Monkey business? Judge Starrett shoots down Cream Scheme Survey Monkey; denies change of venue.

United States District Judge Keith Starrett shot down the cream scheme Survey Monkey Survey defendants Hope and Randy Thomley and Glenn Doyle Beach used to serve as the foundation of their motion for a change of venue due to, “extensive and extremely inflammatory pretrial publicity” which would prevent the Thomleys and Beach from receiving a fair trial.

The motion referred to regular and repeated “inflammatory pretrial publicity” that has occurred since January 2016 as well as media coverage of the indictments and guilty pleas of two alleged co-conspirators. Exhibits included news articles and media posts about the FBI raids in 2016 that launched the current prosecutions, the Albert Diaz trial, the indictments of Beach and the Thomleys, and the indictments and guilty pleas of alleged co-conspirators.

The motion relies heavily on results of a Survey Monkey questionnaire on pretrial publicity conducted by Dancel Multimedia, a D’Iberville-based company the defendants hired to help present their case. Dancel was formed almost 25 years ago; has offices in D’Iberville, New Orleans and Jackson; and

lists a number of well-known clients and references on its website.

In his order, the Honorable Keith Starrett shot down the defendants monkey business and called calling the survey,

> *“virtually useless,”*

and here’s why:

• The survey sample size was too small. Dancel surveyed only 259 people from three of the court’s four divisions. The Southern District’s total population is 1,853,619, according to the 2010 census; the total population of the three divisions from which the survey sample was drawn is 1,697,592.

Translated, that means Dancel surveyed just 0.014% of the population of the Southern District. That figure increases to 0.015% if you consider the population of the three divisions that Dancel sampled. Breaking the figures down, Dancel surveyed 0.019% of the population of the Eastern Division, 0.021% of the Southern Division and 0.011% of the population of the Northern Division. Nobody from the Western Division was surveyed.

• Even more troubling than the sample size, the Court said, was that Dancel did not explain how the sample was selected. Normally, studies provide information on how participants are selected, along with demographic data, to show that the sample of respondents is representative. Beyond that, Starrett asks, “Were the respondents eligible for jury service? What were the respondents’ news consumption habits, and did they vary from the rest of the population?”

The dearth of information left the Court with no way to determine whether Dancel used a representative sample, and no choice but to deem the data Dancel collected "from an already meager sample size" meaningless.

Judge Starrett's order states that most events leading to the upcoming trial occurred in Forrest and Lamar counties, which account for 37.3% of the total population of the Eastern Division of the Southern District.

"…(T)hese matters have been highly publicized in print, online, and television media…(b)ut widespread publicity is not necessarily prejudicial," he says, citing Skilling v. United States. He describes news articles attached to the defendants' motion as "relatively benign…factual reporting" that does not warrant a change of venue, citing Murphy v. Florida, and material from social media and a local blog as "undeniably inflammatory and slanted in favor of the government."

The constant and ongoing media coverage of all types has not been inflammatory or pervasive enough to make it impossible to seat an impartial jury from the Eastern Division of the Southern District alone, the judge says, but it would be challenging.

"Fortunately, there are numerous methods the Court can and will employ to ensure that an impartial jury is impaneled." Judge Starrett states. His order outlines the following measures:

• The jury pool will be expanded to include the entire Southern District of Mississippi.
Judge Starrett notes that the defendants have said they could receive a fair trial in the Northern Division, which has a

population (863,633) larger than the Southern and Eastern Divisions combined (833,959), and that the defendants omitted the Western Division. A jury pool that has been expanded to include the entire District, then, ensures that an impartial jury can be seated, he says.

This is an option that the defendants "conspicuously failed to address," even after the federal government raised it, Judge Starrett comments.

• The Court will use the same methods it uses in every case to ensure that it seats an impartial jury.

1. It will follow its typical routine for conducting voir dire (the preliminary examination, or
questioning, of potential jurors).

The Court will examine the venire (the panel of prospective jurors) first, and will do so
collectively and, when necessary and appropriate, individually. Parties are free to request that the Court ask questions. When necessary, the Court will question individuals at sidebar to prevent tainting the entire venire.

Then the parties' attorneys will be permitted to examine the venire, both collectively and, when necessary and appropriate, individually. Judge Starrett gives attorneys substantial room to conduct their own voir dire, but requires they stay focused on gathering relevant information.

The Court will not conduct or allow individual voir dire of every potential juror as a matter of course. The Court will not allow pretrial questionnaires. The parties will receive basic information regarding the potential jurors – name, sex, occupation, race, county of residence – on the morning of jury selection.

2. The Court also plans to increase the pool of potential jurors by summoning a larger-than-normal venire. At least

three alternates will be seated because of the anticipated length of the trial and because the trial will be held during flu season. Because there are more alternates, defendants will receive more peremptory strikes to use as they deem necessary.

Even if the Thomleys and Beach were able to present enough evidence to demonstrate a presumption of prejudice because of inflammatory pretrial publicity, the district-wide jury pool and the other measures the Court plans will rebut that presumption, Judge Starrett concludes.

It’s bound to be a bitter pill for the three Cream Scheme defendants. Essentially, the decision means the Thomleys and Beach – who live and work in the Pine Belt – will be tried on January 8th here in federal court here in Hattiesburg.

The three face federal charges of making, marketing, prescribing and billing for fraudulent compounded medications and for conspiring to defraud health care insurance companies of millions of dollars with the illegal medications. The trio is accused of conspiring to pay and receive kickbacks and bribes to doctors and beneficiaries to promote “the Cream Scheme,” as this outlet has dubbed it, and of conspiring to launder the money they gained illegally. Alleged co-conspirators, Gregory Grafton Parker and Marco Moran have already pleaded guilty to conspiracy to commit health care fraud. It is expected both will testify at the forthcoming trial in January.