IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	No. 3:12-CR-317-L
	No. 3:12-CR-413-L
v.	No. 3:13-CR-030-L
BARRETT LANCASTER BROWN	

ORDER

Before the court is Government's Unopposed Motion to Vacate the Agreed Order Re: Extrajudicial Statements and to Unseal Documents, filed April 21, 2014. After reviewing the Unopposed Motion and the provisions of the Plea Agreement signed by the parties, the court finds that Barrett Brown waived his right to a jury trial in causes numbered 3:12-CR-317-L and 3:12-CR-413-L, and the government agreed to dismiss any remaining counts in those matters and to dismiss the Indictment in cause number 3:13-CR-030-L. Therefore, the court finds that the motion should be and is hereby **granted**.

It is hereby **ordered** that, the court's September 4, 2013 Agreed Order Re: Extrajudicial Statements (document number 93 in cause number 3:12-CR-317-L, document number 55 in cause number 3:12-CR-413-L, and document number 53 in cause number 3:13-CR-030-L) is hereby **vacated**.

It is **further ordered** that the following documents **are hereby unsealed**:

DOCUMENT	3:12-CR-317-L	3:12-CR-413-L	3:13-CR-030-L
Factual Resume	109	76	
Plea Agreement	108	75	
Motion to seal the Plea Agreement and Factual Resume	104	68	
Opposition to Brown's Motion to Dismiss the Indictment			61
Motion to Seal Government's Opposition to Brown's Motion to Dismiss			59
Government's Opposition to Brown's Motion to Dismiss	101		
Sealed Order re: Motion to Seal	100		
Motion to Seal Government's Opposition to Brown's Motion to Dismiss	99		

It is so ordered this 23rd day of April, 2014.

Sam A. Lindsay
United States District Judge

ORIGINAL

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DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	NO. 3:12-CR-317-L
	NO. 3:12-CR-413-L
v.	(Supersedes Indictment Returned on Dec. 4, 2012 and July 2, 2013.)
BARRETT LANCASTER BROWN (1)	

PLEA AGREEMENT

BARRETT LANCASTER BROWN, the defendant's attorneys Ahmed Ghappour, Charles Swift, and Marlo P. Cadeddu, and the United States of America (the government) agree as follows:

1. **Rights of the defendant**: Brown understands that he has the rights

   a. to have the allegations set out in the Superseding Information in cause number 3:12-CR-413-L presented to a Grand Jury for indictment;

   b. to plead not guilty;

   c. to have a trial by jury;

   d. to have his guilt proven beyond a reasonable doubt;

   e. to confront and cross-examine witnesses and to call witnesses in his defense; and

   f. against compelled self-incrimination.

2. **Waiver of rights and plea of guilty**: Brown waives these rights and pleads guilty to Count One of the Indictment in cause number 3:12-CR-317-L charging a violation of 18 U.S.C. §875(c) (Transmitting a Threat in Interstate Commerce), and to *both* counts of a two count Superseding Information in cause number 3:12-CR-413-L , charging in Count One a

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violation of 18 U.S.C. § 3 (§§ 1030(a)(5)(B) and 1030(c)(4)(A)(i)(I)) (Accessory After the Fact in the Unauthorized Access to a Protected Computer), and in Count Two a violation of 18 U.S.C. §§ 1501 and 2 (Interference with the Execution of a Search Warrant and Aid and Abet). Brown understands the nature and elements of the crimes to which he is pleading guilty, and agrees that he committed the essential elements of those crimes.

3. **Defendant's Agreement to Withdraw Pending Motions:** The government moved to dismiss Count One, and Counts Three through Twelve of the 3:12-CR-413-L Indictment. When this Plea Agreement is filed, Brown agrees to withdraw any pending pretrial motions in 3:12-CR-317-L, 3:12-CR-413-L, and 3:13-CR-030-L, including his motions to dismiss the Indictments and/or the Superseding Indictment.

4. **Sentence**: Statutorily, the maximum penalties the Court can impose upon Brown's plea of guilty include:

a. imprisonment for a period not to exceed 102 months, consisting of a statutory maximum of 60 months for Count One in 3:12-CR-317-L, 30 months for Count One of the Superseding Information in 3:12-CR-413-L; and 12 months for Count Two of the Superseding Information in 3:12-CR-413-L.

b. a fine not to exceed $475,000,00,[1] or twice any pecuniary gain to the defendant or loss to the victim(s);

c. a term of supervised release not more than three years may follow any term of imprisonment. If Brown violates the conditions of supervised release, he could be imprisoned for the entire term of supervised release;

d. a mandatory special assessment of $250;

1 The Court may impose $250,000.00 for Count One of 3:12-CR-317-L; $125,000 for Count One of the Superseding Information in 3:12-CR-413-L; and $100,000.00 for Count Two of the Superseding Information in 3:12-CR-413-L.

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e. restitution to the victim in this case which may be mandatory. Brown understands that the Court may order additional restitution arising from all relevant conduct and not limited to that arising from the offense of conviction alone; and

f. costs of incarceration and supervision.

5. **Court's sentencing discretion and role of the Guidelines:** Brown understands that the sentence in this case will be imposed by the Court after consideration of the United States Sentencing Guidelines. The guidelines are not binding on the Court, but are advisory only. Brown has reviewed the guidelines with his attorneys, but understands no one can predict with certainty the outcome of the Court's consideration of the guidelines in this case. Pursuant to Fed. R. Crim. P. 11(c)(1)(B), the government recommends that the appropriate sentencing guideline range for a loss relating to Brown's violation of 18 U.S.C. § 3 is more than $400,000.00 but less than $1,000,000.00 based on Strategic Forecasting Inc.'s estimated loss relating to the remediation of its computer system. Strategic Forecasting Inc. was the primary victim of the unauthorized access associated with Brown's violation of 18 U.S.C. § 3. However, Brown understands that this loss recommendation is not binding on the Court, and he will not be allowed to withdraw his plea if the recommendation is not adopted, if the applicable advisory guideline range is higher than expected, or if the Court departs from the applicable advisory guideline range. Brown fully understands that the actual sentence imposed (so long as it is within the statutory maximum) is solely in the discretion of the Court. Moreover, if the government obtains evidence that makes the recommendation inappropriate, the government will disclose that evidence to both the Court

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and Brown, and will be permitted to withdraw its recommendation without being found in breach of this agreement. In the event that the government withdraws its recommendation due to a determination that the loss is $1,000,000.00 or more, Brown will be permitted to withdraw his plea without being found in breach of this agreement.

6. **Factual Resumé:** Brown agrees that the factual resumé he signed is true and will be submitted as evidence. Brown also understands that "the District Court may consider acts in addition to the acts underlying the offense of conviction so long as those other acts constitute relevant conduct as defined in the guidelines,"[2] that is, the District Court may consider facts beyond those documented in the Factual Resumé.

7. **Mandatory special assessment**: Prior to sentencing, Brown agrees to pay to the United States District Clerk the amount of $250.00,[3] in satisfaction of the mandatory special assessments in this case.

8. **Defendant's agreement**: Brown shall give complete and truthful information and/or testimony concerning his participation in the offense of conviction. Upon demand, Brown shall submit a personal financial statement under oath and submit to interviews by the government and the U.S. Probation Office regarding his capacity to satisfy any fines or restitution. Brown expressly authorizes the United States Attorney's Office to immediately obtain a credit report on him in order to evaluate the Defendant's ability to satisfy any financial obligation imposed by the Court. Brown fully understands that any financial

2 *United States v. Fowler*, 216 F.3d 459, 461 (5th Cir. 2000) and U.S.S.G. § 1B1.3.

3 $100.00 in Count One of 3:12-CR-317-L; $100.00 in Count One of the Superseding Information; and $50.00 in Count Two of the Superseding Information

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obligation imposed by the court, including a restitution order and/or the implementation of a fine, is due and payable immediately. In the event the Court imposes a schedule for payment of restitution, Brown agrees that such a schedule represents a minimum payment obligation and does not preclude the U.S. Attorney's Office from pursuing any other means by which to satisfy defendant's full and immediately enforceable financial obligation. Brown understands that he has a continuing obligation to pay in full as soon as possible any financial obligation imposed by the court.

9. **Government's agreement**: The government will not bring any additional charges against Brown based upon the conduct underlying and related to Brown's plea of guilty. The government agrees not to institute any other charges for violations of 18 U.S.C. §§ 1028 or 1029 based on the personal identifying information and financial information of other persons maintained on Brown's data storage devices seized pursuant to the Search Warrants in March 2012 or September 2012. In addition, the Government will dismiss the remaining counts in cause number 3:12-CR-317-L; and the original Indictment and the Superseding Indictment in cause number 3:12-CR-413-L;[4] and the original Indictment in cause number 3:13-CR-030-L at the time of sentencing. The government will file a Sealed Plea Agreement Supplement signed by the parties in this case, as is routinely done in every case, even though there may or may not be any additional terms. This agreement is limited to the United States Attorney's Office for the Northern District of Texas and does not bind

4 The Court granted the government's motion to dismiss Count One, and Counts Three through Twelve of the 3:12-CR-413-L Indictment.

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any other federal, state, or local prosecuting authorities, nor does it prohibit any civil or administrative proceeding against Brown or any property.

10. **Violation of agreement**: Brown understands that if he violates any provision of this agreement, or if his guilty plea is vacated or withdrawn, the government will be free from any obligations of the agreement and free to prosecute Brown for all offenses of which it has knowledge. In such event, Brown waives any objections based upon delay in prosecution. If the plea is vacated or withdrawn for any reason other than a finding that (a) the plea was involuntary, (b) the Plea Agreement was breached by the government, or (c) the government withdrew its Fed. R. Crim. P. 11(c)(1)(B) recommendation as provided in paragraph 5, Brown also waives any objection to the use against him of any information or statements he has given to the government, and any resulting leads.

11. **Voluntary plea**: This plea of guilty is freely and voluntarily made and is not the result of force or threats, or of promises apart from those set forth in this plea agreement. There have been no guarantees or promises from anyone as to what sentence the Court will impose.

12. **Relinquishment of Interest in Property:** Brown agrees to relinquish all interest in the property identified in Attachment A, and agrees to waive all his legal right, title, and ownership interest in the property. Brown agrees not to assert any ownership, proprietary, or possessory interest in this property at any time in the future. Brown agrees to take all steps, as requested, to pass clear title to this property to the Federal Bureau of Investigation,

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including executing any and all documents necessary to transfer all interest he has or holds in this property.

13. **Loss**: The loss attributed to Brown and related to Count One of the Superseding Information (3:12-CR-413-L) is more than $10,000.00 but less than $30,000.00. (U.S.S.G. § 2B1.1(b)(1)(C)). Brown understands that this statement is not binding on the Court.

14. **Waiver of right to appeal or otherwise challenge or seek reduction in sentence:** Brown waives his rights, conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742, to appeal from his conviction and sentence. He further waives his right to contest his conviction and sentence in any collateral proceeding, including proceedings under 28 U.S.C. § 2241 and 28 U.S.C. § 2255. He further waives his right to seek any future reduction in his sentence (e.g., based on a change in sentencing guidelines or statutory law). Brown, however, reserves the rights (a) to bring a direct appeal of a sentence exceeding the statutory maximum punishment that is applicable at the time of his initial sentencing, (b) to challenge the voluntariness of his plea of guilty or this waiver, or (c) to bring a claim of ineffective assistance of counsel.

15. **Representation of counsel**: Brown has thoroughly reviewed all legal and factual aspects of this case with his lawyer and is fully satisfied with that lawyer's legal representation. Brown has received from his lawyer explanations satisfactory to him concerning each paragraph of this plea agreement, each of his rights affected by this agreement, and the alternatives available to him other than entering into this agreement.

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Because he concedes that he is guilty, and after conferring with his lawyer, Brown has concluded that it is in his best interest to enter into this plea agreement and all its terms, rather than to proceed to trial in this case.

16. **Entirety of agreement:** This document is a complete statement of the parties' agreement and may not be modified unless the modification is in writing and signed by all parties. This agreement supersedes any and all other promises, representations, understandings, and agreements that are or were made between the parties at any time before the guilty plea is entered in court. No promises or representations have been made by the United States except as set forth in writing in this plea agreement.

SARAH R. SALDAÑA
UNITED STATES ATTORNEY

CANDINA S. HEATH — Date 3-31-2014
Assistant United States Attorney

APPROVED:

LINDA C. GROVES — Date 3-31-14
Deputy Criminal Chief

[redacted]

I have read (or had read to me) this Plea Agreement and have carefully reviewed every part of it with my attorney. I fully understand it and voluntarily agree to it.

BARRETT LANCASTER BROWN — Date 3/27/14
Defendant

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I am the defendant's counsel. I have carefully reviewed every part of this Plea Agreement with the defendant. To my knowledge and belief, my client's decision to enter into this Plea Agreement is an informed and voluntary one.

AHMED GHAPPOUR
Attorney for Defendant

3/27/14.
Date

CHARLES SWIFT
Attorney for Defendant

3/27/14
Date

MARLO P. CADEDDU
Attorney for Defendant

3/27/14
Date

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	NO. 3:12-CR-317-L
VS.	§	NO. 3:12-CR-413-L
	§	
BARRETT LANCASTER BROWN	§	

FACTUAL RESUME

BARRETT LANCASTER BROWN, the defendant's attorneys, Ahmed Ghappour, Charles Swift, and Marlo P. Cadeddu, and the United States of America (the government) agree that the following is true and correct:

Essential Elements

1. **Accessory After The Fact**: In order to prove that Brown was guilty of Count One of the Superseding Information, cause number 3:12-CR-413-L, the government would be required to prove beyond a reasonable doubt the following essential elements of a violation of 18 U.S.C. § 3:

First: At least one other person was actively engaged in acts of Unauthorized Access to Protected Computers in violation of 18 U.S.C. §§ 1030(a)(5)(B) and § 1030(c)(4(A)(i)(I) as alleged in the Superseding Information;

Second: Brown knew of the commission of the above crime by the principal; and

Third: Thereafter, Brown assisted the principal by concealing his involvement, creating confusion regarding the identity of the principal, and diverting attention away from the principal in

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order to hinder or prevent the principal's apprehension.

2. **Unauthorized Access to a Protected Computer:** The essential elements of a violation of 18 U.S.C. §§ 1030(a)(5)(B) and § 1030(c)(4)(A)(i)(I) are as follows:

First: A person intentionally accessed a computer without authorization;

Second: By said conduct, the person recklessly caused damage and loss to the protected computer; and

Third: By said conduct, the person caused a loss aggregating at least $5,000 in value during any one-year period to one or more persons.

3. **Interference with the Execution of a Search Warrant:** In order to prove that Brown was guilty of Count Two of the Superseding Information, cause number 3:12-CR-413-L, the government would be required to prove beyond a reasonable doubt the following essential elements of a violation of 18 U.S.C. § 1501:

First: Brown knew that FBI Special Agents were attempting to execute a Search Warrant and legal process of a Court of the United States;

Second: Brown knowingly and willfully obstructed, resisted, or opposed the FBI Special Agents while they were attempting to execute and executing the Search Warrant.

4. **Transmitting a Threat in Interstate Commerce:** In order to prove that Brown was guilty of Count One of the Indictment, cause number 3:12-CR-317-L, the government would be required to prove beyond a reasonable doubt the following

essential elements of a violation of 18 U.S.C. § 875(c):

First: Brown knowingly transmitted a communication in interstate commerce; and

Second: The communication transmitted by Brown contained a true threat to injure the person of another.

5. A true threat is a serious statement expressing an intent to injure the person of another, which under the circumstances would cause apprehension in a reasonable person, as distinguished from mere idle or careless talk, exaggeration, or something said in a joking manner.

Factual Stipulations

6. Defendant Barrett Lancaster Brown (Brown) stipulates and agrees to the following facts in support of his plea of guilty. Brown understands that "the District Court may consider acts in addition to the acts underlying the offense of conviction so long as those other acts constitute relevant conduct as defined in the guidelines,"[1] that is the District Court may consider facts beyond those documented in this Factual Stipulation.

Facts Specific to the Accessory After The Fact

7. In or about early to mid-December 2011, a person known to Brown as "o" knowingly and intentionally accessed the computer network of Strategic Forecasting (Stratfor) without authorization. The unauthorized access is herein referred to as the Stratfor intrusion. The computer network of Stratfor constituted a protected computer

1 *United States v. Fowler*, 216 F.3d 459, 461 (5th Cir. 2000) and U.S.S.G. § 1B1.3.

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pursuant to 18 U.S.C. § 1030(e)(2)(B), in that the network was used in or affecting interstate and foreign commerce and communications.

8. Brown knew that during "o's" unauthorized access into the computer network of Stratfor in early to mid-December 2011, "o"

(a) defaced Stratfor's website,

(b) deleted files from Stratfor's server, causing damage exceeding $5,000 in value, and

(c) exfiltrated data from Stratfor's network system.

9. On December 25, 2011, after the Stratfor intrusion, "o," Brown and others engaged in an IRC (Internet Relay Chat) chat. Brown offered to communicate with the Stratfor CEO on "o's" behalf, to assess if Stratfor had reasonable requests of redaction for "o" and others in possession of the data. Brown stated:

> Earlier it occurred to me that it might be a good idea to tell Stratfor that you guys will consider making any reasonable redactions to e-mails that might endanger, say, activists living under dictatorships with whom they might have spoken
>
> [..]
>
> if they fail to cooperate, it will be on them if any claims are made about this yield endangering anyone

10. Hours later, "o" agreed, responding, "I can paste you a few emails, which you can then forward on to them, as proof that you have some."

11. On December 26, 2011 Brown sent an email to the CEO of Stratfor, stating, "you've probably been informed that I've been authorized to communicate with Stratfor in an effort to minimize damages this operation may cause to vulnerable parties, etc. I received a call from your general office an hour ago but missed it; give me a call back at your convenience."

12. Brown sought to assist "o" by communicating with Stratfor on "o's" behalf. By preventing "o's" identity from being known, Brown hindered or prevented "o's" apprehension.

Facts Specific to the Interference with the Execution of a Search Warrant

13. On or about March 6, 2012, at approximately 6:05 a.m., Special Agents (SAs) of the Federal Bureau of Investigation (FBI) executed a court issued Search Warrant at Brown's residence. Brown was not home at the time.

14. At approximately 6:30 a.m. on March 6, 2012, FBI SAs, including FBI SA RS, visited KM's residence and notified Brown and KM that they had just executed a Search Warrant at Brown's residence. FBI SAs asked Brown if he would voluntarily produce the laptops they were unable to locate at his residence. Brown declined and the FBI SAs departed.

15. Between 6:30 a.m. and 1:55 p.m. on March 6, 2012, KM and Brown believed that it was likely the FBI SAs would return with a Search Warrant for the computers that

Brown had not volunteered. During this time, Brown posted the following statements in the ProjectPM IRC channel:

> just got raided
>
> long story short, the laptops they thought would be at my place weren't there
>
> as I wasn't home
>
> three other agents came to see me at mom's, where I stayed last night
>
> this morning at 6;30
> [the FBI had a warrant] for my apartment, yep . . . not for my mom's husband's house . . .
>
> so [the FBI] talked to me for a minute their purpose being to see if I'd be willing to give them any other laptops
>
> not sure if they knew that the apartment raid will have produced nothing more than an old IMac in my closet
>
> also, lead agent who left his card was named RS . . .

16. At approximately 10:00 a.m., Brown tweeted from his Twitter account as follows:

> My apartment was raided this morning by FBI. Feds also came to another residence where I actually was.
>
> . . . they didn't arrest me. They wanted laptops.

17. Brown and KM discussed Brown's desire to hide and conceal two of Brown's laptop computers from FBI SAs. Following this discussion, KM placed two of Brown's laptops behind some pots and pans in the far back of a lower corner cabinet in the kitchen in an attempt to conceal the laptops and prevent them from being located and seized by

the FBI. KM and Brown set up another laptop out in the open on a table, to act as a decoy device. The decoy device was less valuable in terms of evidentiary content.

18. FBI SAs arrived at KM's residence at approximately 1:55 p.m., and advised Brown and KM that they had obtained a second Search Warrant from a United States Magistrate Judge for KM's residence. The second Search Warrant authorized the FBI SA's to search for and seize data storage devices, to include the laptop computers. FBI SA's asked KM and Brown for any and all data storage devices belonging to or used by Brown. Once the FBI SA's had seized the decoy device and any other devices in plain sight, both Brown and KM denied the existence of any additional devices. Neither Brown nor KM disclosed that two laptops belonging to Brown were hidden in a kitchen cabinet.

19. Brown and KM knew that it was unlawful to conceal the laptops. By concealing the laptops, Brown acted knowingly and willfully.

20. Brown and KM knew that concealing the laptops would obstruct and impede the agents' search for the laptops and attempt to locate the laptops.

21. By hiding the laptops, Brown and KM intended to impede, obstruct, and influence the FBI investigation and the execution of the second Search Warrant issued by a United States Magistrate Judge.

Facts Specific to Transmitting a Threat in Interstate Commerce

22. Prior to, during, and after the execution of the two search warrants, Brown was concerned about being the target of an FBI investigation. After the FBI executed the two search warrants and seized Brown's laptops and other data storage devices, Brown became obsessed about his property that had been seized and how to get his property returned. Brown was upset and believed the FBI had targeted KM for assisting Brown conceal the two laptops.

23. In September of 2012, Brown knowingly communicated with others in interstate commerce; that being, over the Internet by way of Twitter.com, YouTube, etc... By these communications, Brown sought to threaten agents in the FBI.

24. On or about September 10, 2012, Brown e-mailed JY stating that he was "going on Russia Today in 30 minutes to announce war on the FBI."

25. On or about September 11, 2012, Brown posted the following on his Twitter account:

> #Agent[RS] claimed my warrants weren't public due to #Zeta threat. He knows it's serious and won't mind if I shoot any suspects.
>
> As I'll explain further tomorrow, I will regard any further armed raids as potential #Zeta assassination attempts and respond accordingly

26. On or about September 11, 2012, Brown posted a self-made 15 minute video to YouTube.com, entitled "*Why FBI Agent [RS] Has Two Weeks to Send my Property back,*

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Part 1/3." Within a few hours, Brown posted a second self-made 15 minute video to YouTube.com, entitled "*FBI Ultimatum Pt 2*."

27. On or about September 12, 2012, Brown e-mailed another person and stated "as noted, Doj wants to charge [KM] with obstruction of justice. Holder is a f-----g monster. More than willing to die if that's what I have to do to make media pay attention to possibility of prison time for [KM]." A short time later during the same e-mail exchange, Brown stated "every time I think of that I get more pissed off. Am armed with shotgun, other weapons I won't name so as not to provide intel; they know about shotgun and rifle . . . ."

28. On or about September 12, 2012, Brown posted a self-made 13 minute video to YouTube.com, entitled "*Why I'm Going to Destroy FBI Agent [RS] Part Three: Revenge of the Lithe*." In the video:

> Brown called FBI Special Agent [RS] a "f-----g chicken s--t little f----t c--------r" and indicated that "we are investigating [him] now."
>
> Brown stated "[t]hat's why [RS]'s life is over, but when I say his life is over, I don't say I'm going to kill him, but I am going to ruin his life and look into his f-----g kids."
>
> Brown stated [a]ny armed officials of the US government, particularly the FBI, will be regarded as potential Zeta assassin squads, and as the FBI and DPD know . . . I'm armed, that I come from a military family, that I was taught to shoot by a Vietnam vet and by my father a master hunter . . . I will shoot all of them and kill them if they come.
>
> Brown stated "[a]nd frankly, you know, it was pretty obvious I was going to be dead before I was forty or so, so, I wouldn't mind going out with two

FBI sidearms like a f-----g Egyptian Pharaoh. Adios."

29. By these statements, Brown knowingly communicated in interstate commerce a serious statement to injure the person of another, which under the circumstances would cause apprehension in a reasonable person, and with which Brown intended to scare, intimidate and harass FBI Special Agents.

Respectfully submitted,

SARAH R. SALDAÑA
UNITED STATES ATTORNEY

CANDINA S. HEATH
Assistant United States Attorney

3-31-2014
Date

[redacted]

I have read (or had read to me) this Factual Resume and have carefully reviewed every part of it with my attorney. I fully understand it and voluntarily agree that the facts recited herein are true and correct.

3/27/14

BARRETT LANCASTER BROWN
Defendant

Date

I am the defendant's counsel. I have carefully reviewed every part of this Factual Resume with the defendant. To my knowledge and belief, my client's decision to sign the Factual Resume is an informed and voluntary one, and that according to my client the facts recited herein are true and correct.

3/27/14.

AHMED GHAPPOUR
Attorney for Defendant

Date

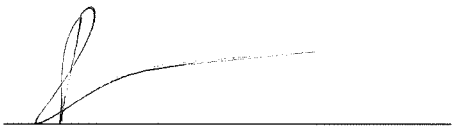
CHARLES SWIFT
Attorney for Defendant

Date

MARLO P. CADEDDU
Attorney for Defendant

Date

I have read (or had read to me) this Factual Resume and have carefully reviewed every part of it with my attorney. I fully understand it and voluntarily agree that the facts recited herein are true and correct.



3/27/14

BARRETT LANCASTER BROWN
Defendant

Date

I am the defendant's counsel. I have carefully reviewed every part of this Factual Resume with the defendant. To my knowledge and belief, my client's decision to sign the Factual Resume is an informed and voluntary one, and that according to my client the facts recited herein are true and correct.

3/27/14

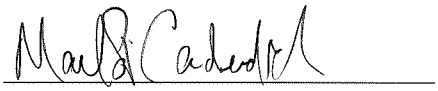
AHMED GHAPPOUR
Attorney for Defendant

Date

3/27/14

CHARLES SWIFT
Attorney for Defendant

Date



3/27/14

MARLO P. CADEDDU
Attorney for Defendant

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	No. 3:12-CR-317-L
v.	§	
	§	
BARRETT LANCASTER BROWN	§	

GOVERNMENT'S OPPOSITION TO
BROWN'S MOTION TO DISMISS THE INDICTMENT,
HIS REQUEST TO STRIKE SURPLUSAGE,
AND FOR A BILL OF PARTICULARS

1. The United States Attorney for the Northern District of Texas, by and through the undersigned Assistant United States Attorney, files this opposition to Brown's Motion to Dismiss the Indictment.

BROWN'S CLAIMS SUMMARIZED

2. Brown sets out two points in support of his motion to dismiss. First he claims that Counts One and Three fail to state an offense regarding a "true threat." Second he claims that Count Two fails to allege the essential elements of the crime charged, specifically an unlawful agreement and an overt act.

3. Third, as an alternative to his first two points, Brown requests that the court strike surplusage or order the government to file a Bill of Particulars.

THE GOVERNMENT'S OPPOSITION SUMMARIZED

4. Regarding Brown's first point, Counts One and Three adequately state an offense. Brown's statements are "not entitled to First Amendment protection under the true threat doctrine because his [statements] would have reasonably been considered a threat" to Federal Bureau of Investigation (FBI), Special Agent (SA) [RS]. P*orter ex re. LeBlanc v. Ascension Parish School Bd*., 301 F.Supp.2d 576, 585 (M.D.La. January 21, 2004). The question of whether Brown's statements constituted a "true threat" is an issue of fact for the jury.

5. Regarding Brown's second point, Count Two adequately states an offense.

6. Regarding Brown's request to strike surplus, the challenged language is relevant and inextricably intertwined with the charged conduct. Brown fails in his burden to show that the requested language is *not* relevant to the government's case *and* is prejudicial *and* inflammatory.

PROCEDURAL BACKGROUND

7. In or about September 2012, the United States Magistrate Judge Paul D. Stickney issued a Criminal Complaint for the arrest of Barrett Brown. On the same evening, the Federal Bureau of Investigation arrested Brown pursuant to an arrest warrant issued for the complaint. On October 3, 2012, a federal Grand Jury returned a true bill of Indictment charging Brown with three separate violations of federal law.

8. Count One charged Brown with violations of 18 U.S.C. § 875(c), that being transmitting threats via the Internet to injure another person.

> From on or after March 6, 2012, through and including on or about September 12, 2012, in the Dallas Division of the Northern District of Texas, the defendant Barrett Lancaster Brown, knowingly and willfully did transmit in interstate and foreign commerce communications containing threats to injure the person of another, that being, Barrett Lancaster Brown transmitted messages through the Internet on his Twitter.com account and his YouTube.com account, threatening to shoot and injure agents of the Federal Bureau of Investigation, and specifically focusing on Federal Bureau of Investigation Special Agent [RS].

9. Count Two charged Brown with conspiring with another to make restricted personal information about a specific FBI agent and his family publically available (18 U.S.C. §§ 371 and 119).

> Between on or about March 5, 2012 through on or about September 12, 2012, in the Dallas Division of the Northern District of Texas, the defendant Barrett Lancaster Brown, knowingly and willfully did combine, conspire, confederate, and agree with other persons known and unknown to the grand jury, to commit an offense against the United States, to wit: to make restricted personal information about Federal Bureau of Investigation Special Agent [RS] and his immediate family publically available with the intent to threaten and intimidate the Special Agent and to incite the commission of a crime of violence against the Special Agent in violation of 18 U.S.C. § 119, in that in September 2012 in the Northern District of Texas, Barrett Lancaster Brown requested another person known to the grand jury to assist him find on the Internet restricted information about Federal Bureau of Investigation Special Agent [RS] and [RS]'s family, and that other person agreed to do so, and furthermore, the other person did conduct a search on the Internet for the restricted information.

10. Finally, Count Three charged Brown with retaliation against a law enforcement officer in violation of 18 U.S.C. § 115(a)(1)(B) and (b)(4).

> Between on or about March 5, 2012 through on or about September 12, 2012, in the Dallas Division of the Northern District of Texas, the defendant Barrett Lancaster Brown, did knowingly and willfully threaten to assault a Federal Law enforcement officer, with the intent to impede, intimidate, and interfere with such Federal Law enforcement officer while engaged in the

> performance of official duties, and with the intent to retaliate against such Federal Law enforcement officer on account of the performance of official duties.

RESPONSE TO BROWN'S FIRST POINT:
COUNTS ONE AND THREE ADEQUATELY STATE AN OFFENSE

11. Count One (18 U.S.C. § 875(c)) requires the government to prove that (1) Brown knowingly transmitted a communication in interstate commerce, and (2) the communication contained a threat to injure the person of another. Count Three (18 U.S.C. § 115(a)(1)(B) and (b)(4)) requires the government to prove that (1) Brown knowingly threatened to assault a federal law enforcement officer, (2) at the time of the threat, the individual threatened was a federal law enforcement officer, and (3) Brown acted with the intent to impede, intimidate, or interfere with a federal law enforcement officer while engaged in the performance of his official duties or Brown acted with the intent to retaliate against that official on account of the performance of his official duties. The only aspect of the essential elements complained about by Brown is whether the threat was a "true threat." Brown statements constituted "true threats," especially when viewed in light of the surrounding circumstances. The determination of whether this is a "true threat" is an evidentiary issue, and the task of interpretation is for the jury. "'If a reasonable recipient, familiar with the contents of the communication, would interpret it as a threat, the issue should go to a jury.'" *United States v. Raymer*, 876 F.2d 383, 391 (5th Cir. 1989), quoting *Martin v. United States*, 691 F.2d 1235, 1240 (8th Cir.1982).

Brown's Conduct as Set Out in the Introduction to the Indictment is Intrinsic to Brown's Indicted Conduct

12. Viewing Brown's comments and conduct as a whole, there is no doubt the statements by Brown set out in the Introduction to the Indictment constituted a "true threat," reasonably causing his target, FBI SA [RS] to be apprehensive and to have concern for his own personal safety and the safety of his family. Brown's past involvement with Anonymous is crucial to understanding the significance of his threatening comments and conduct. On many occasions, Brown bragged about his association with Anonymous and claimed that he created ProjectPM to further those actions of Anonymous that he supported. Brown recruited personnel to work for him by culling from the participants in Anonymous. Brown communicated with his associates through the Internet via e-mail, Twitter.com, Youtube.com, Tinychat.com, IRC channels related to Anonymous and ProjectPM, and through interviews he gave to media outlets. Furthermore, Brown has privately stated that he intended ProjectPM to be a "front" organization for Anonymous which secretly plotted the overthrow of the government. Brown used Anonymous and ProjectPM to target government employees on multiple occasions, particularly government employees in or associated with the United States justice system.

13. Brown assisted Anonymous members by identifying targets; providing advice to the Anonymous hackers on what data to steal; and using the stolen data for further targeting, as well as to harass and occasionally to threaten those targets. In some cases, Brown offered

monetary bounties for producing personal identifying information on law enforcement officers whom he had targeted.

14. More specific to the indicted threats, Brown targeted FBI SA [RS] for (1) seizing Brown's computers and property during the legal execution of a search warrant, and (2) Brown's fabricated contention that [RS] harassed and threatened Brown's mother. Brown publically vented his anger at the government, at the FBI, and specifically at FBI SA [RS]. Brown sought the assistance of Anonymous members and followers to provide information to identify and locate FBI SA [RS] and his children. Brown encouraged his associates to "retaliate," revolt, take to the "streets," act, and "kill every government." [sic] Brown personally threatened to shoot any law enforcement officer that appeared at his door, and announced publically that he "was armed," came "from a military family," and knew how to shoot. As evidence of his abilities, he posted a video of himself shooting a long gun. Brown tweeted, the "[t]hreat to put my mom in prison last mistake #Agent[RS] will ever fucking make" and posted links to three fifteen minute home-made videos in which he ranted and raged and threatened physical harm to FBI SA [RS]. On the videos, Brown stating that he was "fucking angry" at FBI SA [RS], that "[RS]'s life [was] over" and that he was "going to ruin [[RS]'s] life and look into his fucking kids." Brown specifically said he would "shoot all of them and kill them" if they came to his door, referring to law enforcement in general and specifically to the FBI. Brown's concluding remarks in the third video predicted a standoff, resulting in Brown's death and the death of at least two FBI agents. Brown stated, "[a]nd frankly, you know, it was pretty obvious I

was going to be dead before I was forty or so, so, I wouldn't mind going out with two FBI side arms like a fucking Egyptian Pharaoh. Adios."

"True Threat"

15. Crimes that contain a "threat" element such as a violation of 18 U.S.C. §875(c) should be interpreted "with the commands of the First Amendment clearly in mind." *Watts v. United States*, 394 U.S. 705, 707 (1969). "True threats" are a historic and traditional exception to the bar against content-based restrictions on speech. See U*nited States v. Alvarez,* 132 S.Ct. 2537, 2544 (2012). They are "statements where the speaker means to communicate a serious expression *of an intent* to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black,* 538 U.S. 343, 359 (2003) (Emphasis added). Per the Fifth Circuit Pattern Jury Instructions 2012 Edition, "[a] "threat" is a serious statement expressing an intention to injure [kidnap] any person, which under the circumstances would cause apprehension in a reasonable person, as distinguished from mere idle or careless talk, exaggeration, or something said in a joking manner." See *United States v. Daughenbaugh*, 49 F.3d 171, 173 n.2 (5th Cir. 1995) (approving this instruction on the definition of threat with respect to 18 U.S.C. § 876); *United States v. Turner,* 960 F.2d 461, 464 & n.3 (5th Cir. 1992).

16. It is not necessary to prove that the defendant actually intended to carry out the threat made. *United States v. Morales,* 272 F.3d 284, 288-289 (5th Cir. 2001). It is not necessary to prove that the defendant actually wrote or created the communication. *United States v. Turner*, 960 F.2D 461, 463-464 (5th Cir. 1992). It is not necessary to

prove that the defendant communicated the threat directly to the victim. *Morales*, 272 F.3d at 288. It is not necessary to prove that the defendant was even capable of carrying out the threat. *United States v. Guevara*, 408 F.3d 252, 258 (5th Cir. 2005) (dealing with a violation of 18 U.S.C. §2332a). What the government must prove beyond a reasonable doubt is that the defendant transmitted or sent the communication containing a "threat" in interstate commerce, and the threat was such to cause a reasonable person to be apprehensive, i.e. anxious or uneasy.

17. Fed. R. Crim. P. 7(c)(1) provides that an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Rule 7(c)(1) "is designed to simplify indictments by eliminating unnecessary phraseology which needlessly burdened many indictments under the former practice." *United States v. Debrow*, 203 F.2d 688, 701-02 (5th Cir. 1953). Counts One and Three track the language in the applicable statutes, thereby providing the defendant notice of the charges against him.

Case Law Examples of "True Threats"

18. Most courts view the intent element in a threat crime as objective. "A § 875(c) prosecution, then, generally requires the government to establish [a threat that] a reasonable observer would construe as a true threat to another. Once the government makes this showing . . . it matters not what the defendant meant by the communication, as opposed to how a reasonable observer would construe it." *United States v. Jeffries*, 692 F.3d 473 (6th Cir. 2012). *See also United States v. Martinez*, 2013 WL 6182973 (11th Cir.

Nov. 27, 2013); *United States v. Elonis*, 2013 WL 5273118 (3d Cir. Sept. 19, 2013); *United States v. White*, 670 F.3d 498, 506-12 (4th Cir. 2012).

19. In *Virginia v. Black*, 538 U.S. 343 (2003), one defendant burned a cross at a Ku Klux Klan rally that could be seen by the public; the other two defendants burned a cross on the lawn of their African-American neighbor's home. Defendants appealed, arguing that the cross-burning statute violated the First Amendment. In *Virginia v. Black*, the Supreme Court noted that "'[t]rue threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." However, the Supreme Court stressed that "the speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." (internal citations and quotations omitted).

20. In *United States v. Stefanik*, 674 F.3d 71 (1st Cir. 2012), the defendant was upset because a notice of default had issued in a civil case. During a telephone call to a clerk's office employee, he said:

> "What kind of douche bags do you hire? I'll come down there with my shotgun and show you who means business." A few minutes later the defendant added, "You're lucky I'm only talking on the phone and not driving down there with my shotgun."

The First Circuit Court of Appeals found these statement to constitute a true threat, and affirmed the district court's use of a pattern jury instruction (Sand and Seifert) defining the

term "intimidate" to mean "make timid or fearful, to inspire or affect with fear, to frighten, deter, or overawe."

21. In *United States v. Stinnett,* 313 F. App'x 711 (5th Cir. 2009), a defendant sent letters to an Immigration and Customs Enforcement agent threatening to shoot him in the head with a gun or plant bombs in the ICE office. The government offered evidence to show that the agent was concerned for his safety and his family's safety. The Fifth Circuit opined that "[a] communication is a true threat if in its context it would have a reasonable tendency to create apprehension that its originator will act according to its tenor."

22. In *United States v. Guevara,* 403 F.3d 252 (5th Cir. 2005), a defendant sent a letter to a District Judge, stating "I am sick and tired of your games[.] All [A]mericans will die as well as you. You have been now [sic] exposure [sic] to anthrax. Mohammed Abdullah." The substance turned out to be hair gel and powdered cleanser. Following the rationale in *United States v. Reynolds*, 381 F.3d 404, 406 (5th Cir.2004) (see below), the Fifth Circuit Court of Appeals opined that there was no requirement of a reference to a future act. The court also reiterated that the government need not prove that the defendant intended, or was able, to carry out the threat and further held that it was not error for the jury to be so instructed.

23. In *United States v. Reynolds,* 381 F.3d 404 (5th Cir. 2004), during a dispute with his mortgage company, a defendant told the customer service agent over the telephone that he "just dumped anthrax in [their] air conditioner." The Fifth Circuit Court of Appeals adopted the definition of "threaten" in § 2332a as articulated in *United States v. Myers*, 104

F.3d 76, 79 (5th Cir. 1997), that being a communication that has a reasonable tendency to create apprehension that the originator of the communication will act as represented.

24. In *United States v. Morales,* a defendant had the following conversation another person in a chat room:

> Morales: I will kill
> Lees: huh?– me You will kill what–me
> Morales: TEACHERS AND STUDENTS AT MILBY (Defendant's high school)
> Lees: Why do you want to do that Where is Milby?
> Morales: CAUSE AM TIRED...HOUSTON
> Lees: are you really going to go and kill people Who has made you mad r u ok do
> you want to talk to me
> Morales: YES F NE ONE STANDS N MY WAY WILL SHOT
> Lees: r u ok
> Morales: I HATE LIVE
> Lees: I am here
> Morales: YES MY NAME S ED HARRIS SEE U N A COUPLE OF MONTHS

The other person alerted the Milby High School, and extra security measures were taken. The Fifth Circuit Court of Appeals held that defendant's statements constituted "true threats," stating that the statute did not require that the threats be made directly to the intended target. The court iterated its prior standard: "the communication 'in its context would have a reasonable tendency to create apprehension that its originator will act according to its tenor.'" *United States v. Morales,* 272 F.3d at 288, citing *United States v. Myers*, 104 F.3d 76, 78 (5th Cir. 1997), quoting U*nited States v. Bozeman*, 495 F.2d 508, 510 (5th Cir. 1974).

25. In *United States v. Myers*, 104 F.3d 76 (5th Cir. 1997), a defendant who was disgruntled with the VA, told a congressional staff member on the telephone that he "would take matters into his own hands" and that they “should be sure to have plenty of body bags around.” When questioned about his intention during a follow up telephone call, the defendant stated that he was “still talking about body bags.” He then said he was “going to get retribution for my and my family's suffering. You can take that to the bank.” When asked what that meant, the defendant said it meant he would “do what, ah, like we said in Nam, whatever it takes.” Later in the conversation, the defendant said that he had a friend in Seattle who had TOW missiles, and spoke of "coming up there to die." A few weeks later, the defendant called the office of the Paralyzed Veterans of America. In that conversation, the defendant threatened the “VA and Congress with damage severe enough to make the explosion in the World Trade Center look like a picnic.” He stated that he was “head of the militia in this area” and made reference to AK-47 rifles being shoved into the faces of congressmen.

26. The Fifth Circuit held in *Meyers* that “whether a statement amount[ed] to a threat under § 875(c) depend[ed] on its context. In order to convict, a fact finder must determine that the recipient of the in-context threat reasonably feared it would be carried out. It was entirely appropriate, then, for the jury to consider the context . . . for the context was directly relevant to how [the victim] perceived the threat. Indeed, it probably would have been inappropriate for the jury not to consider these statements.” The Fifth Circuit also

opined that § 875(c) was a general intent, not a specific intent, crime, thus the government need not prove that the defendant intended his statements be threats.

27. In *Shackelford v. Shirley*, 948 F.2d 935 (5th Cir. 1991), a defendant told his former supervisor on the telephone that the next time the supervisor appeared at the defendant's place of business, he would be "toting an ass whipping." The Fifth Circuit Court of Appeals held that, "as expansive as the First Amendment's conception of social and political discourse may be, threats made with specific intent to injure and focused on a particular individual easily fall into that category of speech deserving of no First Amendment protection."

28. In his motion to dismiss, Brown erroneously represented that the unpublished Fifth Circuit opinion in *United States v. O'Dwyer*, 443 Fed.Appx 18, 2011 WL 4448739 (C.A.5 (La)) set out a Fifth Circuit standard for a statement to qualify as a "true threat." In reality, the Court in *O'Dwyer* only dealt with the specific facts in that case, finding that the threat in that case did not qualify as a "true threat."

29. The actual factors considered by the Circuits to determine a "true threat" include (1) the recipient's reaction,[1] (2) whether the threat was conditional, (3) to whom the threat was communicated,[2] (4) the history of the relationship between the defendant and the victim, and (5) the context in which the threat was made. Brown seeks to have this Honorable Court invade the province of the jury by opining on the existence of a "true

1 *United States v. Morales*, 272 F.3d 284, 287-8 (5th Cir. 2001) (explaining that statement is a true threat if recipient placed in fear of bodily harm and holding that the fact that recipient felt apprehension was factor in true threat analysis.)

2 *United States v. Morales*, 272 F.3d 284, 288 (5th Cir. 2001) (finding that statements made to a third party in an internet chat room were true threats under 18 U.S.C. § 875(c).)

threat." The question of whether Brown's statements constituted a "true threat" is an issue of fact for the jury.

RESPONSE TO BROWN'S SECOND POINT: COUNT TWO ADEQUATELY STATES AN OFFENSE

Conspiracy (18 U.S.C. § 371) to Make Restricted Personal Information of a Government Employee Publically Available (18 U.S.C. § 119)

30. Brown claims that Count Two failed to allege the elements of the 18 U.S.C. § 371 conspiracy, specifically an agreement and an overt act. The government contends that the Indictment more than adequately sets out the essential elements of the offense, gives the defendant sufficient notice of the charges against him, and absolutely protects the defendant's rights against double jeopardy.

31. Count Two adopts the allegations in the Introduction of the Indictment and reads as follows:

> Between on or about March 5, 2012 through on or about September 12, 2012, in the Dallas Division of the Northern District of Texas, the defendant Barrett Lancaster Brown, knowingly and willfully did combine, conspire, confederate, and agree with other persons known and unknown to the grand jury, to commit an offense against the United States, to wit: to make restricted personal information about Federal Bureau of Investigation Special Agent [RS] and his immediate family publically available with the intent to threaten and intimidate the Special Agent and to incite the commission of a crime of violence against the Special Agent in violation of 18 U.S.C. § 119, in that in September 2012 in the Northern District of Texas, Barrett Lancaster Brown requested another person known to the grand jury to assist him find on the Internet restricted information about Federal Bureau of Investigation Special Agent [RS] and [RS]'s family, and that other person agreed to do so, and furthermore, the other person did conduct a search on the Internet for the restricted information.

32. An Indictment adequately charges an offense if it "'(1) enumerates each prima facie element of the charged offense, (2) notifies the defendant of the charges filed against him, and (3) provides the defendant with a double jeopardy defense against future prosecutions.'" *United States v. McBirney*, 2006 WL 2432675, at 8 (N.E. Tex. Aug. 21, 2006) (Fitzwater, J.). "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. Gordon* 780 F.2d 1165, 1169 (5th Cir. 1986).

33. To establish a violation of 18 U.S.C. § 371 in the Fifth Circuit, the government must prove that (1) Brown and at least one other person made an agreement to commit a violation of 18 U.S.C. § 119[3] as described in the Indictment; (2) Brown knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose; and (3) one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the Indictment, in order to accomplish some object or purpose of the conspiracy.

34. Count Two "enumerates" the prima facie elements of a violation of 18 U.S.C. § 371. Count Two stated that Brown "knowingly and willfully did combine, conspire, confederate, and agree with other persons," satisfying element number one (see preceding paragraph for the "elements"). Count Two stated that Brown and the other(s) conspired "to commit an offense against the United States, to wit: to make restricted personal

3 The essential elements of a violation of 18 U.S.C. § 119 are that (1) the defendant knowingly made restricted personal information about a covered person, or a member of the covered person's immediate family, publicly available; (2) the defendant did so with the intent to threaten, intimidate, and incite the commission of a crime of violence against that covered person; (3) FBI SA Robert Smith was a covered person; and (4) the information made public was restricted personal information.

information about Federal Bureau of Investigation Special Agent [RS] and his immediate family publically available with the intent to threaten and intimidate the Special Agent and to incite the commission of a crime of violence against the Special Agent in violation of 18 U.S.C. § 119," satisfying element number two. Lastly, Count Two stated that "Brown requested another person . . . to assist him find on the Internet restricted information about Federal Bureau of Investigation Special Agent [RS] and [RS]'s family, and that other person agreed to do so, and furthermore, the other person did conduct a search on the Internet for the restricted information," satisfying element number three and further satisfying element number one.

35. The Introduction to the Indictment clearly outlined Brown's rage and anger with FBI Special Agent [RS] and Brown's unwavering obsession with hunting down and hurting FBI Special Agent [RS] and his children. Brown encouraged the doxing[4] of law enforcement[5] while he railed against law enforcement and Special Agent [RS] specifically. Brown claimed "*we* are investigating [RS] now"[6] (emphasis added) and asked others to "[s]end all info on Agent [RS] to [Brown's email address] so FBI can watch [Brown] look up his kids."[7]

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4 To "dox" meant to acquire personal information about an individual, without that individual's knowledge or permission. The information acquired could include names and aliases, physical addresses, email addresses, phone numbers, social security numbers, financial information (bank, credit card), employment information, identifiers of the individual's family members, etc.

5 Introduction to the Indictment 3:12-CR-317-L, paragraph 2.b.

6 Introduction to the Indictment 3:12-CR-317-L, paragraph 12.a.

7 Introduction to the Indictment 3:12-CR-317-L, paragraph 13.

36. In his motion, Brown complains that "search on the Internet cannot be in furtherance of making restricting [sic] information public." As Brown well knows, restricted information is defined at 18 U.S.C. § 119, as information to include "the Social Security number, the home address, home phone number, mobile phone number, personal email, or home fax number of" the covered person.[8] A search on the Internet absolutely can result in the acquisition of restricted information.[9] Plus, Brown's previous acquisition of restricted information from known hackers, and his continued association with these known hackers leaves no doubt that Brown was more than capable of obtaining whatever information he sought.

THERE IS NO SURPLUSAGE

37. Brown asks for following items to be struck from the Indictment: Paragraphs 2-4, 7(a-e),8(a, c, e-f). In the same surplusage argument, Brown requests that the time frame of the criminal conduct as alleged in the indictment be limited to only acts occurring after September 2012.

38. The paragraphs identified as surplusage by Brown are part of the introduction to the Indictment and are relevant to the offenses charged. Brown fails to prove that the language is not relevant, much less not relevant and prejudicial and inflammatory.

39. Brown mistakenly identifies paragraph 7 as a paragraph with subparts. Paragraph 7 is a stand-alone paragraph. The challenged language sought to be stricken as surplusage

8 18 U.S.C. § 2725(4) provides that "highly restricted person information" means an individual's photograph or image, social security number, medical or disability information."

9 Johnson v. West Pub. Corp., 504 Fed.Appx. 531, **1, (C.A.8 (Mo.) April 9, 2013).

is relevant and material to the charges alleged in the Indictment. Because the contested language is relevant to proving the crimes charged, it cannot and should not be stricken as surplusage. Also, although an indictment need not set forth the evidentiary details of the offenses charged, *see, e.g., United States v. Moody*, 923 F.2d 341, 351 (5th Cir. 1991); *see also United States v. Williams*, 679 F.2d 504, 508 (5th Cir. 1982) (noting that Rule 7(c) "does not mean that the indictment must set forth facts and evidentiary details necessary to establish each of the elements of the charged offense."), there is no prohibition against pleading "evidentiary allegations," and Brown has cited none. As Brown well knows, the Indictment is not evidence and the parties must establish the admissibility of evidence at trial, despite the Indictment's allegations.

40. Fed. R. Crim. P. 7(d) provides that "[t]he court on motion of the defendant may strike surplusage from the indictment." Fed. R. Crim. P. (7)(d). "It is well settled that a motion to strike surplusage from an indictment may be granted only if the challenged allegations *are not relevant to the charges and are inflammatory*." *United States v. Eisenberg*, 773 F. Supp. 662, 700 (D. N.J. 1991) (emphasis added) citations omitted except for *United States v. Bullock*, 451 F.2d 884, 888 (5th Cir.1971). A defendant must establish that the challenged language is *"irrelevant, inflammatory, and prejudicial"* to successfully move to strike. *United States v. Graves*, 5 F.3d 1546, 1550 (5th Cir.1993); (cited in *United States v. Solomon*, No. 00-11210, 273 F.3d 1108, at * 1 (5th Cir. Sept. 21, 2001). If "the charge is not materially broadened and the accused is not misled," then the surplusage should remain in the indictment. *United States v. Quintero*, 872 F.2d

107, 111 (5th Cir.1989); *United States v. Trice*, 823 F.2d 80, 89 n. 8 (5th Cir.1987). Accordingly, if the challenged language is relevant *and* prejudicial, it should not be stricken as surplusage. *United States v. Climatemp*, 482 F. Supp. 376, 391 (N.D. Ill. 1979) ("[I]f the language in the indictment is information which the government hopes to properly prove at trial, it cannot be considered surplusage no matter how prejudicial it may be (provided, of course, it is legally relevant)."). The decision to grant or deny a motion to strike portions of an indictment is left to the sound discretion of the district court. *Graves*, 5 F.3d at 1550. The standard for striking surplusage is an "exacting [one] which is met only in rare cases." *Eisenberg*, 773 F. Supp. at 700; *Solomon*, 273 F.3d 1108, at *1 (citing *Bullock*, 451 F.2d at 888).

41. In effect, the defense has a two-pronged burden. To prevail, the defense must first show that the challenged language is not relevant to the charges. If the Court determines that the challenged language is irrelevant, it must then determine whether the language is inflammatory and sufficiently prejudicial to be stricken. Only if the language is so inflammatory and prejudicial that it cannot be cured with a jury instruction is it appropriate to strike the language. See *United States v. Daniels*, 159 F. Supp. 2d 1285, 1300 (D.Kan July 13, 2001) ("a proper instruction to the jury ordinarily can alleviate the potential prejudicial effect of contested allegations in the indictment."); *Lowther v. United States*, 455 F.2d 657, 666 (10th Cir. 1972) (language not prejudicial because of Court's curative instructions); *United States v. Figueroa*, 900 F.2d 1211, 1218 (8th Cir. 1990) (denial of motion to strike surplusage proper where court repeatedly

instructed jury that the indictment was not evidence of any kind); *United States v. Ramirez*, 710 F.2d 535, 544-45 (9th Cir.1983) ("court properly instructed the jury both at the outset and at the completion of the trial that the indictment is not evidence against the accused and affords no inference of guilt or innocence").

42. Brown has failed to prove that the challenged language is *not* relevant *and* is inflammatory *and* prejudicial, and further that the challenged language, if relevant, is so inflammatory and sufficiently prejudicial that a curative jury instruction could not be used.

43. During the Introduction to the Indictment, Brown was quoted as posting references to #[10]Anonymous, #ProjectPM, Echelon2.org, and blackbloc. These references are essential to the government's case, to show the context in which Brown made the threatening statements.

44. Paragraph 2a-e of the Introduction of the Indictment sets out postings by Brown on his Twitter.com account on or about September 4, 2012. Although not all inclusive, the below sets out at least one reason why each of the below items are relevant.

Indictment	Relevance
a. "Don't be a pussy. Call up every facist and tell them you're watching. http://www.youtube.com/watch?v=4gcptY8ne14 ... #ProjectPM."	In this posting, Brown encouraged his associates to harass government-related authority figures. The attached link contained a recording of Brown calling and harassing such a person using personal identifying information exfiltrated during the breach of H.B.Gary.

10 The hash-tag (#) allows Twitter.com users to organize and categorize postings, which makes the topics easy to search and reference.

b. "Have you doxed a pig today? Be ready for the #revolution - have a list informationliberation.com/?id=40815 #Anonymous."	In this posting, Brown encouraged his followers to dox law enforcement. The attached link related to a law enforcement officer that was indicted in a shooting.
c. "Don't know how to shoot? You've got five years to learn. Maybe less.http://www.youtube.com/watch?v=wkqSIZaBhUY&list=UUv1FlZ4TdveCyva7okPRmSA&index=1&feature=plcp ... #Anonymous #ProjectPM #blackbloc."	The attached link accessed a video of Brown possessing, shooting, and reloading a long gun. The video was entitled "If only all of Rome had just one neck." Blackbloc referred to a manner of demonstrating or protesting that included acts of violence.
d. "#DHS stocking up on ammo. Are you? http://www.youtube.com/watch?v=wkqSIZaBhUY&list=UUv1FlZ4TdveCyva7okPRmSA&index=1&feature=plcp ... Don't wait. Retaliate."	In this posting, Brown encouraged his associates to stock up on ammo and to retaliate. The attached link accessed a video of Brown possessing, shooting, and reloading a long gun. The video was entitled "If only all of Rome had just one neck."
e. "Have a plan to kill every government you meet. #ProjectPM tinychat.com/BarrettBrown #Anonymous Echelon2.org."	In this posting, Brown encouraged his associates to have a plan to kill governments. On occasion, Brown used an online chat website called Tinychat.com to communicate and coordinate with regarding operations against certain targets of his group.

45. Paragraph 3a-c of the Introduction of the Indictment sets out postings by Brown on his Twitter.com account on or about September 7, 2012. Although not all inclusive, the below sets out at least one reason why each of the below items are relevant.

Indictment	Relevance
a. "Kids! Overthrow the US government lol https://www.youtube.com/watch?v=pHCdS7O248g Y"	In this posting, Brown encouraged his associates to overthrow the US government.
b. "@Badger32d I've experienced other end of the gun, watching mom detained by U.S. armed thugs. See you on the streets!"	In this posting, Brown gave an explanation as to why he was angry at the FBI and wanted to retaliate.

c. "#ProjectPM - Everyone in #Anonymous with balls is either with us or awaiting trial. Don't wait. Retaliate."	In this posting, Brown referenced his connection to Anonymous and encourages his associates to retaliate.

46. Paragraph 4 of the Introduction of the Indictment sets out a posting by Brown on his Twitter.com account on September 7, 2012. Although not all inclusive, the below sets out at least one reason why this posting is relevant.

Indictment	Relevance
"Organize. Choose your pig. Make your move. Pastebin.com/HFxBIHv #ProjectPM #Anonymous #blackbloc #revolution."	In this posting, Brown encouraged his associates to target a law enforcement officer and act.

47. Paragraph 7 of the Introduction of the Indictment sets out a re-posting by Brown on his Twitter.com account on September 10, 2012. Although not all inclusive, the below sets out at least one reason why this posting is relevant.

Indictment	Relevance
"A dead man can't leak stuff… Illegally shoot the son of a bitch."	In this posting, Brown promoted the idea of shooting a person because a dead person cannot talk.

48. Paragraph 8a, c, e-f of the Introduction of the Indictment sets out postings by Brown on his Twitter.com account on or about September 11, 2012. Although not all inclusive, the below sets out at least one reason why each of the below items are relevant.

Indictment	Relevance
a. "0 uploading now, dropping in 30 minutes #Anonymous #Wikileaks #ProjectPM #PantherModerns #FBI #Agent[RS]."	In this posting, Brown referenced an ultimatum given to FBI SA [RS], and advised his associates and FBI SA [RS] that he was uploading the first Youtube.com threat video.

c. "@AsheraResearch My mother is being threatened with charges by #FBI due in part to your lies. Mention her again and see what happens."	In this posting, Brown expressed his anger surrounding his incorrect perception that the FBI threatened his mother. Brown threatened to retaliate if his mother was "mentioned" again.
e. "#ProjectPM backs up its claims, threats. Don't wait. Retaliate. #OpClydeTolson #Anonymous #Wikileaks http://www.youtube.com/watch?v=klvP1Xx6OH4&feature=youtu.be . . ."	In this posting Brown encouraged his associates to retaliate, and assured his associates that his entity ProjectPM would back up its threats. The attached link accessed the first of three videos wherein Brown threatened FBI SA [RS] and gave the Agent an ultimatum. Brown sought to retaliate for the search of his and his mother's residences. The video was entitled "Why FBI Agent [RS] Has Two Weeks To Send My Property Back, Part 1/3" Brown provided the following information related to the posting of this video: "See Echelon2.org for why I'm being raided, harassed, threatened, put at risk by law enforcement officers and private contractors. Echelon2.org is listed on my FBI search warrant which may be seen at Buzzfeed."
f. "As I'll explain further tomorrow, I will regard any further armed raids as potential #Zeta assassination attempts and respond accordingly."	In this posting, Brown contended that any armed person appearing at his door, including law enforcement, would be shot.

A BILL OF PARTICULARS IS NOT APPROPRIATE

49. Brown is correct in that the government's response to his request for a Bill of Particulars is that the Indictment adequately presents the essential facts and apprises him of the charges against him. Also, the discovery provided by the government provides additional information regarding the charged conduct. In January 2014, Brown took advantage of the government's repeated suggestion to meet with the government to

obtain an overview of the government's evidence. During this meeting the government provided Brown with additional overt acts attributed to Brown and the identity of the coconspirators and associates referenced in the Indictment.

50. Under the Fourth Amendment to the United States Constitution a defendant in a criminal action is entitled "to be informed of the nature and cause of the accusation...." In order to assure that an accused is provided constitutionally adequate notice, under Fed. R. Crim. P. 7(f), the trial court "may direct the filing of a bill of particulars." However, as case law holds, the basis for ordering a bill of particulars is limited. "The function of a bill of particulars is to enable the defendant to prepare for trial and avoid prejudicial surprise as well as providing protection from a subsequent prosecution for the same offense." *United States v. Burgin* 621 F.2d 1352, 1358 (5th Cir. 1980); *Wong Tai v. United States*, 273 U.S. 77 (1927); *United States v. Gorel*, 622 F.2d 100, 104 (5th Cir. 1979), *United States v. Haas*, 583 F.2d 216 (5th Cir. 1978).

51. Courts have uniformly held that a bill of particulars is "not designed to compel the government to detailed exposition of its evidence or to explain the legal theories upon which it intends to rely at trial," *Burgin*, 621 F.2d at 1358; *United States v. Sheriff*, 546 F.2d 604, 606 (5th Cir. 1977); *Overton v. United States*, 403 F.2d 444, 446 (5th Cir. 1968); *Downing v. United States*, 348 F.2d 594, 599 (5th Cir. 1965). A bill of particulars is not an investigative vehicle for the defense. "A defendant should not use the Bill of Particulars to obtain a detailed disclosure of the government's evidence prior to trial." *United States v. Kilrain*, 566 F.2d 979, 985 (5th Cir. 1978).

52. Brown has failed to articulate a basis for the granting of a Bill of Particulars.

CONCLUSION

53. The government respectfully requests that this Honorable Court deny Brown's Motion.

Respectfully submitted,

SARAH R. SALDAÑA
UNITED STATES ATTORNEY

S/ Candina S. Heath
CANDINA S. HEATH
Assistant United States Attorney
[redacted]

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2014, I electronically filed the foregoing document with the clerk for the U.S. District Court, Northern District of Texas, using the electronic case filing (ECF) system of the court. The ECF system sent a "Notice of Electronic Filing" to Brown's attorneys of record Ahmed Ghappour, Charles Swift, and Marlo Cadeddu, who consented in writing to accept this Notice as service of this document by electronic means.

S/ Candina S. Heath
CANDINA S. HEATH
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	**FILED UNDER SEAL**
	§	No. 3:13-CR-030-L
v.	§	
	§	
BARRETT LANCASTER BROWN	§	

GOVERNMENT'S OPPOSITION TO
BROWN'S MOTION TO DISMISS THE INDICTMENT

1. The United States Attorney for the Northern District of Texas, by and through the undersigned Assistant United States Attorney, files this opposition to Brown's Motion to Dismiss the Indictment.

BROWN'S CLAIMS SUMMARIZED

2. Brown sets out four points in support of his motion to dismiss. First he claims that Counts One and Two fail to state an offense. Second he claims that Count One fails to allege a corrupt mens rea, or that the statute is unconstitutionally vague and overbroad. Third he claims that 18 U.S.C. § 1512(c)(2) (Count Two) is inapplicable to Brown's conduct. Brown's fourth claim is that Counts One and Two are multiplicitous.

THE GOVERNMENT'S RESPONSES SUMMARIZED

3. Each count in the Indictment unambiguously alleged the elements of the offense, provided notice to Brown of the charges against him, and provided Brown a double

jeopardy defense against future prosecutions. The statutes were not unconstitutionally vague.

4. Again, 18 U.S.C. § 1519 is not unconstitutionally vague, and the Indictment adequately alleged the elements of the offense including the statutorily prescribed mens rea.

5. The plain wording of 18 U.S.C. § 1512(c)(2) (Count Two) and the definitions in 18 U.S.C. § 1515 are appropriate to charge Brown's conduct.

6. Due to the different elements and the proof needed to satisfy those elements, Count One and Count Two are not multiplicitous.

PROCEDURAL BACKGROUND

7. In or about September 2012, the United States Magistrate Judge Paul D. Stickney issued a Criminal Complaint for the arrest of Barrett Brown. On the same evening, the Federal Bureau of Investigation arrested Brown pursuant to an arrest warrant issued on the complaint. On three different dates, a Federal grand jury returned true bills of Indictment charging Brown with criminal offenses. The first Indictment dealt with Brown's threat to harm FBI Special Agent RS. The second Indictment dealt with the data Brown possessed from the intrusion or hack of the Strategic Forecasting Inc.'s computer network. The third Indictment dealt with Brown and KM hiding two laptops during the execution of a Search Warrant in March 2012.[1]

1 Brown notes that the third Indictment was returned almost one year after the conduct charged; however, as Brown well knows, the charges in the third Indictment could have been joined with the first or the second Indictments, but were delayed at KM's attorneys' requests, so that KM could negotiate a

8. Count One of the third Indictment charged Brown with violations of 18 U.S.C. §§ 1519 and 2. Section 1519 provided that

> [w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both. (Underlined for comparison)

9. Count One of the third Indictment tracked the statutory language and stated as follows:

> On or about March 6, 2012, in the Dallas Division of the Northern District of Texas, the defendant Barrett Lancaster Brown, aided and abetted by KM, did knowingly conceal tangible objects, namely two laptop computers containing records, documents, and digital data, with the intent to impede, obstruct, and influence the investigation and proper administration of any matter within the jurisdiction of any department and agency of the United States, and in relation to and in contemplation of any such matter, in that Barrett Lancaster Brown and KM concealed two laptop computers in KM's residence in the Northern District of Texas prior to the execution of a search warrant at KM's residence, said search warrant having been issued by a United States Magistrate Judge in the Dallas Division of the Northern District of Texas, and the execution of the search warrant was in relation to an investigation conducted by the Dallas Division of the Federal Bureau of Investigation, an agency of the United States Department of Justice. (Underlined for comparison)

10. The essential elements of 18 U.S.C. § 1519 are as follows:

FIRST: that the defendant altered, destroyed, mutilated, concealed, covered up, falsified, or made a false entry in any record, document, or tangible object;

SECOND: that the defendant did so with intent to impede, obstruct, or influence the investigation or proper administration of any matter within the

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pre-indictment plea of guilty.

jurisdiction of any department or agency of the United States, or any case filed under federal criminal laws, or in relation to or contemplation of any federal criminal case; and

THIRD: that the defendant did so knowingly

11. Count Two of the third Indictment charged Brown with violations of 18 U.S.C. §§ 1512(c)(1) and 2. Section 1512(c)(1) provided that

> [w]hoever corruptly conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding, shall be imprisoned for not more than 20 years. (Underlined for comparison)

12. Count Two of the third Indictment tracked the statutory language and stated as follows:

> On or about March 6, 2012, in the Dallas Division of the Northern District of Texas and elsewhere, the defendant Barrett Lancaster Brown aided and abetted by KM, did knowingly and corruptly conceal and attempt to conceal records, documents, and digital data on two laptop computers, with the intent to impair the integrity and availability of the records, documents, and digital data contained on the laptop computers for use in an official proceeding, that being (1) a proceeding before a federal Grand Jury in the Northern District of Texas, and (2) a proceeding before a United States Magistrate Judge in the Northern District of Texas specifically related to search warrants issued on March 5, 2012. (Underlined for comparison)

13. The essential elements of 18 U.S.C. § 1512(c)(1) are as follows:

FIRST: The defendant concealed a record, document, or other object;

SECOND: The defendant did so with the intent to impair the integrity or availability of the record, document, or other object for use in a proceeding before a federal Grand Jury in the Northern District of Texas or before a United States Magistrate Judge in the Northern District of Texas;

THIRD: The defendant acted corruptly; and

FOURTH: The proceeding before the Federal grand jury in the Northern District of Texas or before the United States Magistrate Judge in the Northern District of Texas was an official proceeding.

14. In Count Two, the term "corruptly" meant "acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information." 18 U.S.C. § 1515(b).

15. The Indictment unambiguously alleged an act and an accompanying mental state for each count. The essential elements of Counts One and Two contain different scienter requirements and are therefore not multiplicitous.

RESPONSE TO BROWN'S FIRST POINT

16. In his first point, Brown contends that the allegations are insufficient because (1) Brown and KM concealed the laptops *within* the scope of the search warrant and the concealment was unsuccessful because the FBI found the laptops, (2) the Indictment does not set out the facts demonstrating the mens rea, (3) the Indictment did not allege a duty that Brown violated, and (4) either the statutory terms are superfluous or the statutes unconstitutionally vague.

17. An Indictment adequately charges an offense if it "'(1) enumerates each prima facie element of the charged offense, (2) notifies the defendant of the charges filed against him, and (3) provides the defendant with a double jeopardy defense against future prosecutions.'" *United States v. McBirney*, 2006 WL 2432675, at 8 (N.E. Tex. Aug. 21,

2006) (Fitzwater, J.), *Blockburger v. United States*, 284 U.S. 299 (1932). "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. Gordon* 780 F.2d 1165, 1169 (5th Cir. 1986). "Those minimal constitutional standards therefore do 'not compel a ritual of words.' The validity of an indictment is governed by practical, not technical considerations." *United States v. Ramos*, 537 F.3d 439 (5th Cir.2008) *citing United States v. Crow*, 164 F.3d 229, 235 (5th Cir.1999).

18. Brown's first two contentions essentially challenge the sufficiency of the government's evidence at trial, not what is required to be alleged in the Indictment. Since the trial has not occurred, this argument is premature. Brown fails to appreciate the difference "between a challenge to the sufficiency of the indictment and a challenge to the evidence produced at trial." *United States v. Bieganowski*, 313 F.3d 264, 286 (5th Cir. 2002), citing *United States v. McGough*, 510 F.2d 598, 603 (5th Cir.1975) (holding that an indictment "need only allege materiality 'in substance,'" and warning against the failure to "draw a clear distinction between an allegation of materiality and proof of materiality."). The Indictment adequately conforms to constitutional standards.

19. On the merits of his argument, Brown failed to cite any authority in support of his contention that a person cannot conceal an item within the physical area covered by the scope of the search warrant. In response, the government would first point out that the concealed laptops were the focus of the FBI's search. The concealed laptops contained key evidence of Brown's and others involvement in criminal conduct. The concealed

laptops contained extensive evidence of computer intrusion and multiple attempts to gain access to credit card and other personal information in order to gain some leverage against the individuals or to harm the individuals. The concealed laptops have verbatim logs of Brown's involvement and communications with the perpetrators of several computer intrusions, sometimes while the intrusions occurred. The logs revealed communications with the perpetrators of the unauthorized accesses to HBGary, Stratfor, SpecialForces, and Combined Systems. Also the logs revealed communications involving the plans to access without authorization other systems including but not limited to Qorvis and Northup Grumman. The concealed laptops contained logs documenting Brown's attempts to orchestrate attacks on Qorvis and the Government of Bahrain on behalf of individuals known as "Commander X" and "Amber Lyon," and involvement with the defacement of Combined Systems with a person using the name "o." Brown received and reposted data containing website vulnerabilities and solicited individuals with the tools and the skills to exploit those vulnerabilities. The concealed laptops contained key identifiers for some of the participants in the actual and planned attacks. By concealing the laptops, Brown attempted to hinder law enforcement's identification of others and to protect himself from criminal prosecution.

20. The government would also point out that during chats on ProjectPM IRC, Brown stated that he expected law enforcement to search his apartment, and therefore he had intentionally moved the laptops from his apartment to KM's residence to prevent them from being seized by the FBI pursuant to a search warrant.

21. In her factual resume in cause number 3:13-CR-110-BF, KM admitted the following facts:

> ▪Between 6:30 a.m. and 1:55 p.m. on March 6, 2012, KM and Brown believed that it was likely the FBI SAs would return with a Search Warrant for the computers that Brown had not volunteered.
>
> ▪On or about March 6, 2012:
>
> a. KM agreed with Barrett Brown to hide and conceal Brown's two laptops computers from FBI SAs.
> b. KM placed two laptops belonging to Barrett Brown in the back of a lower corner cabinet in the kitchen in an attempt conceal and prevent them from being located and seized by the FBI.
> c. When the FBI SAs arrived at approximately 1:55 p.m., KM and Brown knew that the FBI SAs had obtained a Search Warrant, cause number 3:12-MJ-110-BH, from a United States Magistrate Judge seeking data storage devices, to include the laptop computers.
> d. KM and Brown knew that it was unlawful to have hidden the laptops. By hiding the laptops, KM acted knowingly and willfully.
> e. KM and Brown knew that hiding the laptops would obstruct and impede the agents' search for and attempt to locate the laptops.
> f. By hiding the laptops, KM intended to impede, obstruct, or influence the FBI investigation and the Search Warrant issued by the United States Magistrate Judge.

22. Evidence at trial will show that Brown always intended to conceal his laptops from law enforcement. One of the two concealed laptops contains an IRC chat between Barrett Brown and an individual known as Topiary. In that chat, Topiary told Brown that another person "has a meeting with Feds tomorrow morning. I might call his cell just before we take out the main target and lulz at him." Brown replied, "I know, do so, record it, actually don't, be careful man, do what needs to be done, but stay safe, guess I'll start hiding laptops…"

23. The government's evidence shows that Brown knew he was going to be raided, and took steps to hide the laptops in anticipation of a search:

a. On February 2, 2011 Brown had a chat with an individual known as Gabzorr. In that chat Brown stated, "for one thing, I have warrants, and expired ID, I have passport though. Second thing – I may be raided too, so someone else will have to handle it…"

b. During an NBC nightly news video dated March 8, 2011, Brown stated, "…This is an act of warfare that we are involved in… Laws have been broken by us…. Our people break laws… I am going to get prosecuted at some point…."

c. In January 2012, in a news interview on Russia TV (RT), Brown commented on attacks on the United States Government and other illegal activities, stating he did not care about the "rules of America."

d. On November 16, 2011, Brown had a skype conversation with an individual known as "thesecondbase", in which Brown stated, "my mom…Karen Lancaster… has the laptops…two of them…"

24. Evidence at trial will show that on the morning of March 6, 2012, KM and Brown were aware that FBI Special Agents had searched Brown's apartment, and that an agent was posted outside of KM's residence, making it impossible for KM or Brown to hide or conceal the laptops outside of the confines of the residence. KM and Brown underestimated the thoroughness of the search, and believed that they had sufficiently concealed the laptops in the kitchen cabinet behind some pots and pans.

25. After the FBI Special Agents advised Brown and KM that they had searched Brown's apartment, Brown had the following discussion with others on the IRC:

> [07:39] <&BarrettBrown> yo
> [07:39] <&BarrettBrown> just got raided
> [07:40] <~Morpeth> pm
> [07:40] <+m> oh shit
> [07:43] <&BarrettBrown> long story short, the laptops they thought would be at my place weren't there
> [07:43] <&BarrettBrown> as I wasn't home
> [07:43] <&BarrettBrown> three other agents came to see me at mom's, where I stayed last night
> [07:43] <&BarrettBrown> this morning at 6:30
> [07:43] <+m> did they had a warrant?
> [07:44] <%FriedSquid> lowest ebb
> [07:44] <&BarrettBrown> for my apartment, yep
> [07:44] <&BarrettBrown> not for my mom's husband's house
> [07:44] <&BarrettBrown> put a call in to my lawyer
> [07:45] <+m> BarrettBrown: you didnt let them in did you?
> [07:45] <&BarrettBrown> my mom did, there was nothing to see
> [07:45] <&BarrettBrown> it's her house
> [07:46] <%FriedSquid> did she say 'there's nothing to see here'
> [07:46] <&BarrettBrown> then she gave them coffee and shit while I came down stairs
> [07:46] <%FriedSquid> move along
> [07:46] <&BarrettBrown> more like she chatted with them like she does with everyone
> [07:46] <%FriedSquid> civilised, your mothersounds ace
> [07:47] <&BarrettBrown> so they talked to me for a minute, their purpose being to see if I'd be willing to give them any other laptops
> [07:47] <&BarrettBrown> not sure if they knew that the apartment raid will have produced nothing more than an old IMac in my closet
> [07:49] <&BarrettBrown> also, lead agent who left his card was named [RS]

26. And in a private chat with an individual known as Morpeth, Brown stated the following:

> [07:41] <BarrettBrown> FBI came to my apartment this morning, busted up the door, but I wasn't there and neither were any of the laptops

[07:41] <BarrettBrown> my laptop is with me
[07:41] <BarrettBrown> others are hidden
[07:41] <BarrettBrown> so they got nothing
[07:42] <BarrettBrown> three others came to my mom's house
[07:42] <BarrettBrown> knew where I was
[07:42] <BarrettBrown> one of them is [RS]
[07:42] <BarrettBrown> supervisory special agent, CYBER DIVISION
[07:43] <Morpeth> sigh
[07:43] <Morpeth> so you didn't talk to them
[07:43] <BarrettBrown> not really

27. To conceal is not defined by statute. A standard definition of conceal is "to hide; withdraw or remove from observation; cover or keep from sight." http://dictionary.reference.com/browse/conceal. Because Brown's and KM's concealment was not successful does not undermine the fact that Brown and KM committed the criminal act of concealing the laptops with the intent specified in each count. The scope of the search warrant has no bearing on where the item was concealed. A defendant can conceal evidence without a search warrant even existing.

28. In his third contention, Brown complained that the Indictment did not allege a "duty" and cited *United States v. McRae*, 702 F.3d 806 (5th Cir. 2012). Neither statute requires a violation of a known duty. Section 1519 requires the defendant to act knowingly. Section 1512 requires the defendant to act corruptly. Each statute also requires that the conduct be done with an obstructive intent. The Indictment properly alleges the mens rea. No violation of a known duty was required to be alleged in the Indictment. Also Brown's reliance on *McRae* is misplaced because that opinion does not suggest that section 1519 requires a violation of a known duty.

29. Brown confuses knowingly and corruptly with willfully. Willfulness is the mens rea standard that in certain situations requires proof of a violation of a known duty. *United States v. Miller*, 588 F.3d 897, 907 (5th Cir. 2009).

30. Also, Brown contends on page 7 of his motion that Brown and KM "behaved exactly as they were supposed to" and did not "fabricate facts in an effort to prevent the administration of justice." The government disagrees with these statements. Brown and KM showed a complete lack of respect for the justice system by their efforts to conceal the laptops and to obstruct the execution of a Search Warrant. Both Brown and KM lied to law enforcement when asked about the existence of the laptops.

31. In his fourth contention, Brown attacked the constitutionality of the statutes and claimed that the Indictment rendered other terms superfluous. Brown does not cite any authority in support of his contentions. Brown attempts to conflate the charges in Counts One and Two (18 U.S.C. §§1519 and 1512) with an uncharged statute, 18 U.S.C. §1503. Brown was not charged with a violation of 18 U.S.C. §1503, so the definition of "endeavor" is irrelevant. The charges brought against Brown in Counts 1 and 2 properly and adequately track the statutory language of 18 U.S.C. §§ 1519 and 1512(c)(1). *McRae*, which is cited as support in Brown's motion, held that section 1519 was not unconstitutionally vague. *McRae*, 702 F.3d at 836-837. Likewise, the Court in *United States v. Singleton*, 2006 WL 1984467 *6 (July 14, 2006) opined that 18 U.S.C. § 1512(c)(2) provided a defendant "adequate warning" of the charges, and was not unconstitutionally vague.

RESPONSE TO BROWN'S SECOND POINT

32. The second point raised in Brown's Motion to Dismiss contends that the absence of a "corrupt" mens rea in 18 U.S.C. §1519 (Count One) causes the statute to be unconstitutionally vague and overbroad. As mentioned above, *McRae* held that section 1519 was not unconstitutionally vague. *McRae*, 702 F.3d at 836-837. *McRae* held that section 1519 "requires some form of obstructive intent" as can be seen from the statutory language "with the intent to impede, obstruct, or influence the investigation or proper administration of any matter." *McRae*, 702 F.3d at 834.

33. Brown's arguments on pages 9 and 10 of his motion are more applicable to Brown's defense at trial, that being, whether Brown's concealment of the laptops was appropriate or an innocent act. Thus, these arguments go to the proof at trial, not the sufficiency of the allegations in the Indictment.

RESPONSE TO BROWN'S THIRD POINT

34. In the third point raised in Brown's Motion to Dismiss, he contends that the facts are inappropriate to support a charge of 18 U.S.C. § 1512(c)(2). Brown contends that because he was *not* tampering with a witness in a white collar fraud investigation, this statute is inapplicable. Although this specific argument was not raised in *United States v. Simpson*, 741 F.3d 539, 552 (5th Cir. 2014), the Fifth Circuit affirmed Simpson's conviction for a violation of 18 U.S.C. § 1512(c)(2), for Simpson personally deleting data on some hard drives that he "voluntarily" turned over to the FBI. Simpson, like Brown, was an individual who obstructed a grand jury investigation.

35. "The objective of a court called upon to interpret a statute is to ascertain congressional intent and give effect to legislative will. The clearest indication of congressional intent is the words of the statute itself. When the language of a statute is unambiguous we must follow its plain meaning." *Davis v. Johnson,* 158 F.3d 806, 810 (5th Cir.1998) (internal citations and quotation marks omitted). "'The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.' " *United States v. Guidry*, 456 F.3d 493, 502 (5th Cir.2006) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997)).

36. The plain wording of 18 U.S.C. §1512(c)(2) does not limit the criminal conduct only to white-collar fraudsters or defendants directing other defendants to destroy data. Section 1512(c)(2) clearly makes it a felony for a person to "*corruptly* conceal . . . a record, document, or other object, or attempt . . . to do so, with the intent to impair the object's integrity or availability for use in an *official proceeding*." (Emphasis added). Replete throughout section 1512 is the effect of the obstructive conduct on an "official proceeding." An "official proceeding" is defined in 18 U.S.C. § 1515(a)(1)(A) as "a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury." Brown's concealment of the laptops affected not only a proceeding before a United States Magistrate Judge relating to the Search Warrant, but also to the Federal grand jury

investigating Brown. On its face, the facts concerning Brown's conduct fit squarely within the language of the statute.

37. Additionally, the definition of corruptly is defined as "acting with an improper purpose, *personally* or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information."18 U.S.C. § 1515(b). "Corruptly" does not limit the chargeable conduct to tampering with a witness. Corruptly includes the actor's own obstructive behavior.

RESPONSE TO BROWN'S FOURTH POINT

38. In the fourth point raised in Brown's Motion to Dismiss, Brown contends that Counts One and Two of the indictment are multiplicitous. Brown's ad hominem remarks are inappropriate and unhelpful to his argument. The Indictment is concise and properly drafted.

39. Pursuant to *U.S v. Stevens*, 771 F.Supp.2d 556, 562-563, (D.Maryland March 23, 2011), an indictment containing separate allegations pursuant to 18 U.S.C. § 1512 and § 1519 are not multiplicitous.[2] 18 U.S.C. § 1512 requires proof of an essential factual element that 18 U.S.C. § 1519 does not, specifically proof of a pending or foreseeable "official proceeding." Section 1519 simply requires proof that the concealment occurred "with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or

2 See *United States v. Galvan*, 949 F.2d 777, 780 (5th Cir. 1991) (allowing prosecution of defendant under both 1512 and 1513, without discussing double jeopardy); *United States v. Maggitt*, 784 F.2d 590, 599 (5th Cir. 1986) (holding that witness tampering and retaliation charges under 1512 and 1513 are not multiplicitous, given that each is proscribed by a separate statutory provision and the facts necessary to one are not necessary to the other).

any case filed under title 11, or in relation to or contemplation of any such matter or case ...” 18 U.S.C. § 1519 (emphasis added). Section 1519 does not require a showing that the concealment was done “with the intent to impair an object's integrity or availability for use in an official proceeding.” 18 U.S.C. § 1512(c)(1).

40. Additionally, 18 U.S.C. § 1519 has a different jurisdictional element than § 1512. Section 1519 requires an allegation and proof that the matter obstructed was “within the jurisdiction of any department or agency of the United States.” *United States v. McRae*, 702 F.3d 806, 835 (5th Cir. 2012). Section 1512(c)(1) requires an allegation and proof that the obstruction was related to an “official proceeding” as defined in 18 U.S.C. § 1515(a)(1)(A).

CONCLUSION

42. Counts 1 and 2 of the indictment are neither multiplicitous, nor unconstitutionally infirm. Each statute charged requires a different scienter and has different elements. The charges in Counts 1 and 2 are therefore not multiplicitous. A Federal grand jury found sufficient probable cause to charge Brown with those counts, and both counts sufficiently describe the elements of the statute charged. Accordingly, Brown's Motion to Dismiss should denied.

Respectfully submitted,

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[redacted]

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2014, I electronically filed the foregoing document with the clerk for the U.S. District Court, Northern District of Texas, using the electronic case filing (ECF) system of the court. The ECF system sent a "Notice of Electronic Filing" to Brown's attorneys of record Ahmed Ghappour, Charles Swift, and Marlo Cadeddu, who consented in writing to accept this Notice as service of this document by electronic means.

S/ Candina S. Heath
CANDINA S. HEATH
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