December 30, 2013

Thomas J. Petters
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Clerk of the Court
U.S. District Court
Warren E. Burger Fed. Bldg.
316 North Robert Street
St. Paul, Minnesota
U.S. CERTIFIED MAIL NO. 7012-3460-0001-8774-3786

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

Dear Clerk:

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

1. MOTION TO DISQUALIFY THE HONORABLE JUDGE RICHARD H. KYLE IN THIS ACTION. DEFENDANT PETTERS REQUESTS THE RECUSAL OF JUDGE KYLE, PURSUANT TO 28 U.S.C. §§§ 455(a), 455(b)(5)(i), and 455(b)(5)(iii.). DEFENDANT PETTERS WAS PREJUDICED. Dated: **December 28, 2013.**

2. MOTION TO ALTER OR AMEND JUDGMENT OF THIS COURT'S "MEMORANDUM OPINION AND ORDER" FILED DECEMBER 5, 2013, PURSUANT TO RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE. **Dated: December 28, 2013.**

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

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

Sincerely,

Thomas J. Petters, Pro Se

CERTIFICATE OF SERVICE

I THOMAS J. PETTERS certify that I mailed a copy of the above-entitled motions within a stamped envelope with correct postage to the following parties on **DECEMBER 30, 2013,** from the U.S. Penitentiary Leavenworth MAILROOM:

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

Thomas J. Petters, Pro Se

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

MOTION TO DISQUALIFY THE HONORABLE JUDGE RICHARD H. KYLE IN THIS ACTION. DEFENDANT PETTERS REQUESTS THE RECUSAL OF JUDGE KYLE, PURSUANT TO 28 U.S.C. §§§ 455(a), 455(b)(5)(i), AND 455(b)(5)(iii). DEFENDANT PETTERS WAS PREJUDICED.

COMES NOW, Defendant THOMAS JOSEPH PETTERS, Pro Se, (hereinafter Movant) through his JailHouse Lawyer John Gregory Lambros, MUNZ vs. NIX, 908 F.2d 267, 268 FootNote 3 (8th Cir. 1990)(Jailhouse lawyer has standing to assert rights of inmates who need help); BEAR vs. KAUTZKY, 305 F.3d 802, 805 (8th Cir. 2002), and respectfully moves this Court to voluntarily disqualify himself from sitting in this action in the above-entitled case(s).

In support of this motion to disqualify the Honorable Judge Richard H. Kyle, pursuant to Title 28 U.S.C. §§§ 455(a), 455(b)(5)(i), and 455(b)(5)(iii), I THOMAS JOSEPH PETTERS, declares under penalty of perjury that the following is true and correct pursuant to Title 28 U.S.C. §1746.

STANDARD OF REVIEW:

A. TITLE 28 U.S.C. §455(a):

1. The goal of 28 U.S.C. §455(a), which disqualifies a judge from

from acting in a proceeding in which his **IMPARTIALITY MIGHT REASONABLY BE QUESTIONED**, is to avoid even the appearance of partiality; if it would appear to a reasonable person that the 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. TITLE 28 U.S.C. §§§ 455(b)(5)(i thru vi.):

2. Title 28 U.S.C. §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." (emphasis added)

3. **EXHIBIT A.** Copy of Title 28 U.S.C. §455.

C. TIMELINESS OF THIS MOTION UNDER 28 U.S.C. §455:

4. IN RE KENSINGTON INT'L, LTD., 368 F.3d 289, 312-316 (3rd Cir. 2004) In this case, the judge knew of conflict from or near its inception more than 18 months before 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 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. DUTY OF MOVANT PETTERS ATTORNEY'S TO FILE FOR RECUSAL OF JUDGE KYLE:

5. Movant PETTERS and JailHouse Lawyer Lambros requested Attorney's Jon M. Hopeman, Eric J. Riensche, Jessica M. Marsh and Paul C. Engh, who represented Movant Petters at trial and direct appeal in this action, to submit an additional issue within Movant PETTERS direct appeal with the Eighth Circuit, as to violations of Title 28 U.S.C. §§ 455(a) and 455(b)(5)(i - iv.). The following letters will be offered as exhibits later within this motion, as to facts and proof of same:

a. September 1, 2010, Movant's letter to above listed attorney's;

b. September 17, 2010, Attorney Eric J. Riensche letter to Movant Petters, refusing to raise §455 issues on direct appeal and recommending issue be raised pursuant to 28 USC §2255, as to the attorney's being ineffective for not raising the issue at trial. Attorney Riensche states on Page 2 of letter:

*** "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."

c. September 27, 2010, Movant's letter to above listed attorney's in response to attorney's September 17, 2010 letter. Movant Petters states on page 4, paragraph 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 U.S.C. §455 BY JUDGE KYLE.** Also, please attach to your initial motion the following documents: (the documents include those stated in a, b, and c above)"

Please note that both the September 1 and 27 letters where mail U.S. Certified mail and received by the attorneys.

6. The following cases for recusal 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 does not request recusal of judge. See, U.S. vs. WINSTON, 613 F. 2d 221, 223 (9th Cir. 1980)(if recusal is inappropriate in case, appellant is not prejudiced by failure of counsel to make such request and is not entitled to reversal of conviction on ground that he was denied right to effective assistance of counsel guaranteed by Sixth Amendment.); FLEGENHEIMER vs. U.S., 110 F.2d 379, 381 (3rd Cir. 1936)(so long as defendant honestly believes that trial judge is biased and states on what facts be bases his opinion, it is his right to call on his counsel to give certificate by statute in order to have question of bias determined).

E. FAILURE OF COUNSEL TO COMPLY WITH CLIENT'S REQUEST TO FILE RECUSAL CHALLENGE:

7. NATIONS vs. 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 day before trial); MORRIS vs. 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).

F. "CHILDREN OF JUDGE" AS TO VIOLATIONS OF 28 U.S.C. §455:

8. Trail 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 persuasive as precedent. See, IN RE AETNA CASUALTY & SURETY CO., 919 F.2d 1136 (6th Cir. 1990).

9. 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).

10. District Judge did not abuse 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, 1164-65 **(8th Cir. 1998).**

11. **Judge's SON** who was an associate within a law firm that regularly represented defendant but was not representing defendant in case before 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).

12. 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. IN RE MERCEDES-BENZ ANTITRUST LITIGATION, 226 F.Supp. 2d 552 (D. N.J. 2002).

13. 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. See, SELKRIDGE vs. UNITED OF OMAHA LIFE INS. CO., 360 F.3d 155, 166-172 (3rd Cir. 2004).

G. RICHARD H. KYLE, Jr. IS THE SON OF THE HONORABLE JUDGE RICHARD H. KYLE:

14. Attorney Richard H. Kyle, Jr., is the son of the Honorable Judge Richard H. Kyle.

15. Attorney Richard H. Kyle, Jr., "Richard is a **SHAREHOLDER [Equity-Partner] in FREDRIKSON & BYRON'S WHITE COLLAR & REGULATORY DEFENSE, HEALTH CARE FRAUD & COMPLIANCE AND LITIGATION GROUP."** See, **EXHIBIT B.** (Print-out from the Fredrikson & Byron, P.A. lawfirm's website)

16. From on or about 1992 thru 2008, the **LAW FIRM "FREDRIKSON & BYRON, P.A."** represented Movant PETTERS, Petters Company, Inc. and Petters Group Worldwide, LLC.. Movant Petters paid FREDRIKSON & BYRON approximately **$20 MILLION FOR LEGAL SERVICES.**

17. On June 6, 2012, Attorney Douglas A. Kelly submitted the following in U.S.A. vs. THOMAS JOSEPH PETTERS, et al., Civil No. 08-5348 (ADM/JSM):

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

This settlement agreement stemmed from this above-entitled criminal action. The "AFFIDAVIT" stated on page 3, paragraph 4:

> "Prior to the bankruptcy filings, F&B **[Fredrikson & Byron, P.A.]** represented Petters and the Petters Entities, which include the Debtors, for approximately fifteen years as outside legal counsel engaged on specific matters. During the course of its representation, F&B provided various legal services including **BUSINESS TRANSACTIONAL WORK**, such as real estate,
> *** **CORPORATE, FINANCE AND SECURITIES MATTERS**, as well as litigation and other specific matters. During the course of its

representation of Petters and the Petters Entitles, **F&B** asserts it provided standard legal opinions with respect
*** to a number of transactions and received payments from the Debtors in connection with the services that were provided. Petters and the Petters Entities paid **F&B** approximately $8 million during the course of **F&B's** representation." (emphasis added)

18. The June 6, 2012, **"AFFIDAVIT"** by Attorney Kelly also stated on pages 5 and 6, paragraph 9:

"Upon the consideration of the Susman and Freeborn reviews and analyses, I, as Trustee and Receiver, assert legal and equitable claims against **F&B** relating to its **REPRESENTATION OF PETTERS,** the Debtors and the Receivership Entities and made demands upon the firm and its insurer for payment. The claims were for **BREACH OF FIDUCIARY DUTY, BREACH OF CONTRACT,**
*** **AIDING AND ABETTING BREACH OF FIDUCIARY DUTY, AIDING AND ABETTING FRAUD, CIVIL CONSPIRACY, UNJUST ENRICHMENT AND LEGAL MALPRACTICE.** ..... Although the investigation conducted by Susman and Freeborn did not uncover evidence of actual knowledge of 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."** (emphasis added)

19. The June 6, 2012, **"AFFIDAVIT"** by Attorney Kelley included **EXHIBIT A,** which is entitled **"SETTLEMENT AGREEMENT"** which is signed by **Fredrikson & BYRON, P.A.** on May 30, 2012 and Douglas A. Kelly, as Trustee and Receiver on May 30, 2012. The **"SETTLEMENT AGREEMENT"** clearly states that **Fredrikson & BYRON** will settle all claims as to the above possible violations of law, see paragraph 18 above, for the sum of **$13.5 MILLION:** See, Page 4, paragraph 5:

"In full and final settlement of the Debtor Released Claims (as defined below), **F&B SHALL PAY (or cause to by paid) THE SUM OF $13.5 MILLION (THE SETTLEMENT PAY-**
*** **MENT)** 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."** (emphasis added)

20. **EXHIBIT C:** Copy of USA vs. THOMAS JOSEPH PETTERS, et. al, **Civil No. 08-5348 - ADM/JSM,** which is 13 pages and the attached **"Exhibit A" "SETTLEMENT AGREEMENT"** which is 17 pages. This document is dated and filed with the Clerk of Court on **JUNE 6, 2012.**

H. CONFLICTS INFORMATION SYSTEM FOR THE FEDERAL JUDICIARY:

21. Movant 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 Fredrickson & Byron.

22. "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 CONFLICT 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..** 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 are relying on informal conflicts disclosure among family members **(even lawyers)** rather than on 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." (emphasis added)

Basically the $64,000.00 question in this action is why after the above **February 19, 2009** article, didn't the law firm **FREDRIKSON & BYRON, RICHARD H. KYLE, Jr (son of Judge Kyle) and the Federal Court Administrator UNDERSTAND THE "REQUIRED" NEED TO MANAGE CONFLICTS INFORMATION, AS PER THE ABOVE ABA MODEL RULES??** Movant PETTERS **TRIAL COMMENCED IN OCTOBER 2009.** Also of interest, is the fact that Movant PETTERS trial was one of the most widely publicized globally, with front page coverage within the Wall Street Journal and USA TODAY.

23. Movant PETTERS believes Judge Kyle knew from both informal

and/or the automated conflict system of the potential conflict, due to Judge Kyle's son working for **FREDRIKSON & BYRON, P.A., AS A EQUITY-PARTNER, SHAREHOLDER.** See, 28 U.S.C. §455(c) requires federal judges to stay informed of any interests they may have in cases which they preside). Therefore, if this Court, Judge Kyle, had **DISCLOSED THAT HIS SON WAS AN ATTORNEY FOR FREDRIKSON & BYRON, THIS RECUSAL MOTION COULD HAVE BEEN AVOIDED**! The following cases support same, IN RE KENSINGTON INT'L, LTD, 368 F.3d at 313-314 (3rd Cir. 2004)(collecting cases), also see, paragraph 4 above for cases.

I. WAIVER AS TO VIOLATIONS OF 28 U.S.C. §455:

24. 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).

STATEMENT OF FACTS BY MOVANT PETTERS:

25. During the grand jury investigation of this above entitled matter, the "SUPERSEDING INDICTMENT" - filed **June 3, 2009** with the clerk of the court - was **NOT SIGNED** by the U.S. Attorney nor anyone within his office. Also, **NO SIGNATURE** of the foreman of the grand jury, nor anyone else from the grand jury appeared within the "SUPERSEDING INDICTMENT", making the indictment "a true bill". Movant PETTERS prejudiced, as this Court did not have jurisdiction in this matter.

26. Judge Kyle's "IMPARTIALITY MIGHT REASONABLY BE QUESTIONED" in this matter, when the first document he reviewed in this action was the indictment and the indictment was not signed by the grand jury or the U.S. Attorney.

27. **EXHIBIT D: "SUPERSEDING INDICTMENT"** in this above-entitled matter, that was filed with the Clerk of the Court on June 3, 2009.

28. **EXHIBIT E:** JailHouse Lambros' overview as to statement of facts and statement of law regarding the prejudice Movant PETTERS experienced due to the "SUPERSEDING INDICTMENT" - filed June 3, 2009 - not being signed by the grand jury and the U.S. Attorney. This document is seven (7) pages.

29. **EXHIBIT F:** July 10, 2012, letter from Attorney Shauna Kieffer, from the FORD LAW OFFICE, Hopkins, Minneosta, to Movant PETTERS. Please note that Attorney Kieffer plainly states that:

> "1. due process violation for the **SUPERSEDING INDICTMENT THAT WAS NOT SIGNED AND THE COUNT 10 CHARGE ...;**
>
> 2. **FAILURE TO REMOVE THE JUDGE FOR BIAS;**
>
> **OTHER CLAIMS:**
>
> 1. **DUTY OF JUDGE TO RECUSE HIMSELF**
>
> 3. Judge involved in negotiations"

30. Movant PETTERS also believes Judge Kyle's "IMPARTIALITY MIGHT REASONABLY BE QUESTIONED" in this matter, when he allowed Movant PETTERS to proceed in this action when the June 3, 2009 "SUPERSEDING INDICTMENT" contained a charging offense that occurred more than five (5) years prior to date of the "SUPERSEDING INDICTMENT". Count ten (10), dated **June 3, 2004** was barred by the five (5) year statute of limitation. See, Title 18 U.S.C. §3282. Movant PETTERS was found guilty of Count 10 during trial and sentenced to 240 months of incarceration within the U.S. Bureau of Prisons.

31. Movant PETTERS attorney's did not inform him of the invalid Count 10 within the "SUPERSEDING INDICTMENT" **DURING PLEA BARGAINING.** Therefore, Movant's attorney was also ineffective, as well as the U.S. Attorney not informing Movant of same during **PLEA BARGAINING, TRIAL AND SENTENCING.**

32. **EXHIBIT G:** Jailhouse Lambros' overview as to Count 10 charging an offense that occurred more than five (5) years prior to date of indictment, in violation of the statute of limitations, 18 U.S.C. §3282.

33. **MARCH 9, 2009:** Judge Kyle filed a response ORDER in MEDTRONIC LEADS, 601 F.Supp.2d 1120 (D. Minn March 9, 2009), as to a **MOTION FOR RECUSAL** based upon the fact that Judge Kyle's son, Richard Kyle, Jr., is a **SHAREHOLDER AT FREDRIKSON & BYRON.** Therefore, Judge Kyle was on notice as to his **BURDEN TO DISCLOSE OF ANY POSSIBLE CONFLICT.** Movant PETTERS **"SUPPERSEDING INDICTMENT"** was dated **June 3, 2009.** See, IN RE KENSINGTON INT'L, LTD., 368 F.3d at 313-314 (Judge knew of conflict from or near its inception but never disclosed it to parties - burden is to be placed on Judge to disclose possible grounds for disqualification)

34. **EXHIBIT H:** In re MEDTRONIC, INC., SPRINT FIDELIS LEADS PRODUCTS LIABILITY LITIGATION vs. MEDTRONIC, INC., 623 F.3d 1200, 1208-1209 (8th Cir. 2010). This exhibit only includes pages 1200, 1208-1209, as to the **"RECUSAL ISSUE",** that references the **March 9, 2009 "ORDER" by JUDGE KYLE.**

35. The law firm FREDIKSON & BYRON, P.A., not only represented Movant and his companies in all corporate matter from the 1990's, it also represented Movant PETTERS in Criminal matters. FBI 302 forms prove same within this action. Movant recalls one situation in 1994 and 1995, FBI Agent Eileen Rice, David Marshal of Fredikson & Byron and Movant met as to possible criminal matter due to wire transfers between "AFter The Second Millenium" and PETTERS & COMPANY.

36. The filed "SUPERSEDING INDICTMENT", dated June 3, 2009, clearly stated that Movant PETTERS is a resident of Minnesota and that PETTERS COMPANY, INC. (PCI) is a Minnesota Corporation that is located in Minnesota and that the fraud scheme occurred from at least 1995 through 2008, in the State of Minnesota and elsewhere. Movant, PCI and its agents obtained billions of dollars from investors in **EXCHANGE FOR "PROMISSORY NOTES" ISSUED BY PCI ("PCI NOTES").** Movant's entire indictment is premised on illegal **"PROMISSORY NOTES".**

37. **FREDRIKSON & BYRON, P.A.,** was aware that the **"PROMISSORY NOTES"** where **"SECURITIES"** that **"COULD NOT"** be sold to the public by Movant Petters and/or

PCI and its agents. The June 6, 2012, "AFFIDAVIT" by Attorney Douglas A. Kelly supports same as to Fredrikson & Byron's "breach of fiduciary duty, aiding and abetting fraud, civil conspiracy, unjust enrichment and legal malpractice." See, Paragraphs 17 and 18 above.

38. Of interest is the fact that Defendant's within this above-entitled matter, Frank Elroy Vennes, Jr., James Nathan Fry and Bruce Francis Prevost all where indicted and convicted within this action for **"SECURITES FRAUD"** as to the selling of **PCI "PROMISSORY NOTES"** from late 1990's thru September 2008, all in violation of Title 15, U.S.C. §§ 77q(a) and 77(x). See. USA vs. VENNES, et al., Criminal No. 11-141, U.S. District of Minnesota.

39. In November and December 2001 thru February 2002, **Fredrikson & Byron, P.A.** researched the following areas of law for **PETTERS COMPANY, INC.:**

a. **"RESEARCH IN CONNECTION WITH WHETHER PETTERS NOTES ARE SECURITIES"**; Dated: 10-24-2001.

b. "Review State of Minnesota request; review securites laws; review memo on securities; conference with T. King regarding notes." Dated: 10-24-2001.

c. "Review Minnesota securities matters regarding **"PROMISSORY NOTES".** Dated: 10-29-2001.

The following billing statements from FREDRIKSON & BYRON, P.A., prove that Movant PETTERS was assured that the **"PROMISSORY NOTES"** that he and his companies issued where **NOT SECURITIES**:

d. Invoice dates: November 21, 2001;

e. December 13, 2001;

f. January 24, 2002;

g. February 20, 2002.

40. **EXHIBIT I:** FREDRIKSON & BYRON, P.A. invoices for services to PETTERS COMPANY, INC. **(PCI),** as listed in above paragraph, 39(d-g).

41. The February 20, 2002, FREDRICKSON & BYRON invoice states **"RESEARCH WHETHER NOTE IS A SECURITY UNDER REVES TEST" "RESEARCH REVES CASES;**

DRAFT RESPONSE TO MINNESOTA DEPARTMENT OF COMMERCE;" ..... See billing dates January 3, 4 and 5, 2002.

42. JailHouse Lawyer LAMBROS, was a licensed registered representative - BROKER - in Minnesota of a Stock Exchange member, within the meaning of Title 15 U.S.C. §78c. Lambros is very familiar with securities laws and does not understand how FREDRICKSON & BYRON, P.A. could ever allow Movant PETTERS and PCI to sell **"PROMISSORY NOTES", AS IT IS ILLEGAL.**

43. A short review SEC. & EXCH. COMM'N vs. EDWARDS, 540 U.S. 389, 393 (2004)("Congress' purpose in enacting the securities laws was to regulate investments, in whatever form they are made, and by whatever name they are called ... To that end, it enacted a broad definition of 'security', sufficient to encompass virtually any instrument that might be sold as an investment."); **REVES vs. ERNST & YOUNG,** 494 U.S. 56 (1990)(holding that **UNCOLLATERALIZED, UNINSURED PROMISSORY NOTES DUE ON DEMAND WERE "SECURITIES" WITHIN SECTION 3(a)(10) OF THE SECURITIES EXCHANGE ACT OF 1934,** reasoning that "Congress' purpose in enacting the securities law was to regulate investments, in whatever form they are made and by whatever name they are called."

44. Movant PETTERS is not to blame for the **"PROMISSORY NOTES"** that where sold by his employees, lawyers, and agents, as Movant PETTERS was not aware that the Securities and Exchange would of reviewed the **"PROMISSORY NOTES"** yearly via accounting audits, as per law, and detected the fraud in December 2001 or surely by the end of 2002. Movant PETTERS delegation of duties to executives within his company and relying of the advice, oversight, and competency of his **in-house and outside attorneys** allowed for the above-entitled matter to take place. **THIS COURT SHOULD OF UNDERSTOOD SAME.**

45. **RELIANCE-ON-COUNSEL DEFENSE WAS AVAILABLE AND SHOULD OF BEEN USED:** A reliance-on-counsel defense has two (2) 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. See, U.S. vs. 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." U.S. vs. LINDO, 18 F.3d 353, 356 (6th Cir. 1994).

46. This court knew throughout Movant Petters jury trial that his theory of defense was that his attorney's - **FREDRICKSON & BYRON, P.A. AND PCI'S IN-HOUSE-ATTORNEY'S** - and defendant's - known and unknown - were defrauding Mr. Petters. What wasn't revealed to Movant PETTERS was the fact that the **PROMISSORY NOTES WERE ILLEGAL - AS THEY NEEDED TO BE SOLD BY BY A "BROKER-DEALER" AUTHORIZED BY THE SECURITIES EXCHANGE COMMISSION.** Movant PETTERS was informed by all of his attorney's that the "PROMISSORY NOTES" did not need to be a security. Movant PETTERS had to rely on his attorney and executives to oversee his one-hundred plus companies and over 2,000 employees.

47. Of interest, why didn't any of the lawyers from FREDRICKSON & BYRON testify at Movant PETTERS trial as to the legal mistake the firm made regarding the PROMISSORY NOTES not being a security??? Because Fredrickson & Byron quit representing Movant Petters the day after the FBI raided PCI offices and homes of officers. Also, the law firm did not want to incur the liability for advising Movant PETTERS and his agents that they were selling an illegal "PROMISSORY NOTE" that was a security and would have exposed the fraud due to Security and Exchange Commission due diligence overview.

MOVANT PETTERS REQUESTED HIS DIRECT APPEAL ATTORNEY TO RAISE RECUSAL ON DIRECT APPEAL AND THEY REFUSED:

48. As stated within paragraph five (5) above, Movant PETTERS requested Attorney's Jon M. Hopeman, Eric J. Riensche, Jessica M. Marsh and Paul C. Engh, who

represented Movant Petters at trial and direct appeal in this action, to submit an additional issue within Movant's direct appeal with the Eighth Circuit, as to violations of Title 28 U.S.C. §§ 455(a) and 455(b)(5)(i-iv.). Jailhouse lawyer LAMBROS discovered the above violations while researching issues for Movant's direct appeal and §2255.

49. **EXHIBIT J:** September 1, 2010, letter from Movant PETTERS to Attorney's Hopeman, Riensche, Marsh and Engh, as to "Additional issue for July 30, 2010 'Brief & Addendum of Appellant Thomas J. Petters', No. 10-1843, U.S. Court of Appeals for the Eight Circuit., as to violaitons of Title 28 USC §455 - Disqualification of Judge Kyle due to his son - Attorney Richard H. Kyle, Jr. - being a partner and/or 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. Please note that Movant states on page 9 of the letter:

> **"PLEASE SUBMIT AN ADDITIONAL ISSUE WITHING 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."

Movant PETTER incorporates and restates the legal research and facts incorporated within his September 1, 2010 letter.

50. **EXHIBIT K:** September 17, 2010, letter from Attorney Eric J. Riensche to Movant PETTERS, in response to his September 1, 2010 letter. Attorney Riensche states he is writing to address two main issues you inquired about for the appeal: (1) **"the issue regarding disqualification of the judge; ...."**. Please note on page one (1) of the letter Attorney Riensche stated that Movant 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

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.

c. Tom Petters 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"." (emphasis added)

Movant PETTERS incorporates and restates the legal research and facts incorporated within his September 27, 2010 letter to his legal team.

53. Movant PETTERS requested Attorney Steven J. Meshbesher, the attorney Movant's family hired to file Movant's 28 U.S.C. §2255, to file an issue within his §2255 as to the violations of 28 U.S.C. §455 et al. by Judge Kyle. In fact, Movant PETTERS mailed Attorney Meshbesher all of the above information to assist him in same. Attorney Meshbesher refused to include the issue within Movant's §2255. Again, Movant PETTERS believes Attorney Meshbesher had a **DUTY TO FILE FOR RECUSAL OF JUDGE KYLE IN THIS ACTION - KNOWING OTHER ATTORNEY'S WITH SIMILAR YEARS OF LEGAL PRACTICE AND KNOWLEDGE BELIEVED THE ISSUE HAD SUBSTANCE AND WAS A "DECENT ONE."** See, **EXHIBIT K.** (Attorney Riensche & Hopeman's letter)

"... you might make a Section 2255 motion on that ground, and perhaps **ARGUE YOUR COUNSEL (US) WERE INEFFECTIVE FOR FAILING TO MOVE FOR DISQUALIFICATION."**

JUDGE KYLE ALTERED AND REDACTED DEFENDANTS "PCI AND PGW" FROM THE INDICTMENT WITHOUT SENDING THE INDICTMENT BACK TO THE GRAND JURY - VIOLATION OF RULE 14, CRIMINAL RULES OF PROCEDURE:

54. On November 29, 2009, the trial of Movant Petters had come to a conclusion, all except for the jury had not yet decided a verdict. While the jury

was deliberating on Movant's fate, Judge Kyle held a private meeting within Chambers to include himself, the two prosecutors - John Marti and Joseph Dixon - and Movant's two defense attorney's - Jon Hopeman and Paul Engh. During this meeting it can be clearly seen by any reasonable person that a conspiracy to violate Federal Code and Rules is taking place. Under the guise of the Court, the group ponders what can be done to answer the juries question that was just handed to the judge from the jury room where they were deliberating.

"WHY IS PGW AND PCI BOTH STATED IN THE INDICTMENT"

It is not without great care and deliberation this outrageous form of injustice occurred. As one reads (see Trial Transcript pages 3491-3519, **EXHIBIT M.**) the discussion being held, Judge Kyle clearly dances around the issue with the U.S. Assistant Attorney's and defense counsel, then does not "right the ship" but rather proceeds in allowing Movant PETTERS indictment to be ALTERED AND REDACTED,

** **ELIMINATING PCI AND PGW FROM THE INDICTMENT**, being questioned by the jury as to why they are relevant to the indictment. Judge Kyle fosters and holds a conversation that can be without question, that can be viewed not only as totally unethical but in clear violation of federal law and in violation of Movant PETTERS constitutional rights and that of victims and creditors who lost money in the fraud.

55. The significance of this cannot be answered by the court as simple "harmless error" for the indictment cannot be redacted by any party other than the grand jury. See, **EXHIBIT M.** (offering an overview of: ExParte BAIN, 30 L.Ed. 849, 121 US 1 and RUSSEL vs. U.S, 8 L.Ed. 2d 240, 369 US 749.) Judge Kyle had a duty to answer the jury with a truthful answer and explain that in fact two defendant's had been removed from the indictment, admitting that he erred in not requiring a Rule 14 **"RELIEF FROM PREJUDICIAL JOINDER"** be filed in the case to separate defendants. Therefore, ordering that a joinder be filed in this action eliminating PCI AND PGW from the indictment.

56. Further Judge Kyle has created a situation along with the U.S. Attorney that cause the indictment to be defective. The Supreme Court is

very clear in the aforementioned cases that indictments cannot just be tailored to fit the needs of the court or the prosecution. Movant PETTERS believes he has shown **"IMPARTIALITY MIGHT REASONABLY BE QUESTIONED"** due to facts stated. See, **EXHIBIT M.** (complete overview of paragraphs 54 thru 56 above)

CONCLUSION:

57. JailHouse Lawyer Lambros would like to state one final word here, as a past registered representative licensed by the Securites and Exchange Commission. Lambros believes that this tragedy would not have occurred if FREDRIKSON & BYRON, P.A., had not **FOOLED** the Securities and Exchange Commision who raised questions about Movant PETTER **PCI "PROMISSORY NOTES" BEING SECURITES.** See, Paragraphs 39 thru 47. First, **PCI "PROMISSORY NOTES" ARE SECURITES,** as per the Supreme Court cases SEC. & EXCH. COMM'N vs. EDWARDS and REVES vs. ERNST & YOUNG. As a security, the Security and Exchange Commisson, Washington, D.C. based office of Compliance and Examination, would of required a SEC Regional Office to demand records and audits form Movant PETTERS and PCI, as to the **"PROMISSORY NOTES",** if the notes had been a security, as required by law. This would of occurred in late 2001 and 2002, as per FREDRIKSON & BYRON billing statements. See, Paragraph 39. The SEC would of also demanded Movant Petters and PCI employees to by **"REGISTERED INVESTMENT ADVISORS"** if they sold the **"PROMISSORY NOTES".**

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

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

EXECUTED ON: December 28, 2013

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CASE LAW INDEX

BEAR vs. KANITAKY, 305 F. 3d 805 (8th Cir. 2002).....1

FLEGENHEIMER vs. U.S., 110 F.2d 379,381 (3rd Cir. 1936.....4

EX PARTE BAIN, 30 LED 849, 121 US 1.....

HOKE vs. CHARLOTLE-MECKLENBURG HOSP-AUTH,INC. 550 F Supp. 1276 N.D.NC 1982.....5

JENKINS vs. ARKANSAS POWER & LIGHT CO. 140 F. 3d 1161. 1164-65(8th Cir 1998).....5

KENSINGTON INTL.LTD, 368 F. 3d. 289, 312-316 (3rd Cir. 2004).....2

"LAW LIBRARIAN BLOG" at. Typepad.Ccom.....8

LILJEBEING vs. HEALTH SERVICES ACQUISITION CORP. 100 L. Ed. 2d 855 (1988).....1

MEDTRONIC INC. SPRINT & FIDELIS LEADS PRODUCT LIABILLTY LITIGATION vs. MEDTRONIC,INC. 623 F. 3d 1200-1209 (8th Cir. 2010).....11

MERCEDES BENZ ANTITRUST & LITIGATION, 226 F. SUPP. 2d 552(D.N.J.2002).5

MORRIS vs. U.S., 26 F. 2d 444,449 (8th Cir. 1928).....4

MUNZ vs. NIX, 908 F. 2d 267, 268 footnote 3 (8th Cir. 1990).....1

NATIONS vs. U.S., F. 2d 507 (8th Cir. 1926).....4

PARKER vs. CONNORS STEEL CO., F. 2d 1510,1525 (11th Cir. 1988).....3

REEVES vs. ERNST & YONG, 494 U.S 56 (1990).....13

RUSSELL vs. UNITED STATES, 8LED 2D 240, 369 US 749.....

SELKRIDGE vs. UNITED OF OMAHA LIFE INS. CO., 360 F. 3d 155, 166-172 (3rd Cir 2004).....6

SEC & EXCH COMMISSION vs. EDWARDS, 540 U.S. 389, 393 (2004).....13

U.S. vs. BOSCH, 951 F. 2d 1546, 1555n.6 (9th Cir. 1991) 3

U.S vs. FLORIO, 315 SUPP 797, (1970 ED).....

U.S. vs. LINDO, 18 F. 3d 353, 356 (6th Cir. 1994).....1.3.4

U.S. vs. RICE, 449 F. 3d, 887, 897 (8th Cir. 2006).....1.4

U.S. vs. SCHREIBER, 599 F. 2d 534, 537 (3rd Cir. 1979).....3

U.S. vs. WINSTON, 613 F. 221, 223 (9th Cir. 1980).....4

USA v. THOMAS PETTERS, 08-364.....6

USA vs. VENNES et al, Crim NO. 11-141 US.District MINNESOTA.....

WELCH vs. BOARD OF DIRECTORS OF WILDWOOD GOLFCLUB, 918 F. SUPP. 134, 138-139 (W.D. Pa 1996).....5