UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 16-CR-64

RONALD VAN DEN HEUVEL AND
KELLY VAN DEN HEUVEL,

Defendants.

RESPONSE OF THE UNITED STATES TO THE DEFENDANTS' MOTIONS TO SUPPRESS EVIDENCE ON THE GROUND OF AN OVERBROAD WARRANT

The United States of America, by and through its attorneys, Gregory J. Haanstad, United States Attorney, and Mel S. Johnson and Matthew D. Krueger, Assistant United States Attorneys, hereby make the following response to the motions to suppress filed by Ronald Van Den Heuvel and Kelly Van Den Heuvel. (R. 98,113)

These defendants make two arguments in support of their request to suppress evidence seized in a search led by the Brown County Sheriff's Office (BSCO) on July 2, 2015. First, the defense claims that the search warrants used for these searches were overbroad because they did not sufficiently specify the items to be seized. Second, the defense argues that the execution of the warrants were unconstitutional because the extent of the search conducted greatly exceeded the scope of the warrants. This response will only address the first issue, which can be resolved on the face of the warrants. The second issue will be resolved through an evidentiary hearing, now scheduled for August 11, 2017, before the Honorable William C. Griesbach.

Further, through the evidentiary hearing and related briefing, the United States will likely present additional defenses, such as inevitable discovery, and respond to the defense's arguments about derivative use of the search warrant material. The United States therefore does not present those defenses and arguments here.

I. FACTUAL CLARIFICATIONS

Before arguing the issues having to do with the warrant, a few factual clarifications are in order.

First, on July 2, 2015, six searches were done on the basis of six search warrants issued by the Brown County Circuit Court[1]. However, all six warrants were identical but for the identification of the place to be searched and all six affidavits submitted to obtain the warrants were identical as well. With that in mind, the United States will make one unified argument meant to apply equally to all relevant search warrants.

Second, two of the six warrants and searches are apparently irrelevant so, as to them, the motions appear moot. They are the searches of 500 Fortune Avenue, DePere, Wisconsin (a facility of Eco Fibre) and 821 Parkview Drive, Ashwaubenon, Wisconsin (a storage facility). Nothing was seized from either location although photographs were taken.

Finally, page 2 of Kelly Van Den Heuvel's motion states that the government has produced approximately 193,000 pages of seized material that it intends to use at trial. That is false. As government counsel has repeatedly explained in a series of status conferences, the materials seized were provided to defense counsel not because the government planned to use them in this case but

[1] The six places to be searched were: (1 and 2) 2077 Lawrence Drive, Suite A and B, DePere, WI (3) 2107 American Boulevard, DePere, WI (4) 2303 Lost Dolphin Road, Lawrence, WI (5) 500 Fortune Avenue, DePere, WI (6) 821 Parkview Drive, Ashwaubenan, WI

because defense counsel asked to review them. The focus of these searches was on investment fraud. Government counsel has repeatedly stated that they do not plan to use much of the seized materials in any trial of this bank fraud case. Moreover, government counsel has clearly designated for defense counsel the much smaller set of materials - totaling just a few thousand pages – that have any bearing on this case and that the United States may use at trial.

II. THE WARRANTS IN THIS CASE SUFFICIENTLY PARTICULARIZED THE ITEMS TO BE SEIZED.

The Fourth Amendment to the United States Constitution requires that a search warrant particularly describe the things to be seized. As described in myriad cases, that prevents the use of a warrant for exploratory rummaging and ensures that the scope of the search will be confined to evidence relating to the crime under investigation, as to which the application should establish probable cause. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971); *United States v. Leary*, 846 F.2d 592, 600 (10th Cir. 1988). To satisfy this requirement of specificity, a search warrant "must describe the objects of the search with reasonable specificity, but need not be elaborately detailed." *United States v. Reed*, 726 F.2d 339, 342 (7th Cir. 1984). Accord, *United States v. Vitek Supply Corp.*, 144 F.3d 476, 480-481 (7th Cir. 1998). Put another way, *Vitek* cited *United States v. Schoffner*, 826 F.2d 619, 630 (7th Cir. 1987) to state that, "a warrant must explicate the items to be seized only as precisely as the circumstances and the nature of the alleged crime permit." Accord, *United States v. Wenzel*, 854 F.3d 957, 961 (7th Cir. 2017); *United States v. Cooper*, 654 F.3d 1004, 1127 (10th Cir. 2011).

In fraud cases involving searches of offices, search warrants seeking to seize a broad array of typical office records have often been upheld because of the places to be searched and the crimes being investigated. For example, in *United States v. Hills*, 618 F.3d 619, 634 (7th Cir. 2010), the

warrant authorized the seizure of all files and electronic media capable of storing business records relating to the crimes under investigation. Also, the defendants did not identify any particular evidence seized that was not authorized by the warrant. On those bases, the Seventh Circuit held that the warrant sufficiently specified the items to be seized.

Similarly, in *United States v. Gardiner*, 463 F.3d 445, 471 (6th Cir. 2006) the search warrant which was challenged broadly authorized the seizure of a wide range of categories of items typically found in an office. The Sixth Circuit noted that all those items would likely contain evidence of the bribery and extortion scheme being investigated. The search was limited by date, 1994 to the date of the search. The court held that that warrant sufficiently specified the items to be seized.

The warrants involved in the case at bar also listed a wide variety of items to be seized. Like *Gardiner* and *Hills*, these items would typically be found in an office. They would likely contain information which would constitute evidence of the investment fraud scheme under investigation which was described in the supporting affidavit. The warrant limited the search to, "the facts tending to establish the grounds for issuing a search warrant are information given under oath by Sargent Mary Schartner" (the affiant). The warrant listed ten categories of items to be seized but the largest category was item 7. That item included all business and financial records for organizations associated with Ronald Van Den Heuvel, from December 31, 2010, to the present including a large number of particular items which were specified. The crime or crimes under investigation, which help to define relevance, are clearly stated. They include theft in violation of § 943.20(1)(d) of the Wisconsin Statutes (Wisconsin's theft by fraud statute) and securities fraud under Chapter 551 of the Wisconsin Statutes. That chapter clearly states securities offenses in

§ 551.501 and resulting criminal penalties in § 551.508.

Defendant Ronald Van Den Heuvel complains that the warrants did not specify any protocol for the searching of the computers seized. A similar claim was rejected in *Hills*, 618 F.3d at 634. *Hills* cited *Dalia v. United States*, 441 U.S. 238, 257-58 (1979) to hold that the authority to determine how a warrant should be executed is best left to the officers executing the warrant. The Seventh Circuit saw no reason not to apply that rule to computers. Accord, *United States v. Norris*, 640 F.3d 295, 302 (7th Cir. 2011); *United States v. Husband*, 226 F.3d 626, 634 (7th Cir. 2000).

So, the warrants here specified items to be seized, their relevance to the crimes under investigation, and provided a timeframe for the items sought. That explicates the items to be seized as precisely as the circumstances and the nature of the crimes alleged permit. See, *Vitek*, 144 F.3d at 481.

III. THE SEARCH WARRANTS PROPERLY JUSTIFIED THE SEIZURE OF A WIDE RANGE OF MATERIALS SINCE THE BUSINESSES OF RONALD VAN DEN HEUVEL WERE PERMEATED BY FRAUD.

In *United States v. Bentley*, 825 F.2d 1104, 1110 (7th Cir. 1987) the Seventh Circuit considered a warrant to search the office of a fraudulent investment firm. The defendant argued that there was insufficient specificity in the search warrant as to the items to be seized. The court held that there were certain cases in which a warrant directing searches to take every piece of paper related to the business was sufficiently specific because the whole business was a fraud. In that case, there is probable cause to seize all business records and it is unnecessary to specify which of those records can and cannot be taken.

This approach has come to be called the "permeated by fraud" rule. *United States v. Oloyede*, 982 F.2d 133, 141 (4th Cir. 1992) held that if probable cause supports a "permeated by fraud" finding, a warrant may authorize the seizure of all documents relating to the suspected criminal endeavors. Accord, *United States v. Hurwitz*, 459 F.3d 463, 473-74 (4th Cir. 2006); *United States v. Smith*, 424 F.3d 992, 1006 (9th Cir. 2005); *United States v. Falon*, 959 F.2d 1143 (1st Cir. 1993); *see also, e.g.*, *United States v. Durham*, No. 11-CR-42, 2012 WL 1623051 (S.D. Ind. 2012) (following *Bentley* to approve a broach search of a financial firm engaged in a Ponzi scheme); *United States v. Hollnagel*, No. 10 CR 195, 2011 WL 4375891, at *9 (N.D. Ill. Sept. 20, 2011) (approving a broad search when the "[a]ffidavit establishes probable cause to believe that Defendants were engaged in an extensive, widespread scheme to defraud their investors and others").

This rule is certainly applicable in the case at bar. The affidavit used to obtain these search warrants relies on victim statements, court and government records, and statements by Mr. Van Den Heuvel's own employees to establish ample cause to believe that he conducted his business through a long series of interlocking fraudulent maneuvers (these references include the numbers of the paragraphs of the affidavit containing this information):

- Mr. Van Den Heuvel made false representations to a series of investors to get them to make large investments in his Green Box enterprise (4-12, 23, 28, 29)
- Mr. Van Den Heuvel pledged the same collateral to multiple creditors (14)
- Mr. Van Den Heuvel represented Green Box to be a functioning entity to possible investors when it was not (14, 16, 27)
- Money obtained from investors for Green Box was used by Mr. Van Den Heuvel for clearly personal expenses, not for stated purposes (13, 15, 19, 25, 26, 28)
- Those expenditures included items like alimony to his ex-wife, payments on a house for his ex-wife, payments on a Green Bay Packers luxury box, and a trip to Las Vegas (15)
- Mr. Van Den Heuvel directed his employees to make false accounting entries in order to mask his financial activities (13, 22, 27)

- In order to stall creditors, Mr. Van Den Heuvel wrote large checks that he knew had insufficient funds to cover them (17)
- He regularly withdrew money from his business entities for his own personal purposes (20, 21)
- He inflated the value of his purported assets (25)
- He knowingly made false representations in a civil suit (26)
- Mr. Van Den Heuvel transferred titles to company vehicles to his son in law in order to use as collateral to obtain loans for Van Den Heuvel's benefit (26)
- He took money out of the company but did not pay himself wages in order to avoid paying tax debts to the IRS (26)
- In that regard, he regularly failed to file required tax returns (26)

A reading of the affidavit makes it clear that Mr. Van Den Heuvel ran his businesses as a fraudulent enterprise meant to finance his high-end lifestyle with other people's money. As such, it is easy to see that his businesses were permeated by fraud, thus justifying the seizing of all of his business records.

Likewise, the affidavit provides probable cause to believe that evidence of that pervasive fraud would also be found at Van Den Heuvel's residence. The very nature of the fraud—diverting investors' and lenders' funds to personal spending—gives reason to think Van Den Heuvel would have relevant records at his home. Indeed, the affidavit notes that records and information related to financial crimes are often located a suspect's residence (39). In that vein, the affidavit recounts specific examples of personal expenditures, including payment of personal credit cards, alimony, insurance for his wife and children, and vacations, that were likely to result in records found in the home. (13, 15). Thus, the nature of the probable cause justified a broad search also of Van Den Heuvel's residence.[2]

[2] Although the United States plans to address the execution of the searches in the evidentiary hearing and related briefing, it bears noting that the searching officers seized relatively few hard-copy records from the home, along with electronic devices that could hold records. *See* Doc. 114-5 (Ex. D).

IV. THE OFFICERS EXECUTING THE SEARCH WARRANT ACTED IN GOOD FAITH RELIANCE ON A FACIALLY VALID WARRANT.

Even if we assume that there was some imperfection in the search warrant or its execution, the items found and seized would still be admissible into evidence under the "good faith" exception to the warrant requirement. In *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court modified the exclusionary rule to allow the admission of evidence obtained by officers acting in reasonable reliance upon a search warrant even if that warrant would ultimately be found to be unsupported by probable cause. Accord, *United States v. Garey*, 329 F.3d 573, 577 (7th Cir. 2003); *United States v. Koerth*, 312 F.3d 862, 868 (7th Cir. 2002). *Koerth*, at 868, noted, "an officer's decision to obtain a warrant is prima facie evidence that he or she was acting in good faith." See also, *United States v. Maxwell*, 920 F.2d 1028, 1034 (D.C. Cir. 1991) (warrant overbroad but good faith seizure upheld); *United States v. Lee*, 2015 WL 5667102 (N.D. Ga 2015) (same).

An approach which has been used by other courts was suggested in *United States v. $92,422.57*, 307 F.3d 137, 145 (3rd Cir. 2002), which stated, "Under *Leon*, if a motion to suppress evidence obtained pursuant to a warrant does not present a Fourth Amendment argument that should be decided in order to provide instruction to law enforcement or to magistrate judges, is appropriate for a reviewing court to turn "immediately to a consideration of the officer's good faith."

The Court in *Leon*, 468 U.S. at 923, felt that the exclusionary rule should not apply in such "good faith" circumstances since its application would not advance the Court's interest in deterring unconstitutional conduct. Searching agents would not be able to rely upon "good faith" only in four circumstances: (1) the affidavit contained information which the affiant knew or should have known was false; (2) the issuing Magistrate was not detached and neutral but instead traded his

judicial role for a prosecutorial one; (3) the affidavit fell so short of probable cause that no official could reasonably believe that probable cause existed; and (4) the warrant was so deficient on its face that no executing officer could reasonably presume it to be valid.

None of those circumstances are present here. There is no allegation that any information in the affidavit is false or known to be false. There is no allegation that the issuing judge, Brown County Circuit Court Judge Donald Zuidmulder, was not detached and neutral, but instead, was acting as a prosecutor. As discussed above, there is ample probable cause to believe that Ronald Van Den Heuvel and his businesses were engaged in investment fraud. But, even if this court disagrees and felt that it would not have issued this warrant, that would be a close question and there would be no reasonable basis to conclude that no judicial figure could reasonably believe that probable cause existed. Finally, there is no glaring deficiency on the face of this warrant that would signify to any executing officers that they could not reasonably presume the warrant to be valid. The defense has argued that the warrant inadequately specifies the items to be seized. Again, a comparison of the arguments of the defense and prosecution on this issue in this case makes it clear that any shortcoming with regard to specificity is less than clear, especially to a law enforcement officer executing a search warrant who is not expected to be familiar with the nuances of all of the law discussed by the attorneys in this case. *Cf. Durham*, No. 11-CR-42, 2012 WL 1623051, at *7-*8 (applying *Leon*'s good faith rule to sustain a broad warrant based upon a showing that the business was permeated with fraud).

Under the good faith doctrine explained in *Leon* and its progeny, even if this court were to find some technical defect in this warrant or its execution, there is no basis to suppress any evidence which was seized under these warrants.

V. IF THE COURT FINDS ANY LACK OF SUFFICIENT SPECIFICTY IN THESE WARRANTS, THE REMEDY IS SUPPRESSION ONLY OF INSUFFICIENTLY SPECIFIED MATERIAL, NOT ALL MATERIAL SEIZED.

In cases involving allegations that search warrants did not sufficiently specify the items to be seized, federal courts follow a doctrine of severance which allows the court to strike those portions of a warrant that lack sufficient specificity while preserving those portions that satisfy the Fourth Amendment. The *United States v. SDI Future Health, Inc.*, 568 F.3d 684, 706-7 (9th Cir. 2009). Under this approach, the materials seized under valid portions of the warrant are not suppressed unless they were seized pursuant to relatively insignificant parts of an otherwise entirely improper warrant. *SDI,* at 707. Accord, *United States v. Greene*, 250 F.3d 471, 477 (6th Cir. 2001); *United States v. Brown*, 984 F.2d 1074, 1077 (10th Cir. 1993); *United States v. Falon*, 959 F.2d 1143, 1149 (1st Cir. 1992); *United States v. Reed*, 726 F.2d 339, 342 (7th Cir. 1984).

The Tenth Circuit discussed steps to be taken to achieve severance of a warrant in situations like this. *United States v. Sells*, 463 F.3d 1148, 1155 (10th Cir. 2006):

- Divide the warrant into categories of items to be seized.
- Examine each part to determine whether it complies with the Fourth Amendment's requirement of particularization. This must be done in a non-hypertechnical common sense fashion.
- Determine whether valid parts of the warrant are distinguishable from invalid parts, or too intermingled to sever.
- Determine whether the valid portions make up the greater part of the warrant, based on their number and significance.
- Sever valid portions from invalid portions and suppress accordingly.

Applying these standards to the case at bar, it is apparent that, even if this court finds that some items named in the warrant could have been better specified, there is considerable specification on principal portions of the warrant. As discussed above, the warrant identifies a number of specific items to be seized. The crimes to which they pertain are listed. The warrants

set a time period from December 31, 2010 to the present. The warrants specify their target, "the facts tending to establish the grounds for issuing a search warrant … given under oath by Sargent Mary Schartner." The principal portion of the warrants is item 7 which lists a long number of examples of business and financial records for organizations associated with Ronald Van Den Heuvel from December 31, 1010 to the present. That item defines the essence of what these warrants sought in a way which well particularizes the items. In a case alleging fraud as the affidavits in this case certainly do, the essence of the records any search warrants would seek are business and financial records of the type specified in item 7.

In quality and quantity, the principal portion of these warrants is sufficiently specified and should this court disagree with the government's position and find a basis for some suppression, there is no basis for total suppression.

VI. CONCLUSION

For all of the reasons expressed in this response, the United States asks this court to deny the Motions to Suppress filed by Ronald and Kelly Van Den Heuvel in so far as those motions rely upon the allegation that there was insufficient specification of the items to be seized in the search warrants used in this case.

Dated at Milwaukee, Wisconsin this 14th day of July, 2017.

Respectfully Submitted,

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