IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff

v.

DAVID WEIMERT,

Defendant.

REPORT AND RECOMMENDATION

14-cr-22-jdp

On February 19, 2014, the grand jury returned an indictment charging defendant David Weimert with six counts of wire fraud in violation of 18 U.S.C. § 1343 based on Weimert's alleged double-dealing in a real estate deal involving his employer's sale of its interest in a real estate project. *See* dkt. 2. Weimert has filed a motion to dismiss the charges, claiming that they fail to state a criminal offense, and that the mail fraud statute is void for vagueness as applied to the conduct charged in this indictment. *See* dkt. 13. If Weimert doesn't obtain dismissal, then he wants a bill of particulars, *see* dkt. 12 at 3-4. The government opposes both motions, *see* dkts. 17 and 18. For the reasons stated below, I am recommending that the court deny both of Weimert's motions.

The indictment (dkt. 2)

The indictment speaks for itself, but here is a synopsis for the benefit of the reader:[1]

Anchor Bancorp, Wisconsin, Inc. ("ABCW"), is a savings and loan holding company that owns AnchorBank fsb ("Anchor"). ABCW also owns a non-banking subsidiary named Investment Direction, Inc. (IDI). IDI invests in limited partnerships that hold real estate for

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[1] In synopsizing the indictment, I have characterized its contents based on the inferences I draw from what the indictment actually says. Weimert, in his reply brief, criticizes the government for doing this, *see* dkt. 20 at 1-2, but he takes the same approach, albeit with a more exculpatory result, *see* brief in support, dkt. 14, at 3-4 and 7 (quoted *infra* at 3). I will discuss this more below.

development and sale. At the operative times, David Weimert Weimert was a senior vice president at Anchor and also was the president of IDI. Weimert reported directly to the President/CEO and the Lead Director of Anchor and ABCW.

As of January 2009, ABCW was on the hook for over $116 million in short term loans from a national bank group that required ABCW to repay $56.3 million by March 2, 2009. ABCW tapped into the U.S. Treasury Department's TARP program for $110 million, but the "OTS"[2] restricted Anchor's ability to issue a dividend payment to ABCW to pay down its debt to the bank group.

At that time, IDI owned a limited partnership named "S&D Oakmont Round Rock, Ltd." ("SDO"). IDI, through SDO, owned 50% of a joint venture partnership named "Chandler Creek Business Park of Round Rock, Texas" ("Chandler Creek"). The other 50% of Chandler Creek was owned by the Burke Real Estate Group ("Burke Group"). Burke Group had the right of first refusal if IDI sought to sell its interest in Chandler Creek. According to the indictment,

> During the period beginning in or about December 2008 and continuing to on or about March 31, 2009 . . . David Weimert knowingly, and with the intent to defraud, devised and participated in a scheme to defraud IDI, and to obtain money and property by means of materially false and fraudulent pretenses, omissions and promises made to others, including members of the IDI Board of Directors, as well as his supervisors.
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> Indictment, dkt. 2, at 2.

[2] The grand jury does not define the "OTS" acronym. The Treasury Department's "Office of *Financial* Security" managed the TARP program. Although the grand jury doesn't spell it out, I infer that it included these allegations in order to show that in early 2009, Anchor and ABCW were under pressure to raise cash for their looming loan payment. Both parties confirm this in their briefs.

The indictment further alleges that as part of his scheme to defraud, Weimert made false material representations and omitted material facts in order to obtain a personal ownership interest in Chandler Creek and also to obtain a 4% commission on IDI's sale of its half of Chandler Creek to Burke Group. More specifically, Weimert falsely represented to his supervisors at Anchor and ABCW, and also to IDI's board of directors, that Burke Group would buy IDI's shared of Chandler Creek only if Weimert bought a minority interest in Chandler Creek. Weimert did not disclose to IDI's Board or his supervisors that Burke Group had not propounded any such condition; rather, it actually was Weimert's idea as part of his plan to obtain for himself this ownership interest. Further, to trigger Burke Group's right of first refusal on the purchase, Weimert recruited a straw bidder, "N.K.,"to present an offer to purchase Chandler Creek on terms that Weimert had dictated to N.K. These misrepresentations and omissions induced IDI, through its board of directors, to accept Burke Group's offer to purchase IDI's half of Chandler Creek, while allowing Weimert to take a 4 7/8 ownership interest in Chandler Creek, *and* collect a 4% commission on the sale, which totaled $311,000.

The indictment then lists six different electronic communications between February 22, 2009 and March 30, 2009 as the actual counts of wire fraud.

Weimert's Motion To Dismiss (dkt. 13)

(a) Weimert's First Claim: The indictment Fails To Charge a Crime

Weimert offers a general critique of the federal mail fraud/wire fraud statutes followed by his own synopsis of the indictment, then argues that the indictment does not allege any material misrepresentation or any material omission, which, according to Weimert, means that

the indictment fails to state an offense. Def. Brief in Support, dkt. 14 at 4-5, *citing United States v. Neder*, 527 U.S. 1, 16 (1999), and *United States v. Powell*, 576 F.3d 482, 490-91 (7th Cir. 2009). As a corollary to this, Weimert submits that, although an indictment that states the elements of the charged offense generally suffices, it must allege that the defendant performed acts, which, if proven, constituted a violation of the criminal statute charged. *Id.* at 5, *citing United States v. Gimbel*, 830 F.2d 621, 624 (7th Cir. 1987). Put another, says Weimert, the court must determine whether it is possible to view the conduct alleged as constituting the crime alleged. *Id.*, *citing United States v. Moore*, 563 F.3d 583, 586 (7th Cir. 2009).[3]

Weimert concedes that ¶ 2 of indictment tracks the statutory language of the wire fraud statute, 18 U.S.C. § 1343, but contends that "the facts supplied by the indictment . . . even when accepted as true . . . fail to support its legal conclusion that he violated the wire fraud statute." Def. Brief in Support, dkt. 14, at 6. The way Weimert describes it,

> The indictment describes an arms-length transaction between knowledgeable parties, who were openly notified by Mr. Weimert of his participation in the agreement and agreed to it. But the indictment alleges no material misrepresentation or omission, and so fails to state each element of the charged offenses and fails to provide Mr. Weimert with sufficient notice of the charges' nature to prepare his defense.
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> *Id.* at 7.

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[3] *Moore* is not a case I would expect Weimert to cite. The defendants there were two guys who submitted over 9000 counterfeit entries to a promotional cash drawing at the Ho-Chunk casino. They made essentially the same argument that Weimert makes here: their conduct as alleged in the indictment was not illegal because it did not break any rules and no one had been gulled. The court of appeals announced that it only had to decide "whether it's *possible* to view the conduct alleged as an agreement to steal $10,000 from the casino." 563 F.3d at 586, emphasis added. The court of appeals "ha[d] no problem" concluding that the defendants' behavior could only be viewed as "a tricky scheme to dupe the casino out of its money." In reaching this conclusion, the court made factual assumptions and drew inferences that were not contained in the challenged indictment. *Id.* To the same effect, see this court's May 31, 2007 report and recommendation in *United States v. Moore*, 2007 WL 6335715 at **3-5 (concluding that "the government has not pled itself out of court.")

The government disagrees. It contends that the grand jury's indictment is adequate because it tracks the statutory language of § 1343, it sets forth all three elements of the statute, it adequately apprises Weimert of the dates and location of the charged scheme, it identifies the alleged victims and it identifies the recipients of Weimert's material misrepresentations and omissions (although one does not receive an omission, but the point is clear). *See* Gov't. Response, dkt. 17 at 3-4. The government labels as meritless Weimert's contention that he did not make any false statements or material omissions regarding the need for him to be included in the purchase offer tendered by Burke Group. Pointing to ¶¶ 2-9 of the indictment, the government proffers that Weimert's alleged false statements and omissions are palpable. According to the government, Weimert, who was the only person in this transaction with access to all of the relevant information, used his unique vantage point to play both ends against the middle (and also recruiting N.K. as his shill) in order to obtain both a hefty commission and an ownership interest in Chandler Creek that otherwise would not have available to him. Gov't Response, dkt. 17, at 6.

Weimert, in his reply brief, accuses the government of trying to salvage a deficiently-worded indictment by reframing it in terms that do not actually appear in the indictment. Weimert is incorrect.

As noted above (in footnote 2), this court's synopsis in this report also uses verbs and nouns that aren't actually in the indictment to characterize what the grand jury actually has charged. This is completely proper, and Weimert's claim to the contrary is wrong. That's because the test for validity is not whether the indictment could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards. *United States*

v. Vaughn, 722 F.3d 918, 925 (7th Cir. 2013). At this stage, the court is to look at the contents of the indictment's wire fraud charges in their entirety, on a practical basis rather than in a hypertechnical manner. This means that "the indictment must be read to include facts which are necessarily implied and construed according to common sense." *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 860 (7th Cir. 1998) (citations omitted). Indeed, at the dismissal stage, the court is to view the facts alleged in the indictment in the light most favorable to the government *cf. United States v. Yashar*, 166 F.3d 873, 880 (7th Cir. 1999) (indictment's failure to make clear whether all elements of the offense occurred outside the statute of limitations must be construed in favor of the government, which means that the indictment should not be dismissed).

An indictment that tracks the words of a statute to state the elements of the crime is generally acceptable, and while there must be enough factual particulars so that the defendant is aware of the specific conduct at issue, the presence or absence of any particular fact is not dispositive. *United States v. Vaughn*, 722 F.3d at 925. In *United States v. Fassnacht*, 332 F.3d 440 (7th Cir. 2003), when the defendants sought to dismiss the indictment's obstruction of justice charge because it failed to allege any acts specifically aimed at obstructing the grand jury, the court brushed them aside:

> [the defendants] ask too much from the indictment. After all the defendant's constitutional right is to know the offense with which he is charged, not to know the details of how it will be proved. Once the elements of the crime have been specified, an indictment need only provide enough factual information to enable the defendants to identify the conduct on which the government intends to base its case.
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> 332 F.3d at 446.

Here, Weimert concedes that the indictment parrots the words of § 1343 and recites the elements of wire fraud,[4] and he is acutely aware of what specific conduct the grand jury has alleged to be criminally fraudulent; his contention is that this conduct is neither criminal nor fraudulent. But as already noted, the indictment reasonably allows the inference of fraud by Weimert when a reader considers its allegations them as a whole, reads them commonsensically and grants the government the benefit of reasonable inferences. After all,

> [M]ail fraud applies broadly to schemes that deprives individuals of money by making a false statement, or providing a half truth that is misleading, expecting that individual to act upon it to his detriment. . . . [T]he omission or concealment of material information, even when a statute or regulation does not impose a duty to disclose, constitutes mail fraud.
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> *United States v. Palumbo Bros., Inc.*, 145 F.3d at 868.

Whether there actually was criminal fraud here is a question of fact that cannot be decided without a trial; "challenging an indictment is not a means of testing the strength or weakness of the government's case, or the sufficiency of the government's evidence." *United States v. Moore*, 563 F.3d 583, 586 (7th Cir. 2009). If the indictment states facts that track the statutory elements of the charged offense but the defendant argues that this does not state an offense, then the dispute is not really about the validity of the indictment "but is instead a dispute over the meaning and inferences that can be drawn from the facts." *United States v. White*, 610 F.3d 956, 962 (7th Cir. 2010). In *White,* the court of appeals reversed the trial court's dismissal of the indictment, holding that a jury must decide whether defendant's website

[4] Counts 1 - 6 allege that Weimert (1) knowingly devised a scheme to defraud; (2) he did so with intent to defraud, (3) this scheme involved a materially false or fraudulent pretense or representation; and (4) for the purpose of carrying out this scheme, Weimert caused interstate wire communications to take place. *See* dkt. 2 at 3-5. These are the elements of wire fraud, *See* Seventh Circuit Pattern Federal Jury Instructions (2012) at 490.

posting was protected speech or a criminal solicitation to injure a juror. The defendant's First Amendment concern "is addressed by the requirement of proof beyond a reasonable doubt at trial, not by a dismissal at the indictment stage." *Id.* at 959. Put another way, "Summary judgment does not exist in criminal cases." *United States v. Thomas*, 150 F.3d 743, 747 (7th Cir. 1998) (Easterbrook, J., concurring); *see also United States v. Browning*, 436 F.3d 780, 781 (7th Cir. 2006). Weimert is not entitled to dismissal of the indictment on the basis that it fails to state a crime.

(b) Weimert's second claim: the wire fraud statute is unconstitutionally vague as applied to him

Weimert begins Section IV of his brief for dismissal with a general overview of the void-for-vagueness doctrine, then argues that there is no firm legal definition of "scheme to defraud," but does not explain why this would require dismissal of the indictment against him. Weimert then cites generally to the Rule of Lenity to suggest that "application of limiting construction" is necessary to "eliminate ambiguity," which in turn "illustrates that the alleged offense conduct falls outside the statute's parameters." Brief in Support, dkt. 14 at 9. Weimert then provides snippets of quotes from various published cases, a definition of "scheme" from the 1983 edition of Webster's New Collegiate Dictionary, then stirs back in the Rule of Lenity to suggest that the wire fraud statute "could be applied only to conduct clearly covered by the above definition." *Id.* at 10.[5] From this premise, Weimert circles back to his argument the court should dismiss the

[5] Defense counsel, who is a fervid nemesis of the federal criminal fraud statutes, deserves credit in this case for dropping his reliance on 19th Century European legal maxims. *See, e.g., United States v. Mathwich*, 12-cr-70-wmc, dkt. 16 at 1-2 (mischaracterizing the maxims *nullum crimen sine lege* and *nulla poena sine lege* as "basic and fundamental premise[s] of criminal law in American jurisprudence"). But counsel's failure even to acknowledge the existence of the Seventh Circuit's pattern criminal jury instructions addressing exactly these issues makes it appear that he is arguing just for the sake of arguing.

indictment because "the indictment's facts fail to describe a scheme to defraud that employed material misrepresentations or omissions" which means that Weimert had no fair warning that his conduct violated it. *Id.*

As the government points out in its response, this is not really a void-for-vagueness argument. Weimert is just repeating his challenge to the sufficiency of the factual allegations in the indictment. Brief in Opposition, dkt. 17 at 9. In reply, Weimert does not concede the point, sticking with his argument that because § 1343 provides no definition of "scheme to defraud," his proposed limiting instructions–necessary, he says, to eliminate the statute's ambiguity–place the conduct alleged in the indictment outside the scope of the statute. Brief in Reply, dkt. 20, at 4. Put more succinctly, because the indictment does not allege that Weimert misrepresented or omitted any material facts, "the statute does not clearly encompass the alleged offense conduct and the Rule of Lenity prohibits its application to the facts of this case." *Id.* at 4.

The government is correct: this is just a reprise of Weimert's argument that the indictment fails to state an offense. As already noted, the indictment does state an offense. Paragraphs 3, 4, 5, 6, 7 and 8 of the indictment charge that Weimert engaged in specified misstatements, omissions and conduct, with intent to defraud, in order to obtain specified money and property. No matter how often Weimert denies these allegations and claims this was an arms-length transaction, he will never achieve dismissal of the indictment.

Finally, as just observed in footnote 5, *supra,* the jury will receive detailed definitions and elements instructions regarding the wire fraud statute in the form of the pattern instructions published by the Court of Appeals for the Seventh Circuit (2012 ed.), *see* pp. 490-500, 507-08. There is no ambiguity here that would call for invocation of the Rule of Lenity. Weimert's

claim that the conduct charged by the government is not criminal "is addressed by the requirement of proof beyond a reasonable doubt at trial, not by a dismissal at the indictment stage." *United States v. White,* 610 F.3d at 959.

In sum, there is no basis to dismiss any of the wire fraud charges against Weimert.

Motion for Bill of Particulars (dkt. 12)

If the court does not grant Weimert's motion to dismiss the indictment, then he wants the court to order the government to provide him with a bill of particulars pursuant to Fed. R. Crim. Pro. 7(f). Weimert lists five categories of particulars he seeks:

> (a) The specific material misrepresentations and omissions that constitute Weimert's fraudulent attempt to gain an ownership interest in Chandler Creek.
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> (b) The specific material misrepresentations and omissions that constitute Weimert's fraudulent attempt to obtain a commission on the Chandler Creek sale.
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> (c) "The specific falsity of representations allegedly made . . to his supervisors and in writing to the IDI board . . . that the Burke Group would purchase IDI's share of Chandler Creek contingent on Mr. Weimert purchasing a minority interest in Chandler Creek as part of the deal."
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> (d) "The specific manner, form and materiality of Mr. Weimert's alleged failure to disclose to his supervisors and the IDI board of directors that he was the one who desired a minority ownership interest for himself in Chandler Creek as part of the deal, not the Burke Group."
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> (e) The specific material misrepresentations and omissions that constitute his fraudulent inducement of the IDI board of directors to accept the Burke Groups' purchase offer, along with the ownership interest and commission to Weimert.
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> Motion, dkt. 12, at 3.

Weimert contends that he is entitled to these particulars because, as set forth in his motion to dismiss, he cannot discern in the indictment any specific material false statements or omissions of material fact. Weimert also states that "discovery materials received to date from the government total 46,816 pages; th government has provided no index or inventory of this content." Dkt. 12 at 2. Although Weimert doesn't say this, it could be inferred from this unadorned statement that he is unable to uncover any alleged material omissions or material misstatements in these materials.

The government opposes this motion on several levels. First, it contends that the law of the circuit does not support Weimert's request for a bill of particulars. Dkt. 18 at 1-2. Second, it disputes Weimert's claim that he is unable to discern from the government's discovery what the evidence against him purports to establish. It starts by characterizing the six-page indictment's charges as narrow in time and scope but still relatively detailed in their explanation of the alleged fraud scheme. The government then proffers that it provided all of its discovery to Weimert and his attorney on April 1, 2014, six months ago, and this discovery included the grand jury testimony of the lead investigative agent, who explained the case to the grand jury, using exhibits; the grand jury testimony, with exhibits, of the representatives of the competing buyers (namely, "N.K."–Nachum Kalka–and one of the Burkes), as well as witness statements from Weimert's supervisors and the IDI board of directors, as well as 51 exhibits that establish a time line for the alleged fraud scheme. *Id.* at 4-5. Third, the government contends that Weimert actually seeks a bill of particulars for an improper purpose, to learn the details of how the government intends to prove its case, and to lock in the government before trial to the particulars it lists in any bill ordered by the court. *Id.* at 5.

In reply, Weimert repeats his refrain that because the indictment does not actually adduce any facts that constitute material misstatements or material omissions, it has not sufficiently apprised him of the charges against him to enable him to prepare for trial, especially given the huge volume of evidence. Reply, dkt. 21, at 1. This segues to Weimert's main point, that the government has glossed over the overwhelming enormity of the discovery provided by the government. According to Weimert, the government's responsive proffer applies to the first 2474 pages of discovery, but is inapplicable to the remaining 42,408 pages, all on a single CD-ROM containing 7083 PDF image files in fifteen electronic folders. "It bears repeating that the government has provided no index or inventory to the content contained on this CD-ROM disc." *Id.* at 2.

This, however, is not enough for Weimert to succeed on his motion. The Seventh Circuit's antipathy toward bills of particulars goes back over 25 years.[6] It views bills as unnecessary whenever the indictment sets forth the elements of the offense charged, the time and place of the accused's conduct which constituted a violation, and a citation to the statutes violated. *United States v. Fassnacht*, 332 F.3d at 446-47. Because every valid indictment contains this information, it is difficult to envisage a circumstance in which a defendant in this circuit would be entitled to a bill.

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[6] "The test for whether a bill of particulars is necessary is 'whether the indictment sets forth the elements of the *offense charged* and sufficiently apprises the defendant of the *charges* to enable him to prepare for trial." *United States v. Kendall*, 665 F.2d 126, 134 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982), *quoting United States v. Roya*, 574 F.2d 386, 391 (7th Cir. 1978)(emphasis in original). The defendant has no right, under the guise of a bill of particulars, to force the government to reveal the details of how it plans to prove its case. *United States v. Glecier*, 923 F.2d 496, 502 (7th Cir. 1991), *citing Kendall*, 665 F.2d at 135. "It is established that a defendant is not entitled to know all the *evidence* the government intends to produce, but only the *theory* of the government's case." 665 F.2d at 135, emphasis in original. It is appropriate for the court to look at post-indictment discovery to determine whether a bill of particulars is required. *Id.; United States v. Canino*, 949 F.2d 928, 949 (7th Cir. 1991).

A court's analysis of a defendant's request for a bill of particulars is to parallel the court's analysis of the defendant's challenge to the sufficiency of the indictment: "in both cases, the key question is whether the defendant was sufficiently apprised of the charges against him in order to enable adequate trial preparation." *United States v. Vaughn*, 722 F.3d 918, 926-27 (7th Cir. 2013), quoting *United States v. Blanchard*, 542 F.3d 1133, 1140 (7th Cir. 2008), citations omitted. Information relevant to the preparation of a defense includes the elements of each charged offense, the time and place of the accused's allegedly criminal conduct, and a citation to the statutes violated. When the indictment fails to provide the full panoply of such information, then a bill of particulars "is nonetheless unnecessary if the information is available through some other satisfactory form, such as discovery." *Blanchard*, 542 F.3d at 1133.

In *Blanchard*, the court found that a bill of particulars was not required because the defendant had had ample access to the information necessary to prepare his defense: although the indictment was "somewhat sparse," the defendant had been the beneficiary of extensive pretrial discovery, which was "more than sufficient" to enable the defendant to prepare for trial. *Id.* at 1140-41. *See also United States v. Bloom*, 2013 WL 437962 at ** 2-4 (N.D. Ill., 2013)(government not required to specify the details of the alleged false statements charged in a prosecution for mail fraud and false statements to a benefit plan because the request essentially sought the specific evidence the government would offer at trial to prove the charges, information the defendant had no right to obtain through a bill of particulars).

So far, *not* so good for Weimert, but the Seventh Circuit *has* expressed disapproval of the government burying a defendant with discovery "so voluminous that it places an unreasonable burden on the defendant." *United States v. Vaughn*, 722 F.3d at 928. And, the court has to

wonder why the government provided its documents in PDF's page-at-a-time format rather than in a more searchable format as it has in at least some other cases. *See, e.g.*, *United States v. Christian Peterson*, 12-cr-87-bbc, Gov't Brief in Opposition, dkt. 41, at 23 (government had provided a new subset of its discovery to defendant, limited to that tenth of the original discovery upon which the government intended to rely at trial, provided in a searchable format).

But Weimert hasn't connected the dots here in a fashion that would allow the court to conclude that a bill of particulars is appropriate here. Weimert points out that the government's response does not address the enormous amount of discovery contained on the CD-ROM, but neither does he, really. Weimert, by counsel, does not indicate that he has reviewed *any* of the documents, either by sampling or a page-by-page flip-through, to determine what's there. He's not going to get a bill of particulars simply by announcing that the government provided thousands of pages of discovery, particularly where the government proffers that it has highlighted its best evidence for Weimert. This leads to a related question: *are* there any golden needles hiding in this PDF haystack? Perhaps the government's response was meant to imply that the discovery that it *did* discuss in opposition to this motion is its operative evidence, and that the rest is merely flotsam. But the government didn't actually say this. I giving both sides the opportunity to provide further information about the contents of this CD-ROM so that the court can determine what, if anything, needs to happen next.

Even so, unless something unexpected and important turns up, there is no basis or reason for the court to order the government to provide the particulars that Weimert is requesting. The case law of this circuit is clear and unwavering in its rejection of requests for bills of particulars seeking information as specific as that Weimert seeks here. The alleged fraud scheme is clear

enough from the indictment, and the government has provided Weimert with enough detail in its roadmap discovery (outlined above at 11) to meet its obligations to Weimert. Weimert is not entitled to the evidentiary specifics he has requested.

Normally when a court orders the government to provide a bill of particulars pursuant to Rule 7(f), the bill acts as a limitation on the government's evidence at trial, such that variance from the bill could lead to a mistrial. *Cf. United States v. Webster*, 125 F.3d 1024, 1031-32 & n.10 (7th Cir. 1997)(noting that a variance between the information provided in a bill of particulars and the evidence at trial is fatal to the prosecution if the defendant is prejudiced by it); *see also United States v. Sanford, Ltd.*, 841 F.Supp.2nd 309, 316 (D.D.C. 2012) (a bill of particulars is designed to limit and define the government's case; as such, it is properly used to clarify the indictment, not provide the government's proof). Thus, Weimert is not entitled to freeze the government's proof at trial with a bill of particulars that lists the specifics he requests. Weimert is entitled to know the government's theory of prosecution, period. This theory is clear enough.

Weimert disagrees, mainly because he contends the government's proffered theory of prosecution as set forth in the indictment is so palpably meritless that it must be some sort of trick. Because what's actually charged is not actually a crime, says Weimert, he is entitled to look behind the curtain by means of a bill of particulars. But this is yet another variation on Weimert's repeated theme that he did nothing wrong. This is a trial issue that is not properly addressed by a bill of particulars.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that:

(1) The court deny defendant David Weimert's Motion to Dismiss the indictment.

(2) The court deny Weimert's motion for a bill of particulars.

(3) Within the time allowed for objections, the parties be allowed to report to the court generally what sort of information is contained on the CD-ROM and to opine on the relevance and importance of this information to the trial.

Entered this 30th day of September, 2014.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
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September 30, 2014

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Re: United States v. David Weimert
Case No. 14-cr-22-jdp

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before October 14, 2014, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by October 14, 2014, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures

MEMORANDUM REGARDING REPORTS AND RECOMMENDATIONS

Pursuant to 28 U.S.C. § 636(b), the district judges of this court have designated the full-time magistrate judge to submit to them proposed findings of fact and recommendations for disposition by the district judges of motions seeking:

(1) injunctive relief;
(2) judgment on the pleadings;
(3) summary judgment;
(4) to dismiss or quash an indictment or information;
(5) to suppress evidence in a criminal case;
(6) to dismiss or to permit maintenance of a class action;
(7) to dismiss for failure to state a claim upon which relief can be granted;
(8) to dismiss actions involuntarily; and
(9) applications for post-trial relief made by individuals convicted of criminal offenses.

Pursuant to § 636(b)(1)(B) and (C), the magistrate judge will conduct any necessary hearings and will file and serve a report and recommendation setting forth his proposed findings of fact and recommended disposition of each motion.

Any party may object to the magistrate judge's findings of fact and recommended disposition by filing and serving written objections not later than the date specified by the court in the report and recommendation. Any written objection must identify specifically all proposed findings of fact and all proposed conclusions of law to which the party objects and must set forth with particularity the bases for these objections. An objecting party shall serve and file a copy of the transcript of those portions of any evidentiary hearing relevant to the proposed findings or conclusions to which that party is objection. Upon a party's showing of good cause, the district judge or magistrate judge may extend the deadline for filing and serving objections.

After the time to object has passed, the clerk of court shall transmit to the district judge the magistrate judge's report and recommendation along with any objections to it.

The district judge shall review de novo those portions of the report and recommendation to which a party objects. The district judge, in his or her discretion, may review portions of the report and recommendation to which there is no objection. The district judge may accept, reject or modify, in whole or in part, the magistrate judge's proposed findings and conclusions. The district judge, in his or her discretion, may conduct a hearing, receive additional evidence, recall witnesses, recommit the matter to the magistrate judge, or make a determination based on the record developed before the magistrate judge.

NOTE WELL: A party's failure to file timely, specific objections to the magistrate's proposed findings of fact and conclusions of law constitutes waiver of that party's right to appeal to the United States Court of Appeals. ***See United States v. Hall,*** **462 F.3d 684, 688 (7th Cir. 2006).**