection with various adversary proceedings and the preparation of a detailed **ANALYSIS OF CLAIMS AND ANTICIPATED DEFENSES. F & B** cooperated in the investigation by making additional records and potential fact witnesses available to Freeborn.
*** Freeborn also produced a **PRIVILEGED AND CONFIDENTIAL REPORT FOR THE BENEFIT OF ME, AS TRUSTEE, AND MY LEGAL COUNSEL.**" (emphasis added)

g. **EXHIBIT C, Page 5 & 6, Paragraph 9,** within the "AFFIDAVIT"

stated:

"9. Upon the conclusion of the Susman and Freeborn reviews and analyses,

*** I, as **Trustee and Receiver, ASSERTED LEGAL AND EQUITABLE CLAIMS AGAINST F & B RELATING TO ITS REPRESENTATION OF PETTERS,** the Debtors and the Receivership Entities and made demands upon the firm and its insurer for
*** payment. **THE CLAIMS WERE FOR BREACH OF FIDUCIARY DUTY, BREACH OF CONTRACT, AIDING AND ABETTING BREACH OF FIDUCIARY DUTY, AIDING AND ABETTING FRAUD, CIVIL CONSPIRACY, UNJUST ENRICHMENT AND LEGAL MALPRACTICE.** .... Although the investigation conducted by Susman and Freeborn did not uncover evidence of actual knowledge of fraud by any person employed by **F & B,** there were a number of red flags that should have alerted **F & B** of the possibility that the business allegedly conducted by Petters was fraudulent." (emphasis added)

h. **EXHIBIT C: Page 8, Paragraph 15,** within the "AFFIDAVIT" stated:

"15. The SETTLEMENT AGREEMENT provides that the net proceeds from the SETTLEMENT PAYMENT, **AFTER REIMBURSING THE RECEIVER $656,612.30 FOR COSTS**
*** **AND EXPENSES INCURRED BY THE RECEIVER IN CONNECTION WITH THE INVESTIGATION OF CLAIMS AGAINST F & B ....**" (emphasis added)

I. **EXHIBIT C:** included copy of the **"SETTLEMENT AGREEMENT" signed by F & B on May 30, 2012,** that was mediated in a confidential mediation with Retired Judge Richard B. Solum on March 7, 2012. The "SETTLEMENT AGREEMENT" clearly states the following:

1. Page 3, Paragraphs 2(D) & 2(E) define that **Judge Kyle's son, RICHARD H. KYLE, JR., a shareholder [Equity-Partner] IS PART OF THE "SETTLEMENT AGREEMENT":**

*** "D. The term **"F & B Releasees"** shall mean **F & B together with its CURRENT AND FORMER .... PARTNERS** ..."

"E. The term **"F & B Releasor"** shall mean **F & B together with its CURRENT AND FORMER, ... PARTNERS** ..."

2. Page 4, Paragraph 5, clearly supports that **F & B** will settle all claims as to the **ABOVE POSSIBLE VIOLATIONS OF LAW,** see paragraph 15(g) above, for the sum of **$13.5 MILLION:**

"In full and final settlement of the Debtor Released Claims (as defined below), **F & B SHALL PAY (or cause to be paid) THE SUM OF $13.5 MILLION (the "SETTLEMENT PAYMENT")** within 20 business days after the effective date. ..." (emphasis added)

16. The above information clearly states **FREDRICKSON & BYRON, P.A. PROVIDED LEGAL SERVICES MORE THAN "SALE OF SECURITIES". Also, Judge Kyle's son**

RICHARD WAS PART OF THE $13.5 MILLION "SETTLEMENT AGREEMENT" THAT INCLUDED CLAIMS OF "CIVIL" AND "CRIMINAL". See, ATTACHMENT A.:

1. "AFFIDAVIT OF DOUGLAS A. KELLY ...", Filed on June 6, 2012, in USA vs. THOMAS JOSEPH PETTERS, et al., **Civil No. 08-5348 (ADM/JSM)**, pages 1, 2, 3, 4, 5, 6, 7, & 8.

2. "SETTLEMENT AGREEMENT", filed on June 6, 2012, as an EXHIBIT in USA vs. THOMAS JOSEPH PETTERS, et al., **CIVIL No. 08-5348 (ADM/JSM)**, Docket No. **2264-1, Pages 2, 3, 4, 5 of 18.**

17. **Page 5:** Judge Kyle states, "According to Defendant, this relationship requires my recusal under 28 U.S.C. **455(b)(5)(iii)**, which oblibates a judge to disqualify himself when a person within the judge's "third degree of relationship" has an "interest that could be substantially affected by the outcome of the proceeding" **This is true but not totally inclusive!** Movant Petters filed his "MOTION FOR RECUSAL AND DISQUALIFY JUDGE KYLE, **PURSUANT TO 28 U.S.C. §§§ 455(a), 455(b)(5)(i), AND 455(b)(5)(iii).** Title 28 U.S.C. §455 clearly states:

*** a. **§455(b)(5)(i):** "Is a party to the proceeding, or an officer, director, or trustee of a party;" BLACK'S LAW DICTIONARY, Eighth Edition, clearly the word **"PARTY"** as "one who takes part in a transaction - **a party to the contract.**" "A person who takes part in a legal transaction or proceeding is said to be a party to it." "One by or against whom a **Lawsuit is brought - a party to a lawsuit".**

The above "AFFIDAVIT OF DOUGLAS A. KELLEY" and "SETTLEMENT AGREEMENT" provided as **ATTACHMENT A,** clearly proves **RICHARD H. KYLE, JR.** was a party to this proceedings.

b. **§455(b)(5)(iii):** "Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;"

Again, the above "AFFIDAVIT OF DOUGLAS A. KELLEY" and "SETTLEMENT AGREEMENT" provided as **ATTACHMENT A,** clearly proves **RICHARD H. KYLE, JR.** was a party to this proceeding and as a PARTNER of Fredrikson & Byron, P.A. paid **$13.5 MILLION TO SETTLE "CIVIL" and "CRIMINAL" CLAIMS.** Therefore, if Movant Petters would not have been found guilty Fredrikson & Byron, P.A. would not of lost **$13.5 MILLION.** Fredrikson law firm and partners of the firm were **"SUBSTANTIALLY AFFECTED BY THE OUTCOME OF THE PROCEEDING."**

18. **Page 5:** Judge Kyle states, "Defendant's argument is frivolous and does not merit extended discussion, there is no suggestion that my son, who practices

in the area of criminal defense, is involved ...., was involved in his defense at trial, or provided legal advice to him or his companies." **This is not true, in regard to the law firm Judge Kyle's son worked for,** as Fredrikson clearly was involved in Movant Petters defense at trial due to the legal services they provided to Movant and his companies that were indicted in this action. This can be proved by referring to Movant Petters direct appeal brief by Attorney's Hopeman and Engh, in USA vs. THOMAS JOSEPH PETTERS, **No. 10-1843,** U.S. Court of Appeals for the Eighth Circuit, **ARGUMENT No. 4:** See, Page 47 of brief:

> "Argument #4: Mr. Petters was entitled to an appropriate theory-of-defense instruction because there was competent evidence to support the theories that (1) ..... ; and
> *** (2) **HE RELIED ON THE ADVICE, OVERSIGHT, AND COMPETENCY OF HIS IN-HOUSE AND OUTSIDE ATTORNEYS [FREDRIKSON & BYRON, P.A.] AFTER HE DEVELOPED SUSPICIONS OF FRAUD.**" (emphasis added)

Page 50 of the brief states:

> "The record is replete with testimony of his attorney's involvement in PCI affairs. His counsel were heavily involved in many
> *** PCI transactions, **INCLUDING THOSE CHARGED IN THE INDICTMENT. HIS COUNSEL DREW UP ALL THE PROMISSORY NOTES. HIS COUNSEL ASSURED INVESTORS THAT LAWSUITS AGAINST PCI WERE FRIVOLOUS. HIS COUNSEL ASSURED INVESTORS ALL WAS WELL AT THE COMPANY.** [3 Trial Tr. at 388, 397, 413-14, 448, 457-58, 479-80; 5 Trial Tr. at 830-39; 10 Trial Tr. at 1676, 1828; 11 Trial Tr. at 1937-39; 12 Trial Tr. at 2149-50.] Mr. Petters spent most of his time at work with chief in-house counsel David Baer, who had an office adjacent to his. [14 Trial Tr. at 2707.]
>
> All of this directly contradicts the government's theory that Mr. Petters walled off PCI from the rest of his companies so as to avoid detection. The **JURY SHOULD HAVE BEEN INSTRUCTED REGARDING RELIANCE-ON-COUNSEL TO SHOW MR. PETTERS HAD INNOCENT INTENT.**"

Page 48 of the brief states:

> **"C. The Violations**
>
> Defense counsel asked for appropriate theory-of-defense instructions. **THE DISTRICT COURT [Judge Kyle] REFUSED TO GIVE THEM, [17 Trial Tr. at 3300-04], WHICH IS REVERSIBLE ERROR."**

19. **PAGE 5 and 6:** Judge Kyle states, "Nor does Defendant explain how **FREDRIKSON'S PRIOR REPRESENTATION IN SECURITIES MATTERS SOMEHOW SUGGESTS THAT**

THAT MY SON CURRENTLY HAS AN 'INTEREST THAT COULD BE SUBSTANTIALLY AFFECTED BY THE OUTCOME OF' THIS PROCEEDING. 28 U.S.C. §455(b)(5)(iii)." THIS IS NOT TRUE. Movant Petters clearly presented to the Court copy of the **"AFFIDAVIT OF DOUGLAS A. KELLY" and the "SETTLEMENT AGREEMENT"** with **FREDRIKSON & BYRON, P.A.** - with portions attached to this motion - which clearly offers the potential civil and criminal claims against the firm. See, Paragraph 15(g) above, pages 5 & 6 for list. The possible civil and criminal claims stemmed from this above-entitled action, and settlement was reached in the amount of **$13.5 MILLION. THE "SETTLEMENT AGREEMENT" INCLUDED JUDGE KYLE'S SON, AS STATED IN PARAGRAPH 15(i).** The **"INTEREST THAT COULD BE SUBSTANTIALLY AFFECTED BY THE OUTCOME OF" THIS PROCEEDING INCLUDES:** See, POTASHNICK vs. PORT CITY CONSTR. CO., 609 F.2d 1101, 1113-1115 (5th Cir. 1980):

a. Fifth Circuit held, "when a **PARTNER** in a law firm is **RELATED TO A JUDGE WITHIN THE THIRD DEGREE, THAT PARTNER WILL ALWAYS BE 'KNOWN BY THE JUDGE TO HAVE AN INTEREST THAT COULD BE SUBSTANTIALLY**
*** **AFFECTED BY THE OUTCOME' OF A PROCEEDING INVOLVING THE PARTNER'S LAW FIRM."** Id. at 1113. (emphasis added)

b. "The outcome of any proceeding handled by a law firm may affect the **PARTNERS'** financial interest as well as certain **NONECONOMIC**
*** **INTERESTS, INCLUDING THE REPUTATION AND GOODWILL OF THE FIRM."** Id. at 1113. (emphasis added)

c. "The language of section 455(b)(5)(iii) referring to **"an**
*** **interest" DOES NOT REQUIRE** that the interest of the judge's lawyer-relative be financial." Id. at 1113. (emphasis added)

d. "While Charles Hand's financial interest was not actually affected by the outcome of the case, we interpret section 455(b)(5)
*** (iii) to **REQUIRE DISQUALIFICATION** when the lawyer-relative's interest **HAS THE POTENTIAL TO BE AFFECTED BY THE OUTCOME.** This case **COULD OF BEEN** handled on a contingent fee basis, or **A FAVORABLE RESULT MIGHT HAVE JUSTIFIED A HIGHER FEE,** so that Charles Hand's interest **COULD OF BEEN AFFECTED BY THE OUTCOME."** Id. at 1113. (emphasis added)

e. "Apart from the potential financial interests at stake, a win or loss in any lawsuit **COULD AFFECT** a PARTNER'S interest in his
*** **FIRM'S REPUTATION, ITS RELATIONSHIP WITH ITS CLIENTS, AND ITS ABILITY TO ATTRACT NEW CLIENTS.** The language of section 455(b)(5)(iii) **DOES NOT REQUIRE** the judge to investigate whether his lawyer-relative's interest **WILL IN FACT BE AFFECTED BY THE OUTCOME OF THE PROCEEDING.**
*** **INSTEAD, THE STATUTE REQUIRES AUTOMATIC DISQUALIFICATION WHEN THE JUDGE IN A PROCEEDING KNOWS OF HIS RELATIVE'S INTEREST, AND THE**
*** **OUTCOME OF THE PROCEEDING MAY POTENTIALLY AFFECT THAT INTEREST."** Id. at 1113-14. (emphasis added)

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f. "However, a recent advisory opinion interpreting **CANON 3C**
*** **OF THE CODE OF JUDICIAL CONDUCT** suggests that apart from any interests involved, the **PARTNER STATUS** of the judge's relative by itself is sufficient **GROUND FOR DISQUALIFICATION.** Titled, "Disqualification in a case in which a relative is employed by a participating law firm," the opinion notes the distinction between law firm associates and **PARTNERS**, and states: ...." Id. at 1114. (emphasis added)

g. "The statute imposes, however, no duty on the parties to seek disqualification, **NOR ANY TIME LIMITS WITHIN WHICH DISQUALIFICATION MUST BE SOUGHT.** Although the Department of Justice recommended that section 455 include some limitation of time "to prevent application for disqualification from being filed near the end of a trial when
*** the underlying facts were known long before," **CONGRESS DID NOT INCORPORATE THIS RECOMMENDATION.** 1974 U.S. Code Cong. & Admin. News, pp. 6351, 6358; See, SCA Services, Inc. MORGAN, 557 F.2d 110, 117 (7th Cir. 1977)." Id. at 1115 (emphasis added)

20. **PAGE 6:** Judge Kyle states, "Indeed, this last point lays bare a fundamental problem with Defendant's Motion. While he seeks the undersigned's recusal from these post-conviction proceedings, there is no suggestion whatsoever that these proceedings bear any connection to my son **OR HIS LAW FIRM.** Fredrikson's prior association with Defendant simply does not provide a basis for recusal **AT THIS JUNCTURE.** See, VENEKLASE vs. CITY OF FARGO, 236 F.3d 899, 901-02 (8th Cir. 2000); IN RE MEDTRONIC, INC. SPRINT FIDELIS PRODS. LIAB. LITIG., 601 F.Supp. 2d 1120, 1125-28 (D. Minn. 2009)." **THIS IS NOT TRUE.** This court - Judge Kyle - wrote in SPRINT FIDELIS PRODS. LIAB. LITIG., 601 F. Supp. 2d at 1125:

> "The Court begins its analysis with ...., **Section 455(b)(5)(iii)** requires a judge to recuse if his or her child is known to have an **INTEREST IN AN ACTION THAT "COULD BE SUBSTANTIALLY AFFECTED" BY IT OUTCOME.** Plaintiffs argue that because my son is a shareholder at **FREDRIKSON**, and because **FREDRICKSON** derives **"SIGNIFICANT"** revenue from Medtronic, it necessarily follows that my son has an interest that could be affected by the outcome of this case."
>
> "At bottom, the argument Plaintiffs advance is little more than a hypothetical house of cards: my son **COULD** be affected **IF** the Court were to rule against Medtronic, **IF** the removal of that business were to impair my son's financial interests, and **IF** that impairment were **"SUBSTANTIAL."** The converse argument, which Plaintiffs also raise, is similarly conjectural: my son **COULD** be affected **IF** the Court were to rule in favor of Medtronic, **IF** Medtronic then "rewarded" **Fredrikson** by funneling it more business, **IF** the additional business enhanced my son's financial interests, and **IF** that enhancement were **"SUBSTANTIAL"."**
>
> *** **"PLAINTIFFS ARE REQUIRED TO OFFER PROOF OF PARTIALITY**, ..."

11.

*** 21. **MAY 30, 2012 "PROOF OF PARTIALITY" IS OFFERED:** Attorney Richard H. Kyle, Jr., the son of the Honorable Judge Kyle and a **PARTNER - SHAREHOLDER - Equity-PARTNER OF THE LAW FIRM FREDRIKSON & BYRON, P.A.,** was included within the May 30, 2012 "SETTLEMENT AGREEMENT" between the Trustee and/or Receiver for Movant Petters and all other defendant's in this action. The full and final settlement Fredrikson paid as to possible civil and criminal action related to this action

*** and **COUNTS WITHIN THE INDICTMENT WAS $13.5 MILLION.** See, U.S. vs. PETTERS, et al., Civil No. 08-5348(ADM/JSM). See attached. Therefore, this Court's - Judge Kyle's reasoning in SPRINT FIDELIS, 601 F. Supp.2d at 1125, as to Movant Petters trying to advance "little more than a **HYPOTHETICAL HOUSE OF CARDS**" by using the words **"COULD" and "IF" IS NOT VALID.** On **May 30, 2012 Movant Petters offered "PROOF"** as to the "**INTEREST THAT COULD BE SUBSTANTIALLY AFFECTED BY THE OUTCOME OF THE PROCEEDING".**

22. **JUNE 6, 2012 "PROOF OF PARTIALITY" IS OFFERED AS TO THE LAW FIRM "FREDRIKSON & BYRON, P.A. AND PARTNERS "REPUTATION AND ABILITY TO ATTRACT NEW CLIENTS":** Attorney Douglas A. Kelly, the "TRUSTEE AND RECEIVER" in this above entitled action clearly stated within his June 6, 2012 "AFFIDAVIT" that the law firms "SUSMAN GODFREY LLP, FREEBORN & PETERS, LLP" and attorney's within his office asserted legal and equitable claims against FREDRIKSON & BYRON, P.A., after extensive discovery that cost over **$600,000.00. THE CLAIMS WERE FOR:**

a. Breach of fiduciary duty;
b. Breach of contract;
c. Aiding and abetting breach of fiduciary duty;
*** d. Aiding and abetting **FRAUD;**
e. Civil conspiracy;
f. Unjust enrichment and **LEGAL MALPRACTICE;**
g. Disgorgement of fees that the firm had received as **FRAUDULENT;**
h. Preferential transfers that the Trustee contended were avoidable under Chapter 5 of the Bankruptcy Code and under other relevant state and federal law .....

See, See, "AFFIDAVIT OF DOUGLAS A. KELLEY", Page 5 and 6, Paragraph 9, "Upon the

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conclusion of the Susman and Freeborn reviews and analysis, I, as Trustee and Receiver, **ASSERT LEGAL AND EQUITABLE CLAIMS AGAINST F & B [Fredrikson & Byron, P.A.]** *** **RELATING TO ITS REPRESENTATION OF PETTERS**, ..."

23. **PAGE 6:** Judge Kyle addresses an Eighth Circuit case stating, "[M]otions for recusal under 28 U.S.C. §455 will not be considered unless timely made," TRI-STATE FIN., LLC vs. LOVALD, 525 F.3d 649, 653 (8th Cir. 2008)("[t]imeliness requires a party to raise a claim [of recusal] 'at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for [it]." **THIS IS NOT TOTALLY TRUE!** This Court cited FLETCHER vs. CONOCO PIPE LINE CO., 323 F.3d 661, 664 **(8th Cir. 2003)**, in which the Eighth Circuit stated:

> "Although section 455 has **NO EXPLICIT TIMELINESS REQUIREMENT**, we have ruled a claim for judicial recusal under section 455 'will not be considered unless timely made'". Id. at 664. (emphasis added).

Movant Petters clearly explained within his "MOTION TO DISQUALIFY JUDGE KYLE...", dated December 28, 2013, that he requested his **DIRECT APPEAL ATTORNEY TO RAISE ON DIRECT APPEAL THE ISSUE OF "RECUSAL OF JUDGE KYLE".** Movant's request occurred on September 1, 2010. On September 17, 2010, Movant's attorney responded, stating the issue **"IS A DECENT ONE,"** but refused to file same. On September 27, 2010, Movant Petters again requested his direct appeal attorney's to file the **RECUSAL ISSUE, BUT THEY REFUSED.** See, Paragraphs 47 thru 52, EXHIBITS: J, K, AND L. On or about March 2013, Movant Petters requested Attorney Steven J. Meshbesher to file an issue within his §2255 as to the violations of 28 U.S.C. §455 et al. by Judge Kyle. Movant Petters mailed Attorney Meshbesher all the above exhibits offered in paragraphs 47 thru 52 and EXHIBITS J, K, AND L, as to letters to his direct appeal attorney to file recusal. Attorney Meshbesher refused to include *** the issue within Movant's §2255. Movant was prevented in filing the **RECUSAL ISSUE**, after paying Attorney Meshbesher half of his fee.

24. **JUDGE KYLE HAD THE BURDEN TO DISCLOSE THE CONFLICT NEAR THE** *** **BEGINNING OF THIS ABOVE-ENTITLED ACTION:** Judge Kyle knew of the conflict and/or

should of known of the conflict, that his son was a PARTNER at the law firm that represented Movant PETTERS during all the charges within this action. In fact, *** paragraph 18 above offers the **EXACT TRANSCRIPT PAGES AS TO TESTIMONY OF HIS ATTORNEYS INVOLVEMENT IN PETTERS AND HIS COMPANIES AFFAIRS, INCLUDING THOSE CHARGED IN THE INDICTMENT.** See, IN RE KENSINGTON INT'L, LTD., 368 F.3d 289, 312-316 (3rd. Cir. 2004):

> "In the recusal context, we are satisfied that if there is to be a burden of disclosure, **THE BURDEN IS TO BE PLACED ON THE JUDGE TO DISCLOSE POSSIBLE GROUNDS FOR DISQUALIFICATION.** (citing cases) .... §455(a) 'has a **DE FACTO DISCLOSURE REQUIREMENT.**' .... (recognizing that recusal motion could have been avoided **IF JUDGE HAD DISCLOSED GROUNDS FOR RECUSAL TO PARTIES.**)."

Id. at 313-314.

Also see, LILJEBERG vs. HEALTH SERVICES ACQUISITION CORP., 486 U.S. 847, 869 (1988)

> "Finally, although a delay of 10 months after affirmance by the Court of Appeals would normally foreclose relief based on a violation of §455(a), in this case the **ENTIRE DELAY IS** *** **ATTRIBUTABLE TO JUDGE COLLINS' INEXCUSABLE FAILURE TO DISQUALIFY HIMSELF** on March 24, 1982; had he recused himself on March 24, **OR EVEN DISCLOSED LOYOLA'S INTEREST IN THE CASE AT THAT TIME, THE MOTION COULD HAVE BEEN MADE LESS THAN 10 DAYS AFTER ENTRY OF JUDGMENT."**

Id. at 869.

25. **PAGE 7:** Judge Kyle states, "Finally, Defendant also contends recusal is required under 28 U.S.C. §455(a) because my impartiality 'might reasonably be questioned,' but in support makes several puzzling arguments. For instance, he argues that my impartiality might reasonably be questioned because 'the first document [the Court] reviewed in this action was the **INDICTMENT AND THE INDICTMENT WAS NOT SIGNED BY THE GRAND JURY OR THE U.S. ATTORNEY.**' (Doc. No. 631 at 9) He also argues that the undersigned (1) 'allowed' him to proceed to trial when the Superseding Indictment contained an untimely charge (id. at 10) and (2) improperly amended the Superseding Indictment by allowing a **REDACTED VERSION, REMOVING** *** **REFERENCES TO DEFENDANTS' COMPANIES (WHICH WERE NOT ON TRIAL), TO GO TO THE JURY DURING DELIBERATIONS** (id. at 18)." The undersigned simply fails to understand how any of these matters suggests partiality or bias. .... Regardless, all of the

arguments **FAIL ON THE MERITS. FootNote 4." THIS IS NOT TRUE!** First, Movant Petters incorporates and restates all of his arguments under **SECTIONS 455(b)(5)(i) and 455(b)(5)(iii)** within his argument under **Section 455(a).**

26. **PAGE 8:** Movant Petters responds to **FootNote 4:** Movant incorporates and restates the above paragraph 25 here. First, the Court states, "First, while the **PUBLICLY AVAILABLE INDICTMENT** in this case (Doc. No. 79) **CONTAINS NO SIGNATURES** - the Court reviewed the **ORIGINAL INDICTMENT MAINTAINED BY THE CLERK OF THE COURT,** and confirmed it is signed by both the foreperson of the grand jury and an attorney for the government. In any event, signatures on an indictment "are a formality, and even the lack of signatures would not render an indictment invalid." U.S. vs. MORSE, 613 F.3d 787, 793 (8th Cir. 2010)." **THIS IS NOT TRUE!** This Court correctly offers U.S. vs. MORSE, at 793-94, as to the Eighth Circuit stating "The Federal Rules of Criminal Procedure state that **INDICTMENTS ARE TO BE SIGNED BY BOTH THE FOREPERSON OF THE GRAND JURY AND BY AN ATTORNEY FOR THE GOVERNMENT.** See, Fed. R. Crim. P. 6(c) ("The foreperson ... will sign all indictments."); Fed. R. Crim. P. 7(c)(1)("The
*** indictment ... must be signed by an attorney for the government.")" **RULE 6(f)** states, "A grand jury may indict only if at least 12 jurors concur. The grand jury - or its foreperson or deputy foreperson - **MUST RETURN THE INDICTMENT TO A MAGISTRATE JUDGE IN OPEN COURT.** ....":

> a. **THE DOCKET SHEET DOES NOT CONTAIN AN ENTRY** as to the concurrence of twelve (12) or more grand jurors authentication of the indictment, nor the indictment being **RETURNED BY THE GRAND JURY TO A JUDGE IN OPEN COURT.** See, Rule 6(f).

The Eighth Circuit **INCORRECTLY STATED IN MORSE,** at 793 "The signatures on the indictment, however, are a formality, and even the lack of signatures would not render an indictment invalid. Citing cases from the THIRD and SEVENTH CIRCUITS." The law of this Circuit - Eighth Circuit - requires the signatures of both the Grand Jury Foreperson and the U.S. Attorney. See, LITTLE vs. U.S., 524 F.2d 335, 336-337 (8th Cir. 1975), cert. denied, 96 S.Ct. 1125 (1976):

> "The **SIGNING OF AN INDICTMENT** is one step in the conduct

> of a criminal proceeding. Its function is to show that the attorney for the United States **JOINS WITH THE GRAND JURY INSTITUTING THE PROCEEDING.** U.S. vs. COX, 342 F.2d 167, 172 (5th Cir.)(, cert. denied, 381 U.S. 935 (1965). The broad grant of authority to conduct judicial proceedings must have included the authority to perform the essential step of consenting to the instruction of the proceedings." (emphasis added)

The Eighth Circuit agreed with the ruling of the Fifth Circuit in the above case U.S. vs. COX, 342 F.2d 167, 172 (5th Cir. 1965), that an **INDICTMENT REQUIRES THE SIGNATURE OF THE GOVERNMENT ATTORNEY:**

> "Because, as we conclude, the signature of the Government attorney is necessary to the validity of the indictment and the affixing or withholding of the signature is a matter of executive discretion which cannot be coerced or reviewed by the courts, the contempt order must be reversed."

This Court's cite to U.S. vs. MORSE is invalid, as the Eighth Circuit has not overruled LITTLE vs. U.S. with an en banc ruling. Movant Petters requests this Court to provide an **"AFFIDAVIT" FROM A JUDGE THAT RECEIVED THE SIGNED INDICTMENT**

*** **ON JUNE 3, 2009 FROM THE GRAND JURY IN OPEN COURT, AS PER THE FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 6(f).**

27. **PAGE 8,** Petters responds to the SECOND part of **FootNote 4:** This Court states, "**SECOND,** Count 10 of the Superseding Indictment was not time-barred. That count charged mail fraud occurring on June 3, 2004 and the Superseding Indictment was returned on June 3, 2009 - the final day of the **5-YEAR LIMITATIONS PERIOD UNDER 18 U.S.C. §3282.** See, U.S. vs. GUERRO, 694 F.2d 898, 901 (2nd Cir. 1982) (limitations period begins to run on day **AFTER OFFENSE IS COMMITTED,** and therefore expires on five-year anniversary offence); U.S. vs. JOSEPH, 765 F. Supp. 326, 328-30 (E.D. La. 1991)(same). **THIS IS NOT TRUE.** A review JOSEPH, at 329, informs us that the argument in this action is:

> "Whether an indictment subject to the five (5) year statute of limitations, filed on the anniversary date of the crime five (5) years **AFTER** the crime, is within the statutory five (5) year limitation period stated within Title 18 U.S.C. §3282?" Id. at 327.

This Court cites U.S. vs. GUERRO, which is not applicable to Movant Petters, as it

involves **CONSPIRACY CHARGES**. id. at 329.

> "Confusion arises in applying a limitation period to a continuing offense such as a conspiracy or a RICO violation because the crime is not completed without the occurrence of an overt or predicate act(s)."
>
> "In a **NON-CONTINUING OFFENSE** [**As Count 10 in this action**], the 'event' constitutes the whole crime and, and thus, **TOLLS THE LIMITATION PERIOD.**"

Id. at 329.

28. This Court argues that the better interpretation of **Title 18 U.S.C. §3282** is the limitations period **BEGINS TO RUN ON THE DAY FOLLOWING THE DAY THE CRIME WAS COMMITTED.**

29. Movant Petters maintains that the **DATE OF THE CRIME IS INCLUDED IN THE LIMITATIONS PERIOD, AND THAT AN INDICTMENT FILED ON THE FIFTH ANNIVERSARY IS ONE (1) DAY TOO LATE.**

30. The June 3, 2009, "SUPERSEDING INDICTMENT" in this above-entitled action clearly states that **COUNT 10, IS IN VIOLATION OF TITLE 18 U.S.C. §1343 and 2, 'WIRE FRAUD'.** Count 10 states:

> "10 ... June 3, 2004 ... Facsimile from PCI in Minnesota to Lancelot Investors Fund L.P. in Illinois.

31. Title 18 U.S.C. §3282, states:

> "Except as otherwise expressly provided by the law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the **INDICTMENT IS FOUND** OR the information is **INSTITUTED WITHIN FIVE (5) YEARS NEXT AFTER SUCH OFFENSE HAVE BEEN COMMITTED.**"

32. **RULE OF LENITY:** The RULE OF LENITY is a rule of **STATUTORY CON-**

*** **STRUCTION THAT PROVIDES THAT AMBIGUITIES IN CRIMINAL STATUTES MUST BE RESOLVED IN FAVOR OF LENITY. Dunn v. U.S.**, 442 U.S. 100, 112-13 (1979); **CLEVELAND vs. U.S.**, 531 U.S. 12, 25 (2000).

33. This above issue, "Whether the date of the crime is included in the limitation period", is an issue of first impression as to 18 U.S.C. §3282 in the Eighth Circuit and must be resolved in **FAVOR OF LENITY TO MOVANT PETTERS.** The

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INDICTMENT FILED ON THE FIFTH ANNIVERSARY IS ONE (1) DAY TOO LATE!

34. **PAGE 8** - Petters responds to the THIRD part of **FootNote 4:** This Court states, "Third, the Court did not improperly amend the Superseding Indictment
*** by removing references to Defendant's companies, which were not on trial. Although a judge may not alter an indictment by **BROADENING** the charges against a defendant, he may safely 'withdraw[] or ignore[] independent and unnecessary allegations in [an] indictment[]' without grand jury involvement. U.S. vs. MILLER, 471 U.S. 130, 144 (1985); accord, e.g., id. at 136 ('A part of the indictment unnecessary to an independent unnecessary to and independent of the allegations of the offense proved may normally be treated as a useless averment that may be ignored.')" **THIS IS NOT TRUE.**
*** Movant Petters believes that this Court **IMPROPERLY AMEND THE SUPERSEDING INDICTMENT BY REMOVING REFERENCES TO DEFENDANT'S COMPANIES "PGW" AND "PCI" "BOTH STATED IN THE INDICTMENT".** The indictment was changed and amended in a conversation held in Judge Kyles, private chambers, while the jury was deliberating on Movant Petters fate, at the close of his trial. The indictment in this action clearly listed the following defendants:

a. Thomas Petters;
b. PGW (Movant Petters holding company with most of the assets);
c. PCI (the main fraud).

35. The following quotes from Movant Petters criminal trial transcripts (pages 3491-3517), USA vs. PETTERS, et al., 08-CR-364-RHK-AJB, clearly indictate the Court is struggling for an answer to the error made. The following excerpts show there is a problem with the **INDICTMENT:**

THE JURY NOTE TO JUDGE KYLE:	**"WHY IS PGW & PCI BOTH STATED IN THE INDICTMENT?"** (page 3493 Line 16 & 17).
Mr. Dixon:	Well we have **AMENDED THE INDICTMENT**, all of us, in the context of trying to **REDACT OUT THE COMPANIES THAT ARE DEFENDANTS.** (Page 3496, Line 1-4)
Mr. Hopeman:	The only entity that can amend an **INDICTMENT IS THE UNITED STATES GRAND JURY, WE CANNOT AMEND IT AND THE COURT CANNOT AMEND IT.** (Page 3496, Line 10 thru 12)

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Judge Kyle: Well **THE INDICTMENT THAT WENT TO THE JURY, HOWEVER, DOES NOT SHOW ANYBODY BUT MR. PETTERS AS A DEFENDANT. AND WE CAN'T CHANGE THAT.** That's what we submitted. That was an agreement of all parties. (Page 3496, Lines 13 thru 17)

Judge Kyle: But there is no answer to this question there? (Page 3497, Lines 17 and 18).

Mr. Marti: And I think the safe answer for the court is just to say refer them back to the instructions that the court has already given and refer back to their recollection of what the evidence is in the case. (Page 3502, Lines 17 thru 20)

JUDGE KYLE: But I don't want to ask them what they really meant by it either, I'm not going to do that. (Page 3503, Lines 3 thru 5)

Mr. Engh: Our argument is that they are critical statements and critical inference in the **INDICTMENT** that's false. (page 3503, Lines 13 thru 16)

Judge Kyle: Well where is the **INDICTMENT**? Do we have that? **IS THIS THE REDACTED ONE?** (Page 3505, Lines 23 thru 25)

Judge Kyle: And I don't think there is an answer to this question, a nice, neat, clean answer that is both accurate and not objectionable by one side or the other. (page 3505, Line 23 and 24)

Judge Kyle: They are not going to like it (the answer), **BUT THEY WILL FORGET ABOUT IT.** (Page 3508, Lines 23 and 24)

Judge Kyle: Is anybody concerned about what to tell the press out there with us in here? (Page 3508, Lines 21 and 22)

Mr. Hopeman: I'm concerned about what to tell them and not having to lie to them (referring to the media waiting outside the door) I don't want to lie to them. (Page 3508, Lines 23 and 24)

Mr. Hopeman: And I said well we don't know (again referring to the media). So, I sort of didn't tell them the truth. (Page 3509, 6 and 7)

36. **THE $64,000.00 QUESTIONS IN THIS ABOVE MATTER ARE:**

a. **WHEN DID DEFENDANT'S "PGW" AND "PCI" FILE A MOTION FOR SEVERANCE FROM MOVANT PETTERS "INDICTMENT"?**

b. **WHETHER DEFENDANT'S "PGW" AND "PCI" ARE ENTITLED TO A SEPARATE TRIAL, THE COURT MUST DECIDE WHETHER JOINDER WAS PROPER UNDER RULE 8 AND WHETHER JOINDER IS LIKELY TO HAVE A "SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT."**

c. **WHEN SEVERANCE IS REQUIRED ONLY WHEN THERE IS A SHOWING THAT "REAL PREJUDICE" WILL RESULT FROM A JOINT TRIAL.** U.S. vs. WILLIAMS, 923 F.2d 76, 78 (8th Cir. 1990). **WHY DIDN'T THE COURT OR GOVERNMENT MAKE A SHOWING OF "REAL PREJUDICE"? THE GOVERNMENT, MOVANT'S ATTORNEY'S, JUDGE KYLE, NOR ANY OTHER PARTY HAS ESTABLISHED THAT THE DISPARITY IN THE QUANTITY OF THE EVIDENCE COULD NOT BE EFFECTIVELY HANDLED BY APPROPRIATE INSTRUCTIONS FROM THE COURT.**

37. Judge Kyle claims **IMPROPER JOINDER OF DEFENDANTS "PETTERS", "PGW" AND "PCI" OCCURRED DUE TO ALLEGATIONS ON THE FACE OF THE INDICTMENT.** See, U.S. vs. MASSA, 740 F.2d 629, 644 (8th Cir. 1984). This is very confusing to Movant Pettters as a facial reading of the **INDICTMENT** provides a compelling basis for concluding that the charges arise from a series of acts and transactions "connected together or constituting parts of a common scheme or plan." Fed.R.Crim.P. 8(a). There is, on the face of Movant Petters **INDICTMENT**, an integration and dependency of the counts. The substantive wrongful activities alleged to be undertaken by **DEFENDANTS "PETTERS", "PGW" AND "PCI"** in those various business forms is claimed in the **"INDICTMENT"** to be directed at the singular purpose of **SELLING ILLEGAL "PROMISSORY NOTES".** This unity or commonality of the various counts sustains their joinder in a **SINGLE INDICTMENT.** SCHAFFER vs. U.S., 362 U.S. 511 (1960).

38. **IF MOVANT PETTERS WANTED TO MOVE FOR SEVERANCE FROM "PGW" AND "PCI" WHAT WOULD OF BEEN REQUIRED? -** Defendants usually move for severance pursuant to **Rules 8(d) and 14 of the Federal Rules of Criminal Procedure.** In determining whether a defendant is entitled to a **SEPARATE TRIAL**, the court must decide whether joinder was proper under **RULE 8** and whether joinder is likely to have a "substantial and injurious effect or influence in determining the jury's verdict." U.S. vs. LANE, 474 U.S. 438, 449 (1986), quoting KOTTEAKOS vs. U.S., 328 U.S. 750 (1946).

39. **JOINDER UNDER RULE 8(b):** Rule 8(b) requires that there be a

factual interrelationship among all the joined DEFENDANTS AND COUNTS. E.g., U.S. vs. BLEDSOE, 674 F.2d 647, 656-57 (8th Cir. 1981). In determing **BEFORE TRIAL** whether or not **JOINDER WAS PROPER**, the court must see whether this factual interrelationship is alleged in the **INDICTMENT**. id. at 655; U.S. vs. ANDRADE, 788 F.2d 521, 529 (8th Cir. 1985); see also, U.S. vs. JONES, 880 F.2d 55, 62-63 (8th Cir. 1989).

40. **RULE 14(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE:** When defendants have been properly joined under Rule 8(b), a district court should grant severance under Rule 14 **ONLY** if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants. ZAFIRO vs. U.S., 506 U.S. 534, 539 (1993). "There is a preference in the federal system for joint trials fo defendants who are **INDICTED TOGETHER.**" ZAFIRO, 506 U.S. at 537; U.S. vs. SHIVERS, 66 F.3d 938, 939 (8th Cir. 1995).

*** 41. **"RARELY, IF EVER WILL IT BE IMPROPER FOR CO-CONSPIRATORS TO BE TRIED TOGEATHER."** U.S. vs. STEPHENSON, 924 F.2d 753, 761 (8th Cir. 1990).

42. **"WHAT IS REQUIRED FOR REQUIRED FOR SEVERANCE IS A SPECIFIC SHOWING THAT A JURY COULD NOT BE REASONABLY EXPECTED TO COMPARTMENTALIZE THE EVIDENCE."** See, U.S. vs. HIVELY, 437 F.3d 752, 765 (8th Cir. 2005). Judge Kyle nor anyone else has made the required showing in this action. There is no reason a jury could not recognize, with appropriate instructions, what evidence is relevant and material to each of the defendants in this action - **MOVANT PETTER, "PGW" and "PCI".**

43. **SEVERANCE IS REQUIRED ONLY WHEN THERE IS A SHOWING THAT "REAL PREJUDICE" WILL RESULT FROM A JOINT TRIAL. THIS IS NOT THE CASE HERE!!!** See, U.S. vs. WILLIAMS, 923 F.2d 76, 78 (8th Cir. 1990).

CONCLUSION:

44. WHEREFORE, Movant Petters respectfully moves the Honorable Judge Richard H. Kyle to disqualify himself from this action, for all the foregoing

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reason set forth within this "MOTION TO ALTER OR AMEND JUDGMENT, PURSUANT TO RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE."

45. **EVIDENTIARY HEARING REQUESTED:** In TOWNSEND vs. SAIN, 372 U.S. 293, 312-13 (1963), the Supreme Court held that the district court **MUST** hold an evidentiary hearing (1) if the prisoner alleges facts that, if true, would entitle him to relief; and (2) the relevant facts have not yet been reliably found after a full and fair hearing.

46. I THOMAS JOSEPH PETTERS, declare under penalty of perjury that the foregoing is true and correct pursuant to 28 U.S.C. §1746.

EXECUTED ON: MARCH 3, 2014.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA, Plaintiff, v. 1. THOMAS JOSEPH PETTERS dba PETTERS COMPANY INC., PCI and PETTERS GROUP WORLDWIDE, LLC; 2. DEANNA COLEMAN aka DEANNA MUNSON; 3. ROBERT WHITE; 4. JAMES WEHMHOFF; 5. LARRY REYNOLDS dba NATIONWIDE INTERNATIONAL RESOURCES aka NIR; 6. MICHAEL CATAIN dba ENCHANTED FAMILY BUYING COMPANY; 7. FRANK E. VENNES JR. dba METRO GEM FINANCE, METRO GEM INC., GRACE OFFERINGS OF FLORIDA LLC, METRO PROPERTY FINANCING, LLC, 38 E. ROBINSON, LLC, 55 E. PINE, LLC, ORLANDO RENTAL POOL, LLC, 100 PINE STREET PROPERTY, LLC, ORANGE STREET TOWER, LLC, CORNERSTONE RENTAL POOL, LLC, 2 SOUTH ORANGE AVENUE, LLC, HOPE COMMONS, LLC and METRO GOLD, INC., Defendants.	)	Civil No. 08-5348 –ADM/JSM

AFFIDAVIT OF DOUGLAS A. KELLEY IN SUPPORT OF THE MOTION TO APPROVE SETTLEMENT AGREEMENT BY AND BETWEEN DOUGLAS A. KELLEY, AS RECEIVER AND AS CHAPTER 11 TRUSTEE, AND FREDRIKSON & BYRON, P.A. AND FOR ENTRY OF AN ORDER BARRING CERTAIN CLAIMS

EXHIBIT C.

23.

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

I, DOUGLAS A. KELLEY, in my capacity as the Court-appointed Receiver ("Affiant"), state and allege as follows:

1. I am the Court-appointed Receiver (the "Receiver") of the assets of the above-captioned defendants, their affiliates and subsidiaries pursuant to this Court's Order for Entry of Preliminary Injunction, Order Appointing Receiver and Other Equitable Relief dated October 6, 2008, as subsequently amended on December 8, 2008 (the "Receivership Order"). [Dkt. 127].

2. In my capacity as the Receiver of Thomas J. Petters ("Petters") and affiliated entities, I have entered into a Settlement Agreement by and between me, in my capacity as Receiver and as the Chapter 11 Trustee ("Trustee") of Petters Company, Inc. ("PCI"), Petters Group Worldwide, LLC ("PGW") and affiliated debtors in the jointly-administered bankruptcy cases captioned *In re Petters Company, Inc., et al.*, currently pending before the United States Bankruptcy Court, District of Minnesota (the "Bankruptcy Court"), BKY Case No. 08-45257 (Kishel, Judge) (the "Bankruptcy Cases" and the "Bankruptcy Estates"), and Fredrikson & Byron, P.A. ("F&B" and, together with the Receiver and Trustee, the "Parties"), fully and finally resolving the claims and disputes between the Parties A true and correct copy of the Settlement Agreement is attached hereto as Exhibit A. The estates of the debtors in the Bankruptcy Cases (the "Debtors") and the remaining estates and entities managed, administered and/or

EXHIBIT C.

24.

controlled by me as Receiver and/or the Trustee (the "Receivership Entities") are collectively referred to herein as the "Petters Entities."

3. Fraudulent schemes, and particularly Ponzi schemes, pit victim against victim because, in most instances, and as is the case here, the funds recovered are not sufficient to satisfy the claims of all of the numerous creditors and victims. Many of the victims and creditors of Petters' Ponzi Scheme have asserted claims against assets subject to multiple proceedings pending before both this Court and the Bankruptcy Court. Instead of competition for such assets, cooperation and coordination will maximize the recovery of assets and distributions to creditors and victims while minimizing the risks, costs and expenses of administering the Receivership Entities and the Bankruptcy Estates.

A. F&B Services and Claims

4. Prior to the bankruptcy filings, F&B represented Petters and the Petters Entities, which include the Debtors, for approximately fifteen years as outside legal counsel engaged on specific matters. During the course of its representation, F&B provided various legal services including business transactional work, such as real estate, corporate, finance and securities matters, as well as litigation and other specific matters. During the course of its representation of Petters and the Petters Entities, F&B asserts it provided standard form legal opinions with respect to a number of transactions and received payments from the Debtors in connection with the services that were provided. Petters and the Petters Entities paid F&B approximately $8 million during the course of F&B's representation.

EXHIBIT C.

25.

5. As Receiver and Trustee, I devoted significant resources to the investigation of potential claims and causes of action against third parties arising from Petters' Ponzi scheme that was designed and orchestrated principally by Petters and the business organizations that he controlled. Claims that have been the subject of investigation have included those against professionals that have represented the Debtors prior to the bankruptcy filings and during the course of the Ponzi scheme.

6. In June of 2009, the Susman Godfrey LLP law firm ("Susman"), with offices located in Seattle, Washington, independently investigated factual and legal issues impacting the determination of whether the Petters Entities possessed causes of action against F&B. Susman performed a comprehensive investigation that was conducted over a period of approximately four months. Susman's investigation was conducted with the cooperation of F&B, and included interviews of fact witnesses and reviews of thousands of documents (including billing records, voicemails, e-mails and files produced by F&B, documents maintained by the Receiver on the Stratify database, and records associated with the federal government's criminal cases against Petters, PCI and PGW). Susman performed a detailed analysis of claims against F&B and its anticipated defenses and produced a privileged and confidential report for me and my legal counsel.

7. The Freeborn & Peters, LLP law firm ("Freeborn"), with offices located in Chicago, Illinois, performed a supplemental investigation of the relevant facts, which included a review of additional discovery materials and deposition transcripts of a number of F&B personnel that provided testimony in connection with various adversary proceedings and the preparation of a detailed analysis of claims and anticipated defenses.

EXHIBIT C.

26.

4.

F&B cooperated in the investigation by making additional records and potential fact witnesses available to Freeborn. Freeborn also produced a privileged and confidential report for the benefit of me, as Trustee, and my legal counsel.

8. Petters' Ponzi Scheme has given rise to numerous claims and causes of action on behalf of creditors, victims, the Debtors and the Receivership Entities. As Trustee, I commenced more than 200 adversary proceedings seeking to avoid and recover fraudulent and preferential transfers. Petters' Ponzi Scheme has also given rise to numerous claims and causes of action asserted by me, as Trustee and Receiver, against F&B resolved by the Settlement Agreement that is the subject of this Motion. These claims arise from a common set of facts. As this Court is aware, a number of the legal issues raised by these claims, causes of action and defenses are unsettled, with the complexity increased by the size of the Ponzi Scheme. In addition, the legal issues implicated by the claims asserted against F&B relate to matters involving legal services that were rendered by F&B prior to the commencement of the Bankruptcy Cases which, if litigated, would likely necessitate costly expert testimony. Resolution of unsettled legal issues as well as the fact-intensive inquiry that will be necessary to resolve the issues in dispute will require extensive discovery and dispositive motions or potential trial.

9. Upon the conclusion of the Susman and Freeborn reviews and analyses, I, as Trustee and Receiver, asserted legal and equitable claims against F&B relating to its representation of Petters, the Debtors and the Receivership Entities and made demands upon the firm and its insurer for payment. The claims were for breach of fiduciary duty,

EXHIBIT C.

27.

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breach of contract, aiding and abetting breach of fiduciary duty, aiding and abetting fraud, civil conspiracy, unjust enrichment and legal malpractice. As Trustee, I also asserted claims for disgorgement of fees that the firm had received as fraudulent and preferential transfers that the Trustee contended were avoidable under Chapter 5 of the Bankruptcy Code and under other relevant state or federal law, including claims under § 547 to recover allegedly preferential payments. The claims and demands for payment were asserted in the context of confidential Rule 408 settlement discussions and no adversary proceeding or other litigation has been commenced to date. The Parties entered into a series of agreements consensually tolling the time period within which I was required to commence such actions in order to permit the Parties to continue to evaluate their claims and defenses and explore the prospect of settlement. Although the investigation conducted by Susman and Freeborn did not uncover evidence of actual knowledge of the fraud by any person employed by F&B, there were a number of red flags that should have alerted F&B to the possibility that the business allegedly conducted by Petters was fraudulent.

10. F&B denied, and continues to deny, any and all liability and has asserted a number of defenses to the asserted claims. The firm states that it represented Petters and some of the Petters Entities, including Sun Country, Polaroid and Fingerhut, in the ordinary course. F&B maintains that it is a reputable service provider and that its professionals at all times believed that Petters was running a legitimate business. The firm asserts that the information considered red flags by the Trustee was inconsequential and without greater meaning and/or was known to investors and others. F&B further

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asserts that, in the weeks before the FBI raid when the firm learned of the nature and magnitude of the problems within Petters, it advised Petters that an independent internal investigation should be performed to identify the problems and that, if warranted, the results should be reported to the U.S. Attorney's Office. The firm states that its advice was not followed. F&B also asserts that, upon learning of the wrongdoing that was the source of the problems, the firm withdrew from any Petters representation.

B. The Settlement Agreement

11. The Parties ultimately determined that engaging in a process of mediation of their respective claims and defenses before additional and substantial resources were dedicated to litigation would, if successful, avoid the uncertainty, further expenses and distraction associated with protracted litigation. The Parties therefore voluntarily participated in confidential mediation with Richard B. Solum (an experienced mediator and former judge) on March 7, 2012. As a result of a negotiation process that occurred during the course of the formal mediation process, the Parties reached a binding settlement under which we have agreed to fully and finally settle and resolve all claims between us and our affiliates on the terms and subject to the conditions set forth in the Settlement Agreement.

12. The Settlement Agreement is based on an analysis and assessment of the claims and defenses, the prospects of a materially superior recovery associated with the expenditure of additional funds, and the belief that a settlement reached as part of the formal, arm's-length mediation process is fair and equitable.

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13. The settlement reached contemplates a complete resolution of all claims and potential claims of the Receiver and the Trustee against F&B. As part of the release given by F&B, the Bankruptcy Estates and the Receivership Entities will obtain the benefit of, among other things, a complete release that includes a release from any and all claims, demands, debts, agreements, rights of subrogation, rights of indemnification, rights of reimbursement, rights to advances, rights of and rights to restitution as well as any right of and rights to remission or to distribution on account of any forfeited assets. In addition, F&B waives the right, if any, to participate in and receive any distribution of assets or payment of funds in connection with any process or proceeding (whether civil, criminal, *in rem*, supplemental, ancillary or otherwise) based on, arising out of or relating to restitution or the remission of or distribution on account of any forfeited assets in connection with Petters, the Receivership or the Receivership Proceeding.

14. In agreeing to these settlements, I have evaluated the claims against and potential defenses of F&B, the economic realities of the claims being settled, the costs and risks of further litigation, the prospects of a materially superior recovery associated with the expenditure of additional funds and the belief that the settlement reached as part of the arm's-length mediation process is fair and equitable.

15. The Settlement Agreement provides that the net proceeds from the Settlement Payment, after reimbursing the receivership $656,612.30 for costs and expenses incurred by the Receiver in connection with the investigation of claims against F&B as well as the Bankruptcy Estates for professional fees and costs incurred by the Trustee, will be paid to the Trustee to be allocated between the PCI and PGW Bankruptcy

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SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT ("***Agreement***") is made and entered into as of the latest date that a party hereto has executed and delivered this Agreement to the other party as reflected on the signature page hereto, by and among: (a) Douglas A. Kelley ("***Trustee***" or "***Receiver***"), in his capacity as Receiver and as Chapter 11 Trustee for the estate of Petters Company, Inc. and the estates of the related, jointly-administered entities, Petters Group Worldwide, LLC; PC Funding, LLC; Thousand Lakes, LLC; SPF Funding, LLC; PL Ltd., Inc.; Edge One LLC; MGC Finance, Inc.; PAC Funding, LLC; and Palm Beach Finance Holdings, Inc. (each, a "***Debtor***" and, collectively, "***Debtors***"), and (b) the Debtors, on the one hand; and (c) Fredrikson & Byron, P.A. ("***F&B***") on the other hand (collectively, the "***Parties***").

WHEREAS, petitions for relief under Chapter 11 of the Bankruptcy Code were filed on behalf of Petters Company, Inc. and Petters Group Worldwide, LLC on October 11, 2008; petitions for relief under Chapter 11 of the Bankruptcy Code were filed on behalf of PC Funding, LLC; Thousand Lakes, LLC; SPF Funding, LLC; PL Ltd. Inc.; Edge One, LLC and MGC Finance, Inc. on October 15, 2008; a petition for relief under Chapter 11 of the Bankruptcy Code was filed on behalf of PAC Funding, LLC on October 17, 2008; and a petition for relief under Chapter 11 of the Bankruptcy Code was filed on behalf of Palm Beach Finance Holdings, Inc. on October 19, 2008;

WHEREAS, the Trustee has asserted claims against F&B but has refrained from commencing an adversary proceeding against F&B;

WHEREAS, F&B denies any and all liability;

WHEREAS, the Parties conducted a confidential mediation with Retired Judge Richard B. Solum on March 7, 2012;

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WHEREAS, the Parties have concluded that this Agreement will avoid the uncertainty, further expense, inconvenience and distraction of protracted litigation, and acknowledge that they are receiving a substantial and valuable benefit when the settlement herein is consummated; and

WHEREAS, it is now the desire and intention of the Parties to settle and resolve all claims between the Parties and their affiliates.

NOW, THEREFORE, it is stipulated, consented to and agreed, by and among the Parties as follows:

1. The foregoing recitals are incorporated into the operative provisions of this Agreement and are made a part hereof.

2. For the purposes of this Agreement:

A. The term "***Claims***" shall mean all liabilities, judgments, rights, claims, cross-claims, counterclaims, third-party claims, demands, suits, matters, obligations, damages, debts, losses, costs, actions and causes of action, of every kind and description, held by any Debtor Releasor, including but not limited to those pertaining to any dealings with, loans to or investments in the Debtors, arising under common law, rule, regulation or statute, whether arising under state or federal law, whether presently known or unknown that relate in any manner whatsoever to the Debtors.

B. The term "***Debtor Releasees***" shall mean: (i) the Trustee and the Receiver (but only in his capacity as the Trustee and as a representative of the bankruptcy estates of the Debtors and as Receiver and not in any other capacity), and his successors and assigns (but only to the extent of any such successor(s)' and assign(s)' rights to serve in the capacity of the Trustee as a representative of the Debtors or as Receiver and not in any other capacity); (ii) the Debtors

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and their respective current and former parents, subsidiaries and affiliates, predecessors, successors and assigns of any of the foregoing; (iii) the Debtors' bankruptcy estates and their respective successors and assigns; and (iv) any other person or entity that claims by, through, under, or on behalf of any of the foregoing.

C. The term "***Debtor Releasors***" shall mean (i) the Trustee and the Receiver (but only in his capacity as the trustee and as a representative of the bankruptcy estates of the Debtors and as Receiver and not in any other capacity), and his successors and assigns (but only to the extent of any such successor(s)' and assign(s)' rights to serve in the capacity of the Trustee as a representative of the bankruptcy estates of the Debtors or as Receiver and not in any other capacity); (ii) the Debtors and their respective current and former parents, subsidiaries and affiliates, predecessors, successors and assigns of any of the foregoing; (iii) the Debtors' bankruptcy estates and their respective successors and assigns; and (iv) any other person or entity that claims, or might claim, by, through, under, on behalf of or for the benefit of any of the foregoing.

D. The term "***F&B Releasees***" shall mean F&B together with its current and former parents, subsidiaries and affiliates, all of its and their respective current and former partners, shareholders, directors, officers, employees, members, managers, agents, attorneys and insurers, and the heirs, executors, administrators, trustees, beneficiaries, predecessors, successors and assigns of any of the foregoing.

E. The term "***F&B Releasor***" shall mean F&B together with its current and former parents, subsidiaries and affiliates, all of its and their respective current and former partners, shareholders, directors, officers, employees, members, managers, agents, attorneys and insurers, and the heirs, executors, administrators, trustees, beneficiaries, predecessors, successors

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and assigns of any of the foregoing; and any other person or entity that claims by, through, under, or on behalf of any of the foregoing.

3. The Parties acknowledge that this Agreement is a compromise and settlement of a controversy. F&B does not admit, and expressly denies, any liability.

4. This Agreement constitutes the entire agreement and understanding between the Parties with respect to the subject matter hereof and there are no other stipulations, agreements, representations, or warranties other than those specifically set forth herein. All prior agreements and understandings between the Parties concerning the subject matter hereof shall, on the Effective Date (as defined below), be superseded by the terms of this Agreement.

5. In full and final settlement of the Debtor Released Claims (as defined below), F&B shall pay (or cause to be paid) the sum of $13.5 million (the "***Settlement Payment***") within 20 business days after the Effective Date. The Settlement Payment shall be made *via* wire transfer or check pursuant to written instructions to be provided by the Trustee to F&B.

6. The Trustee and the Receiver, with the cooperation of F&B, shall seek the entry of final, non-appealable orders (the "***Orders***") by the United States Bankruptcy Court for the District of Minnesota ("***Bankruptcy Court***") and the United States District Court for the District of Minnesota ("***District Court***") in the Debtors' bankruptcy and receivership cases substantially in the form of Exhibit 1, which approve this Agreement. The Orders shall include a provision (such provision referred to herein as the "***Bar Order***") that bars and permanently enjoins the prosecution of: (i) any and all Claims against any F&B Releasee by any and all Debtor Releasors which directly or indirectly arise from or relate to, in whole or in part, any services rendered by any F&B Releasee at any time to any Debtor Releasor or relating to the Petters Ponzi Scheme or the Debtor Releasors, which include all Claims that could be asserted by Douglas A. Kelley, in

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