UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. **Case No. 16 CR 64**

RONALD D. VAN DEN HEUVEL,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION FOR SEVERANCE OF COUNTS

The defendant has filed a Motion for Severance of Counts 1 through 13, from 14 through 19 and to grant separate trials. Counts 1 through 13 of the Superceding Indictment allege a fraud scheme from 2008 through 2009 during which the defendant and others purportedly secured loans from Horicon Bank by use of straw purchasers. The first 13 counts include: conspiracy to defraud the bank; the substantive acts to perpetrate the fraud; and the false statements made in order to obtain the loan funds.

Counts 14 through 19 involve a totally separate and unrelated scheme in which the defendant purportedly utilized an individual to attempt to obtain bank funds by misrepresentation. The acts are alleged to have occurred between June 10, 2013 and July 2, 2013. Neither the alleged straw purchasers nor the co-defendants from the first scheme are claimed to be involved in the second series of events. The first counts exclusively involve loan funds from

Horicon Bank, whereas the second series of counts relate to different lending institutions. In the first scheme there are no allegations of material misrepresentation about the identity of the loan applicants or the collateral to be used.

In the first scheme, the defendant is alleged to have received the funds derived from the various straw loans and to have then transferred them to his business entities. In the second series of counts, it is alleged that PH made misrepresentations about his income, the nature of his employment, and the circumstances surrounding the collateral, all in an attempt to obtain bank loans. Counts 1 through 13 are alleged to have occurred between four to five and half years before counts 14 through 19.

RULE 8(a)

F.R.Crim.P 8(a) permits joinder of multiple offenses if they are (1) the same or similar in character; (2) based on the same act or transaction; or (3) connected with or constitute parts of a common scheme or plan. In *U.S. v. Alexander*, 135 F.3d 470, 476 (7th Cir. 1998), the court held that Rule 8(a) "is a rather clear directive to compare the offenses charged for categorical, not evidentiary similarities." (quoting *U.S. v. Coleman*, 22 F.3d 126, 133 (7th Cir. 1994)). The court then held that "counts may be joined pursuant to this prong of the rule if the offenses 'are of like class,' even if they are not temporally or evidentially related." *Alexander* at 476.

In *Coleman*, the court further opined that:

> "Although Rule 8(a) speaks to nothing more than the similarity between joined counts, this court, following the lead of the eighth circuit, has opined that this kind of joinder is permitted if 'the counts refer to the same type of offenses occurring over a relatively short period of time, and the evidence as to each count overlaps.' *United States v. Koen*, 982 F.2d 1101, 1111 (7th Cir. 1992) (quoting *United States v. Shue*, 766 F.2d 1122, 1134 (7th Cir. 1985) (quoting *United States v. Rodgers*, 732 F.2d 625, 629 (8th Cir. 1984))); *see also United States v. Quintanilla*, 2 F.3d 1469, 1482 (7th Cir. 1993); *United States v. L'Allier*, 838 F.2d 234, 240 (7th Cir. 1988)." *Coleman* at 131.

The defendant maintains that the prerequisites of Rule 8(a) have not been satisfied. There are significant disparities in the two groupings; they are not connected with, nor do they constitute parts of a common scheme or plan. They are not based on the same act or transaction. Clearly, the two sets of offenses did not occur over a relatively short period of time, nor does the evidence as to each series of counts overlap for the other series.

RULE 14

Alternatively, severance should be granted and separate trials ordered to avoid the prejudice which will result from joinder of the two series of offenses. Application of the Coleman "short-period-of-time/evidence-overlap formula" necessitates severance in this case. Severance is appropriate, pursuant to Rule 14 when necessary to avoid undue prejudice. Joinder may be proper under Rule 8(a) and yet still be prejudicial. *U.S. v. Shue*, 766 F.2d 1122

(7th Cir. 1985), (holding modified by *U.S. v. Coleman*, *supra*). In *U.S. v. Turner*, 93 F.3d 276, 284 (7th Cir. 1996), the court noted:

> "We have observed that where joinder is based upon the 'similar character' of the indictment's charges, the risk of potential prejudice to the defendant from a joint trial is enhanced, and the district court must therefore be especially vigilant in monitoring the proceedings for developing unfairness." *Turner* at 284.

In *Coleman*, the court acknowledged the propriety of implementing the "short-period-of-time/evidence-overlap formula" in determining joinder severance issues. *Coleman* at 132. It further stated:

> "The short-period-of-time/evidence-overlap formula reflects a concern that the liberal joinder rule not result in the unchecked bundling of offense. It recognizes that the value of joining offenses in a particular case depends upon the extent to which real efficiencies can be realized with minimal concomitant prejudice to the conduct of a fair trial. Judicial economy and convenience are the chief virtues of joint trial - i.e. joinder often avoids expensive and duplicative multiple trials - *see Archer*, 843 F.2d at 1021; *United States v. L'Allier*, 838 F.2d 234, 240 (7th Cir. 1988), while defendant embarrassment of confoundment in presenting separate defenses simultaneously, jury cumulation of evidence, and jury inference of criminal disposition are its main vices. See *Drew v. United States*, 331 F.2d 85, 88 (D.C.Cir. 1964)." *Coleman* at 132.

In *Coleman* the court determined "it is clear that the evidentiary overlap between the joint offenses in this case was as scant as the overall temporal proximity between them was slight." *Coleman* at 132.

If separate trials occurred, the evidence necessary to prove one scheme would be inadmissible in the separate trial for the

other scheme. Similarly, the counts for one scheme would not constitute admissible evidence pursuant to F. R. E. 404(b). *See U.S. v. Quilling*, 261 F.3d 707, 715 (7th Cir. 2001) and *U.S. v. Rogers*, 475 Fd.2 821, 828 (7th Cir. 1978). If a joint trial were held there is a serious risk that the jury would consider the evidence of guilt admitted for one scheme to convict Mr. Van Den Heuvel of the second series of counts. If the jury finds that the defendant is engaged in the conduct alleged in the first series of offenses, it is likely to convict on the second series no matter how strong the court's instructions are that there must be separate consideration for each count. No curative or cautionary instruction would alleviate the prejudicial effect of joint trials.

Joinder, as has occurred in the superceding indictment, creates an improper "criminal disposition" inference which may lead the jury to believe that the defendant has propensity to commit bank fraud. As such, he would be deprived of a fair trial and would prevent the jury from making a reliable judgment about guilt or innocence. *See U.S. v. Zafiro*, 506 U.S. 534, 539-540 (1993) and *U.S. v. Rollins*, 301 F.3d 511, 518 (7th Cir. 2002).

SUMMARY

Trying both offense schemes in the same trial would be highly prejudicial to the defendant because of the disparate nature of the schemes themselves, the significant passage of time between the events; the inability to utilize the evidence of one scheme for

proof of the other in separate trials; and the grave potential that the jury will utilize the evidence adduced in support of one series for the proof of the other.

For all these reasons, the defense respectfully requests the court grant separate trials.

Dated at Milwaukee, Wisconsin this 16th day of June, 2017.

Respectfully submitted,

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