UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 16-CR-64

RONALD H. VAN DEN HEUVEL,
PAUL J. PIIKKILA, and
KELLY Y. VAN DEN HEUVEL,

Defendants.

UNITED STATES' BRIEF FOR EVIDENTIARY HEARING REGARDING MOTIONS TO SUPPRESS EVIDENCE FROM BROWN COUNTY SHERIFF'S OFFICE SEARCH WARRANTS

The United States of America, by and through its attorneys, Gregory J. Haanstad, United States Attorney for the Eastern District of Wisconsin, and Mel S. Johnson and Matthew D. Krueger, Assistant United States Attorneys for said district, respectfully submits this brief in advance of the August 11, 2017 evidentiary hearing regarding the defendants' motions to suppress and return evidence seized pursuant to the Brown County Sheriff's Office's (BCSO) July 2015 search warrants. *See* Doc. 98, 102, 113. This brief provides a preview of the anticipated evidence and relevant legal authorities.

This brief first summarizes the distinct federal and BCSO investigations, and how they relate to the bank fraud charges at issue here. The federal investigations that led to the bank fraud charges proceeded largely independently of the BCSO's investigation. Indeed, the federal investigation into the Horicon Bank loans (Counts 1-13) had already gathered virtually all the relevant evidence *before* the BCSO executed its search warrants. The additional evidence from the search warrants that the United States may use at trial is comparatively minimal.

The United States has addressed the defendants' claim that the search warrants are not sufficiently particularized in a separate filing because that claim turns on the face of the warrants. *See* Doc. 121. Accordingly, this brief only summarizes the United States' arguments that the search warrants properly authorized officers to seize broad categories of material because the affidavit established that the defendants' enterprise was permeated with fraud.

Next, this brief addresses the defendants' claims that all the seized evidence should be suppressed on the grounds the officers "flagrantly disregarded" the search warrants' limits and collected material beyond its limits. As detailed below, the officers made reasonable efforts to adhere to the search warrants' limits. The large quantity of materials seized reflects not officer misconduct, but rather the pervasive, complex, and long-term nature of the defendants' fraudulent activities. Moreover, the remedy for over-collection is to suppress only the materials that fell outside the search warrant, not all the evidence.

To the extent the officers seized materials relating to the Horicon Bank fraud (Counts 1-13) that predate the search warrants' December 31, 2010 time limit, suppression is not warranted for two reasons. First, under the plain view doctrine, because the BCSO officers were aware of the federal Horicon Bank fraud investigation, they could seize documents related to that fraud to the extent the documents' relevance was apparent. Second, in all events, the federal investigators would have inevitably discovered the Horicon Bank documents because they would have approached the defendants with a subpoena or search warrant to complete their investigation. The inevitable discovery doctrine likewise would preclude suppression of documents related to the P.H. auto loan fraud (Counts 14-19) because the BCSO had obtained key witness statements regarding that scheme before executing the search warrant, thus giving investigators a basis to obtain the evidence apart from the search warrants.

FACTUAL BACKGROUND

This case arose from federal investigations regarding the defendants pursuing two schemes to defraud banks by obtaining loans through straw borrowers. Separately, the BCSO was investigating Ronald Van Den Heuvel for defrauding investors and lenders by promoting his Green Box businesses. Federal agencies also subsequently began investigating Ronald Van Den Heuvel's Green Box scheme; that investigation is ongoing and has not led to charges yet.

A. Indictment and Underlying Federal Investigation of Bank Fraud

The indictment charges two schemes to defraud banks by obtaining loans through straw borrowers: a scheme to defraud Horicon Bank (Counts 1-13) and a scheme to defraud three other financial institutions through straw borrower P.H. (Counts 14-19). *See* Doc. 52.

1. Horicon Bank Fraud

Count 1 charges Ronald Van Den Heuvel, Paul Piikkila, and Kelly Van Den Heuvel with participating in a scheme to defraud Horicon Bank from January 1, 2008 through September 30, 2009, by obtaining nine loans through six straw borrowers. Doc. 52, at 1-6. Kelly Van Den Heuvel is expressly alleged to be involved with three of those loans (two loans to KYHKJG, LLC and the loan to J.G.). Doc. 52, at 2, 5-6. Counts 2 through 13 charge Ronald Van Den Heuvel with specific executions of the scheme to defraud and false statements regarding the Horicon Bank loans. Kelly Van Den Heuvel is also charged in Counts 10 and 11 regarding the loan to her live-in nanny J.G.

The Horicon Bank fraud scheme was investigated principally by the Federal Deposit Insurance Corporation (FDIC). The FDIC's Division of Risk Management and Supervision received a complaint from Horicon Bank about Piikkila in 2010. The FDIC conducted an administrative investigation that collected the key evidence for each of the nine loans in the

Horicon Bank fraud. In 2013, the FDIC imposed an administrative sanction on Piikkila and barred him from further participation in financial institutions.

In 2013, the U.S. Attorney's Office received a referral from the FDIC Office of Inspector General (OIG) and opened a grand jury inquiry into potential criminal charges related to the Horicon Bank fraud. The FBI also assigned a case agent to assist this investigation. The investigation obtained received the evidence collected in the FDIC's administrative action against Piikkila as well as additional materials from Horicon Bank and other sources.

In April 2015, Piikkila provided the investigators with an extensive statement regarding the Horicon Bank fraud, corroborating the documents and statements from Horicon Bank regarding each of the loans in the indictment. Representatives from the Brown County District Attorney's Office attended Piikkila's interview because Piikkila worked for Van Den Heuvel after Horicon Bank fired Piikkila, and thus, Piikkila had information relevant to the BCSO's Green Box investigation. FDIC Special Agent Sara Hager is expected to testify that the investigation into the Horicon Bank fraud was almost complete before July 2015 when the BCSO executed its search warrants for its separate investigation.

The Horicon Bank fraud investigation continued through 2015 and into early 2016, interviewing additional witnesses and obtaining additional documents from financial institutions that received proceeds from the loans. In November 2015, FDIC Special Agent Sara Hager obtained copies of certain materials that the BCSO had seized during the July 2015 search warrant. On April 19, 2016, the case was presented to the grand jury, which returned the initial indictment charging the Horicon Bank fraud counts (1-13).

The United States has followed its customary discovery policies in this case. The vast majority of the discovery produced in support of the Horicon Bank fraud counts came from

Horicon Bank, other financial institutions, and witnesses. The defense is demonstrably incorrect in asserting that there are "over 193,000 pages" that the government "has indicated may be used at trial." Doc. 114, at 2. As the United States has explained repeatedly during status conferences and discussions with defense counsel, the government has identified a comparatively small amount of materials from the search warrants—approximately 3,200 pages—that have any potential relevance to this case. The actual number of documents the government will likely use at trial is far smaller because much of those 3,200 pages are duplicative or otherwise not probative of any disputed issue.

2. Straw Borrower P.H. Fraud

Counts 14 through 19 of the indictment charge Ronald Van Den Heuvel with pursuing a scheme to defraud three other financial institutions from June 10, 2013 through July 2, 2013. Ronald Van Den Heuvel arranged to have his employee (P.H.) seek loans in his name that would be for Van Den Heuvel's benefit. To make P.H. appear credit-worthy, Ronald Van Den Heuvel gave P.H. pay stubs with inflated wages and titled two Cadillac Escalades in P.H.'s name even though P.H. did not have control or custody of the vehicles. At Ronald Van Den Heuvel's direction, P.H. applied for loans from Community First Credit Union, Nicolet National Bank, and Pioneer Credit Union. All three financial institutions denied the loan applications.

The investigation that led to these charges arose from statements two witnesses gave to the BCSO in April 2015, before the BCSO executed its search warrants. Specifically, S.H. and G.L. described how Van Den Heuvel had titled the two Escalades in P.H.'s name and directed him to seek loans from banks in mid-2013. The affidavits submitted in support of the search warrants include S.H. and G.L.'s statements. *See* Affidavit ¶ 26.g. The BCSO subsequently

executed the search warrants in July 2015 and recovered certain documents related to this scheme.

In mid-2016, federal investigators commenced an investigation into this fraud scheme. They interviewed P.H. as well as S.H. and G.L. The investigators also obtained records from the financial institutions and interviewed their employees. This led to a superseding indictment, returned September 21, 2016, adding Counts 14 to 19 to the indictment. Doc. 52.

B. BCSO Investigation into Green Box Fraud

Independent of the federal investigations, the BCSO began investigating Ronald Van Den Heuvel related to his Green Box companies in approximately January 2015. The BCSO's investigation determined that Ronald Van Den Heuvel was promoting Green Box as a process for converting fast food waste into useful products without any need for landfills or waste water discharges. Van Den Heuvel induced lenders and investors to provide funding for his Green Box companies but diverted large sums to other uses, including his own personal spending.

The BCSO's investigation led to the execution of six search warrants on July 2, 2015, that were issued by Brown County Circuit Judge Zuidemulder. The affidavits established probable cause to believe that Van Den Heuvel operated pervasively fraudulent businesses. The search warrants authorized the seizure of a broad range of records, including "all business and financial records for organizations associated with Ronald Van Den Heuvel from December 31, 2010, to present."

The search warrants were executed at these locations:

1. 2077 Lawrence Drive, Suite A, an office suite used by Van Den Heuvel.
2. 2077 Lawrence Drive, Suite B, another office suite used by Van Den Heuvel.
3. 2302 Lost Dauphin Road, the Van Den Heuvel residence.

4. 2107 American Boulevard, the site of Patriot Tissue, a paper-converting operation controlled by Van Den Heuvel.

5. 500 Fortune Avenue, De Pere, WI, a facility in which Van Den Heuvel stored equipment for Eco Fibre, a Van Den Heuvel entity.

6. 821 Parkview Drive, a warehouse with equipment controlled by Van Den Heuvel.

All six warrants were identical but for the identification of the place to be searched, and all six supporting affidavits were identical as well. Nothing was seized from 500 Fortune Avenue or 821 Parkview Drive; only photographs were taken of those facilities.

The BCSO led the operations to execute the search warrants. Because the operation involved searching multiple locations for a broad range of materials, the BCSO obtained the assistance of other law enforcement agencies, including local police departments, Brown County Drug Task Force, and the FBI. On the morning of July 2, 2015, the BCSO briefed all officers involved in the search. The briefing included instructions on the nature of the investigation, the materials to be seized, and the officers' respective roles. The officers then executed the searches at the respective locations, summarized below.

1. 2077 Lawrence Drive, Suites A & B

As alleged in the search warrant affidavits, Ronald Van Den Heuvel maintained office Suites A and B at 2077 Lawrence Drive. Van Den Heuvel used that address for Green Box NA Green Bay LLC as well as other numerous other entities that he promoted to induce investments and loans, to transfer funds to avoid creditors, and to pay personal expenses. He did not operate any business that actually provided any goods or services in these suites.

The officers began searching the suites at 10:37 am. Doc. 99-3, at 11. Employees were escorted out of the premises. Because the search warrant authorized the seizure of electronic devices that could store relevant records, the officers seized such devices from the employees,

including computers, tablets, and smartphones. The officers also seized computers of the businesses. In order to seize the computers, the officers had to disconnect the computers from the network. The officers did not intentionally damage any equipment or network connections.

Within the suites, the officers encountered a large volume of records that fell within the scope of the search warrant. In many areas, documents that predated December 31, 2010, were intermingled with records that followed that date. Nonetheless, the officers did not seize all documents. The officers made reasonable efforts to review the documents and determine which fell within the search warrant. The officers also seized some physical items that had evidentiary value, including a golf bag that contained drawings and documents related to Green Box and samples of pellets and oil that Van Den Heuvel used in promotional pitches. The officers' searches of the suites lasted until approximately 7:00 p.m. *See* Doc. 99-3, at 7.

2. 2302 Lost Dauphin Road (Residence)

The officers conducted a comparatively brief search of the Van Den Heuvel residence. The search began at approximately 10:30 a.m. and concluded about two hours later. According to the search warrant return, the officers seized eleven digital devices that could hold relevant records, a briefcase with files, a checkbook, and a small amount of hard copy files. *See* Doc. 99-8, at 1.

The hard copy records seized from the residence included Green Box business plans and promotional materials, Ronald Van Den Heuvel's call logs, credit card statements, and receipts from furniture purchased with funds from an account used in the Green Box fraud. These hard copy records also included bank records and correspondence between Kelly Van Den Heuvel and banks regarding bank accounts involved in the Green Box fraud scheme. Defendants claim that the BCSO seized medical records and children's' education records. Doc. 99-7. To the

extent such records reflected billing and payment information, they fell within the search warrant as potential evidence of how ill-gotten funds were spent. The affidavit expressly notes by way of example that one victim's investment into Green Box was diverted to pay Kelly Van Den Heuvel's dental bill. *See* Affidavit, ¶¶ 26.b.

None of the records seized from the residence are among the 3,200 pages that the United States has designated as potentially relevant to this case. Thus, the United States does not intend to offer any of the records seized from the house at trial.

3. 2107 American Blvd. (Patriot Tissue)

The building at 2107 American Boulevard housed Patriot Tissue, LLC, a Van Den Heuvel-controlled entity that converted paper rolls into tissue paper products. The search warrant affidavit stated that Patriot Tissue employees were paid by Green Box NA Green Bay, LLC, and that employees would occasionally move between various entities controlled by Van Den Heuvel. The affidavit further stated that documents related to Green Box NA Green Bay were located at the Patriot Tissue facility. *See* ¶ 27. Patriot Tissue was the only Van Den Heuvel entity that actually operated, producing and selling products. *Id.*

Because Patriot Tissue was an operating business, the officers sought to minimize their search's intrusiveness. The officers imaged, rather than seized, computers that may have relevant records. The officers encountered a large volume of Van Den Heuvel's hard copy business and financial records. The officers made reasonable efforts to review the records and seize only records that fell within the search warrant. At one point, the officers determined that they had inadvertently seized several pallets of records that predated the search warrant's December 31, 2010 limit, and so the officers returned those pallets the same day.

The officers also encountered an office and living quarters occupied by Attorney Ty Willihnganz. The officers took steps not to seize records related to any entities that were not associated with Van Den Heuvel. The officers then instituted procedures to segregate any materials that arguably contained privileged communications.

The search warrant return indicates that, in total, the officers seized 9 file boxes from the front office storeroom, 2 file boxes from Willinganz's living quarters, a file box and paperwork from the front officer, and samples of oil/chemicals from the a production room.

4. The BCSO's Subsequent Review of Seized Material

Given the probable cause to believe that Van Den Heuvel was operating a pervasively fraudulent enterprise, and given the large volume of records Van Den Heuvel maintained, the BCSO ultimately seized a large volume of records and stored them in a secure warehouse at the BCSO facility. The BCSO reviewed the seized materials as part of its investigation. Given the volume and complexity of the materials, as well as the BCSO's limited resources, the review required a substantial amount of time.

C. Federal Investigation into Green Box Fraud and Review and Return of the Search Warrant Materials

In early 2015, the BCSO apprised the FBI that it was investigating Van Den Heuvel for the Green Box fraud scheme. At that time, the FBI was working with the FDIC to investigate Van Den Heuvel for the Horicon Bank fraud and allowed the BCSO to take the lead in investigating the Green Box fraud scheme. In late 2015, the FBI and the United States Attorney's Office decided to investigate the Green Box fraud scheme actively, assigning prosecutors and case agents from the Milwaukee offices. The federal investigation into the Green Box fraud is continuing, although no charges have been filed to date.

As that federal investigation progressed into 2016, the FBI took the lead in processing the materials seized by the BCSO. In June 2016, the FBI devoted significant resources to completing review of the materials. The FBI segregated materials that could have significant evidentiary value for the Green Box fraud investigation from other materials that, although potentially relevant and properly seized within the search warrant, were not significant enough to retain. The FBI took custody of the significant materials and scanned them. The United States has provided them to defense counsel in discovery. Those retained materials totaled seven pallets and approximately 313,000 pages.

In late June 2016, the Brown County District Attorney initiated discussions with defense counsel, counsel for Green Box NA Green Bay, and the United States regarding the return of materials not being retained for evidentiary value. Discussions continued through July and August 2016, partly because Ronald Van Den Heuvel changed counsel and had to determine the proper parties to take custody of the material (e.g., Green Box versus Mr. Van Den Huevel). In August 2016, the BCSO returned to defendants the materials deemed not to have evidentiary value.

LEGAL DISCUSSION

I. Standard of Review

The defendants bear the burden to show that the officers violated the Fourth Amendment. *See, e.g., United States v. Scott*, 731 F.3d 659, 663 (7th Cir. 2013). The standard of proof in a suppression case is a preponderance of evidence. *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984); *United States v. Matlock*, 415 U.S. 164, 178 n.14 (1974). Courts have applied those well-established principles to suppression motions alleging searches beyond the scope of the warrant. *See, e.g., United States v. Crawford*, 220 F. Supp. 3d 931, 936 (W.D. Ark. 2016); *United States*

v. Carson, 2012 WL 5866211, at *3 (C.D. Ill. 2012). If the Court finds that evidence was improperly seized, the United States bears the burden to prove, by a preponderance, that it would have inevitably discovered the evidence or obtained it from an independent source. *Nix v. Williams*, 467 U.S. 431, 444 (1984).

II. The Search Warrants Properly Authorized Search and Seizure of a Broad Array of Records

Defendants have challenged the validity of the search warrant as overbroad on its face. The United States has addressed that argument in a separate filing, *see* Doc. 121, and summarizes the arguments below to the extent they bear on the defendants' challenge to the officers' execution of the searches.

A. The Search Warrants Were Sufficiently Particularized

The search warrants satisfied the Fourth Amendment's particularity requirement. In fraud cases involving searches of offices, search warrants seeking to seize a broad array of 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 Seventh Circuit rejected challenges to a warrant that authorized the seizure of all files and electronic media capable of storing business records given the crimes under investigation.

Likewise, the Seventh Circuit has held that "[w]hen the whole business is a fraud, the warrant properly may permit the seizure of everything the agents find." *United States v. Bentley*, 825 F.2d 1104, 1110 (7th Cir. 1987). In *Bentley*, the defendant challenged a warrant to search the office of a fraudulent investment firm, claiming the warrant did not sufficiently specify the items to be seized. *Id.* The Seventh Circuit held that in certain cases, a warrant directing searches to take every piece of paper related to the business was sufficiently specified because the whole business was a fraud. *Id.* In such cases, there is probable cause to seize all business

and financial records and it is unnecessary to specify which of those records can and cannot be taken. *See id.*

Courts have applied this "permeated by fraud" doctrine to approve of broad search warrants when there was probable cause to believe an enterprise was fraudulent. *See United States v. Sigillito*, 759 F.3d 913, 924 (8th Cir. 2014); *see also, e.g., United States v. Smith*, 424 F.3d 992, 1006 (9th Cir. 2005); *United States v. Falon*, 959 F.2d 1143 (1st Cir. 1993); *United States v. Oloyede*, 982 F.2d 133, 141 (4th Cir. 1992); *United States v. Durham*, No. 11-CR-42, 2012 WL 1623051 (S.D. Ind. 2012); *United States v. Hollnagel*, No. 10 CR 195, 2011 WL 4375891, at *9 (N.D. Ill. Sept. 20, 2011).

This doctrine applies here because the BCSO affidavits establish ample cause to believe that Ronald Van Den Heuvel conducted his businesses through a long series of interlocking fraudulent maneuvers. To illustrate, following are facts asserted in the affidavits, with the numbers of the paragraphs 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 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)

The affidavit makes 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, his businesses were permeated by fraud, thus justifying the seizing of all of his business records.

B. The Officers Acted in Good Faith Reliance on a Facially Valid Warrant

Even if there were 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. Under *United States v. Leon*, 468 U.S. 897 (1984), the exclusionary rule does not apply to evidence obtained by officers acting in reasonable reliance upon a search warrant even if that warrant ultimately lacked 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).

None of *Leon*'s exceptions to its good-faith rule 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 was anything but detached and neutral. 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 disagreed and felt that it would not have issued this warrant, that would be a close question; without doubt, a judicial figure could reasonably believe

that probable cause existed. Finally, there is no glaring deficiency on the warrant's face that would signify to any executing officer that they could not reasonably rely on the warrant's validity. Especially given the probable cause to believe pervasive fraud existed, the executing officers could reasonably believe that the search warrant was valid. *Cf. Sigillito*, 759 F.3d at 923 (applying *Leon*'s good faith rule to sustain a broad warrant based upon a showing that the business was permeated with fraud); *Durham*, No. 11-CR-42, 2012 WL 1623051, at *7-*8 (same).

III. There Is No Basis for Blanket Suppression Because the Officers Did Not "Flagrantly Disregard" the Search Warrants' Limitations

The defendants argue that all the seized evidence should be suppressed on the ground that the officers "flagrantly disregarded" the search warrants' limitations. Doc. 99, at 20. This argument should be rejected both because blanket suppression is not an available remedy and because, in all events, the officers executed the search warrant reasonably.

A. Blanket Suppression Is Not an Available Remedy

When officers execute their search in the authorized places but seize items outside the scope of the warrant, "there is certainly no requirement that lawfully seized evidence be suppressed as well." *Waller v. Georgia*, 467 U.S. 39, 43 n.3 (1984). Rather, the remedy in such cases is to suppress only the evidence that does not fall within the warrant. *See United States v. Buckley*, 4 F.3d 552, 557–58 (7th Cir. 1993). Moreover, it is a defendant's burden to identify the evidence that he or she believes fell outside the warrant. *Id.* Thus, if defendants "wish for suppression of all the evidence, they must assert that all of the evidence was beyond the scope of the warrant." *Id.* "The seizure of uncontested evidence remains valid and is 'severable from any invalid search.'" *Id.* (quoting *United States v. Reed*, 726 F.2d 339, 342 (7th Cir. 1984)).

The defendants rely on decisions from outside the Seventh Circuit to argue that blanket suppression of all the evidence is required when officers "flagrantly disregard" the search warrant's limitations. *See* Doc. 99, at 20. Although the Seventh Circuit has not squarely decided the issue, in *United States v. Buckley*, 4 F.3d 552 (7th Cir. 1993), the Court expressly rejected the invitation to apply blanket suppression. *See id.* at 557-58. Since then, the Seventh Circuit has followed *Buckley*'s traditional approach, reserving suppression only for evidence seized outside the scope of the search warrant. *See, e.g., United States v. Klebig*, 228 F. App'x 613, 619 (7th Cir. 2007). Thus, the defendants have the burden to identify specific evidence they believe was seized outside the warrant and should be suppressed. Blanket suppression is not available.

B. Blanket Suppression Is Not Appropriate Because the Officers Did Not "Flagrantly Disregard" the Search Warrant's Limitations

Even if blanket suppression were a possible remedy, it would not be appropriate here because the officers did not "flagrantly disregard" the search warrant's limitations. The circuits that have recognized the doctrine have treated blanket suppression as an extraordinary remedy that applies "only when (1) [government agents] effect a 'widespread seizure of items that were not within the scope of the warrant,' and (2) do not act in good faith." *United States v. Shi Yan Liu*, 239 F.3d 138, 140 (2d Cir. 2000).

Accordingly, courts have applied blanket suppression rarely, in cases involving extreme circumstances of officers who willfully disregarded a search warrant and embarked on exploratory, general searches. For example, the remedy has been applied when officers holding a narrow search warrant for firearms and drugs consciously treated the warrant as authorizing a "general search," "simply seized anything of value," and sought "to turn up evidence of additional crimes." *United States v. Foster*, 100 F.3d 846, 851 (10th Cir. 1996). By contrast, even when officers collect substantial records beyond the scope of a search warrant, blanket

suppression is not warranted if the "record does not reflect a flagrant general search." *United States v. Sedaghaty*, 728 F.3d 885, 915 (9th Cir. 2013).

Whether the officers acted in "flagrant disregard" of the search warrant must be determined in light of the search warrant itself. When a search warrant authorizes officers to seize a broad array of documents, the officers act reasonably in doing so. Here, the officers searched and seized broadly because they were executing a broad search warrant, based on that type of broad probable cause. This is fundamentally different than officers who execute a narrow search warrant and willfully disregard its limits.

Even when an enterprise is not entirely permeated with fraud, courts recognize that searches for evidence of fraud schemes often will result in some over-collection. Fraud schemes frequently involve a wide array of records, and relevant records may be mixed throughout the business's files. In such instances, it is reasonable for officers to seize entire groups of files to be reviewed in closer detail off site. *See, e.g.*, *United States v. Shi Yan Liu*, 239 F.3d 138 (2d Cir. 2000) (approving seizure of entire file cabinets); *United States v. Hargus*, 128 F.3d 1358, 1363 (10th Cir. 1997) (same). For example, in *United States v. Tomkins*, officers executing a search warrant for financial documents and other records seized an entire file cabinet, which contained some records that were outside the scope of the warrant. No. 07 CR 227, 2009 WL 590237, at *6 (N.D. Ill. Mar. 6, 2009), aff'd, 782 F.3d 338 (7th Cir. 2015). The court rejected the defendant's claim that all evidence must be suppressed because "as a practical matter given the size of the cabinet, it was reasonable for the agents to search it off-site." *Id.* at *6. Such over-collection does not constitute a flagrant, general search.

Applied here, because there was probable cause to believe Van Den Heuvel's businesses were pervasively fraudulent, the officers could seize all records related to his business dealings

and misuse of funds, within the bounds of the search warrant. The warrants' most significant limitation was the date (December 31, 2010). The officers made reasonable efforts to abide by that limitation and, in fact, left behind many records that preceded that date or otherwise did not fall within the search warrant.

As it turned out, in many areas, records that preceded December 31, 2010 date were intermingled with records that followed that date. In addition, given the volume of records and the nature of the scheme, the officers could not reasonably scrutinize each record on site. Consequently, to some extent, the officers had to over-collect records and review them more carefully off-site. That over-collection was reasonable in the circumstances and did not constitute a flagrant disregard of the search warrant's limits.

After the search, the BCSO worked diligently to review the materials and segregate only the materials likely to have evidentiary value—even if other records also fell within the bounds of the search warrant and could have been retained. Given the wide-ranging, long-term, and complex nature of Van Den Heuvel's fraudulent schemes, however, the review necessarily was time-intensive. After federal law enforcement agencies decided to investigate Van Den Heuvel's Green Box fraud actively, they worked with the BCSO, devoted substantial resources to completing the review, and expedited the return of materials that did not have significant evidentiary value. In addition, the United States has made digital copies of all the retained materials available to defendants even though there have not been any charges in the investment fraud case which would require the United States to provide such discovery. In sum, given the circumstances, the officers search, seizure, and subsequent review and return of the material was eminently reasonable. At a minimum, the officers did not act in such flagrant disregard of the search warrant's limits as to justify the draconian remedy of blanket suppression.

IV. Records Seized Outside the Search Warrant Should Not Be Suppressed Because They Were in Plain View and Would Have Been Inevitably Discovered

The United States has identified approximately 3,200 pages of seized materials relating to the Horicon Bank fraud and the P.H. straw borrower fraud that it may use at trial. Some of this material predates the search warrants' December 31, 2010 date limitation. Suppression of such evidence is not appropriate, however, for two reasons. First, the officers could seize the records under the plain view doctrine. Second, in all events, the federal officers would have inevitably discovered the evidence in the course of their investigations.

A. The Records Were Seized in Plain View

Under the plain view doctrine, officers may seize an item without a warrant if (1) the officer is "lawfully located in a place from which the object can be plainly seen," and (2) the item's "incriminating character" is "immediately apparent." *Horton v. California*, 496 U.S. 128, 137 (1990). Although the doctrine often applies to contraband such as drugs, the doctrine can apply equally to records. *See, e.g.*, *Andresen v. Maryland*, 427 U.S. 463, 484 (1976) (approving officers seizure of documents related to a real estate parcel not listed in search warrant because officers were "familiar with the [defendant's] method of operation," so that the "relevance of documents pertaining" to the other lot "would have been apparent"); *United States v. Berkowitz*, 927 F.2d 1376 (7th Cir. 1991) (approving plain-view seizure of documents); *United States v. Mason*, 1993 WL 191806 (N.D. Ill. 1993) (same).

Here, although the Horicon Bank fraud was not the subject of the BCSO investigation, the BCSO was aware that the FDIC and FBI were investigating Piikkila and Ronald Van Den Heuvel for the Horicon Bank fraud. Consequently, as the BCSO officers came across documents related to the Horicon Bank fraud, the incriminating nature of the documents would have been

apparent. By virtue of the plain-view doctrine, the BCSO officers were not required to ignore that incriminating evidence but could lawfully seize it.

B. The Federal Investigators Would Have Inevitably Discovered the Records

In all events, suppression is not warranted because the federal agents would have inevitably discovered the evidence. Suppression is not required if the United States shows "by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Nix v. Williams*, 467 U.S. 431, 444 (1984). Thus, suppression does not apply if illegally seized documents would have been obtained legally pursuant to an independent investigation or subpoena. *See, e.g.*, *States v. Fialk*, 5 F.3d 250, 253 (7th Cir. 1993) (allowed evidence of Social Security fraud obtained illegally during a murder investigation to be admitted, because the documents would have been discovered during an independent investigation); *United States v. Fifer*, No. 16-2812, 2017 WL 3015843, at *4–5 (7th Cir. July 17, 2017) (denying suppression of evidence seized by a state search warrant because the evidence would have inevitably been seized by a federal search warrant).

Here, as detailed above, before the search warrant executions in July 2015, the federal investigation had already gathered the vast majority of the necessary evidence and information to prosecute the Horicon Bank fraud. Among its final investigative steps, the FDIC and FBI would have approached Van Den Heuvel directly, whether by subpoena or search warrant, for any additional evidence he had. It just so happened that the BCSO executed its search warrants first. If the BCSO had not executed its search warrants, the federal investigators would have inevitably recovered the same documents from Van Den Heuvel directly.

Similarly, for the P.H. straw borrower fraud, key witnesses S.H. and G.L. had already described the fraud to the BCSO before the search warrant was executed. When federal officers

later began investigating this scheme, they reviewed those witness statements and followed their leads, obtaining evidence from P.H. and the financial institutions as independent sources.

CONCLUSION

For the reasons given above, and for reasons to be stated in subsequent briefing after the evidentiary hearing, the United States respectfully requests that the Court deny the defendants' motions to suppress evidence and return property.

Dated at Milwaukee, Wisconsin, this 7th day of August, 2017.

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