IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, vs. TIMOTHY DEFOGGI, Defendant.	**8:13CR105** **MEMORANDUM AND ORDER**

This matter is before the Court on defendant's objection, Filing No. 139, to the Findings and Recommendation, Filing No. 137, of the magistrate judge, denying his motion to sever his co-defendant from trial, Filing No. 102. The Indictment in this case charges the defendant with knowingly engaging in a child exploitation enterprise, in violation of 18 U.S.C. § 2252A(g) (Count I); conspiracy to advertise child pornography, in violation of 18 U.S.C. § 2251(d)(1) and (e) (Count II); conspiracy to distribute child pornography, in violation of 18 U.S.C. § 2252A(a)(2) and (b)(1) (Count III); and knowingly accessing a means or facility of interstate commerce to view child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) (Counts IV-VII). See Filing No. 1. Additionally, the Indictment alleges forfeiture of any property used to commit or promote the commission of the crimes alleged in the Indictment. The magistrate judge addressed a number of issues in his order, and defendant filed an objection to that portion of the order denying severance.

The magistrate judge held an evidentiary hearing on March 25, 2014. The magistrate judge determined that the indictment points to a single conspiracy in which both defendants participated, or in the alternative two closely related conspiracies; and the magistrate determined that the jury will not have a difficult time compartmentalizing the evidence as it relates to each defendant. The defendant objects to these findings.

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The Court has carefully reviewed the findings and recommendation of the magistrate judge. The Court concludes that the findings are correct as a matter of law and fact. The magistrate judge found that so long as the defendants participated in the "same series of acts or transactions, constituting an offense" they could be charged in the same counts together. Fed. R. Crim. P. 8(b); Filing No. 137, at 2-3. The magistrate judge further cited Fed. R. Crim. P. 14 which provides for separate trials with a showing of prejudice as a reason for granting a severance. The magistrate judge then analyzed the facts in this case, finding that the co-defendants frequented the same website containing the child pornography, were registered members, and that both defendants engaged in conduct to share and post pictures and to advertise and distribute child pornography. Thereafter, the magistrate judge determined the facts as stated in the indictment comply with those needed for a conspiracy charge, that prejudice is not likely, and determined that the motion to sever should be denied. Having carefully reviewed the findings and recommendation and the relevant law, the Court finds the magistrate's ruling should be adopted in its entirety.

THEREFORE, IT IS ORDERED THAT:

1. Defendant's motion to sever, Filing No. 102, is denied;

2. Defendant's objections, Filing No. 139, are overruled;

3. The findings and recommendation of the magistrate judge, Filing No. 137, is adopted in its entirety.

Dated this 20th day of June, 2014.

BY THE COURT:

s/ Joseph F. Bataillon
United States District Judge