UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MINNESOTA

United States of America,	*	
Plaintiff,	*	Criminal No. 08-364 (RHK)
v.	*	Civil No. 13-1110 (RHK)
Thomas Joseph Petters,	*	
Defendant.	*	Affidavit Form

Motion for Issuance of Certificate of Appealability

and/or

Writ of Mandamus

Issue: Routes of appellate review to challenge Judge Kyle's refusal to disqualify himself during Defendant Petters' § 2255 motion on March 11, 2014, pursuant to Fed. R. Civ. P. 59(e).

COMES NOW Defendant Thomas Joseph Petters, **pro se**, with the assistance of his jailhouse lawyer John Gregory Lambros, **Munz v Nix**, 908 F.3d 267, 268 Footnote 3 (8th Cir. 1990)(Jailhouse lawyer has standing to assert rights of inmates who need help); **Bear v Kautzky**, 305 F.3d 802, 805 (8th Cir. 2002), and moves this Honorable Court for the issuance of a Certificate of Appealability (COA), pursuant to the District Court's Order issued on March 11, 2014, by the United States District Judge Richard H. Kyle, in this above-entitled action, which denied Petters' Rule 59(e) motion requesting Judge Kyle's recusal and disqualification in this action.

Petters believes he needs a COA to appeal the denial of a Rule 59(e) motion in a §2255 habeas proceeding. As this court knows, a COA is required to appeal from the final order in a proceeding under § 2255. 28 U.S.C. 2253(c)(1)(B).

Likewise, the COA requirement under 28 U.S.C. § 2253(c)(1) may not be circumvented through creative pleading. A COA is required to appeal the denial of **any motion that effectively or ultimately seeks habeas corpus or § 2255 relief.** See, **U.S. v Lambros**, 404 F.3d 1034, 1036-37 (8th Cir. 2004) ("Because Lambros' Rule 59(e) motion, just like his previous Rule 60(b) motions, sought ultimately to resurrect the denial of his earlier § 2255 motion, we hold that a certificate of appealability is required for the present appeal").

Petters' jailhouse lawyer Lambros understands that the **Writ of Mandamus** is a proper means for appellate review of a district court's refusal to disqualify pursuant to 28 U.S.C. § 455 et al. However, this may not be the correct procedure in this action as most aggrieved parties challenging a judge's refusal to disqualify seek interlocutory review via mandamus, reasoning that, at least in some cases, the damage to public confidence in the justice system (or perhaps to the litigants) would not be undone by postjudgment appeal. See, **Liddell v Board of Education**, 677 F.3d 626, 643 (8th Cir. 1982); **In re Sch. Asbestos Litig.**, 977 F.2d 764, 776 (3rd Cir. 1992) ("While review after final judgment can (at a cost) cure the harm to a litigant, it cannot cure the additional, separable harm to public confidence that § 455 is designed to prevent").

Jurisdictional Statement

1. On or about May 10, 2013, Petters' attorney Steven J. Meshbesher filed a motion to vacate or set aside sentence pursuant to 28 U.S.C. § 2255.

2. The Honorable Richard H. Kyle **denied** Petters' § 2255 on December 5, 2013.

3. **December 30, 2013**: Petters filed the following motions dated December 28, 2013:

a. Motion to Disqualify the Honorable Judge Richard H. Kyle in this action. Defendant Petters requests recusal of Judge Kyle pursuant to 28 U.S.C. §§ 455(a), (b)(5)(i), and (b)(5)(iii). Petters was prjudiced. 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 Fed. R. Civ. P. 59(e). See, Doc. No. 630.

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

5. Petters responded to the government and also filed a "Motion for Bail" on January 15, 2014.

6. The Honorable Richard H. Kyle issued his Memorandum Opinion and Order as to Petters' Motion to Alter and Amend Judgment Pursuant to Rule 59(e) (Doc. No. 630) and **Motion to Disqualify the Honorable Judge Richard Kyle** (Doc. No. 631) on February 10, 2014.

7. Petters filed a Motion to Alter or Amend Judgment of This Court's "Memorandum Opinion and Order" filed February 10, 2014, pursuant to Rule 59(e) on March 3, 2014.

8. Judge Kyle **denied** Petters' Rule 59(e) motion on March 11, 2014 as to the request for Judge Kyles' recusal and disqualification in this action.

9. Rule 59(e) motions toll the time to appeal. See, Fed. R. App. P. 4(a)(4)(A)(iv). The time for filing an appeal begins to run anew from the date this Court rules on the motion. Also, an appeal from the denial of a Rule 59(e) motion brings up the entire underlying judgment for review. See, **Foman v Davis**, 371 U.S. 178, 181-82 (1962).

10. Notice of Appeal must be filed withing 60 days from the entry of final order because the United States is a party in a section 2255 proceeding. See, Fed. R. App. P. 4(a)(1)(B). Petters has attached a Notice of Appeal to this COA.

11. **Certificate of Appealability**: Prisoners seeking to appeal a § 2255 proceeding must also obtain a COA either from the district court or the court of appeals. 28 U.S.C. § 2253(c)(1)(B); Fed. R. App. P. 22(b)(1).

12. An application for a COA must be first considered by the district court. See, Fed. R. App. P. 22(b)(1). See, **U.S. v Mitchell**, 216 F.3d 1126, 1129-30 (D.C. Cir. 2000) (collecting cases). If this Court denies Petters' COA as to some or all the issues, Petters requests a COA on those denied issues by the Court of Appeals. Petters understands he receives two (2) bites at the apple, one with this Court, and if that is unsuccessful, another before a circuit judge. See, **Jones v U.S.**, 224 F.3d 1251, 1255 (11th Cir. 2000).

Statement of the Case

13. In December 2008, a federal grand jury returned an indictment against Thomas Petters, PCI and PGW on charges of mail fraud, wire fraud, money laundering, and conspiracy to commit the same offenses. A superseding indictment was issued by the grand jury on June 3, 2009, that expanded the existing charges against the same defendants. The trial court redacted the indictment that was given the jury during deliberations to exclude defendants PCI and PGW illegally after the close of trial. **The jury was shown a unique indictment, different from the indictment shown everyone else, including Petters himself.** Petters was convicted of the twenty (20) charges against him and sentenced to fifty (50) years imprisonment. Petters' direct appeal was denied. See, **U.S. v Petters**, 663 F.3d 375 (8th Cir. 2011). The Supreme Court denied Petters' petition for certiorari.

14. Petters restates and incorporates paragraphs one (1) thru eight (8) above, as to events within this action. See, Jurisdictional Statement above.

Standard of Review

15. Unlike an appeal, this application does not raise the question whether this Court erred, clearly erred, or abused its discretion as to any of the reasons Petters advances for granting a COA. As Petters demonstrates in this section of the application, his burden is substantially lighter; it is not to show that the memorandum and order denying relief was necessarily wrong, but only to show that it is not necessarily right. This Court's function is therefore not to review what

it has done in its order and memorandum, but to ask what some other reasonable court - any other reasonable court - might do.

16. The Supreme Court provided guidance to this Court on the question of how an application for a COA is to be addressed in **Miller-El v Cockrell**, 123 S.Ct. 1029, 154 L.Ed. 2d 931 (2003). The Supreme Court's opinion in **Miller-El** makes clear that whether to grant a COA is intended to be a preliminary inquiry, undertaken before full consideration of the petitioner's claims. **Miller-El**, 123 S.Ct. at 1039 (noting that the "threshold [COA] inquiry does not require full consideration of the factual or legal bases adduced in support of the claims"); **Id** at 1040 (noting that a "claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail"); **Id.** at 1042 (noting that "a COA determination is a separate proceeding, one distinct from the underlying merits"); **Id.** at 1046-47 (Scalia, J., concurring) (noting that it is erroneous for a court of appeals to deny a COA only after consideration of the applicant's entitlement to habeas relief on the merits). Indeed, such full consideration in the course of the COA inquiry is forbidden by § 2253(c). **Id.** at 1039 ("When a court of appeals side steps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction").

17. Petters believes he is raising a substantial question about the procedural rulings of the District Court on February 10 and March 11, 2014, as the correctness of them as it now stand is debatable among jurists of reason. See, **Slack v McDaniel**, 529 U.S. 473, 484 (2000). Petter's contention about the procedural ruling against him has not been foreclosed by a binding decision from the Supreme Court or Circuit Court that is on point.

18. The District Court rejected Petters' constitutional claims on the merits; the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. See, **Miller-El**, 154 LEd. 2d 931, 950-51 (2003).

19. Therefore, this Court must issues a COA if Petters presents a question of debatability regarding the resolution of this petition. See, **Miller-El**, 123 S.Ct. 1029, 1039 (under the controlling standard, a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'").

20. Among the identifiable reasons for granting a COA are those listed by Liebman & Hertz, Federal Habeas Corpus Practice and Procedure, Fourth Ed., CR 2001, pp. 1590-1593 (collecing cases).

21. Petters incorporates herein all of his already-filed briefs and responses, pursuant to Fed. R. Civ. P. 10(c).

Recusal Claim Preserved During Direct Appeal

Petters preserved the disqualification and/or recusal claim during his direct appeal - by notifying his lawyers and demanding them to file a motion pursuant to 28 U.S. C. § 455(a) and (b) for the recusal of the Honorable Judge Richard H. Kyle.

Petters' attorneys refused to file the motion.

22. July 30, 2010: Petters' attorneys Jon M. Hopeman, Eric J. Riensche, Jessica M. Marsh and Paul C. Enge who represented Petters during trial and direct appeal in this action, submitted the "Brief and Addendum" to the U.S. Court of Appeals for the Eighth Circuit, No. 10-1843, as to Petters' direct appeal.

23. On or about August 5, 2010 thru August 25, 2010, Petters' jailhouse lawyer, John Gregory Lambros, discovered the violations of 28 U.S.C. §§ 455(a) and (b)(i-iv). Specifically, Attorney Richard H. Kyle, Jr. is the son of the Honorable Judge Richard H. Kyle and attorney Richard is a shareholder (Equity-Partner) in Fredrikson & Byron's White Collar & Regulatory Defense, Health Care Fraud & Compliance and Litigation Group.

24. From on or about 1992 thru 2008, the law firm Fredrikson & Byron, P.A. represented Petters, Petters Company, Inc. and Petters Group Worldwide, LLc. Petters paid Fredrikson & Byron over $10 million for legal fees, which included a possible criminal investigation by the Department of Justice and the MInnesota Department of Commerce.

25. The June 3, 2009, superseding indictment clearly stated the only three (3) defendants in this action are:

a. Thomas Joseph Petters;

b. Petters Company, Inc.; and

c. Petters Group Worldwide, LLC.

the same person and companies Fredrikson & Byron represented from on or about 1992 thru 2008, as to all actions included within this prosecution.

26. September 1, 2010: On September 1, 2010, Petters and jailhouse lawyer Lambros wrote Attorneys Hopeman, Riensche, Marsh and Enge, requesting the lawyers to submit an additional issue to the July 30, 2010 "Brief and Addendum" of Petters in this action, No. 10-1843, U.S. Court of Appeals for the Eighth Circuit, as to violations of 28 U.S.C. § 455 et seq. - **Disqualification and Recusal of Judge Kyle due to his son, Attorney Ricahrd H. Kyle Jr., being a partner and/or shareholder in the law firm Fredrikson & Byron, P.A.** - counsel for Petters and companies ~~from on or about 1992 thru 2008.~~

Page 9 of the letter states:

> Please submit an additional issue within my direct appeal as to the violation of Title 28 U.S.C. §§ 455(a) and 455(b)(5) (ii & iii).
>
> It is my understanding that the 8th Circuit must be placed on notice as soon as possible as to your request to supplement my appeal with the above additional issue.

Petters incorporates and restates the legal research and facts cited in his September 1, 2010 letter to the attorneys. See, **Exhibit A.**

27. September 17, 2010: On September 17, 2010, Attorney Eric J. Riensche responded to Petters' letter of September 1, 2010. Riensche stated he is writing to address the two (2) main issues Petters inquired about for his direct appeal: (1) the issue regarding disqualification of the judge. On page one (1), Riensche states that Petters did not have to preserve the issue as to violations of 28 U.S.C. § 455(a) et al.

> I spoke to Jon [Hopeman] about this and we agree you should not for the following reasons:
>
> a. Perhaps more importantly, raising the issue now could very well deprive you of an opportunity to raise the issues later in a motion to vacate or correct federal sentence pursuant to 28 U.S.C. § 2255.

Riensche continues on p. 2:

> b. We think if you file papers to preserve the above issues the exact opposite may well occur - the court may find that the issue was already raised on direct appeal and therefore unavailable in a Section 2255 motion. (see Point #2 above). Alternatively, the court may construe your pro se papers as your one and only shot at a Section 2255 motion and deprive you of that venue of relief in the future (see Point #3 and #5 above).
>
> c. Now to the substance: We think the argument regarding whether the judge should be disqualfied is a decent one. If we should lose the appeal, you might make a Section 2255 motion on that ground, and perhaps argue your counsel (us) were ineffective for failing to move for disqualification. There might be other ways to frame the issue as well, but that is one.

Petters incorporate and restates the legal research and facts in Riensche's letter. See, **Exhibit B.**

28. Attorney Riensche and Attorney Jon Hopeman's September 17, 2010 letter clearly supports the necessity of a 28 U.S.C. § 455 motion, as both attorneys state:

a. Judge Kyle's impartiality might reasonably be questioned when they recommend Petters argue that both attorneys were ineffective for failing to move for disqualification (¶27(c) above).

29. September 27, 2010: On September 27, 2010, Petters and jailhouse lawyer Lambros sent Attorneys Rienche, Hopeman, Marsh and Engh a letter via U.S. Certified Mail in response to the attorneys' September 17, 2010 letter as to violations of 28 U.S.C. § 455 et seq. by Judge Kyle. Petters and Lambros outline case law supporting the position that an additional issue should be added to Petters' direct appeal as to the violation of 28 U.S.C. § 455 et seq. by Judge Kyle. On page 4, Petters emphasizes his position (¶ 12):

> Again, I am requesting you - my legal team - to file a motion with the 8th Circuit requesting 14 days to serve a supplemental pleading setting out events that happened after your principal brief was filed as to your knowledge of violations of Title 28 U.S.C. § 455 by Judge Kyle. Also, please attach to your initial motion the following documents:
>
> a. Tom Petters' September 1, 2010 letter to you;
>
> b. Eric Riensche's September 17, 2010 letter to Tom Petters; and
>
> c. Tom Petters and jailhouse lawyer Lambros' September 27, 2010 letter to you.
>
> By including the above three (3) letters to the court with your request Motion to file a Supplemental Pleading, the issue will be preserved with no possible negative § 2255 problems, due to the fact that I did not file the motion. It is not possible for the Court to turn your motion into my § 2255 motion, as your first motion is only a request - not the actual supplemental pleading.

Petters incorporates and restates the legal research and fact contained in his September 27, 2010 letter to his legal team. See, **Exhibit C.**

30. Petters requested Attorney Steven J. Mesnbesher, the attorney Petters' family hired to file his 28 U.S.C. § 2255 Motion, to file an issue within his 2255 as to the violations of 28 U.S.C. § 455 et seq. by Judge Kyle. In fact, Petters mailed Attorney Meshbesher all the above information (Exhibits A, B, and C) to assist him. Meshbesher refused to include the issue within Petters' § 2255. Petters asserts that Meshbesher had a duty to file for recusal of Judge Kyle in this action - knowing other attorneys with similar years of legal practice and knowlege believed the issue had substance and was a decent one.

Recusal Claim "Post-It Notes" by § 2255 Lawyers

31. Post-It notes mistakenly left on letters Meshbesher legal team reviewed for § 2255 research: As lawyers from Attorney Meshbesher's office concluded their representation of Petters, they gathered documents used to prepare the failed defense and mailed them back to Petters at U.S. Penitentiary Leavenworth. The documents from Petters' trial were picked up from Meshbesher's office by Petters' family.

32. When Petters opened and reviewed the documents from Attorney Meshbesher's office, he was shocked to find post-it notes attached to letters that he had mailed to his attorneys during his direct appeal demanding them to file a motion pursuant to 28 U.S.C. 455 et seq. as to the disqualification and/or recusal of Judge Kyle.

33. The post-it notes affixed to Exhibits A, B, and C are from attorneys within Attorney Meshbesher's office:

a. Attorney Dave Lundgren; and

b. Attorney Kevin Gregorious.

Petters was pleased to see that Attorney Dave Lundgren agreed wih Petters' trial and appellate lawyers, by writing on the post-it note attached to Petters' September 2010 letter:

> Kevin,
>
> Read the following letter, Hopeman's response, and Petters' reply. We may have a more difficult time convincing Petters than we thought, and he may have a legit issue.
>
> Dave.

See, **Exhibit D**, page one (1) of Exhitits A, B, and C with attached post-it notes.

34. The most troubling part of this discovery is that, although Petters insisted that attorney Meshbesher file the recusal issue within the § 2255 motion, Meshbesher informed Petters that he refused to file the issue because he "did not want to make the judge mad." Meshbesher also informed Petters that the recusal issue was not a good issue.

35. The Eighth Circuit - since 1926 - has held that attorneys must comply with client's request to file a recuasl challenge:

a. **Nations v U.S.**, 14 F.2d 507 (8th Cir. 1926) (Affidavit was timely where, although defendant had known of facts concerning prejudice for some time, defendant had been dissuaded by counsel from making affidavit until the day before trial);

b. **Morris v U.S.**, 26 F.2d 444, 449 (8th Cir. 1928) (Delay in filing affidavit from hesitation of defendant's counsel in interposing same at defendant's request did not render it untimely).

36. The above two (2) cases for recusal were filed under 28 U.S.C. § 144, which is construed in same manner as 28 U.S.C. § 455. support a defendant being prejudiced when his attorney doe not request recusal of a judge when requested to do so by his client. See, **U.S. v IBM**, 475 F.Supp. 1372, 1377 (SD NY 1979), affirmed 688 F.2d 923 (2nd Cir. 1980) (Timeliness requirement

of 28 U.S.C. § 2144 applies to 28 U.S.C. § 455).

37. Petters' attorneys, both appellate and post-conviction, were required to file a motion to recuse and disqualify Judge Kyle due to Petters' request.

Reasons for Granting the COA

Issue/Ground One (1)

Reasonable jurists could differ with, or would find debatable or wrong, the district court's authority to reject the use of a "Motion for Issuance of Certificate of Appealability" as a route of appellate review to challenge Judge Kyle's refusal to disqualify during Petters' § 2255 motion on March 11, 2014, pursuant to Fed. R. Civ. P. 59(e). Does the COA restricted standard of review prejudice Petters more than the unrestricted availability of appellate review for the writ of mandamus?

38. Under pre-AEDPA law, federal prisoners in section 2255 proceedings could perfect an appeal simply by timely filing a notice of appeal. See, 28 U.S.C. § 2253 (1955); Fed. R. App. P. 22(b) (1995). Following enactment of the AEDPA, however, in addition to a timely notice of appeal, a prisoner seeking to appeal a section 2255 proceeding must also obtain a "Certificate of Appealability" either from the district court or the court of appeals. 28 U.S.C. § 2253(c)(1)(B); Fed. R. App. P. 22(b)(1).

39. The requirement that a section 2255 appellant obtain a COA to appeal is jurisdictional in nature; that is, the absence of a COA will preclude a prisoner's appeal. See, **Miller-El**, 537 U.S. 322, 336.

40. COA is required to appeal a final order in a section 2255 proceeding. See, 2253(c)(1)(B). "Final" orders include orders other than those denying the motion. For example, a prisoner is required to obtain a COA to appeal a final collateral order, such as the district court's denial of bond/bail pending the

resolution of the motion. See, **Pagan v U.S.**, 353 F.3d 1343, 1346 (11th Cir. 2003). A COA is also required to appeal the district court's order denying a motion under Fed. R. Civ. P. 60(b) that was filed more than ten (10) days after entry of judgment, **U.S. v Vargas**, 393 F.3d 172, 174-75 (D.C. Cir. 2004) (collecting cases); **Zeitvogel v Bowersox**, 103 F.3d 56, 57 (8th Cir. 1996) (per curiam), and to appeal the district court's order denying a motion to reopen the time to file an appeal under Fed. R. App. P. 4(a)(6). See, **U.S. v Rinaldi**, 447 F.3d 192, 195 (3rd Cir. 1006); **Eltayib v U.S.**, 294 F.3d 397, 399 (2nd Cir. 2002).

41. A COA is also required to appeal the district court's order denying a motion under Fed. R. Civ. P. 59(e). See, **U.S. v Lambros**, 404 F.3d 1034, 1036-37 ("Because Lambros' Rule 59(e) motion ..., sought ultimately to resurrect the denial of his earlier § 2255 motion, we hold that a COA is required for the present appeal").

There is a split on the question among different circuits as to the best route of appellate review to challenge Judge Kyle's refusal to disqualify himself during Petters' § 2255 motion.

42. No COA is required to appeal the denial of a recusal motion in a § 2255 proceeding. Therefore, this Court should order Petters to file a writ of mandamus in order to move forward in this action, as to the appeal of Judge Kyle's refusal to disqualify himself during § 2255 proceedings. See,

a. **Trevino v Johnson**, 168 F.3d 173, 177 (5th Cir. 1999).

b. **Nelson v U.S.**, 297 Fed. Appx. 563, 566 (8th Cir. 2008) (Nelson "need not obtain a certificate of appealability ... because it is separate from the merits"), citing **U.S. v Falls**, 242 F.3d 377 (8th Cir. 2000)(unpublished) (also denying an application for a COA).

43. A COA is required to appeal the denial of a recusal motion in habeas corpus proceedings. See,

a. **Davis v Jones**, 406 F.3d 1325, 1330 (11th Cir. 2007) (noting that the district court had granted a COA as to whether due process was violated by the fact that the brother of the judge who presided over Davis's juvenile court pre-trial proceedings was counsel for the prosecution).

b. **Wilson v Parker**, 515 F.3d 682, 701 (6th Cir. 2008) ("We granted Wilson a certificate of appealability for his claim that [the judge] should have recused").

Does the COA restricted standard of review prejudice Petters more than the unrestricted availability of appellate review for the writ of mandamus?

44. Although habeas corpus and section 2255 appeals follow the usual civil appellate procedures in most respects (e.g., the requirement of a "final order" and the standards for the timing and content of a notice of appeal), habeas corpus, as revised in 1996 by the Antiterrorism and Effective Death Penalty Act (AEDPA). section 2255, appellate practice is unique in one (1) important aspect. In contrast to the unrestricted availability of appeals in most other civil litigation, there is no appeal as of right for prisoners in habeas corpus and section 2255 cases. Instead, the prisoner must obtain leave to appeal by making a "substantial showing of the denial of a constitutional right." See, 28 U.S.C. § 2253(c)(2) and **Miller-El**, supra at 327. Until the enactment of the AEDPA (1996), section 2255 appeals were not subject to the restriction.

45. The COA requirement applies to any appeal in which the application for the COA was filed after the AEDPA's effective date, April 24, 1996.

Whether statutory recusal and disqualification standards within 28 U.S.C. § 455 et seq. violates the due process clause or any other constitutional provision?

46. "The Constitution promises through the operation of due process that an impartial judge will preside over trial proceedings." See, **Haynes v Quarterman**, 2007 U.S. Dist. LEXIS 5320, *108-109 (S.D. Tex. 2007). **Repub. Party of Minn. v White**, 536 U.S. 765, 776 (2002) ("[due process requires the lack of bias for or against any party]. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party").

47. "Under the Due Process Clause, a criminal defendant is guaranteed the right to a fair trial and impartial tribunal." See, **Richardson v Quarterman**, 537 F.3d 466, 474 (5th Cir. 2008), citing **Bracy v Gramley**, 520 U.S. 899 (1997). "An accused has a constitutional right to an impartial judge at all stages of the proceedings against him," citing **Tumey v Ohio**, 273 U.S. 510, 522 (1927). See, **People v Hagos**, 2009 Colo. App. LEXIS 1868 *20 (2009).

48. The Eighth Circuit has stated:

a. "Because on this record the relevant statutes do not require the district judge to recuse, Nelson also cannot meet the more rigorous standard of demonstrating a violation of his due process right to an impartial 'judge]." See, **Nelson v U.S.** , 297 Fed. Appx. 563, 566 (8th Cir. 2008).

b. "The likelihood or appearance of bias, even in the absence of actual bias, may prevent a defendant from receiving a fair trial." See, **Kinder v Bowersox**, 272 F.3d 532, 540 (8th Cir. 2001).

c. **Jones v Luebbers**, 359 F.3d 1004, 1012-13 (8th Cir. 2004) (noting that the standard for a constitutional due process claim based on an appearance of judicial bias is "vague").

49. In 2009, the Supreme Court addressed the standard for whether an appearance of bias could offend notions of due process to be vague in **Caperton v A.T. Massey Coal Co.**, 129 S.Ct. 2252 (2009). "**Caperton** was decided under the Due Process Clause of the Fourteenth Amendment, which is not applicable to federal officers. There is no reason to believe ... the same analysis would not be applied under the Due Process Clause of the Fifth Amendment." See, **Valente v Univ. of Dayton**, 2009 U.S. Dist. LEXIS 108352, * 1 n.1 (S.D. Ohio 2009). The Supreme Court addressed this situation, but did not entirely solve the problem. A majority of the court found that, while most claims of apparent bias would not satisfy the due process standard, other types of extreme situations could arise in which a probability of actual bias might warrant disqualifying a judge, even though no actual bias on the part of the judge could be established. **Caperton**, at 2263-22o65. Also see, **Wersal v Sexton**, 613 F.3d 821, 837 (8th Cir. 2010) ("The harm in **Caperton** was that the judge re fused to recuse himself, not that he originally accepted the $3 million in contributions").

50. Chief Justice Roberts and Justice Scalia worried, in dissenting opinions, that the Court's **Caperton** holding would lead to further confusion as to the applicable due process standard, as well as to an unwanted expansion of due process based on recusal claims. See, **Caperton**, at 2269 and 2272-2274, Roberts dissenting. Scalia dissent at page 2274.

Conclusion:

51. This Court must consider issuing a COA in this action, if and only if, this Court rules that a writ of mandamus is not the correct appellate remedy as to this Court's order on March 11, 2014 by Judge Richard Kyle, which denied Petters' Rule 59(e) motion requesting Judge Kyle's recusal and disqualification in this action.

52. Due to the Supreme Court's ruling and overview in **Caperton**, Petters believes a question of "debatability" exists regarding the standard of whether an appearance of bias violates the due process clause or any other constitutional provision. If "debatability" exist, Petters does not believe that a COA is the correct appellate remedy in this action, as a COA may issue only if the question presented violates the due process clause or any other constitutional provision.

53. Petters believes this Court must address any possible prejudice, in addressing the best route of appellate review to challenge Judge Kyle's refusal to disqualify during Petters' 2255 motion.

54. If this Court orders that the best route of appellate review is a COA, Petters has clearly presented a question of "debatability" within this action.

55. At this juncture, Petters believes the above facts and law has supported and persuaded this Court that another reasonable jurist could debate and come to a different conclusion. The foregoing cases illustrate that jurists have in fact come to a different conclusion on precisely the same facts.

Issue/Ground Two (2)

> **Reasonable jurists could differ with, or would find debatable or wrong, the District Court's denial of relief on Petters' claim that Judge Kyle has a "sua sponte" duty to disclose "before, during and after a judicial proceeding, whenever disqualifying circumstances become known" that his son, Attorney Richard H. Kyle, Jr., is a shareholder (equity partner) at the law firm that represented all of Petters' companies for the entire time period covered in the indictment. The law firm offered legal advice to Petters and other defendants as to business decisions of which Petters was convicted in this action.**

Judge Kyle knew or should have known that his son worked at Fredrikson & Byron P.A. and that Fredrikson & Byron P.A. represented all of Petters' 51 companies, including the primary companies which were indicted with Petters. Fredrikson & Byron P.A. provided legal advice on the specific financial matters relevant to the counts and charges in Petters' indictment. Judge Kyle never disclosed the conflict.

56. Attorney Richard H. Kyle, Jr., is the son of the Honorable Judge Richard H. Kyle, the judge who presided over trial, sentencing and § 2255 proceedings in this action.

57. Attorney Richard H. Kyle, Jr., "Richard" is a shareholder [equity-partner] in Fredrikson & Byron's white collar and regulatory defense, health care fraud and compliance and litigation group. See, Fredrikson website.

58. From on or about 1992 thru 2008, the law firm "Fredrikson & Bryon P.A" represented Petters, Petters Company, Inc. and Petters Group Worldwide, LLC, all defendants in the above-entitled action. Petters paid Fredrikson & Byron approximately $15 million for legal services.

59. Judge Kyle knew or should have known that his son worked at Fredrikson & Byron and that Fredrikson & Byron represented Petters and all defendants within this action during all times within this action, as was made plain during the discovery and exhibits offered within this action.

60. Judge Kyle never offered to voluntary disclose the fact that his son, Richard H. Kyle, Jr., was employed and a shareholder [equity-partner] at Fredrikson & Byron before, during, and after all judicial proceedings in this action.

Proof that Judge Kyle knew Fredrikson & Byron P.A. provided Petters and the other defendants advice, oversight and legal representation throughout the entire time-period of this action and specific counts Petters was convicted and sentenced on:

61. Petters requests this Court to refer to his direct appeal brief by Attorneys Hopeman and Engh in **U.S. v Thomas Joseph Petters**, No. 10-1843, U.S. Court of Appeals for the Eighth Circuit, Argument No. 4:

> 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.] ....

Brief, p. 47.

> 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. (offering exact trial transcript pages). Mr. Petters spent most of his time at work with chief in-house counsel David Baer, who had an office adjacent to his.
>
> 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.

Brief, p. 50.

> C. The Violations
>
> Defense counsel asked for appropriate theory-of-defense instructions. The district court [Judge Kyle] refused to give them, [17 Trial Transcript at 3300-04] which is reversible error.

Brief, p. 48.

62. Exhibits during the trial included all of the billing statements from Fredrikson & P.A. for services to Petters and the other defendants. Petters specifically included the invoices dated:

a. November 21, 2001;

b. December 13, 2002;

c. January 24, 2002; and

d. February 20, 2002

as **Exhibit I** within his "Motion to Disqualify the Honorable Judge Richard H. Kyle in this action ....," dated December 28, 2013. See, Paragraphs 37 thru 42. The exhibit during trial included hundreds of billing statements from Fredrikson & Byron P.A. for legal services performed for Petters and the other defendants.

Statement of Law:

63. In this case, the judge knew of conflict from or near its inception, more than 18 months before the first recusal motion, but never disclosed it to parties. The Third Circuit stated:

> In the recusal context, we are satisfied that if there is to be a burden to disclose, the burden is to be placed on the judge to disclose possible grounds for disqualification. See, **U.S. v Bosch**, 951 F.2d 1546, 1555 n.6 (9th Cir. 1991) (noting that § 455(a) 'has a de facto disclosure requirement.' See, also **Parker v Connors Steel Co.**, 855 F.2d 1510, 1525 (11th Cir. 1988) (recognizing that recusal motion could have been avoided if judge had disclosed grounds for recusal to parties.)
>
> As we stated in **U.S. v Schreiber**, 599 F.2d 534, 537 (3rd Cir. 1979), 'sound public considerations ....militate for the adoption of a .... rule that the parties should be apprised of any possible grounds for disqualification known privately to the judge.' The most compelling of these public policy considerations is that the judge is in the best position to know of the circumstances supporting a recusal motion. Id. at 313-14.

See, **In re Kensington Int'l, Ltd**, 368 F.3d 289, 312-316 (3rd Cir. 2004).

Conflict Information System for the Federal Judiciary

64. Did Judge Kyle receive notice of conflict from the law firm Fredrikson & Byron P.A.? Petters believes Judge Kyle received notice that a potential conflict would occur if he was the judge within this above-entitled action, either by his son Richard H. Kyle, Jr. or from the law firm Fredrikson & Bryon P.A.

65. "Most ethic rules require law firms to implement measures to manage conflicts informatin, see, e.g. ABA Model Rule 5.1(a) & cmt. [2] & cmt. [3] to ABA Model Rule 1.7, and most law firms appear to use automated conflicts systems." This information was taken from the February 19, 2009 article "Medtronic Case Highlights Judicial Conflict Control," by Robert Richards. The article appeared within the "Law Library Blog" at typepad.com. Of interest is the fact the article was about Senior U.S. District Judge Richard H. Kyle and his son Richard H. Kyle, Jr., who was an attorney at the law firm Fredrikson & Bryon P.A. The article stated:

> If the Journal's [Wall Street Journal] report is accurate, it points to a possible gap in federal judiciary conflicts information control. If the judge did not receive a notice of this potential conflict, the reason may be either that some federal judges relying on informal conflicts disclosure among family members (even lawyers)rather than on an automated conflicts system; or that his son's firm did not contribute all client information to the judge's automated conflict system. This case may afford federal court administrators an opportunity to review and possibly reform their conflicts information systems.

66. October 2009 - Thomas Petters' trial started: The above article appeared on February 19, 2009. Basically, the question in this action is why, after the above February 19, 2009 article was published, didn't the law firm Fredrikson & Byron P.A., Attorney Richard H. Kyle, Jr., (son of Judge Kyle), Judge Kyle and the Federal Court Administrator understand the required need to manage conflict information, as per the above ABA

Model Rules? Also of interest is the fact that Petters' trial was one of the most widely publicized globally, with front page coverage on the Wall Street Journal and the USA Today.

67. Petters believes Judge Kyle was placed on notice, by informal and/or the automated conflict system of the potential conflict, due to Judge Kyle's son working for Fredrikson & Byron P.A.

68. Title 28 U.S.C. § 455(c) requires federal judges to stay informed of any interests they may have in cases over which they preside. Therefore, if this Court, Judge Kyle, had disclosed that his son was an attorney for Fredrikson &Byron P.A., this recusal motion could have been avoided.

Waiver as to Violations of 28 U.S.C. § 455

69. Section 455(a) may be waived by the parties after full disclosure, whereas section 455(b) may not. See, **Parker v Connors Steel Co.**, 855 F.2d 1510, 1527 (11th Cir. 1988).

Violations of the Following Canons of Judicial Ethics

A. Code of Conduct for United States Judges: See, **Exhibit E.**

70. The "Code of Conduct for United States Judges" was adopted by the Judicial Conference of the United States in 1973. It prescribes ethical norms for federal judges as a means to preserve the actual and apparent integrity of the federal judiciary. Every federal judge receives a copy of the Code, the Commentary to the Code, the Advisory Opinions of the Judicial Conference's Committee on Codes of Conduct, and digests of the committee's informal, unpublished opinions. See, II Guide to Judiciary Policies and Procedures (1973). The material is periodically updated. Judges who have questions about whether their conduct would be consistent with the Code may write to the Codes of Conduct Committee for a written, confidential opinion. See, Introduction, Code of Conduct. The Committee traditionally responds promptly. A judge may also

seek informal advice from the Committee's circuit representative. See, **U.S. v Microsoft Corp.**, 253 F.3d 34, 111-12 (Dist. of Col. 2001).

71. The Code of Conduct contains no enforcement mechanism. See, Thode, "Reporter's Notes to Code of Judicial Conduct 43." The Canons, including the one that requires a judge to disqualify himself in certain circumstances, Code of Conduct for United States Judges, Canon 3c, are self-enforcing. There are, however, remedies extrinsic to the Code. One is an internal disciplinary proceeding, begun with the filing of a complaint with the clerk of the court of appeals pursuant to 28 U.S.C. § 372(c).

72. The Eighth Circuit stated in **White v NFL**, 585 F.3d 1129, 1140 (8th Cir. 2009):

> The Code of Conduct, which establishes aspirational rules and relies upon self-enforcement, does not overlap perfectly with §455(a) [and] it is possible to violate the Code without creating an appearance of partiality. **In re Boston's Children First**, 244 F.3d 164, 168 (1st Cir. 2001).

73. **In re Boston's Children First**, 244 F.3d 164, 168 (1st Cir. 2001):

> Second,both this Court and other Courts have indicated that the Code of Judicial Conduct does not overlap perfectly with §455(a); it is possible to violate the code without creating an appearance of partiality; likewise, it is possible for a judge to comply with the Code yet still be required to recuse herself. See, **In re Cargill**, 66 F.3c at 1262 n.5 (not deciding the point, but noting the "strong argument" that "not all instances of noncompliance" with the Code require automatic disqualification); **In re Barry**, 292 U.S. App. D.C. 39, 946 F.2d 913, 914 (D.C. Cir. 1001)(per curiam). But, see, 946 F.2d at 916(Edwards, J. dissenting) (suggesting that breach of this canon will almost always give rise to a legitimate claim for disqualification under § 455(a)

74. Judge Kyle should have disqualified himself due to the following violations of Canon 3 for the "Code of Conduct for United States Judges":

a. C. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(d) The judge or the judge's spouse, or a person related to either within the third degree or relationship, or the spouse of such person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(3) For the purpose of this section:

(c) "Financial interest" means ownership of a legal or equitable interest, however small ....:

(d) "Proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

See, **Exhibit E.**

75. The above Canons of the Code of Conduct for U.S. Judges clearly proves that Judge Kyle should have recused himself, as Judge Kyle knew that his son, Attorney Richard H. Kyle, Jr., was employed and a shareholder (equity-partner) at Fredrikson & Byron P.A., the law firm that represented Petters and all of the other defendants in this action during all times of this indictment.

76. Judge Kyle's son, Attorney Richard H. Kyle, Jr., was a party to the proceeding, as a shareholder (equity-partner) at Fredrikson & Byron P.A. Judge Kyle knew that the billing statements from Fredrikson & Byron P.A., as to legal costs relating to its representation of Petters and the other defendants. The billing statements were entered into evidence as exhibits in the above-entitled action.

77. Judge Kyle knew that Douglas A. Kelley, as Receiver and as Chapter 11 Trustee in this action, was investigating clawback actions, civil actions, and possibly assisting the U.S. Attorney in the criminal investigation of Fredrikson & Byron P.A., relating to its representation of Petters and the other defendants.

78. June 6, 2012, the 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.S. and for entry of an order barring certain claims stated: (hereinafter Fredrikson & Byron,P.A. are referred to as "F&B")

a. Petters and the Petters Entities paid F&B approximately $8 million during the courts of F&B's representation. (¶ 4).

b. In June of 2009, the Susan 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 conducted over a period of approximately four (4) months. Susman's investigation was conducted with the cooperation of F&B and included interviews of fact witnesses and review 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 case 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. (¶ 6).

c. Upon conclusion of the Susman and Freeborn reviews and analysis, 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..... See ¶ 19.

The above June 6, 2012 "Affidavit" appears within **U.S. v Petters, et al.**, Civil No 08-5348 - ADM/JSM, U.S. District Court of Minnesota.

79. May 30, 2012: Fredrikson & Byron, P.A. agreed to a "Settlement Agreement' as to the facts within the June 6, 2012 "Affidavit of Douglas A. Kelley." Page 5 (of 18) states:

> 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.

See, **Exhibit F**, (Pages 1, 4, 5, 6 and **Exhibit A**, Page 4, of **U.S. v Thomas Jospeh Petters, et al.**, Civil No. 08-5348 - ADM/JSM).

80. Note that although **U.S. v Petters, et al.**, Civil No. 08-5348 was filed in 2008, Petters' jury trial did not start until October, 2009.

81. The above clearly proves that Fredrikson & Byron, P.A. and employee Attorney Richard H. Kyle, Jr. - a shareholder and Equity-Partner of F&B - are a "party to the proceeding" in this action. Therefore, a clear violation of Canon 3(C)(1) and (C)(1)(d)(i & iii) occurred. The definition of "Proceeding" states "or other stages of litigation."

82. A breach of the Code of Conduct for United States Judges "will almost always give rise to a legitimate claim for disqualification under Section 455(a). See, **In re Barry**, 946 F.2d 913, 916 (D.C. Cir. 1991).

B. Minnesota Code of Judicial Conduct

83. Judge Kyle also violated the "Minnesota Code of Judicial Conduct." Canon 3(c), 27A, 27B Minnesota Stat. Ann., which states a judge must decline to hear a case if biased.

Conclusion:

84. This Court must consider issuing a Certificate of Appealability, as Petters clearly presents a question of "debatability" regarding the resolution of Issue/Ground Two (2). See, **Miller-El**, supra at 1039.

85. At this juncture, Petters believes the above facts and law supported and persuaded this Court that another reasonable jurist could debate and come to a different conclusion. The foregoing cases illustrate that jurists have in fact come to a different conclusion on precisely the same facts.

Issue/Ground Three (3)

Reasonable jurists could differ with, or would find debatable or wrong, the district court's denial of relief on Petters' claim that a $13.5 million penalty does fulfill the standard of "an interest that could be substantially affected," within 28 U.S.C § 455(b)(5)(iii) and/or the "Code of Conduct for United States Judges," Canon 3(C)(1)(d)(iii).

86. Title 28 U.S.C. § 455(b)(t)(iii) and the "Code of Conduct for United States Judges," Canon 3(C)(1)(d)(iii), states that a judge must disqualify himself "where he or his spouse, or a person within the third degree of a relationship to either of them or the spouse of such person ... is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding. The word "Proceeding" includes pretrial, trial, appellate review, or other stages of litigation. See, ¶ 74 above.

87. Petters restates and incorporates paragraphs 56 thru 85 here, as to Attorney Richard H. Kyle, Jr., being the son of the Honorable Judge Kyle and Attorney Richard H. Kyle, Jr., being a shareholder and Equity-Partner at the law firm Fredrikson & Byron, P.A., the law firm that represented Petters and the other defendants in this action during all times pertinent to the prosecution.

88. Paragraphs 75 thru 82 and **Exhibit F** clearly prove that the shareholders and Equity-Partners of the law firm Fredrikson & Byron, P.A. (including Attorney Richard H. Kyle, Jr.) offered and paid a "Settlement Agreement" in the amount of $13.5 million due to the asserted and equitable claims against Fredrikson & Byron relating to its reprentation of Petters and all of the defendants in this action. 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.

89. The Honorable Judge Kyle does not agree with Petters that the $13.5 million settlement paid by Fredrikson & Byron, P.A. meets the standard of an interest that could be substantially affected.

Statement of Law:

90. The Fifth Circuit adopted a **per se** rule requiring disqualification where a relative of the judge is a partner in a law firm representing a party in the case: "[W]hen 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.'" See, **Potashnick v Port City Construction Co.**, 609 F.2d 1101, 1113 (5ht Cir. 1980) (quoting § 455(b)(5)(iii)).

91. The Second Circuit explicitly rejected the **per se** approach in **Pashaian v Eccelston Properties, Ltd.**, 88 F.3d 77 (2nd Cir. 1996). It found disqualification unnecessary where a partner in the law firm representing the defendant was married to the sister of the judge's wife. The judge concluded that his sister-in-law's interest would not be "substantially affected" nor would the firm's reputation likely be affected by the outcome of the case, and the court of appeals agreed. Id. at 83 (quoting § 455(b)(5)(iii)).

92. **U.S. v Miell**, 2008 U.S. Dist. LEXIS 28451, *9, 2008 WL 974843 (N.D. Iowa 2008). The defendant was indicted for scheming to defraud several insurers, one of which sued the defendant to recover its losses and was represented in that litigation by the judge's husband's law firm. The judge found, out of an abundance of caution, because of the close connection between the criminal and civil cases, "the appearance of impropriety" requires recusal. This case is very close to the issues in Petters' case.

93. The Honorable Judge Kyle responded to this exact issue on March 9, 2009 in another case - seven (7) month before Petters' trial started: See, **In re Medtronic, Inc. Sprint Fidelis Leads Products Liability Litigation**, 601 F. Supp. 2d 1120 (D. Minn. 2009) (Attached as **Exhibit G**):

> The relevant facts and circumstances here concern my son, Richard H. Kyle, Jr., a shareholder at Fredrikson & Byron, P.A. ("Fredrikson"), a large Minneapolis law firm that represents the Defendant, Medtronic, in corporate matters and other litigation unrelated to the case **sub judice.** According to Plaintiffs, these facts require my recusal from this case. The court does not agree.

Id. at 1123.

> This court begins its analysis with the more specific subsection of Section 455, Section 455(b). As noted above, 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 sustantially affected by its outcome. Plaintiffs argue that because my son is a shareholder at Fredrikson, and because Fredrikson derives significant revenue from

> Medtronic, it necessarily follows that my son has an interest that could be affected by the outcome of this case. The argument, it seems, is predicated on the assumption that Medtronic is likely to steer its legal business elsewhere in the event the court were to rule against it in this case.

Id. at 1124-25.

Hypothetical House of Cards

> 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 Medtronic then retaliated by withdrawing business from Fredrikson, if the removal of the 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. But, Plaintiffs are required to offer proof of partiality, ... (collecting cases).

Id. at 1124-25.

> Here, the facts point to a close-knit relationship between Fredrikson and Medtronic, which suggest that there will be little (if any) financial consequences to the firm --- let alone my son --- no matter how Medtronic fares in this litigation. That Medtronic might be a significant Fredrikson client, therefore, does not rule the day.

Id. at 1127.

> Plaintiff also argue that has other interest [Kyle's son], such business relationships and reputations, that could be substantially affected were the Court to rule against Medtronic. Plaintiffs are correct that Section 455(b)(5)(iii) is not limited to purely financial interests. .... But Plaintiffs fail to explain, and the Court fails to understand, how a decision for or against Medtronic here might affect his reputation when neither he, nor his firm, is counsel of record in this case. For the same reason, it is equally unclear to the court how a decision in this case will affect his (or the firm's business relationships). Large law firms like Fredrikson gain and lose clients - even material clients - all the time, and the reputation and good will of those firms has not been affected substantially. At the end of the day, it impossible to do more than speculate that [my son] might someday reap a [non-pecuniary] benefit as an indirect result of the success of Medtronic in this litigation.

Id. at 1127.

Section 455(a):

> As noted above, Section 455(a) is broader than Section 455(b). Its purpose is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. **Liljeberg v Health Serv. Acquisiton Corp.**, 486 U.S. 847, 865 (1988).
>
> Plaintiffs' argument for recusal under 455(a) largely parrots their argument under Section 455(b). They contend that a reasonable person could question my impartiality because my son is a Fredrikson shareholder and a ruling against Medtronic cold adversely affect Fredrikson (whether financially or by reputation or by its ability to obtain new business from Medtronic). For the reasons set forth above, the Court rejects that argument, as Plaintiffs offer nothing more than the gossamer strands of speculation and surmise to support it. An average person, knowing all of the above facts and circumstances, could not conclude that my presiding over this case would have any impact on Medtronic's relationship with Fredrikson.

Id. at 1128.

No Hypothetical House of Cards Exits in this Request for Recusal of Judge Kyle:

94. Petters only presents facts that "substantially affect" and/or impair Judge Kyle's son Attorney Richard H. Kyle, Jr., the law firm Fredrikson & Byron, P.A.:

a. May 30, 2012, "Settlement Agreement" in the sum of $13.5 million, due to claims of legal malpractice, breach of contract, civil conspiracy, etc. See, paragraphs 76 thru 80.

b. Fredrikson & Byron, P.A.'s business reputation has been substantially affected due to the comprehensive investigation that was conducted over a period of approximately four (4) months by the Susman Godfrey LLP law firm and the Freeborn & Peters, LLP law firm, that asserted legal and equitable claims against Fredrikson & Byron, P.A. for breach of duty, breach of contract, aiding and abetting breach of fiduciary duty, aiding and abetting fraud, civil conspiracy, unjust enrichment, and legal malpractice. See, **Exhibit F**, (pages 5 and 6).

Forthcoming Litigation Against Fredrikson & Byron, P.A. - Potential Billion Dollar Class Action Suit

95. **Exhibit F.** Settlement Agreement, Document 2264-1, dated June 6, 2012

Exhibit A, page 5 (of 12) states:

> The Order shall include a provision (such provision referred to herein as the Bar Order) that bars and permanently enjoins the prosecution of: (1) any and all claims against any F & B (Fredrikson & Byron) Release by any and all debtors Releasors which directly or indirectly arise from or relate to, in whole or in part, any services rendered by any F & B Release at any time to any Debtor Releasor or relating to the Petters Ponzi Scheme or the Debtors Releasors, which include all claims that could be asserted by Douglas A. Kelly, in ....

The June 6, 2012 "Settlement Agreement" does not bar all lawsuits against Fredrikson & Byron, P.A.

96. Although a district court may properly bar claims of nonsettling defendants against settling defendants for contribution or indemnity, **Denney v Deutsche Bank AG**, 443 F.3d 253, 273 (2nd Cir. 2006), principles of due process and fundamental fairness precludes a court from barring claims of nonparties. It is well settled general rule that a person cannot be deprived of his legal rights in a proceeding to which he is not a party. **Martin v Wilks**, 490 U.S. 322, 327 n.7 (1979) (It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard). **Hansberry v Lee**, 311 U.S. 32, 40 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment **in personam** in which he is not designated as a party or to which he has not been made a party by service of process").

97. This current action does not bar potential claims of non-parties in this action.

98. Petters is currently reviewing a potential class-action claim against Fredrikson & Byron, P.A. in excess of $1 billion in damages for the breach of duty, breach of contract, aiding and abetting breach of fiduciary duty, aiding and abetting fraud, civil conspiracy, unjust enrichment and legal malpractice, with non-parties, victims and those parties that have not been made a party by service of process.

99. Petters believes that a website will be used to notify potential class members. Petters believes social medial and Facebook will also be used to notify potential parties in this action. Jailhouse Lawyer Lambros is currently researching the availability of website and social media releases.

100. Currently, the public may review this motion and forthcoming legal issues by visiting the website www.NoPayClassifieds.Com/TomPetters.

101. Petters believes that Fredrikson & Byron, P.A.'s business is being substantially affected due to the information on the website(s) and blogs that are ubiquitious on the Internet. As interest increases by victims who read about the U.S. Supreme Court ruling on February 26, 2013 validating the victims' cause in the Stanford Ponzi scheme and is better understood by the victims and other potential class members in the instant case, Petters beiieves that the favorable reputation heretofore enjoyed by Fredrikson & Byron, P.A. will be adversely affected.

Supreme Court Gives Ponzi Scheme Victims the Right to Pursue Class-Action Suits Against Law Firms that Aided theFraud.

102. The U.S. Supreme Court ruled in **Chadbourne & Parke LLP v Troice, et al.**, No. 12-79 (February 26, 2014):

a. Victims of R. Allen Stanford's $7 billion Ponzi scheme can sue law firms and other third parties on allegations they aided the fraud.

b. The court's 7-2 decision, written by Justice Stephen Breyer, said the victims' class-action lawsuits were allowed even though a 1998 federal law largely prohibits state-law class-action claims for securities fraud.

c. The ruling gives victims a chance to recover more of their losses. .... since the holding is limited to products sometimes sold in Ponzi schemes that aren't considered securities.

d. The ruling will permit victims of this (and similar) frauds to recover damages under state law.

See, **Exhibit H**, "Wall Street Journal" February 27, 2014, article entitled "Court Opens Recourse for Stanford Victims." This holding opens the door for PCI fraud victims to now sue Fredrikson & Byron, P.A. for damages.

Conclusion:

103. This Court must consider issuing a Certificate of Appealability as Petters clearly presents a question of "debatability" regarding the resolution of the above issue/ground three (3). See, **Miller-El**,, supra at 1039.

104. At this juncture, Petters believes the above facts and law supported and persuaded this Court that another reasonable jurist could debate and come to a different conclusion. The foregoing cases illustrate that jurists have in fact come to a different conclusion on virtually identical facts.

Relief:

105. For all the above-mentioned reasons, Petters requests that this Court issue a Certificate of Appealability on all the above issues/grounds presented.

106. If this Court determines that a COA is not required to appeal Judge Kyle's March 11, 2014 denial of Petters' Rule 59(e) motion requesting Judge Kyle's recusal and disqualification in this action, Petters request the Court to relabel the motion a writ of mandamus in order to move forward in this action.

107. If this Court does not believe it is correct to relabel this motion a writ of mandamus, Petters requests instructions on how to move forward in appealing this action to the Eighth Circuit Court of Appeals. See, **Castro v U.S.**, 540 U.S. 375 (2003).

108. I, Thomas Joseph Petters, declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. See Title 28 U.S.C. § 1746.

Executed on May 6, 2014

Thomas Joseph Petter, **pro se**
Reg. No. 14170-041
U.S. Penitentiary
P.O. Box 1000
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September 1, 2010

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U.S. CERTIFIED MAIL NO.
7008-1830-0004-2649-1285

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AFFIDAVIT FORM

RE: ADDITIONAL ISSUE FOR JULY 30, 2010 "BRIEF & ADDENDUM OF APPELLANT THOMAS JOSEPH PETTERS", USA vs. PETTERS, No. 10-1843, U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

VIOLATION OF: Title 28 USCS §455 - Disqualification of Judge Richard H. Kyle due to his son's - Attorney Richard H. Kyle, Jr. - being a partner/share-holder in the law firm FREDRIKSON & BYRON, P.A. - consul for Defendant's THOMAS J. PETTERS and COMPANIES from on or about 1992 thru 2008. Legal billing fees paid by Defendant PETTERS & COMPANIES in excess of $25 MILLION to Fredrikson & Byron, P.A..

Dear Jon, Eric, Jessica & Paul:

As you know, I've been introducing myself to the legal library here at USP Leavenworth for the past couple of weeks, an area that I have no formal education within. Also, John Lambros - a jailhouse lawyer - has been assisting me in navigating same and putting-up with my endless questions. You may recall John Lambros, as he overturned his mandatory life sentence after being extradited from Brazil to Minnesota to stand trial.

The following facts exist that leads me to believe that the Honorable Richard H. Kyle should of DISQUALIFIED HIMSELF FROM MY JURY TRIAL:

1. From on or about 1992 thru 2008, the law firm FREDRIKSON & BYRON, P.A. represented Defendant THOMAS JOSEPH PETTERS, PETTERS COMPANY, INC., and PETTERS GROUP WORLDWIDE, LLC. (hereinafter DEFENDANT'S). The defendant's paid the law firm FREDRIKSON & BYRON, P.A. in EXCESS OF $25 MILLION.

2. Attorney's John Koneck, Simon Root, and Herther Thayer where FREDRIKSON & BYRON's firm representatives and addressed legal questions from Defendant's after consulting with the attorney's and researchers at FREDRIKSON & BYRON.

EXHIBIT A.

3. Defendant's chief in-house counsel was Attorney David Baer. Attorney David Baer and his in-house attorney's worked directly with FREDRIKSON & BYRON as to the insurmountable legal difficulties in running the Defendant's corporate behemoth, with more than 2,000 employees. In fact, FREDRIKSON & BYRON was involved in the following transactions charged within Defendant's **INDICTMENT:**

a. **Counts:**

1	Attorney John Koneck;
2	Attorney's Koneck and Root;
3	Attorney Root;
5	Attorney Thayer and Root;
6	Attorney Simon and Root;
7.	Attorney Root;
8.	Attorney Root;
9.	Not sure;
10.	Attorney Root;
11.	Attorney Root and Thayer;
12.	Not sure; Maybe Root & Thayer;
13.	In-House attorney's;
14.	**Conspiracy Count - go to individual counts.**
15.	**Conspiracy Count - go to individual counts.**
16.	In-house attorney's; **(I think)**
17.	In-House attorney's: **(I think)**
18.	Attorney's Koneck, Root, & Thayer **(Purchase of Sun Country Airlines)**
19.	In-House attorney's: **(I think)**
20.	In-House attorney's: **(I think)**

4. RICHARD H. KYLE, Jr. is an attorney and shareholder in Fredrikson & Byron. I believe Richard started working at the law firm in 2006. Richard H. Kyle, Jr. is the son of the Honorable Richard H. Kyle, U.S. District Court Judge for the District of Minnesota. See, **EXHIBIT A** (website printout from: www.Fredlaw.com/bios/attorneys)

5. **ARGUMENT #4 WITHIN JULY 30, 2010 APPEAL FILED WITH 8th CIRCUIT - Pages 47 thru 51:** Within this argument you state:

> "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 after he developed suspicions of fraud.**" (emphasis added)

See, **EXHIBIT B.** (Pages 47 thru 51 of appeal brief)

On page 50 of your appeal brief you state:

> "The record is replete with testimony of his attorneys'

involvement in PCJ 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 FRIVOLUS. HIS COUNSEL ASSURED INVESTORS ALL WAS WELL AT THE COMPANY." (emphasis added)

It appears to me that the law firm FREDRIKSON & BYRON, P.A. COULD HAVE A SUBSTANTIAL FINANCIAL INTEREST IN THIS UNDERLYING LITIGATION!!! Therefore, the outcome of this case could affect any PARTNER/SHAREHOLDER of Fredrikson & Byron, P.A., as to the firm's reputation, relationship with clients, ability to attract new clients and POSSIBLE LAWSUITS FROM THE INVESTORS IN PCJ. Richard H. Kyle, Jr. is an attorney and SHAREHOLDER at Fredrikson & Byron.

A. GOAL OF TITLE 28 USCS §455(a):

6. The goal of Title 28 USCS §455(a), which disqualifies a judge from acting in a proceeding in which his IMPARTIALITY MIGHT REASONABLY BE QUESTIONED, is to avoid even appearance of partiality; if it would appear to REASONABLE PERSON that judge has knowledge of facts which would give him interest in litigation, then appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, actually has no interest in the case, or is pure in heart and incorruptible. See, LILJEBERG vs. HEALTH SERVICES ACQUISITION CORP., 100 L.Ed.2d 855 (1988). Also, § 455(c) requires federal judges to stay informed of any personal or financial interest they may have in cases over which they preside.

B. GOAL OF TITLE 28 USCS § 455(b)(5)(i thru iv):

7. 28 USCS § 455(b)(5) states: "He or his spouse, or a PERSON WITHIN THE THIRD DEGREE OF RELATIONSHIP TO EITHER OF THEM, or the spouse of such person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a LAWYER IN THE PROCEEDING;

(iii) Is known by the judge to HAVE AN INTEREST THAT COULD BE SUBSTANTIALLY AFFECTED BY THE OUTCOME OF THE PROCEEDING;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding."

8. EXHIBIT C: (Title 28 USCS § 455)

C. TIMELINESS UNDER 28 USCS § 455:

9. As my attorney's at trial, you did not file a motion to disqualify Judge Kyle during my trial. Failure to move for recusal at trial does not preclude raising the issue on APPEAL, but we will bear a greater burden in demonstrating that Judge Kyle erred in failing to recuse himself. See, NOLJ vs. COMMISSIONER, 860 F.2d 1521, 1527 (9th Cir. 1988).

10. Motions under § 455 must be made at earliest possible moment after obtaining knowledge of facts demonstrating basis of such claim. See, HOFFENBERG vs. U.S., 333 F.Supp.2d 166 (S.D.N.Y. 2004).

11. IN RE APEX OIL CO., 981 F.2d 302, 304 (8th Cir. 1992) - "The timing of a recusal motion affects whether the moving party in entitled to relief."

12. IN RE KENSINGTON INTERN, LTD., 368 F.3d 289, 312-316 (3rd Cir. 2004): Timeliness of motions to disqualify federal judge on grounds of questionable impartiality depends on movants' actual rather than constructive knowledge of underlying circumstances, which consisted of conflict of interest on part of judge's panel of expert advisors; JUDGE KNEW OF CONFLICT FROM OR NEAR ITS INCEPTION MORE THAN 18 MONTHS BEFORE FIRST RECUSAL MOTION BUT NEVER DISCLOSED IT TO PARTIES.

> "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. See, U.S. vs. BOSCH, 951 F.2d 1546, 1555 n. 6 (9th Cir. 1991)(noting that § 455(a) 'has a de facto DISCLOSURE REQUIREMENT.'; see also PARKER vs. CONNORS STEEL CO., 855 F.2d 1510, 1525 (11th Cir. 1988) (recognizing that recusal motion could have been avoided IF JUDGE HAD DISCLOSED GROUNDS FOR RECUSAL TO PARTIES.)
>
> As we stated in U.S. vs. SCHREIBER, 599 F.2d 534, 537 (3rd Cir. 1979), "sound public policy considerations ... militate for the adoption of a ..... rule that the parties should be apprised of ANY POSSIBLE GROUNDS FOR DISQUALIFICATION KNOWN PRIVATELY TO THE JUDGE." The most compelling of these public policy considerations is that the judge is in the best position to know of the circumstances supporting a recusal motion." (emphasis added)

Id. at 313-314.

D. MOTIONS UNDER 28 USCS § 2255 AS TO VIOLATIONS OF 28 USCS § 455:

13. HARDY vs. U.S., 878 F.2d 94, 96-98 (2nd Cir. 1989): Appearance of impropriety may be raised ON COLLATERAL ATTACK ONLY IF ASSERTED PROMPTLY UPON LEARNING facts alleged to warrant recusal and MAY NOT BE RAISED COLLATERALLY IF OPPORTUNITY TO DO SO EXISTED AT TIME WHEN DIRECT REVIEW WAS AVAILABLE; it is especially appropriate to apply rule to attempted collateral attack on criminal judgment because of usual rule that in criminal cases collateral attack may not substitute for appeal. (emphasis added)

E. "MATTER IN CONTROVERSY"

14. The term "MATTER IN CONTROVERSY" as set forth in 28 USCS § 455(b)(2) should be given restrictive reading; that is, it should be read as applying only to case that is before court as defined by docket number attached to that case and pleadings containing therein (answer and any third party pleadings that may be filed in case. See, BLUE CROSS, BLUE SHIELD, R.I. vs. DELTA DENT., R.I., 248 F.Supp.2d 39, 46 (D.R.I. 2003).

F. "RELATIVE OF JUDGE" AS TO VIOLATIONS OF 28 USCS § 455:

15. District Court judge should have granted plaintiff's motion to disqualify pursuant to 28 USCS § 455(a) and (b)(5)(iii) where judge's brother is senior partner in law firm which has entered general appearance for one of the parties, since Judge's brother could have substantial financial interest in underlying litigation and present situation that creates appearance of partiality. See, SCA SERVICES, INC. vs. MORGAN, 557 F.2d 110 (7th Cir. 1977).

16. Under caselaw of Court of Appeals for Second Circuit, even where judge's relative is partner in law firm that is involved in litigation before judge, recusal is not automatic, but depends upon factual inquiry into whether relative has interest that could be substantially affected by outcome of case. See, FAITH TEMPLE CHURCH vs. TOWN OF BRIGHTON, 348 F.Supp.2d 18 (WD NY 2004).

17. Unknown to district judge, judge's brother-in-law acted as lawyer for tort plaintiff in action that was tried in district court, without jury; Judge did not abuse discretion, as judge was unaware of need to disqualify himself because of firm's materially misleading affidavits and company's failure to bring relevant documents to his attention, YET 28 USCS § 455(b)(5)(ii) REQUIRED DISQUALIFICATION AND REMAND OF CASE. MANGINI vs. U.S., 314 F.3d 1158 (9th Cir. 2003) (new trial)

G. "CHILDREN OF JUDGE" AS TO VIOLATIONS OF 28 USCS § 455:

18. TRIAL JUDGE PROPERLY RECUSED HIMSELF BECAUSE his DAUGHTER worked for law firm representing party in several consolidated cases and should not have reentered case to preside over those which law firm was not directly involved in since decision on merits of any important issue in any of consolidated cases could or might constitute law of case in all of them or be highly persuaive as precedent. See, IN RE AETNA CASUALTY & SURETY CO., 919 F.2d 1136 (6th Cir. 1990).

19. DISTRICT JUDGE WILL DISQUALIFY HIMSELF from presiding over damages aspect of trial involving physician who was temporarily represented by JUDGE'S SON in separate, unrelated action in another federal district court, in order to avoid appearance of impartiality. See, HOKE vs. CHARLOTTE-MECKLENBURG HOSP. AUTH., INC., 550 F.Supp. 1276 (W.D. NC 1982).

20. District Judge did not abuse his discretion in refusing recusal motion based on his son's acceptance of associate's position with law firm representing defendant since JUDGE'S SON was not involved in litigation and his employment would not begin until sometime in future and was contingent upon his graduating from law school and passing bar, and his position would be that of SALARIED ASSOCIATE WHO WOULD NOT BE SUBSTANTIALLY AFFECTED BY OUTCOME OF CASE. See, JENKINS vs. ARKANSAS POWER & LIGHT CO., 140 F.3d 1161, 1164-1165 (8th Cir. 1998).

21. Judge was not required to recuse himself where he had NO KNOWLEDGE of any involvement by law firm, WHERE HIS SONS WERE ASSOCIATES and that regularly represented defendant but was not representing defendant in case before judge, until motion for relief from judgment was filed, AS JUDGE HAD TO HAVE KNOWLEDGE OF DISQUALIFYING CIRCUMSTANCES FOR RECUSAL; JUDGE WOULD HAVE BEEN REQUIRED TO RECUSE HIMSELF IF HIS SONS HAD INTEREST KNOWN TO JUDGE THAT COULD BE SUBSTANTIALLY AFFECTED BY OUTCOME OF PROCEEDING. See, WELCH vs. BOARD OF DIRECTORS OF WILDWOOD GOLF CLUB, 918 F.Supp 134, 138-139 (W.D.Pa. 1996).

22. IN RE MERCEDES-BENZ ANTITRUST LITIGATION, 226 F.Supp.2d 552 (D.N.J. 2002): Judge presiding over antitrust suit WAS NOT REQUIRED to recuse himself (but could of), when his son became non-equity partner of law firm representing automobile manufacture.

23. SELKRIDGE vs. UNITED OF OMAHA LIFE INS. CO., 360 F.3d 155, 166-172 (3rd Cir. 2004): In this case no motion for recusal was made in the district court. Id. 166. Where a party HAS NOT made a request to recuse during district court proceeding the appeals court will review same for plain error on appeal. Id. at 166. Judge's DAUGHTER was employed by school district. "In LILJEBERG, the Supreme Court approved the vacatur of a final judgment entered by a district judge who should have disqualified himself." Id. 171.

EXHIBIT A.

H. REVIEW AS TO VIOLATION OF 28 USCS § 455:

24. Appellate Court must vacate judgment and remand case if magistrate who determined petition was automatically disqualified under 28 USCS § 455, even though disqualification was neither noticed by magistrate nor called to his attention by counsel. See, MIXON vs. U.S., 620 F.2d 486 (5th Cir. 1980).

I. CONFLICTS INFORMATION SYSTEMS FOR THE FEDERAL JUDICIARY:

25. "Most ethics rules require law firms to implement measures to manage conflicts information, see, e.g. ABA MODEL RULE 5.1(a), & cmt. [2], & cmt. [3] to ABA MODEL RULE 1.7, and most law firms appear to use automated conflicts systems." This information was taken from the February 19, 2009 article "MEDTRONIC CASE HIGHLIGHTS JUDICIAL CONFLICTS CONTROL", by Robert Richards. The article appeared within the "LAW LIBRARIAN BLOG", at typepad.com. Of interest is the fact the article was about Senior U.S. DISTRICT JUDGE RICHARD H. KYLE and his "SON" RICHARD H. KYLE who was an attorney at the law firm FREDRIKSON & BYRON, P.A., over litigation involving the medical firm MEDTRONIC - a client of FREDRIKSON & BYRON, P.A. The article stated:

> "If the Journal's [Wall Street Journal] report is accurate, it points to a possible gap in federal judiciary conflicts information control. If the judge did not receive an notice of this potential conflict, the reason may be either that some federal judges are relying on informal conflicts disclosure among family members (even lawyers) rather than on automated conflicts systems; or that his son's firm did not contribute all client information to the judge's automated conflicts system. This case may afford federal court administrators an opportunity to review and possibly reform their conflicts information systems." (emphasis added)

See, EXHIBIT D. (February 19, 2009, article "MEDTRONIC CASE HIGHLIGHTS JUDICIAL CONFLICTS CONTROL, by Robert Richards.)

J. FBI 302 FORMS PROVE FREDIKSON & BYRON REPRESENTED DEFENDANTS IN CRIMINAL INVESTIGATION WITHIN TIME FRAME OF INDICTMENT:

26. FBI 302 EVIDENCE FORMS WITHIN DEFENDANTS TRIAL clearly prove that Attorney David Marshall of the law firm FREDIKSON & BYRON, P.A. represented Defendant's Tom J. Petters and Petters Company, Inc. in 1994 and 1995, as per my recollection. FBI Agent Eileen Rice, David Marshal and TOM PETTERS have met as to possible criminal

investigations into the actions TOM PETTERS and COMPANIES - Defendant's - in 2002 due to **WIRE TRANSFERS** between the company owned by **LARRY CHAIJ** the owner of **AFTER THE SECOND MILLENIUM** company in Florida and PETTERS & COMPANY. Again, Attorney **DAVID MARSHAL and FREDIKSON & BYRON REPRESENTED DEFENDANT'S IN CRIMINAL INVESTIGATIONS WITH THE FBI.**

K. **WAIVER AS TO VIOLATIONS OF 28 USCS § 455:**

27. Section 455(a) may be waived by the **PARTIES AFTER FULL DISCLOSURE**, whereas section 455(b) **MAY NOT.** 28 U.S.C. § 455. See, PARKER vs. CONNORS STEEL CO., 855 F.2d 1510, 1527 (11th Cir. 1988).

L. **FREDRIKSON & BYRON, P.A. - PROMISE TO CLIENTS:**

28. When the law firm "FREDRIKSON & BYRON, P.A." comes knocking for legal business, it advocates that, insurmountable legal difficulties for there clients are almost non-existant, as the legal challenge of applying the firm's painstaking approach to utilize **EVERY ATTORNEY ON STAFF TO SOLVE THE CLIENT'S LEGAL PROBLEMS, IS ALWAYS A REQUIREMENT.** Therefore, in the client's mind, a consensus exists amongst the best attorney's in Minnesota that legal decisions/research will never be undermined.

Who did TOM PETTERS trust? On legal matters regarding business decisions, TOM PETTERS trusted the **150-PLUS ATTORNEY'S AT FREDRIKSON & BYRON, P.A..** You have to decide who you trust before you decide what to believe. People start off with a belief and a prejudice - we all do. And the job of law firms is to set that aside to get the truth.

John Koneck, the president of FREDRIKSON & BYRON, P.A., became one of defendant TOM PETTERS closest friends and certainly most trusted attorney and advisor. He not only accompanied and assisted TOM PETTERS to Italy when his son was murdered in 2004, but he always told TOM PETTERS, **"I AM YOUR EYES, EARS AND GUARDIAN ANGEL IN THE LEGAL BUSINESS".** Hence, that guardian angel disappeared two (2) days after the raid of PETTERS office by the FBI with his team of angels.

CONCLUSION:

29. John Lambros and myself believe that the above facts would cast doubt in the public's mind on Judge Kyle's ability to remain impartial and at a **MINIMUM THESE FACTS RAISE THE APPEARANCE OF IMPROPRIETY.** It has been stated on numerous occasions that when a judge harbors any doubt concerning whether his disqualification is

is required he should resolve the doubt in favor of disqualification. Thus, we merely conclude that all of the above facts taken together raise the appearance of impropriety and may cause on to reasonably question Judge Kyle's impartiality.

PLEASE SUBMIT AN ADDITIONAL ISSUE WITHIN MY DIRECT APPEAL AS TO THE VIOLATION OF TITLE 28 USCS § 455(a) and 455(b)(5)(ii & iii).

It is my understanding that the 8th Circuit must be placed on notice as soon as possible as to your request to supplement my appeal with the above additional issue.

Thank you in advance for your continued assistance in this matter and please write me as soon as possible as to your views and intent.

Sincerely,

Thomas J. Petters

BY: John Gregory Lambros, JailHouse Lawyer
Reg. No. 00436-124
USP Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000
Website: www.BrazilBoycott.org

EXHIBIT A.

Richard H. Kyle, Jr.

rkyle@fredlaw.com

p: 612.492.7333 f: 612.492.7077

Assistant: Janalee Aurelia
612.492.7607

MEET RICHARD

"I really enjoy working with clients. I adopt their problems and make them my own. I like the role of lawyer as counselor where I can offer good, practical advice."

INTRODUCTION

Richard is a shareholder in Fredrikson & Byron's White Collar & Regulatory Defense, Health Care Fraud & Compliance and Litigation Groups.

Richard has considerable criminal defense experience defending individuals and businesses at trial and on appeal in state and federal court. He has worked on a wide variety of white collar cases, including antitrust, bank fraud, environmental crimes, health care fraud, mail and wire fraud, securities fraud, and tax evasion. In addition, Richard handles other serious misdemeanor and felony cases for Fredrikson & Byron. Richard is regularly named one of the top 40 criminal defense lawyers in Minnesota by the Minnesota Journal of Law and Politics.

Before joining Fredrikson & Byron, Richard was a solo criminal defense practitioner (1997-2005) and an associate at Robins, Kaplan, Miller & Ciresi (1991-1996).

EDUCATION

- William Mitchell College of Law, Minnesota, J.D. 1989
- Oxford University, Oxford, England
- St. Olaf College, Northfield, Minnesota, B.A., History, 1984

BAR ADMISSIONS

- Minnesota, 1990
- U.S. District Court of Minnesota, 1990
- U.S. District Court of North Dakota, 1996

PRACTICE AREAS

- White Collar & Regulatory Defense

EXHIBIT A.

No. 10-1843

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

THOMAS JOSEPH PETTERS,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF AND ADDENDUM OF APPELLANT THOMAS JOSEPH PETTERS

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Counsel for Appellant Thomas Joseph Petters

(1)

V. Argument #4: Mr. Petters was entitled to an appropriate theory-of-defense instruction because there was competent evidence to support the theories that: (1) he was not aware of a fraud in his own company because of the numerous past legitimate deals that resembled the fraudulent ones as well as his delegation of duties to executives who appeared competent and responsible; and (2) he relied on the advice, oversight, and competency of his in-house and outside attorneys after he developed suspicions of fraud.

Mr. Petters advanced two salient theories of defense: (1) that he was an unwitting participant in a fraud conceived by Reynolds, Coleman, White and possibly others (discussed throughout this brief), and (2) that he relied on his attorneys' advice with respect to his suspicions of fraud at PCI—which demonstrates good faith and innocent mind. [1 Trial Tr. at 60-70.] The District Court refused an appropriate instruction. This too was reversible error.

A. Standard of Review

This Circuit has said it will review for abuse of discretion a district court's refusal to give a theory-of-defense instruction. *United States v. McCourt*, 468 F.3d 1088, 1093-94 (8th Cir. 2006). This standard conflicts with sister circuits which review such matters *de novo*. *E.g., United States v. Jackson*, 598 F.3d 340, 345 (7th Cir. 2010).

B. Right To Theory-Of-Defense Instruction

A defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. *Mathews v. United States*, 485 U.S. 58, 63 (1988); *accord United States v.*

EXHIBIT A.

(6)

Casperson, 773 F.2d 216, 223 (8th Cir. 1985). Sister circuits have said this rises to a constitutional right. *United States v. Escobar de Bright*, 742 F.2d 1196, 1201 (9th Cir. 1984).

A reliance-on-counsel defense has two elements: (1) the accused fully disclosed all material facts to his attorney before seeking advice; and (2) he actually relied on his counsel's advice in the good faith belief that his conduct was legal. *United States v. Rice*, 449 F.3d 887, 897 (8th Cir. 2006). "[A] defendant who identifies any evidence supporting the conclusion that he or she has fully disclosed all pertinent facts to counsel, and that he or she has relied in good faith on counsel's advice, is entitled to a reliance jury instruction." *United States v. Lindo*, 18 F.3d 353, 356 (6th Cir. 1994).

C. The Violations

Defense counsel asked for appropriate theory-of-defense instructions. The District Court refused to give them, [17 Trial Tr. at 3300-04], which is reversible error.

1. The Overarching Theory of Defense

Mr. Petters needed to inculcate his theory that Reynolds, Coleman, White and possibly others were defrauding PCI lenders, and so too they were defrauding Mr. Petters. The defense wanted to make these critical points in its theory-of-defense instruction:

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- Mr. Petters and his companies had done many real, legitimate deals with the very same large retailers Coleman and White claimed were buying the fraudulent PCI deals, which means Mr. Petters would have reasonably believed Coleman and White were procuring or financing real deals with these same retailers;
- He paid less and less attention to PCI as time went on and in particular after his son's death, but rather put executives in charge whom he believed to capable;
- He was unaware of any fraud until deep into 2008, at which time he took steps to discover the extent of the fraud and its perpetrators.

The defense submitted an instruction in this regard, [Docket No. 355 at 2], fully supported by the evidence. *Supra* Statement of the Facts §§ I, VI. But the District Court refused to give it. Instead the District Court gave a cursory instruction. [Docket No. 350 at 47.]

The bare bones did not suffice here, where a man's life was at stake. Mr. Petters needed the District Court to give some context for his theory of defense, an explanation for why this big fraud could go on in his own company undetected. The proposed theory of defense would have done that, and because the District Court refused to give the instruction Mr. Petters was wrongly convicted.

2. The Reliance-on-Counsel Theory of Defense

Similarly the defense needed the District Court to give an appropriate reliance-on-counsel instruction. [Docket No. 355 at 5.] The record supports the instruction. Mr. Petters' testimony was:

EXHIBIT A.

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- He believed his attorneys and accountants vetted each PCI transaction;
- He informed his attorneys of his suspicions there was some degree of "bad receivables" or possibly fraud at PCI, beginning in 2007 and into 2008;
- His attorneys advised him to perform an internal investigation, and in the near term they advised that Reynolds assist with the investigation.

[15 Trial Tr. at 2898-900; 16 Trial Tr. at 3058-62, 3117-18, 3203; 17 Trial Tr. at 3260-61.]

The record is replete with testimony of his attorneys' 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.

D. The Remedy

The accused's theory of defense is a key component of the right to fair trial. A violation cannot be harmless, and particularly not in this case. *Escobar de Bright*, 742 F.2d at 1201-02. A new trial is required. *Id.*

VI. Argument #5: Due to the overwhelming inflammatory publicity a presumption of prejudice arose, such that venue should have been transferred.

The case made national news and the brunt of the media coverage was in the State and District of Minnesota. It was a firestorm. The coverage was inflammatory and pervasive to the point no objective observer could be confident the jury was not tainted by it. [Docket Nos. 108, 109, 306; *Voir Dire* Tr. at 48.]

A. Standard of Review

This Circuit has said it will "review the denial of a change of venue for abuse of discretion." *United States v. Blom*, 242 F.3d 799, 803 (8th Cir. 2001). This is at odds with sister circuits which "review *de novo* whether presumed prejudice tainted a trial, and this review includes conducting an independent evaluation of the facts." *United States v. Skilling*, 554 F.3d 529, 557-58 (5th Cir. 2009), *aff'd in part and vacated in part*, 130 S. Ct. 2896 (2010). *De novo* is the correct standard in this important constitutional inquiry. *Supra* Argument § II.A.

EXHIBIT A.

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February 19, 2009

Medtronic Case Highlights Judicial Conflicts Control

Conflicts information systems for the federal judiciary are highlighted in the role of Senior U.S. District Judge Richard H. Kyle, District of Minnesota, in complex litigation involving Medtronic, Inc. According to a Feb. 13 Wall Street Journal report (see also the ABA Journal story here), last month Judge Kyle dismissed more than 600 consolidated personal injury cases against Medtronic, respecting allegedly defective Sprint Fidelis defibrillator leads, on the ground that federal regulation of those devices preempted state law claims. The Journal reports that on Feb. 5, the plaintiffs' lawyers told the judge that they would "raise the question of the propriety of the judge's presiding over the case on the grounds that Medtronic is a client of the judge's son's law firm, Fredrikson & Byron, P.A. According to the Journal, Fredrikson has represented Medtronic in major mergers & acquisitions transactions, though not in the case before Judge Kyle.

The role of the son's firm appears to have constituted a potential conflict of interest for the judge under 28 U.S.C. § 455(b)(5)(iii), which provides in relevant part that a judge "shall also disqualify himself [where] . . . [h]e or his spouse, or a person within the third degree of relationship to either of them . . . [i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding . . ." Though the plaintiffs' conflicts claim in this case may be weak, the intriguing detail for those interested in legal information systems is the Journal's report that the judge was unaware of the potential conflict. The Journal states that the judge "said in an interview that he didn't realize [that his son's] firm . . . had represented Medtronic, and quotes

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the judge as saying "I never thought about it. I don't see that I have a conflict."

Most ethics rules require law firms to implement measures to manage conflicts information, see e.g., ABA Model Rule 5.1(a), & cmt. [2], & cmt. [3] to ABA Model Rule 1.7, and most law firms appear to use automated conflicts systems. If the Journal's report is accurate, it points to a possible gap in federal judiciary conflicts information control. If the judge did not receive any notice of this potential conflict, the reason may be either that some federal judges are relying on informal conflicts disclosure among family members (even lawyers) rather than on automated conflicts systems; or that his son's firm did not contribute all client information to the judge's automated conflicts system. This case may afford federal court administrators an opportunity to review and possibly reform their conflicts information systems.

[Robert Richards]

February 19, 2009 in Courts | Permalink

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EXHIBIT A.

§ 454. Practice of law by justices and judges

Any justice or judge appointed under the authority of the United States who engages in the practice of law is guilty of a high misdemeanor.

(June 25, 1948, c. 646, 62 Stat. 908.)

§ 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(June 25, 1948, c. 646, 62 Stat. 908; Dec. 5, 1974, Pub.L. 93–512, § 1, 88 Stat. 1609; Nov. 6, 1978, Pub.L. 95–598, Title II, § 214(a), (b), 92 Stat. 2661; Nov. 19, 1988, Pub.L. 100–702, Title X, § 1007, 102 Stat. 4667; Dec. 1, 1990, Pub.L. 101–650, Title III, § 321, 104 Stat. 5117.)

HISTORICAL AND STATUTORY NOTES

Change of Name

"United States magistrate judge" substituted for "United States magistrate" in text pursuant to section 321 of Pub.L. 101–650, set out as a note under 28 U.S.C.A. § 631.

EXHIBIT A.

EXHIBIT A.

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September 17, 2010

LEGAL MAIL – OPEN IN THE PRESENCE OF INMATE ONLY

Attorney-Client Privileged

Thomas J. Petters, #14170-041
USP Leavenworth
U.S. Penitentiary
P.O. Box 1000
Leavenworth, KS 66048

RE: U.S. v. Petters
Our File No. 24634.001

Dear Tom:

I'm writing to address the two main issues you inquired about for the appeal: (1) the issue regarding disqualification of the judge; and (2) the issue regarding whether you were sentenced for all the counts of conviction. You asked whether either we (your lawyers) should file something now to preserve the issue despite not raising the issue in the principal brief, or alternatively whether you should file something on your own. I spoke to Jon about this and we agree you should not for the following reasons:

As we discussed the Eighth Circuit will not consider issues unless raised on direct appeal in the principal brief. *United States v. Samuels*, 611 F.3d 914, 919 n.2 (8th Cir. 2010). (I've enclosed a copy of this case, as well as the other authorities cited in this letter.) Thus it is too late to raise the issues on direct appeal, and for that procedural reason alone the Eighth Circuit would almost certainly rule against us. Perhaps more importantly, raising the issue now could very well deprive you of an opportunity to raise the issues later in a motion to vacate or correct federal sentence pursuant to 28 U.S.C. § 2255.

First the procedure: Section 2255 exists so that federal prisoners have a means to challenge custody where there was a major legal defect with a conviction and/or sentence. But there are a number of procedural oddities:

EXHIBIT B.

1. You generally can't file such a motion while direct appeal is pending, 16A *Federal Procedure* § 41:515 (2007);

2. You generally can't raise issues already decided on direct appeal, *Bear Stops v. United States*, 339 F.3d 777, 780 (8th Cir. 2003);

3. You are generally limited to one Section 2255 motion, subject to certain exceptions, 28 U.S.C. § 2255(h);

4. The motion generally must be filed within a year after a conviction is finalized, 28 U.S.C. § 2255(f); 16A *Federal Procedure* § 41:510 (2007);

5. If you file *pro se* motion papers, a court may construe those papers as your one and only Section 2255 motion, so you have to be careful what papers you send to the court and when, *Castro v. United States*, 540 U.S. 375 (2003); 16A *Federal Procedure* § 41:417 (2007).

We think the best procedural route is to exhaust the appellate process as we started it. Should we lose on appeal, you will have a year to file a Section 2255 motion to raise the issues you bring up and perhaps more. We think if you file papers to "preserve" the above issues the exact opposite may well occur—the court may find that the issue was already raised on direct appeal and therefore unavailable in a Section 2255 motion (see Point #2 above). Alternatively the court may construe your *pro se* papers as your one and only shot at a Section 2255 motion and deprive you of that avenue for relief in the future (see Point #3 & #5 above).

Now to the substance: We think the argument regarding whether the judge should be disqualified is a decent one. If we should lose the appeal, you might make a Section 2255 motion on that ground, and perhaps argue your counsel (us) were ineffective for failing to move for disqualification. There might be other ways to frame the issue as well, but that is one. As for the second issue, we think it is unlikely to succeed. I did find some authority to support your theory that what matters is the pronouncement at the sentencing hearing, 9A *Federal Procedure* § 22:1732 (2005), but the transcript clearly shows the judge sentencing you to 600 months with consecutive sentences as to Count 1 (240 months), Count 2 (240 months), Count 14 (60 months) and Count 15 (60 months). Sent. Tr. at 47. I personally don't see how this can be made into a successful issue, but perhaps you can come up with some ideas.

Please write back with comments.

EXHIBIT B.

September 27, 2010

Thomas J. Petters
BOP Reg. No. 14170-041
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000

U.S. CERTIFIED MAIL NO.
7008-1830-0004-2645-4303

Falhaber, Larson, Fenlon, & Vogt
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Paul C. Engh, Engh Law Office

220 South Sixth Street, Suite 2200
Minneapolis, Minnesota 55402-4504

AFFIDAVIT FORM

RE: RESPONSE TO ERIC J. RIENSCHE LETTER DATED SEPTEMBER 17, 2010 - TITLE 28 USC § 455 VIOLATION BY JUDGE KYLE.

Dear Jon, Eric, Jessica & Paul:

Thank you for having Eric respond to my September 1, 2010 letter requesting you to file an additional issue within my current appeal within the U.S. Court of Appeals for the Eighth Circuit - VIOLATION OF TITLE 28 USC § 455 BY JUDGE KYLE DUE TO HIS SON BEING AN ATTORNEY AT "FREDRIKSON & BYRON".

Within the first paragraph of your September 17, 2010 letter you clearly state that that you do not think the issue regarding the disqualification of Judge Kyle should be raised at this time, and offer several reasons for same. John Lambros (jailhouse lawyer) and I would like to address same at this time:

1. You state, "As we discussed the Eighth Circuit will not consider issues unless raised on direct appeal in the principal brief. U.S. vs. SAMUELS, 611 F.3d 914, 919 n.2 (8th Cir. 2010). Thus it is too late to raise the issues on direct appeal, and for that procedural reason alone the Eight Circuit would almost certainly rule against us. Perhaps more importantly, raising the issue now could very will deprive you of an opportunity to raise the issues later in a motion to vacate or correct federal sentence pursuant to 28 U.S.C. §2255."

2. In U.S. vs. SAMUELS the FOOTNOTE (as you know, footnotes are usually considered dicta) stated that SAMUELS filed a motion AFTER ORAL AGRUMENTS at the 8th Circuit and the Court refused to reopen the case. In fact, in all the other cases that follow SAMUELS within the Eighth Circuit - mostly footnotes - the 8th Circuit denied SUPPLEMENTAL BRIEFING due to the late nature of the request. The Court NEVER STATES THAT THEY HAVE A RULE NOT ALLOWING SUPPLEMENTAL BRIEFING AFTER PRINCIPAL BRIEFS HAVE BEEN FILED - NOR CAN I LOCATE ONE. Therefore, a request from you requesting permission to file SUPPLEMENTAL BRIEFING IS POSSIBLE.

EXHIBIT C.

3. SUPREME COURT RULES: Rule 15(8) clearly allows supplemental briefing

EXHIBIT C

AT ANY TIME WHILE A PETITION FOR A WRIT OF CERTIORARE IS PENDING, CALLING ATTENTION TO ...., OR OTHER INTERVENING MATTER NOT AVAILABLE AT THE TIME OF THE PARTY'S LAST FILING. A supplemental brief shall be RESTRICTED TO NEW MATTER and shall follow, ... See, EXHIBIT A. (Rule 15 - Supreme Court)

4. RULES OF CIVIL PROCEDURE: RULE 15 - Amended and Supplemental Pleading. Although civil procedure rules are not applicable to our current action, the rules does offer some insight as to the way District Court's allow "SUPPLEMENTAL PLEADINGS. Issues to be considered from Rule 15:

a. Rule 15(a): A party may amend its pleading once as a matter of course: (A) BEFORE BEING SERVED WITH A RESPONSIVE PLEADING. PLEASE NOTE: THE GOVERNMENT HAS NOT FILED A RESPONSE TO YOUR APPEAL BRIEF AND THE 8th CIRCUIT STATED THAT OCTOBER 8, 2010 IS THE LAST DAY FOR THE GOVERNMENT TO FILE.

b. RULE 15(a)(2): Party may amend pleading with opposing party's written consent OR THE COURT'S LEAVE. THE COURT SHOULD FREELY GIVE LEAVE WHEN JUSTICE SO REQUIRES.

c. RULE 15(d) SUPPLEMENTAL PLEADINGS: On motion... the court may, ... permit a party to serve supplemental pleading out any transaction, ... event THAT HAPPENED AFTER THE DATE OF THE PLEADING TO BE SUPPLEMENTED. ...

See, EXHIBIT B. (Rule 15 - Rules of Civil Procedure)

5. You state on page two (2) of your letter, "You generally can't file such a motion [referring to 28 USC § 2255] while direct appeal is pending." THIS IS CORRECT. PLEASE NOTE: I am not requesting you to file a § 2255 motion nor do I want to file a § 2255 motion now. I AM REQUESTING YOU TO FILE A "SUPPLEMENTAL PLEADING" and/or "AMENDMENT PLEADING" raising the Tile 28 USC §455 violation. I am not requesting you to file an "INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM", as you just discovered the 28 USC §455 violation due to my September 1, 2010 letter. In fact, MASSARO vs. U.S., 155 L.Ed.2d 714 (2003) states that ineffective assistance of counsel claims should not be filed on direct appeal.

6. You state on page two (2) of your letter, "You generally can't raise issues already decided on direct appeal, BEAR STOPS vs. U.S., 339 F.3d 777, 780 (8th Cir. 2003)". This is not totally correct. If for some reason you do not present the Title 28 USC §455 violation correctly, I could than raise the same claim within my §2255 - INEFFECTIVE ASSISTANCE OF COUNSEL. The Supreme Court stated in MASSARO vs. U.S., at 718:

> ".... In such cases, certain questions may arise in subsequent §2255 proceedings concerning the conclusiveness of the determinations made on the claims raised on DIRECT APPEAL, but these ~~implentation~~ matters are not before the court."
> Implementation EXHIBIT C.

7. You state on page two (2) of your letter, "If you file **PRO SE MOTION PAPERS**, a court may construe those papers as your one and only Section 2255, so you have to be careful what papers you send to the court and when, **Castro vs. U.S,** 540 U.S. 375; 157 L.Ed.2d 778 (2003) ...". I do not totally agree with the above and offer other information for your consideration:

a. CASTRO held that **DISTRICT COURTS - NOT APPEALS COURTS - must notify PRO SE defendant prior to recharacterizing motion as MOTION TO VACATE [§ 2255].**

b. You are my attorney's and I want you to file a motion to the 8th Circuit requesting permission to **AMEND AND/OR SUPPLEMENT MY DIRECT APPEAL AS TO THE VIOLATION OF §455.**

MY SEPTEMBER 1, 2010 LETTER TO YOU:

8. I believe that my research within my September 1, 2010 made clear the following reasons **WHY YOU MUST REQUEST THE 8th CIRCUIT TO ALLOW YOU TO FILE A "SUPPLEMENTAL" and/or "AMENDED" BRIEF:**

a. TIMELINESS UNDER 28 USC §455 - See page 4, Paragraphs 9 thru 12:

1. Motions under §455 must be made at earliest possible moment.
2. The 8th Circuit held, "The timing of a recusal motion affects whether the moving party is entitled to relief." IN RE APEX OIL CO., 981 F.2d 302, 304 (8th Cir. 1992).

b. MOTIONS UNDER 28 USC §2255 AS TO VIOLATIONS OF 28 USC §455: See, page 5, Paragraph 13:

1. HARDY vs. U.S., 878 F.2d 94, 96-98 (2nd Cir. 1989), Appearance of impropriety may be raised on **COLLATERAL ATTACK ONLY IF ASSERTED PROMPTLY UPON LEARNING FACTS ALLEGED TO WARRANT RECUSAL and MAY NOT BE RAISED COLLATERALLY IF OPPORTUNITY TO DO SO EXISTED AT TIME WHEN DIRECT REVIEW WAS AVAILABLE**; ...

The $64,000 question is "DOES OPPORTUNITY EXIST FOR MY LEGAL TEAM TO FILE A "SUPPLEMENTAL" and/or "AMENDED" BRIEF AS TO VIOLATIONS OF 28 USC §455?". The only way to answer this question is for you to file a motion with the 8th Circuit asking them for permission to file an AMENDED and/or SUPPLEMENTAL BRIEF.

EXHIBIT C.

RETURNING TO MY RESPONSE TO YOUR SEPTEMBER 17, 2010 LETTER:

9. You state on page two (2) of your letter, "We think if you file papers to 'preserve' the above issues the exact opposite may well occur - the court may find that the issue was already raised on direct appeal and therefore unavailable in a Section 2255 motion (see Point 2 above). Alternatively the court may construe your PRO SE papers as your one and only shot at a Section 2255 motion and deprive you of that avenue for relief in the future (see Point 3 & 5 above)."

Upon review of my September 1, 2010 letter to you, I DO NOT see any statement that I TOM PETTERS wanted to file a **PRO SE MOTION** to the 8th Circuit. I specifically requested you - my LEGAL TEAM - to file an "ADDITIONAL ISSUE" within my direct appeal. Therefore, I want you to file papers to "**PRESERVE**" the §455 issue, thus none of the possible negative effects that you state can occur.

10. You state on page two (2) of your letter, "**We think the argument regarding whether the judge should be disqualified is a decent one.**" **I TOTALLY AGREE WITH YOU AND LOVE THE LEGAL CASES SUPPORTING THE ISSUE.** John Lambros believes it is a winner all the way.

CONCLUSION:

11. Judge Kyle **DID NOT GIVE PARTIAL OR FULL DISCLOSURE OF THE FACT HIS SON WAS AN ATTORNEY AT THE LAW FIRM FREDRIKSON & BYRON, P.A..** The law firm FREDRIKSON & BYRON, P.A. **REPRESENTED** Tom Petters, Petters Company, Inc., and PETTERS GROUP WORLDWIDE, LLC. - **ALL DEFENDANTS WITHIN THIS CRIMINAL ACTION DURING THE ENTIRE TIME FRAME OF THE INDICTMENT.** Tom Petters and companies (defendants) paid FREDRIKSON & BYRON, P.A. **OVER $25 million in LEGAL FEES** for legal advice that involved business transactions charged in counts 1, 2, 3, 5, 6, 7, 8, 10, 11, 14, 15, & 18. Testimony at trial and court exhibits all prove same.

12. Again, I am requesting you - my legal team - **TO FILE A "MOTION" WITH THE 8th CIRCUIT REQUESTING 14 DAYS TO SERVE A "SUPPLEMENTAL PLEADING" SETTING OUT THE EVENTS THAT HAPPENED AFTER YOUR PRINCIPAL BRIEF WAS FILED AS TO YOUR KNOWLEDGE OF VIOLATIONS OF TITLE 28 USC §455 BY JUDGE KYLE.** Also, please attach to your initial motion the following documents:

a. Tom Petters September 1, 2010 letter to you.

b. Eric Riensche's September 17, 2010 letter to Tom Petters.

c. Tom Petters September 27, 2010 letter to you.

EXHIBIT C.

By including the above three (3) letters to the court with your request "MOTION" to file a "SUPPLEMENTAL PLEADING", the issue will be PRESERVED with NO POSSIBLE negative §2255 problems, due to the fact that I did not file the motion. It is not possible for the Court to turn your motion into my §2255 motion, as your first motion is only a request - not the actual "SUPPLEMENTAL PLEADING".

13. Lambros and I firmly believe the 8th Circuit will **FREELY GIVE YOU PERMISSION TO SUBMIT A "SUPPLEMENTAL PLEADING"**, as to the violation of §455, due to the fact:

a. The government HAS NOT responded to your PRINCIPAL BRIEF and was given an **EXTENSION OF TIME TO FILE THE BRIEF** by the 8th Circuit. "Appellee may have until **OCTOBER 13, 2010 TO FILE THE BRIEF.**" See, 8th Circuit ORDER dated September 20, 2010.

b. Justice so requires.

c. The 8th Circuit may stay our appeal and send the §455 issue back to Judge Kyle to respond before the court wastes its time dealing with the other issues, as a new trial is required.

d. This is a winner, §455(a) may be waived **ONLY AFTER FULL DISCLOSURE, WHEREAS §455(b) MAY NOT.** 28 USC §455(e) (.... waiver may be accepted **PROVIDED IT IS PRECEDED BY A FULL DISCLOSURE ON THE RECORD OF THE BASIS FOR DISQUALIFICATION.**)

*****

To the best of my knowledge their is **NOTHING ON THE RECORD - THUS NO DISCLOSURE OCCURRED IN MY CASE.** See, EXHIBIT C. (Parker vs. Connors Steel Co, 855 F.2d 1510, 1527 (11th Cir. 1988).

14. We have nothing to lose and everything to gain by requesting to submit this issue within our direct appeal.

15. Possible question for the above issue:

SHOULD TOM PETTERS SENTENCE BE VACATED BECAUSE JUDGE KYLE VIOLATED TITLE 28 USC §455(a) and §455(b) BY NOT GIVING "FULL DISCLOSURE" THAT HIS SON WAS AN ATTORNEY (Partner/ sharholder) FOR THE LAW FIRM THAT REPRESENTED DEFENDANTS - LEGAL WORK PRODUCT, CIVIL ACTIONS & CRIMINAL INVESTIGATIONS - DURING ALL COUNTS ATTACHED TO THIS CASE, PLEADING & DOCKET NUMBER. JUDGE KYLE SHOULD OF RECUSED HIMSELF.

16. Please respond to this letter in writing as soon as possible.

EXHIBIT C.

17. Thank you in advance for your continued assistance in this matter.

18. I TOM PETTERS, declare under the penalty of perjury that the foregoing is true and correct. See, Title 28 USC § 1746.

EXECUTED ON: September 27, 2010

Sincerely,

Thomas J. Petters

BY: John Gregory Lambros, JailHouse Lawyer
Reg. No. 00436-124
USP Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000
Website: www.BrazilBoycott.org

EXHIBIT C.

motion of parties to vacate certain judgments of District Court, will dismiss writ of certiorari as improvidently granted, where petitioner lacks standing under 28 USCS § 1254(1) to seek review of question whether Courts of Appeals should routinely vacate District Court final judgments, at parties' request when cases are settled while on appeal, which was single question presented in certiorari petition, because (1) petitioner is not party to case under § 1254(1); (2) in order to reach merits of question, Supreme Court would have to address question whether Court of Appeals should have permitted petitioner to intervene, and such question could not be considered under Supreme Court Rule 14.1(a); (3) there is thus heavy presumption created by Rule 14.1(a) against Supreme Court's consideration of intervention question; and (4) Court of Appeals' disposition of petitioner's motion to intervene is not particularly important question, so as to constitute exceptional case in which Rule 14.1(a) could be disregarded. Izumi Seimitsu Kogyo Kabushiki Kaisha v U.S. Philips Corp. (1993) 510 US 27, 114 S Ct 425, 126 L Ed 2d 396, 93 CDOS 8776, 93 Daily Journal DAR 15009, 28 USPQ2d 1930, 1993-2 CCH Trade Cases ¶ 70428, 27 FR Serv 3d 427, 7 FLW Fed S 661, reh den (1994) 510 US 1081, 114 S Ct 904, 127 L Ed 2d 95 and (criticized in Ericsson, Inc. v InterDigital Communs. Corp. (2004, ND Tex) 2004 US Dist LEXIS 11615).

Rule 14.1(a) of United States Supreme Court Rules is prudential and does not limit Supreme Court's power to decide important questions not raised by parties; such rule helps Supreme Court to use its resources most efficiently by highlighting those cases that will enable court to resolve particularly important questions; Supreme Court will disregard Rule 14.1(a) and consider issues not raised in petition only in most exceptional cases. Izumi Seimitsu Kogyo Kabushiki Kaisha v U.S. Philips Corp. (1993) 510 US 27, 114 S Ct 425, 126 L Ed 2d 396, 93 CDOS 8776, 93 Daily Journal DAR 15009, 28 USPQ2d 1930, 1993-2 CCH Trade Cases ¶ 70428, 27 FR Serv 3d 427, 7 FLW Fed S 661, reh den (1994) 510 US 1081, 114 S Ct 904, 127 L Ed 2d 95 and (criticized in Ericsson, Inc. v InterDigital Communs. Corp. (2004, ND Tex) 2004 US Dist LEXIS 11615).

EXHIBIT C.

Rule 15. Briefs in Opposition; Reply Briefs; Supplemental Briefs

1. A brief in opposition to a petition for a writ of certiorari may be filed by the respondent in any case, but is not mandatory except in a capital case, see Rule 14.1(a), or when ordered by the Court.

2. A brief in opposition should be stated briefly and in plain terms and may not exceed the page limitations specified in Rule 33. In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

3. Any brief in opposition shall be filed within 30 days after the case is placed on the docket, unless the time is extended by the Court or a Justice, or by the Clerk under Rule 30.4. Forty copies shall be filed, except that a respondent proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the brief in opposition. If the petitioner is proceeding *in forma pauperis*, the respondent may file an original and 10 copies of a brief in opposition prepared as required by Rule 33.2. Whether prepared under Rule 33.1 or Rule 33.2, the brief in opposition shall comply with the requirements of Rule 24 governing a respondent's brief, except that no summary of the argument is required. A brief in opposition may not be joined with any other pleading, except that any motion for

leave to proceed *in forma pauperis* shall be attached. The brief in opposition shall be served as required by Rule 29.

4. No motion by a respondent to dismiss a petition for a writ of certiorari may be filed. Any objections to the jurisdiction of the Court to grant a petition for a writ of certiorari shall be included in the brief in opposition.

5. The Clerk will distribute the petition to the Court for its consideration upon receiving an express waiver of the right to file a brief in opposition, or, if no waiver or brief in opposition is filed, upon the expiration of the time allowed for filing. If a brief in opposition is timely filed, the Clerk will distribute the petition, brief in opposition, and any reply brief to the Court for its consideration no less than 10 days after the brief in opposition is filed.

6. Any petitioner may file a reply brief addressed to new points raised in the brief in opposition, but distribution and consideration by the Court under paragraph 5 of this Rule will not be deferred pending its receipt. Forty copies shall be filed, except that petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The reply brief shall be served as required by Rule 29.

7. If a cross-petition for a writ of certiorari has been docketed, distribution of both petitions will be deferred until the cross-petition is due for distribution under this Rule.

8. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form for a brief in opposition prescribed by this Rule. Forty copies shall be filed, except that a party proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The supplemental brief shall be served as required by Rule 29.

RESEARCH GUIDE

Federal Procedure:

22 Moore's Federal Practice (Matthew Bender 3d ed.), ch 403, Supreme Court Appellate Jurisdiction Generally § 403.03.

22 Moore's Federal Practice (Matthew Bender 3d ed.), ch 408, Procedural Framework of Supreme Court Practice § 408.91.

23 Moore's Federal Practice (Matthew Bender 3d ed.), ch 501, Clerk § 501.02.

23 Moore's Federal Practice (Matthew Bender 3d ed.), ch 514, Content of a Petition for a Writ of Certiorari § 514.04.

23 Moore's Federal Practice (Matthew Bender 3d ed.), ch 515, Briefs in Opposition; Reply Brief; Supplemental Briefs §§ 515.01 et seq.

23 Moore's Federal Practice (Matthew Bender 3d ed.), ch 520, Procedure on a Petition for an Extraordinary Writ § 520.09.

23 Moore's Federal Practice (Matthew Bender 3d ed.), ch 525, Briefs on the Merits; Number of Copies and Time to File § 525.02.

edly faulty pressure alarm and fire suppression system, court did not address opposition motion filed by service provider to builder's motion for summary judgment on issue of consequential damages because builder did not seek summary judgment on salvage claim filed against it by owner pursuant to Fed. R. Civ. P. 14(c) in related salvage action filed against owner by service provider. Chouest Offshore Servs. v Superior Energy Servs. (2005, ED La) 409 F Supp 2d 757, 2005 AMC 1886.

Because plaintiff first consignee's claims against defendant vessel were admiralty and maritime claims within meaning of Fed. R. Civ. P. 9(h), any claims made by one defendant owner against third-parties made such third-party defendants liable not only to that owner, but to first consignee on claims of owner under Fed. R. Civ. P. 14(c), and where owner instituted confusing third-party action against third party defendant charterer, and caption of that pleading referenced consignee but in body of demand, it cited only factual allegations of claims against it by other plaintiff consignees, not first consignee, and prayer for relief asked for dismissal of only first consignee's claims, and charterer never answered third party action but did eventually file motion for stay pending arbitration describing third party action as "claim against charterer in first consignee's case," since charterer had treated third party claim against it as involving first consignee, no prejudice occurred due to confusion in body of claim and thus, first consignee could take advantage of Fed. R. Civ. P. 14(c) and likewise had claim against charterer. Cargill Ferrous Int'l v M/V Medi Trader (2007, ED La) 513 F Supp 2d 609.

Rule 15. Amended and Supplemental Pleadings

(a) **Amendments Before Trial.** (1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course:

(A) before being served with a responsive pleading; or

(B) within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.

(2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) *Time to Respond.* Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 10 days after service of the amended pleading, whichever is later.

(b) **Amendments During and After Trial.** (1) *Based on an Objection at Trial.* If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) *For Issues Tried by Consent.* When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) **Relation Back of Amendments.** (1) *When an Amendment Relates Back.* An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) *Notice to the United States.* When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) **Supplemental Pleadings.** On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or

EXHIBIT C.

event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

(Amended July 1, 1963; July 1, 1966, Aug. 1, 1987; Dec. 1, 1991; Dec. 9, 1991, P. L. 102-198, § 11(a), 105 Stat. 1626; Dec. 1, 1993; Dec. 1, 2007.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1991. Act Dec. 9, 1991, in subsec. (c)(3), substituted "Rule 4(j)" for "Rule 4(m)".

Other provisions:

Notes of Advisory Committee. See generally for the present federal practice, former Equity Rules 19 (Amendments Generally), 28 (Amendment of Bill as of Course), 32 (Answer to Amended Bill), 34 (Supplemental Pleading), and 35 (Bills of Revivor and Supplemental Bills—Form); U.S.C., Title 28, former § 399 (now § 1653) (Amendments to show diverse citizenship) and former § 777 (Defects of Form; amendments). See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 28, rr 1–13; O. 20, r 4; O. 24, rr 1–3.

Note to Subdivision (a). The right to serve an amended pleading once as of course is common. 4 Mont. Rev. Codes Ann. (1935) § 9186; 1 Ore. Code Ann. (1930) § 1-904; 1 S.C. Code (Michie, 1932) § 493; English Rules Under the Judicature Act (The Annual Practice, 1937) O. 28, r 2. Provision for amendment of pleading before trial, by leave of court, is in almost every code. If there is no statute the power of the court to grant leave is said to be inherent. Clark, Code Pleading (1928) pp. 498, 509.

Note to Subdivision (b). Compare former Equity Rule 19 (Amendments Generally) and code provisions which allow an amendment "at any time in furtherance of justice" (e. g., Ark. Civ. Code (Crawford, 1934) § 155) and which allow an amendment of pleadings to conform to the evidence, where the adverse party has not been misled and prejudiced (e. g., N.M. Stat. Ann. (Courtright, 1929) §§ 105–601, 105–602).

Note to Subdivision (c). "Relation back" is a well recognized doctrine of recent and now more frequent application. Compare Ala Code Ann (Michie, 1928) § 9513; Ill. Rev. Stat. (1937) ch. 110, § 170(2); 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 308-3(4). See U.S.C., Title 28, former § 399 (now § 1653) (Amendments to show diverse citizenship) for a provision for "relation back."

Note to Subdivision (d). This is an adaptation of Equity Rule 34 (Supplemental Pleading).

Notes of Advisory Committee on 1963 amendments. Rule 15(d) is intended to give the court broad discretion in allowing a supplemental pleading. However, some cases, opposed by other cases and criticized by the commentators, have taken the rigid and formalistic view that where the original complaint fails to state a claim upon which relief can be granted, leave to serve a supplemental complaint must be denied. See *Bonner v. Elizabeth Arden, Inc.*, 177 F.2d 703 (2d Cir. 1949); *Bowles v. Senderowitz*, 65 F. Supp. 548 (E.D. Pa.), revd on other grounds, 158 F.2d 435 (3d Cir. 1946), cert. denied, *Senderowitz v. Fleming*, 330 U.S. 848, 67 S. Ct. 1091, 91 L. Ed. 1292 (1947); cf. *LaSalle Nat. Bank v. 222 East Chestnut St. Corp.*, 267 F.2d 247 (7th Cir), cert. denied, 361 U.S. 836, 80 S. Ct. 88, 4 L. Ed. 2d 77 (1959). But see *Camilla Cotton Oil Co. v. Spencer Kellogg & Sons*, 257 F.2d 162 (5th Cir. 1958); *Genuth v. National Biscuit Co.*, 81 F. Supp. 213 (S.D.N.Y. 1948), app dism, 177 F.2d 962 (2d Cir. 1949); 3 Moore's Federal Practice ¶ 15.01 [5] (Supp 1960); 1A Barron & Holtzoff, Federal Practice & Procedure 820–21 (Wright ed. 1960). Thus plaintiffs have sometimes been needlessly remitted to the difficulties of commencing a new action even though events occurring after the commencement of the original action have made clear the right to relief.

Under the amendment the court has discretion to permit a supplemental pleading despite the fact that the original pleading is defective. As in other situations where

EXHIBIT C.

to hold hearings with counsel or using law clerks whose impartiality might be questioned, there is no risk of injustice in future cases. Further, since this case was decided on summary judgment our decision will not produce any injustice in future cases.

Finally, we do not believe that the public's confidence in the judicial process will be undermined if we conclude that the § 455(a) violation was harmless error. Since we have determined that in fact a violation occurred and strongly urge Judge Lynne to discontinue his practice of crediting the work of his law clerks, we believe that our decision will instill greater confidence in our judiciary. To the extent that public confidence has already been undermined we do not believe that granting relief in this case will change the public's perception in any appreciable way. Such harm cannot be remedied by vacating the district court's decision and reassigning this case to a different judge. In fact, if we reverse and vacate a decision that we have already determined to be proper, the public will lose faith in our system of justice because the case will be overturned without regard to the merits of the employees' claims. Judicial decisions based on such technical arguments not relevant to the merits contribute to the public's distrust in our system of justice.

The employees also argue that Judge Lynne was disqualified from presiding over this case under 28 U.S.C. § 455(b)(5)(iii) which would disqualify a judge whose father is a lawyer in the case.[18] *See, e.g., Potashnick*, 609 F.2d at 1113 ("[W]hen 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."). The employees argue that since Somerville acted as the judge's alter ego when he conducted the hearing in the judge's absence, section 455(b)(5)(iii) requires Judge Lynne's disqualification.

We do not believe that we have to reach this question in the present case. If we assume that there was a violation of § 455(b) we believe that our discussion of the remedy for the § 455(a) violation would also apply and reversal would not be mandated. In *Liljeberg* the Supreme Court made it clear that harmless error analysis would be appropriate for a § 455(a) violation. *See* — U.S. at —. 108 S.Ct. at 2202–03. However, it was not made clear whether a violation of § 455(b) could constitute harmless error. Section 455 neither prescribes nor prohibits any particular remedy for a violation of the duties it imposes. *Id.* ("Congress has wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation.").

[25–27] We begin our analysis by noting some of the differences between § 455(a) and § 455(b). Section 455(a) may be waived by the parties after full disclosure, whereas section 455(b) may not. 28 U.S.C. § 455(e); *United States v. Murphy*, 768 F.2d at 1540. In addition, section 455(b) is a *per se* rule that lists particular circumstances requiring recusal. *United States v. Alabama*, 828 F.2d at 1541 ("The statute also states that the parties cannot waive the *per se* rules of disqualification set out in § 455(b)."") (footnote omitted). Thus, § 455(b) is stricter than § 455(a) and is concerned with situations that may involve actual bias rather than § 455(a)'s concern with the public's perception of the judicial process. Nevertheless, we do not believe that these differences preclude the application of harmless error analysis in the context of a § 455(b) violation.

We believe that this conclusion is supported by the Supreme Court's *Liljeberg* decision. When the Supreme Court outlined the test for determining whether a

18. Section 455(b)(5)(iii) provides:
(b) [A judge] shall also disqualify himself in the following circumstances:
(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.
28 U.S.C. § 455(b)(5)(iii). Grounds for disqualification under § 455(b) cannot be waived by the parties. *See* 28 U.S.C. § 455(e).

EXHIBIT C.

September 1, 2010

Thomas J. Petters
BOP Reg. No. 14170-041
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000

Levin,
Read the following letter, Hopeman's response, and Petters' Reply. We may have a more difficult time convincing Petters than we thought, and he may have a last issue. Dave

Felhaber, Larson, Fenlon & Vogt
Attn: Jon M. Hopeman
Eric J. Riensche
Jessica M. Marsh
Paul C. Engh, Engh Law Office

220 South Sixth Street, Suite 2200
Minneapolis, Minnesota 55402-4504

RE: ADDITIONAL ISSUE FOR JULY 30, 2010 "BRIEF & ADDENDUM OF APPELLANT THOMAS JOSEPH PETTERS", USA vs. PETTERS, No. 10-1843, U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

VIOLATION OF: Title 28 USCS §455 - Disqualification of Judge Richard H. Kyle due to his son's - Attorney Richard H. Kyle, Jr. - being a partner/shareholder in the law firm FREDRIKSON & BYRON, P.A. - consul for Defendant's THOMAS J. PETTERS and COMPANIES from on or about 1992 thru 2008. Legal billing fees paid by Defendant PETTERS & COMPANIES in excess of $25 MILLION to Fredrikson & Byron, P.A..

Dear Jon, Eric, Jessica & Paul:

As you know, I've been introducing myself to the legal library here at USP Leavenworth for the past couple of weeks, an area that I have no formal education within. Also, John Lambros - a jailhouse lawyer - has been assisting me in navigating same and putting-up with my endless questions. You may recall John Lambros, as he overturned his mandatory life sentence after being extradited from Brazil to Minnesota to stand trial.

The following facts exist that leads me to believe that the Honorable Richard H. Kyle should of **DISQUALIFIED HIMSELF FROM MY JURY TRIAL:**

1. From on or about 1992 thru 2008, the law firm FREDRIKSON & BYRON, P.A. represented Defendant THOMAS JOSEPH PETTERS, PETTERS COMPANY, INC., and PETTERS GROUP WORLDWIDE, LLC. (hereinafter DEFENDANT'S). The defendant's paid the law firm FREDRIKSON & BYRON, P.A. in **EXCESS OF $25 MILLION.**

2. Attorney's John Koneck, Simon Root, and Herther Thayer where FREDRIKSON & BYRON's firm representatives and addressed legal questions from Defendant's after consulting with the attorney's and researchers at FREDRIKSON & BYRON.

EXHIBIT D.

Felhaber Larson
Fenlon & Vogt

A Professional Association – Attorneys at Law

MINNEAPOLIS
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Eric J. Riensche
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Reply to Minneapolis Office

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September 17, 2010

LEGAL MAIL – OPEN IN THE PRESENCE OF INMATE

Attorney-Client Privileged

Hopaman's Response

Thomas J. Petters, #14170-041
USP Leavenworth
U.S. Penitentiary
P.O. Box 1000
Leavenworth, KS 66048

RE: U.S. v. Petters
Our File No. 24634.001

Dear Tom:

I'm writing to address the two main issues you inquired about for the appeal: (1) the issue regarding disqualification of the judge; and (2) the issue regarding whether you were sentenced for all the counts of conviction. You asked whether either we (your lawyers) should file something now to preserve the issue despite not raising the issue in the principal brief, or alternatively whether you should file something on your own. I spoke to Jon about this and we agree you should not for the following reasons:

As we discussed the Eighth Circuit will not consider issues unless raised on direct appeal in the principal brief. *United States v. Samuels*, 611 F.3d 914, 919 n.2 (8th Cir. 2010). (I've enclosed a copy of this case, as well as the other authorities cited in this letter.) Thus it is too late to raise the issues on direct appeal, and for that procedural reason alone the Eighth Circuit would almost certainly rule against us. Perhaps more importantly, raising the issue now could very well deprive you of an opportunity to raise the issues later in a motion to vacate or correct federal sentence pursuant to 28 U.S.C. § 2255.

First the procedure: Section 2255 exists so that federal prisoners have a means to challenge custody where there was a major legal defect with a conviction and/or sentence. But there are a number of procedural oddities:

1. You generally can't file such a motion while direct appeal is pending, 16A *Federal Procedure* § 41:515 (2007);

2. You generally can't raise issues already decided on direct appeal, *Bear Stops v. United States*, 339 F.3d 777, 780 (8th Cir. 2003);

3. You are generally limited to one Section 2255 motion, subject to certain exceptions, 28 U.S.C. § 2255(h);

4. The motion generally must be filed within a year after a conviction is finalized, 28 U.S.C. § 2255(f); 16A *Federal Procedure* § 41:510 (2007);

5. If you file *pro se* motion papers, a court may construe those papers as your one and only Section 2255 motion, so you have to be careful what papers you send to the court and when, *Castro v. United States*, 540 U.S. 375 (2003); 16A *Federal Procedure* § 41:417 (2007).

We think the best procedural route is to exhaust the appellate process as we started it. Should we lose on appeal, you will have a year to file a Section 2255 motion to raise the issues you bring up and perhaps more. We think if you file papers to "preserve" the above issues the exact opposite may well occur—the court may find that the issue was already raised on direct appeal and therefore unavailable in a Section 2255 motion (see Point #2 above). Alternatively the court may construe your *pro se* papers as your one and only shot at a Section 2255 motion and deprive you of that avenue for relief in the future (see Point #3 & #5 above).

Now to the substance: We think the argument regarding whether the judge should be disqualified is a decent one. If we should lose the appeal, you might make a Section 2255 motion on that ground, and perhaps argue your counsel (us) were ineffective for failing to move for disqualification. There might be other ways to frame the issue as well, but that is one. As for the second issue, we think it is unlikely to succeed. I did find some authority to support your theory that what matters is the pronouncement at the sentencing hearing, 9A *Federal Procedure* § 22:1732 (2005), but the transcript clearly shows the judge sentencing you to 600 months with consecutive sentences as to Count 1 (240 months), Count 2 (240 months), Count 14 (60 months) and Count 15 (60 months). Sent. Tr. at 47. I personally don't see how this can be made into a successful issue, but perhaps you can come up with some ideas.

Please write back with comments.

EXHIBIT D.

September 27, 2010

Thomas J. Petters
BOP Reg. No. 14170-041
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000

U.S. CERTIFIED MAI
7008-1830-0004-264

Falhaber, Larson, Fenlon, & Vogt
Attn: Jon M. Hopeman
Eric J. Rienche
Jessica M. Marsh
Paul C. Engh, Engh Law Office

220 South Sixth Street, Suite 2200
Minneapolis, Minnesota 55402-4504

AFFIDAVIT FORM

Petters Reply

RE: RESPONSE TO ERIC J. RIENSCHE LETTER DATED SEPTEMBER 17, 2010 - TI: § 455 VIOLATION BY JUDGE KYLE.

Dear Jon, Eric, Jessica & Paul:

Thank you for having Eric respond to my September 1, 2010 letter requesting you to file an additional issue within my current appeal within the U.S. Court of Appeals for the Eighth Circuit - **VIOLATION OF TITLE 28 USC § 455 BY JUDGE KYLE DUE TO HIS SON BEING AN ATTORNEY AT "FREDRIKSON & BYRON".**

Within the first paragraph of your September 17, 2010 letter you clearly state that that you do not think the issue regarding the disqualification of Judge Kyle should be raised at this time, and offer several reasons for same. John Lambros (jailhouse lawyer) and I would like to address same at this time:

1. You state, "As we discussed the Eighth Circuit will not consider issues unless raised on direct appeal in the principal brief. U.S. vs. SAMUELS, 611 F.3d 914, 919 n.2 (8th Cir. 2010). Thus it is too late to raise the issues on direct appeal, and for that procedural reason alone the Eight Circuit would almost certainly rule against us. Perhaps more importantly, raising the issue now could very will deprive you of an opportunity to raise the issues later in a motion to vacate or correct federal sentence pursuant to 28 U.S.C. §2255."

2. In U.S. vs. SAMUELS the **FOOTNOTE** (as you know, footnotes are usually considered **dicta)** stated that SAMUELS filed a motion **AFTER ORAL AGRUMENTS** at the 8th Circuit and the Court refused to reopen the case. In fact, in all the other cases that follow SAMUELS within the Eighth Circuit - mostly footnotes - the 8th Circuit denied **SUPPLEMENTAL BRIEFING** due to the late nature of the request. The Court **NEVER STATES THAT THEY HAVE A RULE NOT ALLOWING SUPPLEMENTAL BRIEFING AFTER PRINCIPAL BRIEFS HAVE BEEN FILED - NOR CAN I LOCATE ONE.** Therefore, a request from you requesting permission to file **SUPPLEMENTAL BRIEFING IS POSSIBLE.**

3. **SUPREME COURT RULES: Rule 15(8)** clearly allows supplemental briefing

EXHIBIT D.

Canon 3C

C. *Disqualification.*

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness;

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(e) the judge has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(2) A judge should keep informed about the judge's personal and fiduciary financial interests, and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system; the following relatives are within the third degree of relationship: parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece and nephew; the listed relatives include whole and half blood relatives and most step relatives;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

EXHIBIT E.

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;
(iii) the proprietary interest of a policy holder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;
(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

(4) Notwithstanding the preceding provisions of this Canon, if a judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

D. *Remittal of disqualification.*

A judge disqualified by the terms of Canon 3C(1), except in the circumstances specifically set out in subsections (a) through (e), may, instead of withdrawing from the proceeding, disclose on the record the basis of disqualification. If the parties and their lawyers after such disclosure and an opportunity to confer outside of the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

* This Code governs the conduct of United States Circuit Judges, District Judges, Court of International Trade Judges, Court of Federal Claims Judges, Bankruptcy Judges, and Magistrate Judges. In addition, certain provisions of this Code apply to special masters and commissioners as indicated in the "Compliance" section.

* The Code of Conduct for United States Judges was initially adopted by the Judicial Conference on April 5, 1973, and was known as the "Code of Judicial Conduct for United States Judges." At its March 1987 session, the Judicial Conference deleted the word "Judicial" from the name of the Code. Substantial revisions to the Code were adopted by the Judicial Conference at its September 1992 session. Section C. of the Compliance section, following the code, was revised at the March 1996 Judicial Conference. Canons 3C(3)(a) and 5C(4) were revised at the September 1996 Judicial Conference. Canon 3C(1)(c) was revised at the September 1999 Judicial Conference. The Compliance Section was clarified at the September 2000 Judicial Conference.

TITLE 29 LABOR

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 F.

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.

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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,

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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

Exhibit A

EXHIBIT F.

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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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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In re Medtronic, Inc. Sprint Fidelis Leads Products Liability Litigation; This document relates to: ALL CASES

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

601 F. Supp. 2d 1120; 2009 U.S. Dist. LEXIS 18410

Multidistrict Litigation No. 08-1905 (RHK/JSM)

March 9, 2009, Decided

March 9, 2009, Filed

Editorial Information: Subsequent History

Motion denied by, Stay granted by In re Medtronic Sprint Fidelis Leads Prods. Liab. Litig., 2009 U.S. Dist. LEXIS 55471 (D. Minn., May 12, 2009)

Editorial Information: Prior History

In re Medtronic, Inc. Sprint Fidelis Leads Prods. Liab. Litig., 2009 U.S. Dist. LEXIS 9236 (D. Minn., Feb. 5, 2009)

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For Plaintiffs' Liaison Counsel, Plaintiff: Robert K Shelquist, LEAD ATTORNEY, Lockridge Grindal Nauen PLLP, Mpls, MN.

For Plaintiffs' Steering Committee, Chair of Plaintiffs' Steering Committee, Plaintiff: C Brooks Cutter, LEAD ATTORNEY, Kershaw, Cutter & Ratinoff, LLP, Sacramento, CA; Camilo K Salas, III, LEAD ATTORNEY, Salas & Co LC, New Orleans, LA; Charles S Zimmerman, LEAD ATTORNEY, Zimmerman Reed, PLLP, Mpls, MN; Dianne M Nast, LEAD ATTORNEY, PRO HAC VICE, RodaNast, PC, Lancaster, PA; Eric M Quetglas-Jordan, LEAD ATTORNEY, Quetglas Law Office, San Juan, PR; Fred Thompson, III, LEAD ATTORNEY, Motley Rice LLC, Mt Pleasant, SC; Hunter J Shkolnik, LEAD ATTORNEY, Rheingold Valet Rheingold Shkolnik & McCartney LLP, New York, NY; James L Doyle, II, LEAD ATTORNEY, Williams, Kherkher, Hart & Boundas LLP, Houston, TX; Leila Watson, LEAD ATTORNEY, Cory Watson Crowder & Degaris PC, Birmingham, AL; Marcus L Stevenson, LEAD ATTORNEY, Riff Stevenson Law Firm, LLP, Houston, TX; Mark P Robinson, Jr, LEAD ATTORNEY, Robinson Calcagnie & Robinson, Newport Beach, CA; Michael K Johnson, LEAD ATTORNEY, Goldenberg & Johnson, PLLC, Mpls, MN; Neil D Overholtz, LEAD ATTORNEY, Aylstock, Witkin, Kreis & Overholtz, PLLC, Pensacola, FL; Nicholas J Drakulich, LEAD ATTORNEY, The Drakulich Firm, San Diego, CA; Richard J Arsenault, LEAD ATTORNEY, Neblett, Beard & Arsenault, Alexandria, LA; Russell Jackson Drake, LEAD ATTORNEY, Whatley, Drake & Kallas, LLC, Birmingham, AL; Teresa C Toriseva, LEAD ATTORNEY, Toriseva Law, Wheeling, WV; Tina B Nieves, LEAD ATTORNEY, Gancedo & Nieves LLP, Pasadena, CA; Wendy R Fleishman, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein LLP, New York, NY.

For Defendants' Liaison Counsel, Defendant: George W Soule, LEAD ATTORNEY, Bowman & Brooke, Mpls, MN.

Judges: RICHARD H. KYLE, United States District Judge.

Opinion

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Opinion by: RICHARD H. KYLE

Opinion

{601 F. Supp. 2d 1123} MEMORANDUM OPINION AND ORDER

> In deciding the sensitive question of whether to recuse . . . , the test of impartiality is what a reasonable person, knowing and understanding all the facts and circumstances, would believe. It is for that reason that we cannot adopt a *per se* rule holding that when someone claims to see smoke, we must find that there is fire. That which is seen is sometimes merely a smokescreen. Judicial inquiry may not therefore be defined by what appears in the press. If such were the case, those litigants fortunate enough to have easy access to the media could make charges against a judge's impartiality that would effectively veto the assignment of judges. Judge-shopping would then become an additional and potent tactical weapon in the skilled practitioner's arsenal. Instead, the sensitive issue of whether a judge should be disqualified requires a careful examination of those relevant facts and circumstances to determine whether the charges reasonably bring into question a judge's impartiality. In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1309 (2d Cir. 1988). The "relevant facts and circumstances" here concern my son, Richard H. Kyle, Jr., a shareholder at Fredrikson & Byron, P.A. ("Fredrikson"), a large Minneapolis law firm that represents the Defendant, Medtronic, in corporate matters and other litigation unrelated to the case *sub judice*. According to Plaintiffs, these facts require my recusal from this case. The Court does not agree.

BACKGROUND

This multidistrict litigation concerns Medtronic's Sprint Fidelis defibrillator leads, which were voluntarily recalled on October 15, 2007. See In re Medtronic, Inc. Sprint Fidelis Leads Prods. Liab. Litig., 592 F. Supp. 2d 1147, 1154 (D. Minn. Jan. 5, 2009). Following the recall, plaintiffs nationwide filed actions against Medtronic alleging (among other things) claims for negligence, strict products liability, fraud, and breach of express and implied warranties. On February 21, 2008, the Judicial Panel on Multidistrict Litigation consolidated 27 such actions before the Court for pretrial proceedings, pursuant to 28 U.S.C. § 1407. Hundreds of other cases were later transferred here as "tag along" actions. At present, this multidistrict litigation comprises over 700 individual cases.

Following its initial status conference in May 2008, the Court appointed lead counsel for Plaintiffs and a steering committee to direct the course of the litigation, who later filed a Master Consolidated Complaint for Individuals (the "MCC") on behalf of all individual Plaintiffs in this case. Medtronic later moved to dismiss the MCC, arguing that each of the asserted claims was preempted under federal law. The parties engaged in substantial briefing on that issue, and the Court held a nearly two-hour hearing on the Motion in December 2008. On January 5, 2009, the Court granted Medtronic's Motion and dismissed the MCC with prejudice. 1 At no point during the proceedings before the JPML, **{601 F. Supp. 2d 1124}** at the initial status conference, in the many status conferences that followed, or in connection with the briefing and oral argument on Medtronic's Motion to Dismiss, did Plaintiffs raise the issue of my son's position at Fredrikson or the firm's representation of Medtronic in other matters.

Now, less than two months following the dismissal of the MCC but over a year after the JPML's consolidation order in this Court, Plaintiffs have moved for my recusal. According to Plaintiffs, "[a]pproximately two weeks ago, [they] discovered . . . that Fredrikson . . . has handled $ 14 billion in what it describes as 'deals' with Medtronic." (Pl. Mem. at 1.) As a result of "these strong financial

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interests" and "many other connections" between Medtronic and Fredrikson, including (i) several Fredrikson attorneys having previously worked for Medtronic and (ii) Fredrikson representing the company in intellectual-property litigation, counseling, and corporate work, Plaintiffs contend that there exists a presumption that I am biased due to my son's "position as a shareholder at Fredrikson." (Id. at 2.) Plaintiffs further argue that even if no such presumption exists, I must nevertheless recuse because a reasonable person would question my impartiality. (Id. at 1-2.)

STANDARD OF REVIEW

Recusal in the federal courts is governed by 28 U.S.C. § 455, which contains two subsections pertinent here. Under Section 455's generalized, "'catchall' recusal provision," Liteky v. United States, 510 U.S. 540, 548, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994), a judge must disqualify himself whenever his "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The second, more-specific subsection addresses a judge's personal relationships and requires recusal whenever a judge knows that a family member has "an interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(5)(iii). The decision whether to grant a motion under Section 455 is committed to the Court's "sound discretion." Moran v. Clarke, 296 F.3d 638, 648 (8th Cir. 2002) (*en banc*).

ADC Telecomms., Inc. v. Thomas & Betts Corp., Civ. No. 98-2055, 2001 WL 848559, at *1 n.1 (D. Minn. July 25, 2001)Judges are presumed to be impartial and, accordingly, parties seeking recusal bear "the *substantial* burden of proving otherwise." United States v. Dehghani, 550 F.3d 716, 721 (8th Cir. 2008) (emphasis added) (internal quotation marks and citation omitted); accord Fletcher v. Conoco Pipe Line Co., 323 F.3d 661, 664 (8th Cir. 2003) (movant "carries a heavy burden of proof") (citation omited). "A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is." In re Drexel Burnham Lambert, 861 F.2d at 1312; accord Laird v. Tatum, 409 U.S. 824, 837, 93 S. Ct. 7, 34 L. Ed. 2d 50 (1972) (Mem. of Rehnquist, J.); Sw. Bell Tel. Co. v. FCC, 153 F.3d 520, 523 (8th Cir. 1998) (Mem. of Hansen, J.). Otherwise, parties could easily engage in judge shopping and "deal a serious blow to the integrity of the court system." (Frank, J.).

ANALYSIS

I. Section 455(b)

The Court begins its analysis with the more specific subsection of Section 455, Section 455(b). As noted above, Section 455(b)(5)(iii) requires a judge to recuse if his or her child 2 is known to have **{601 F. Supp. 2d 1125}** an interest in an action that "could be substantially affected" by its outcome. Plaintiffs argue that because my son is a shareholder at Fredrikson, and because Fredrikson derives "significant" revenue from Medtronic, it necessarily follows that my son has an interest that could be affected by the outcome of this case. (Pl. Mem. at 15-17.) The argument, it seems, is predicated on the assumption that Medtronic is likely to steer its legal business elsewhere in the event the Court were to rule against it in this case. (See id. at 13.)

The Court cannot find any principled basis to accept this argument, particularly given the purportedly symbiotic relationship between Fredrikson and Medtronic. Indeed, Plaintiffs repeatedly note that there exists a "deep, pervasive and ongoing" relationship between the two (Pl. Mem. at 17), which is driven by the fact that several former Medtronic attorneys now work for the firm. In light of this close association, it seems particularly unlikely that *any* ruling the Court might make in this case, whether favorable or unfavorable to Medtronic, would have an impact on the quantum of business the firm receives. Simply put, the associations between Medtronic and its former lawyers, and the amount of business those associations generate for the firm, will in all probability continue to exist regardless of the outcome here. 3

Furthermore, it is "utter speculation -- not in accord with common sense -- that a negative outcome in this litigation would affect the relationship between [Fredrikson] and [Medtronic]," when Medtronic is a large, multi-national company with in-house counsel who presumably know "that it would be improper for the court to be influenced by [Medtronic's] relationship with" the firm. Diversifoods, Inc. v. Diversifoods, Inc., 595 F. Supp. 133, 139 (N.D. Ill. 1984). Accordingly, the company "reasonably could not be expected to be resentful of [Fredrikson] or think less of . . . the firm," which is not even involved in this case, if Medtronic should lose this litigation. Id. Simply put, it is "not reasonable" to accept Plaintiffs' argument "that the outcome of the proceeding adversely would affect [Fredrikson]'s relationship with [Medtronic]." Id.

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* Medtronic then "retaliated" by withdrawing business from Fredrikson, *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." 4 But Plaintiffs are required to offer proof of **{601 F. Supp. 2d 1126}** partiality, Dehghani, 550 F.3d at 721; "unsupported, irrational, or highly tenuous speculation" will not do. Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir. 1987); accord In re Kan. Pub. Employees Ret. Sys., 85 F.3d 1353, 1362 (8th Cir. 1996) (recusal not required where alleged interest is "too remote, speculative, [or] contingent"). For this reason, arguments like those asserted by Plaintiffs have been repeatedly rejected. See Canino v. Barclays Bank, PLC, No. 94 Civ. 6314, 1998 U.S. Dist. LEXIS 53, 1998 WL 7219, at *4 (S.D.N.Y. Jan. 7, 1998) ("All of the courts that have addressed this issue have held that § 455(b)(4) does not compel disqualification under these circumstances."). 5

By way of example, Microsoft Corp. v. United States, 530 U.S. 1301, 121 S. Ct. 25, 147 L. Ed. 2d 1048 (2000), the well-publicized antitrust case, addressed circumstances nearly identical to those here. Although Microsoft involved a simple denial of a petition for a writ of *certiorari,* Chief Justice Rehnquist took the unusual step of placing a statement in the United States Reports explaining why he had declined to recuse from considering that petition. He noted that Microsoft had retained Goodwin, Procter & Hoar, a Boston law firm where his son was a partner, to represent it in antitrust matters; although his son was involved in those matters, neither he nor the firm were involved in the case then pending before the Court. After analyzing both Section 455(a) and Section 455(b), Chief Justice Rehnquist determined that his recusal was not warranted, stating "it would be unreasonable and speculative to conclude that the outcome of any Microsoft proceeding in this Court would have an impact on [his son's] interests when neither he nor his law firm would have done any work on the matters here." Id. at 1302. In the instant case, the connection is even more attenuated than that discussed in Microsoft -- unlike the Chief Justice's son, my son, who practices in the area of criminal defense, does not now represent, and has never previously represented, Medtronic. (Koneck Aff. P 14.)

The court in Transportes Coal Sea de Venezuela C.A. v. SMT Shipmanagement & Transport Ltd., No. 05 Civ. 9029, 2007 U.S. Dist. LEXIS 1802, 2007 WL 62715 (S.D.N.Y. Jan. 9, 2007), reached a similar conclusion. There, the issue was whether an arbitration award should be set aside because the arbitrator's son worked for a law firm that represented one of the parties in an unrelated matter. In declining to vacate the award, the SMT court borrowed from the standards applicable to recusal in federal court:

> Additionally, the Court finds it significant that federal judges, who are held to a more stringent

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standard of impartiality, . . . are free to hear cases in which a party is represented in unrelated matters by the law firms of family members. Even under these more stringent standards, for example, a claim that a judge's spouse is a partner in a firm which represented a party appearing before the judge and that, as a result of this relationship, the judge and her husband benefitted from fees from that client describes a chain of causation too attenuated to [require recusal].2007 U.S. Dist. LEXIS 1802, [WL] at *10 (internal quotation marks, alterations, and citations omitted); accord, e.g., Pashaian v. Eccelston Props., Ltd., 88 F.3d 77, 83 (2d Cir. 1996) ("It would simply be unrealistic to assume . . . that partners in today's law firms invariably have an interest that could be substantially affected by the outcome of any case in which [a different] partner is involved."); Canino, 1998 U.S. Dist. LEXIS 53, **{601 F. Supp. 2d 1127}** 1998 WL 7219, at *4 ("Nor can it be said that simply because one or more partners in [the judge's] husband's law firm represented Defendant in some matters, [her] husband possessed an interest that could be 'substantially affected' by the outcome of the proceedings.").

Plaintiffs note that the judges in In re Digital Music Antitrust Litigation, MDL No. 1780, 2007 U.S. Dist. LEXIS 13567, 2007 WL 632762 (S.D.N.Y. Feb. 27, 2007), and Diversifoods declined to recuse because, *inter alia*, their family members' law firms did not receive *significant* compensation from the defendants. Plaintiffs attempt to contrast those cases with the instant one, arguing that Medtronic is a "significant" and "material" Fredrikson client. (See infra note 5.) In essence, Plaintiffs invite the Court to draw a bright-line rule: if a judge's child is a partner in a law firm that derives substantial revenue from a client, then the judge must recuse from all cases involving that client. The Court declines Plaintiffs' invitation. Such a hard-and-fast rule is contrary to the Eighth Circuit's admonition that a "relationship between a party and a judge's son or daughter does not *per se* necessitate a judge's disqualification. Rather, the determination of whether a conflict exists in a given situation is factually bound." In re Kan. Pub. Employees, 85 F.3d at 1364. Here, the facts point to a close-knit relationship between Fredrikson and Medtronic, which suggests that there will be little (if any) financial consequences to the firm -- let alone to my son --no matter how Medtronic fares in this litigation. That Medtronic might be a "significant" Fredrikson client, therefore, does not rule the day. 6

In addition to the ostensible financial interest that my son has in this case, Plaintiffs also argue that he has other interests, "such as business relationships and reputations," that could be "substantially affected" were the Court to rule against Medtronic. (Pl. Mem. at 15.) Plaintiffs are correct that Section 455(b)(5)(iii) is not limited to purely financial interests. See In re Kan. Pub. Employees, 85 F.3d at 1359. But Plaintiffs fail to explain, and the Court fails to understand, how a decision for or against Medtronic here might affect his reputation when neither he, nor his firm, is counsel of record in this case. For the same reason, it is equally unclear to the Court how a decision in this case will affect his (or the firm's) "business relationships." Large law firms like Fredrikson gain and lose clients - even "material" clients - all the time, and "the reputation and good will of those firms has not been affected substantially." Diversifoods, 595 F. Supp. at 139. There is no reason to conclude otherwise here. At the end of the day, it is "impossible to do more than speculate that [my son] might someday reap a [non-pecuniary] benefit as an indirect result of the success of" Medtronic in this litigation. Scott v. Metro. Health Corp., 234 Fed. Appx. 341, 357 (6th Cir. 2007) (unpublished).

For all of these reasons, the Court finds that Plaintiffs have failed to satisfy their **{601 F. Supp. 2d 1128}** burden of demonstrating that recusal is required under 28 U.S.C. § 455(b).

II. Section 455(a)

As noted above, Section 455(a) is broader than Section 455(b). Its purpose "is to promote confidence in the judiciary by avoiding even *the appearance* of impropriety whenever possible." Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 865, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)

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(emphasis added). Hence, in determining whether recusal under Section 455(a) is appropriate, the issue is whether a judge's impartiality might reasonably be questioned "by the average person on the street who knows all the relevant facts of a case." Scenic Holding, LLC v. New Bd. of Trs. of Tabernacle Missionary Baptist Church, 506 F.3d 656, 662 (8th Cir. 2007) (quoting Moran, 296 F.3d at 648). The use of such an objective standard renders irrelevant "whether a judge is actually biased or actually knows of a ground requiring recusal." Id. Yet, it is "not enough for [Plaintiffs] to throw out [such] charges and then maintain that they cast a pall over the proceedings [simply] because they are 'not inconceivable.'" Scott, 234 Fed. Appx. at 355. That is, "judges should not recuse themselves solely because a party *claims* an appearance of partiality." In re Aguinda, 241 F.3d 194, 201 (2d Cir. 2001) (emphasis added); see also In re Mason, 916 F.2d 384, 386 (7th Cir. 1990) (inquiry under Section 455(a) is not made from perspective of "a hypersensitive or unduly suspicious person").

Plaintiffs' argument for recusal under Section 455(a) largely parrots their argument under Section 455(b). They contend that a reasonable person could question my impartiality because my son is a Fredrikson shareholder and "a ruling against Medtronic could adversely affect Fredrikson (whether financially or by reputation or by its ability to obtain new business from Medtronic)." (Pl. Mem. at 13.) For the reasons set forth above, the Court rejects that argument, as Plaintiffs offer nothing more than "the gossamer strands of speculation and surmise" to support it. In re United States, 158 F.3d 26, 35 (1st Cir. 1998). An "average" person, knowing all of the facts and circumstances, would not conclude that my presiding over this case would have any impact on Medtronic's relationship with Fredrikson.

As with Section 455(b), the Court is not painting on a blank palette in reaching this conclusion -- legions of cases have come to the same result. For example, in In re Billedeaux, 972 F.2d 104 (5th Cir. 1992), the plaintiff sought recusal of the district judge because her husband was a partner at a law firm that represented the defendant (Tidex) in other matters. The district judge denied the motion, and the plaintiff then petitioned the Fifth Circuit for a writ of mandamus compelling the district judge to recuse. The appellate court's rejection of that petition is particularly apt here:

> There is no assertion that [the district judge] ever represented Tidex; nor is there an averment that her husband has handled matters for that client. The claim, instead, is that her husband is a partner in a firm that has represented Tidex on various occasions and that, as a result of that relationship, she and her husband benefit from fees from that client and that, accordingly, her impartiality might reasonably be questioned.A similar argument was made in Chitimacha Tribe [of La. v. Harry L. Laws Co., 690 F.2d 1157 (5th Cir. 1982)]: The Plaintiffs asserted that the judge was receiving payments from his former firm, which at all times still represented the defendant and thus might suffer financially if the judge were to rule adversely to the defendant. We held that "[a]t best, this speculation is remote and **{601 F. Supp. 2d 1129}** unrealistic and does not justify disqualification." Id. at 1167.Here, as well, there is no reason to conclude or speculate that any action [the district judge] might take in the case *sub judice* would affect [her husband's law firm] or [her] husband. A "remote, contingent, or speculative" interest is not one "which reasonably brings into question a judge's partiality." Thus, any interest of [the district judge] is too remote and speculative to support or suggest recusal.972 F.2d at 105-06 (citations omitted). Similarly, in Microsoft, Chief Justice Rehnquist stated that he did "not believe that a well-informed individual would conclude that an appearance of impropriety exists simply because [his] son represents, in another case, a party that is also a party to litigation pending in this Court." 530 U.S. at 1302; see also In re Digital Music Antitrust Litig., 2007 U.S. Dist. LEXIS 13567, 2007 WL 632762, at *12 ("Courts have uniformly rejected the argument that an appearance of impropriety exists in the following situation: (i) a judge's spouse is a partner in a law firm that represents a litigant in matters other than the case before the judge; and (ii) the spouse did not perform any work at the law firm for the litigant or worked for the litigant or

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unrelated matters."); Canino, 1998 U.S. Dist. LEXIS 53, 1998 WL 7219, at *3 ("Even if Judge Cederbaum had known that her husband's law firm represented the Defendant in an unrelated matter, § 455(a) would not have compelled her disqualification from this litigation."); Diversifoods, 595 F. Supp. at 134, 139-40 (no appearance of impropriety where judge's husband was partner of law firm that "presently represents the defendant in other matters, and, prior to the filing of this lawsuit, had some connection with the events underlying this litigation"). 7 As the Seventh Circuit has noted, the care with which the recusal rules were crafted should lead any judge to "hesitate to treat the general language of § 455(a) as a bar to judicial service whenever a relative has 'something to do with' a party." In re Nat'l Union Fire Ins. Co. of Pittsburgh, 839 F.2d 1226, 1229 (7th Cir. 1988). That is all that is present here, given the highly tenuous connection between me, my son, and Medtronic. 8

Plaintiffs also argue that my comments in response to inquiries from several **{601 F. Supp. 2d 1130}** reporters would lead a reasonable person to "question the Court's impartiality." (Pl. Mem. at 19.) Plaintiffs are referring to comments made shortly after I was informed by Plaintiffs' lead counsel, in a conference call, that Plaintiffs intended to move for my recusal. 9 In those comments, I noted that I was then unaware of any relationship between Medtronic and Fredrikson and that, because my son practices in the area of criminal defense, I did not then perceive any basis to disqualify myself. (See id. at 18-19.) I fail to see how those comments in any way suggested that I had "predetermin[ed] . . . the outcome of the [instant] motion," as Plaintiffs argue. (Id. at 19.) Rather, they simply and accurately reflected the state of affairs as they existed at the time I was asked to comment. Only under a strained interpretation can they be read to imply that I would not recuse myself under any circumstances or would ignore the facts Plaintiffs intended to present to me. See, e.g., Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees & Rest. Employees Int'l Union, 332 F. Supp. 2d 667, 675 (S.D.N.Y. 2004). An average person fully informed of the facts would not perceive bias based on these comments.

In re Boston's Children First, 244 F.3d 164 (1st Cir. 2001), upon which Plaintiffs rely, is readily distinguishable. There, the district judge wrote a letter to a newspaper and later spoke with a reporter, in both instances defending her decision to defer ruling on a motion for class certification. Id. at 166-67. Under those "highly idiosyncratic" circumstances, the First Circuit concluded that the district judge should have recused herself. Here, by contrast, my comments did not address, let alone defend, any prior decision in this case. Nor were my comments reasonably susceptible to the interpretation that I had pre-judged the instant Motion. 10

Plaintiffs have failed to show that recusal under Section 455(a) is warranted.

III. Additional considerations

The analysis set forth above fully disposes of Plaintiffs' Motion. Nevertheless, the Court pauses to address several additional matters, although it need not (and does not) rely on any of them in reaching its decision.

First, the Court believes that the timing of Plaintiffs' Motion speaks volumes. Plaintiffs claim they learned of the purportedly "extensive" relationship between Fredrikson and Medtronic only a few weeks ago, but their evidence of that relationship consists almost entirely of articles posted on Fredrikson's website, many of which are several years old. For instance, Plaintiffs cite a June 16, 2005, press release touting the firm's hiring of Klepinski **{601 F. Supp. 2d 1131}** (see Pl. Mem. at 5 n.1 (citing / press/pr050616.html (last visited March 9, 2009))); the July/August 2006 issue of *Corporate Board Member* magazine, which lists Medtronic as a "representative" client of the firm (see Pl. Mem. at 5 n.2 (citing (last visited March 9, 2009))); and a June 1, 2007, article in the *Minneapolis St. Paul Business Journal* discussing the firm's hiring of a former Medtronic attorney

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(see Pl. Mem. at 6 n.3 (citing (last visited March 9, 2009))). Plaintiffs also cite various other internet sources that appear to have existed far longer than two weeks. (See, e.g., Pl. Mem. at 10 n.22 (citing / twincities/stories/2008/09/01/daily5.html (last visited March 9, 2009)).)

The Eighth Circuit has repeatedly held that "[m]otions for recusal under 28 U.S.C. § 455 will not be considered unless timely made." Tri-State Fin., LLC v. Lovald, 525 F.3d 649, 653 (8th Cir. 2008) (internal quotation marks and citation omitted); accord Fletcher, 323 F.3d at 664; United States v. Bauer, 19 F.3d 409, 414 (8th Cir. 1994). "Timeliness requires a party to raise a claim 'at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim.'" Fletcher, 323 F.3d at 664 (citation omitted). Plaintiffs seeking recusal cannot claim ignorance of key facts easily discoverable -- they are "charged with knowledge of all facts known or knowable, if true, with due diligence, from the public record or otherwise." In re Digital Music, 2007 U.S. Dist. LEXIS 13567, 2007 WL 632762, at *9; accord In re Kan. Pub. Employees, 85 F.3d at 1363 n.8 (rejecting belated suggestion of partiality based on information "easily accessible" from *Almanac of the Federal Judiciary*); United States v. Daley, 564 F.2d 645, 651 (2d Cir. 1977) (recusal motion untimely where predicate facts were "a matter of public record [and] were at all times ascertainable by counsel"); Huff v. Standard Life Ins. Co., 643 F. Supp. 705, 708 (S.D. Fla. 1986) (where basis for motion is "known, or knowable, with due diligence from public records or otherwise," delay in filing motion is basis for denial). The age of the sources relied on here belies Plaintiffs' assertion that they lacked awareness of the connections between Fredrikson and Medtronic. Indeed, Plaintiffs themselves describe the connection between the firm and Medtronic as "highly promoted" and "long standing." (Pl. Mem. at 10.)

Moreover, there is not now, nor has there ever been, any secret that my son is a shareholder at Fredrikson. Notably, Plaintiffs claim only that they were unaware of Fredrikson's connection to Medtronic, not that they were unaware of my son's position at the firm. Of course, Plaintiffs could not have made that assertion -- I am informed that my son has known Plaintiffs' lead counsel, Dan Gustafson, for many years, and he is well aware of my son's position with the firm. 11 Given that knowledge, Plaintiffs could have -- and in the Court's view, should have -- investigated the extent of the purported "close, continuing" relationship between the firm and Medtronic long ago. (Id. at 10.) 12

{601 F. Supp. 2d 1132} Instead, the timing of Plaintiffs' Motion -- coming not long after the Court issued a major ruling adverse to Plaintiffs -- suggests, to be charitable, that it is an exercise in judge shopping. The Eighth Circuit has expressed its disapproval of litigants who wait to seek recusal until after a judge has "issued an unfavorable ruling." Neal v. Wilson, 112 F.3d 351, 357 n.6 (8th Cir. 1997). Counsel may not "lie in wait, raising the recusal issue only after learning the court's ruling on the merits." Phillips v. Amoco Oil Co., 799 F.2d 1464, 1472 (11th Cir. 1986). A judge faced with a recusal motion, therefore, must "be alert to avoid the possibility that those who . . . question his impartiality are in fact seeking to avoid the consequences of his . . . adverse decision." In re Kan. Pub. Employees, 85 F.3d at 1358-59 (citation omitted). That would appear to be the case here.

The Court is also keenly aware of the prudential considerations militating against Plaintiffs' Motion. Accepting Plaintiffs' logic would require judges to run conflict checks through the law firms employing their children, spouses, parents, aunts and uncles, and other family members within the circle of consanguinity set forth in Section 455. Difficult questions would need to be asked if a party to a proceeding before the judge appeared on such a conflict check: is this a substantial client? Is it likely the client will retain the firm in the future? How is the family member's compensation structured, and is it likely to be affected by this client's business? Such a system would be wholly unworkable, as well as a massive drag on the pace of litigation. Such a concern is not merely illusory -- indeed, the spouses, children, and other family members of many of the judges of this Court work for law firms in the Twin Cities.

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Furthermore, accepting Plaintiffs' argument would push the Court down a slippery slope that could require recusal in many situations well beyond the carefully crafted parameters of Section 455. Should the Court recuse, for example, in any case involving a major medical-device manufacturer, such as St. Jude or Boston Scientific? After all, rulings for (or against) a key player in an industry can affect the fortunes of others in the same industry, such as Medtronic in this hypothetical. Or perhaps the Court should recuse from all cases involving lawyers who are friends with my son, for conceivably (by Plaintiffs' logic) ruling adverse to such a lawyer could impair that friendship. Indeed, it is not difficult for the creative -- or, perhaps more accurately (and bluntly), litigation-savvy -- mind to conjure up a plethora of parades of horribles that could require recusal based on only the thinnest reed of logic. Adopting that logic would cripple the bench and eviscerate the Court's ability to perform its key function: the administration of justice.

{601 F. Supp. 2d 1133} CONCLUSION

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS ORDERED** that Plaintiffs' Motion for Recusal (Doc. No. 245) is **DENIED.**

Dated: March 9, 2009

/s/ Richard H. Kyle

RICHARD H. KYLE

United States District Judge

Footnotes

1

The Court subsequently granted Plaintiffs leave to file a Motion for Leave to Amend the MCC.

2

Section 455(b)(5)(iii) also applies to any other family members "within the third degree of relationship" to a judge or his spouse.

3

One could argue that a sufficiently adverse ruling might put Medtronic out of business, thereby depriving Fredrikson of a "significant" client. Given Medtronic's sheer size, however, such an outcome is highly unlikely.

4

Plaintiffs baldly assert that whatever "substantially affects Medtronic . . . necessarily has an effect on Fredrikson, and in turn, its shareholders." (Pl. Mem. at 14.) That contention, however, is pure hypothesis and ignores the realities of modern law-firm economics. More importantly, the question is not whether this case might affect my son's interests, but rather whether it might "*substantially* affect" them. 28 U.S.C. § 455(b)(5)(iii) (emphasis added). Something that substantially affects Medtronic need not substantially affect Fredrikson -- let alone my son -- *ipso facto,* particularly given my son's relatively small stake in the firm's profits (see Koneck Aff. P 16).

5

The text of Section 455(b)(4) tracks that in Section 455(b)(5)(iii) and requires recusal when a judge, his spouse, or a minor child residing with him has an "interest that could be substantially affected by the outcome of the proceeding."

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6

Plaintiffs cite various articles posted on Fredrikson's website to argue that Medtronic is a "significant" and "material" client of the firm, although none of the cited website sections or articles actually uses those terms. (See Pl. Mem. at 5, 17 & n.2.) Regardless, Fredrikson is a large and diverse law firm, with more than 240 lawyers in five offices spanning three countries, with a wide range of practice areas "includ[ing] banking, corporate, employment, energy, renewable energy, franchise, government relations, healthcare, intellectual property, international, litigation, real estate, securities, and tax." pr090121.html (last visited March 9, 2009). Plaintiffs' arguments notwithstanding, there is simply nothing in the record to indicate that Medtronic is Fredrikson's *raison d'etre*.

7

That the judge's husband in Diversifoods had "some connection with the events underlying" that litigation is noteworthy. Here, Plaintiffs assert that "[c]ertain former Medtronic employees, now Fredrikson shareholders, worked on regulatory and compliance matters including aspects of the PreMarket Approval or exemption from approval, of the very product or root devices in question." (Pl. Mem. at 13.) In support, they rely on a 2000 letter between a Fredrikson shareholder (Robert Klepinski), who was then employed by Medtronic, and the FDA regarding "temporary pacemaker electrodes that include myocardial needles used during open chest surgery." (Gustafson Aff. Ex. D.) But there is no obvious connection between such devices and the Sprint Fidelis leads, which are wires permanently affixed to implantable cardiac defibrillators (see MCC (Doc. No. 129) PP 2-3), nor do Plaintiffs point to any. Moreover, Fredrikson specifically avers that it "has never represented Medtronic in any regulatory matter concerning Fidelis leads and played no role in advising Medtronic during the design, development, testing, premarket approval, or post-market surveillance of Fidelis leads." (Koneck Aff. P 8.) In any event, Diversifoods makes clear that recusal would not be required even if this nine-year-old letter indicated some minor connection between Klepinski and the facts underlying this litigation.

8

Plaintiffs' reliance on United States v. Miell, No. 07-CR-101, 2008 U.S. Dist. LEXIS 28451, 2008 WL 974843 (N.D. Iowa Apr. 8, 2008), is misplaced. There, the defendant was indicted for scheming to defraud several insurance companies. One such insurer sued the defendant to recover its losses and was represented in that litigation by the judge's husband's law firm. See 2008 U.S. Dist. LEXIS 28451, [WL] at *1. Because of the close connection between the criminal and civil cases, the judge recused "out of an abundance of caution." 2008 U.S. Dist. LEXIS 28451, [WL] at *3. The facts here are markedly different.

9

Notably, the Court was contacted by a reporter for the *Wall Street Journal* within hours of that conference call, even though no transcript or other public record of that call had yet been filed. These facts call to mind the concerns raised in In re Drexel Burnham Lambert, 861 F.2d at 1309, that litigants with access to the media can manipulate the press in an attempt to obtain a judge more to their liking.

10

After the First Circuit decided In re Boston's Children First, the district judge asked the court to rehear the matter *en banc*. Although that request was denied, half of the active judges of the Circuit expressed the view that "the district court's statement to the reporter . . . d[id] not create an appearance of partiality such as to require mandatory recusal under 28 U.S.C. § 455(a)." 244 F.3d at 171. Those judges were "particularly concerned that section 455(a) not be read to create a threshold for recusal so low as to make any out-of-court response to a reporter's question the basis for a

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motion to recuse." Id.
11

A judge may rely on "facts drawn from his own personal knowledge" when ruling on a recusal motion under 28 U.S.C. § 455. United States v. Balistrieri, 779 F.2d 1191, 1202 (7th Cir. 1985).
12

Plaintiffs claim they had no obligation to conduct such an investigation, citing American Textile Manufacturers Institute, Inc. v. The Limited, Inc., 190 F.3d 729, 742 (6th Cir. 1999), for the proposition that litigants are not required to "pore through the judge's private affairs" to discover a potential conflict. (See Pl. Mem. at 21.) But the facts Plaintiffs allege to have recently discovered have nothing to do with my "private affairs" -- they concern only the links between Fredrikson and Medtronic. And given Plaintiffs' lead counsel's long-standing knowledge that my son is a shareholder at Fredrikson, the Court does not believe it was appropriate for Plaintiffs to sit idly by while the Court (and the parties) invested substantial time, effort, and expense in this case for the past year only to then move for my recusal. See In re Nat'l Union, 839 F.2d at 1232 (noting "the substantial costs to the administration of justice . . . caused by delay in pursuing" recusal); In re Mercedes-Benz Antitrust Litig., 226 F. Supp. 2d 552, 557 (D.N.J. 2002) (given court's "substantial investment of time" in case, "[f]airness to the litigation process and to the parties weigh[ed] against recusal"; "This is no time for the Court to abandon its post through an excessively nice sense of the proprieties.").

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GLOBAL FINANCE

Court Opens Recourse for Stanford Victims

By Brent Kendall

WASHINGTON—Victims of R. Allen Stanford's $7 billion Ponzi scheme can sue law firms and other third parties on allegations they aided the fraud, the U.S. Supreme Court ruled.

The court's 7-2 decision, written by Justice Stephen Breyer, said the victims' class-action lawsuits were allowed even though a 1998 federal law largely prohibits state-law class-action claims for securities fraud.

The federal prohibitions didn't apply because Mr. Stanford's bogus certificates of deposit weren't real securities traded on national markets, the court said. The court also said it didn't matter that Mr. Stanford's Antigua-based bank claimed it would use investors' money to buy securities.

The ruling gives victims a chance to recover more of their losses. But it likely doesn't open the floodgates for a wave of securities litigation since the holding is limited to products sometimes sold in Ponzi schemes that aren't considered securities.

The ruling "will permit victims of this (and similar) frauds to recover damages under state law," Justice Breyer wrote.

Mr. Stanford is serving a 110-year prison sentence after being convicted in 2012 of defrauding investors.

In the fraud's aftermath, multiple investor groups sued law firms and financial-services companies that had relationships with the Stanford operations. They alleged **SEI Investments** Co. and insurance brokers, including subsidiaries of **Willis Group Holdings** PLC, misrepresented the CDs as safe investments. They also brought claims against law firms Proskauer Rose LLP and Chadbourne & Parke LLP, alleging the firms helped Mr. Stanford's bank evade regulatory oversight. The plaintiffs brought their claims under state law in Louisiana and Texas.

The defendants denied the allegations and said the investors targeted third parties with deep pockets because Mr. Stanford's operations are insolvent.

The law firms said they didn't make misrepresentations to investors. SEI said it merely provided a Stanford affiliate with back-office services, while Willis Group said it helped Mr. Stanford's bank purchase ordinary insurance policies.

Justices Anthony Kennedy and Samuel Alito dissented from the court's ruling, expressing concern it could inhibit the Securities and Exchange Commission's ability to police certain frauds in which real securities transactions don't actually occur.

The SEC raised similar concerns in a brief submitted to the Supreme Court. An SEC spokesman declined to comment.

"We're very happy the victims of this fraud will finally get their day in court," said Thomas C. Goldstein of Goldstein & Russell PC, a lawyer for the investors.

Willis Group and the law firms said the ruling was only on a narrow procedural issue, adding that they would continue to press other arguments on why the case should be dismissed. SEI declined to comment.

R. Allen Stanford is serving a 110-year prison sentence for his fraud.

EXHIBIT H.

Bernanke Set for Legal First

By Leslie Scism And Pedro da Costa

Former Federal Reserve Chairman Ben Bernanke will give a deposition Thursday in a lawsuit about the 2008 bailout of **American International Group** Inc., a case that once seemed a long shot but is marching toward a trial date.

Mr. Bernanke is one of the last [illegible] appellate court ruling in October that Mr. Bernanke wouldn't have to testify at least as long as he was Fed chairman. But as Mr. Bernanke's Jan. 31 retirement loomed, Starr's legal team persisted, and the government dropped its opposition.

It may not be the last testimony by Mr. Bernanke in the case. He could be on the witness stand this fall, under rules of the [illegible] claims suit that four

Ocwen Faces New York Probe

By Andrew R. Johnson

New York's financial regulator is examining mortgage-servicing firm **Ocwen Financial** Corp.'s relationships with several businesses, saying that borrowers may be harmed because of the companies' close ties.

Benjamin Lawsky, superintendent of the New York Department of Financial Services, sent a letter Wednesday to Ocwen that its agreements with the companies are "fully disclosed in our public filings, and we believe them to be on an arms length basis." The company added, "We look forward to addressing the matters raised by NY DFS and will fully cooperate."

The affiliated companies cited in the letter, a copy of which was reviewed by The Wall Street Journal, include **Altisource Portfolio Solutions** SA, which

A recent regulatory filing from Altisource said that Ocwen was its largest customer, accounting for 65% of its 2013 revenue. "We could have conflicts of interest with Ocwen" and other firms, "which may be resolved in a manner adverse to us," Altisource said in the filing.

Mr. Lawsky has been scrutinizing Ocwen's business amid concerns by the regulator that the company isn't equipped to

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CHADBOURNE & PARKE LLP v. TROICE ET AL. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR

THE FIFTH CIRCUIT

No. 12–79. Argued October 7, 2013—Decided February 26, 2014*

The Securities Litigation Uniform Standards Act of 1998 (Litigation Act or Act) forbids the bringing of large securities class actions "based upon the statutory or common law of any State" in which the plain- tiffs allege "a misrepresentation or omission of a material fact in con- nection with the purchase or sale of a covered security," 15 U. S. C. §78bb(f)(1). The Act defines "covered security" to include, as relevant here, only securities traded on a national exchange. §§78bb(f)(5)(E), 77r(b)(1).

Four sets of plaintiffs, respondents here, filed civil class actions under state law, contending that the defendants, petitioners here, helped Allen Stanford and his companies perpetrate a Ponzi scheme by falsely representing that uncovered securities (certificates of de- posit in Stanford International Bank) that plaintiffs were purchasing were backed by covered securities. The District Court dismissed each case under the Litigation Act. Although the certificates of deposit were not covered securities, the court concluded, the Bank's misrep- resentation that its holdings in covered securities made investments in its uncovered securities more secure provided the requisite "con- nection" (under the Litigation Act) between the plaintiffs' state-law actions and transactions in covered securities. The Fifth Circuit re- versed, concluding that the falsehoods about the Bank's holdings in covered securities were too tangentially related to the fraud to trigger the Litigation Act.

Held: The Litigation Act does not preclude the plaintiffs' state-law class

* Together with No. 12–86, Willis of Colorado Inc. et al. v. Troice et al., and No. 12–88, Proskauer Rose LLP v. Troice et al., also on certio- rari to the same court.

actions. Pp. 8–19.
(a)Several factors support the conclusion that the scope of

§78bb(f)(1)(A)'s phrase "misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security" does not extend further than misrepresentations that are material to the decision by one or more individuals (other than the fraudster) to purchase or sell a covered security. First, this interpretation is con- sistent with the Act's basic focus on transactions in covered, not un- covered, securities. Second, the interpretation is supported by the Act's language. The phrase "material fact in connection with the purchase or sale" suggests a connection that matters. And a connec- tion matters where the misrepresentation makes a significant differ- ence to someone's decision to purchase or to sell a covered security, not an uncovered one, something about which the Act expresses no concern. See Matrixx Initiatives, Inc. v. Siracusano, 563 U. S. ___, ___.

EXHIBIT H.