Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Criminal Case No. 15-cr-00303-RBJ

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. THOMAS FORSTER GEHRMANN, JR. and
2. ERIC WILLIAM CARLSON,

Defendants.

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ORDER

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This matter is before the Court on defendants' Joint Motion to Suppress Evidence Seized Pursuant to Search Warrants [ECF No. 34]. For the reasons discussed in this Order, the Court finds that complete suppression is appropriate.

## I. FACTS

Defendants Thomas Gehrmann Jr. and Eric Carlson, with non-defendant John Davis, owned and operated Atlas Chiropractic Center at Briargate, Inc. (Atlas) and SpineMed Decompression Centers of Colorado, LLC (SpineMed). ECF No 1 at 2.a. Atlas and SpineMed, located in Colorado Springs, Colorado, provided their patients with chiropractic and other spine-adjustment services. *Id.* The two businesses shared employees, bank accounts, and other resources. *Id.* Although Atlas and SpineMed had separate side-by-side storefronts, the businesses had no internal separating wall between their offices (Atlas/SpineMed Office). ECF No. 34-1.

On September 16, 2011 Internal Revenue Service (IRS) Criminal Investigation Special Agent Adam Rutkowski executed an affidavit in support of an application for a search warrant of the Atlas/SpineMed Office. *Id.* He asserted that he had probable cause to believe that Dr. Carlson, Dr. Gehrmann, and Dr. Davis committed crimes in violation of 26 U.S.C. § 7201 (Attempt to Evade or Defeat Tax); 26 U.S.C. § 7206(1) (Filing False Income Tax Returns Under Penalties of Perjury); 18 U.S.C. § 371 (Conspiracy); 18 U.S.C. § 1035 (False Statements Related to Health Care Matters); 18 U.S.C. § 1341 (Mail Fraud); 18 U.S.C. § 1343 (Wire Fraud); 18 U.S.C. § 1347 (Health Care Fraud); and 18 U.S.C. § 2 (Aiding and Abetting). *Id.* at 4. He believed evidence of those crimes would be located at the Atlas/SpineMed Office. *Id.*

In his affidavit, Agent Rutkowski made the following claims with respect to the health care fraud allegations:

- In December of 2007 one of Dr. Carlson's former patients called United Healthcare's fraud hotline to report Dr. Carlson for overbilling and other improper billing practices. ECF No. 34-1 at ¶ 13.

- United Healthcare (United) began an investigation into Dr. Carlson's billing practices through its Special Investigative Unit, Ingenix. *Id.* at ¶ 14. Through patient interviews it learned that Dr. Carlson overcharged clients while still billing the insurance company, improperly billed certain services, and submitted duplicate or triplicate billings. *Id.* at ¶¶ 14–16.

- United subsequently referred the matter to the Department of Regulatory Agencies (DORA), prompting state licensing authorities to investigate Dr. Carlson. *Id.* at ¶ 17.

- United also released its report of findings to the National Health Care Anti-Fraud Association. This led the Department of Labor's Employee Benefits Security Administration (DOL-EBSA) to open its own investigation. *Id.*

- On February 20, 2009 the Colorado Division of Registrations, a subsection of DORA, engaged Dr. Ben Elder to review the case. *Id.* at ¶ 29. He issued a report dated April 27, 2009 summarizing his findings. *Id.* Dr. Elder concluded in part that Dr. Carlson intentionally tried to defraud the Board of Chiropractic Examiners and billed United for non-covered treatments under different procedural codes. *Id.*

- Agent Rutkowski obtained records from other health insurance companies for medical claims submitted by Dr. Carlson, Atlas, and/or SpineMed. *Id.* at ¶ 31. Agent Rutkowski found a "similar pattern of misrepresenting the actual services provided by" Dr. Carlson. *Id.*

Agent Rutkowski's search warrant affidavit did not mention that on March 23, 2011 Dr. Carlson received a letter (the Admonition Letter) from DORA. ECF No. 34-5. It admonished Dr. Carlson for failing to "make essential entries on patient records including family and social history and appropriate intake examination information[.]" *Id.* It was "a full and final resolution of the issues raised" in DORA's investigation into Dr. Carlson, which had been prompted by the anonymous patient tip and United's investigation. *Id.* Defendants contend that Agent Rutkowski intentionally or recklessly omitted the Admonition Letter from the affidavit. ECF No. 34 at 17.

On September 16, 2011, after executing the affidavit, Agent Rutkowski obtained a warrant from Magistrate Judge Michael J. Watanabe authorizing a search of the Atlas/SpineMed Office and seizure of specified categories of evidence relating to health care fraud and tax evasion. ECF No. 34-2. Investigators executed the search on September 22, 2011 and seized patient files, business records, and other items. ECF No. 53-1. During the search, investigators learned about a separate storage unit containing business records, Storage Unit 412 (Unit 412). *Id.* Two days later Agent Rutkowski obtained a warrant for Unit 412 using the same affidavit. ECF Nos. 34 at 2, 34-3. Investigators searched the storage unit and seized business records and other items. ECF No. 53-2.

Defendants move to suppress the evidence obtained during both searches. ECF No. 34. The Court held a motions hearing on February 19, 2016 and informed the parties that the motion would be taken under advisement. ECF No. 55. In its written order, the Court granted the motion with respect to defendants' request for a *Franks* Hearing but denied the motion in all

other respects. ECF No. 56. The *Franks* Hearing took place on April 13, 2016. ECF No. 72. Defendants argue that that they have met the *Franks* standard and that complete suppression is appropriate. The government argues that defendants have not met the *Franks* standard, but if the Court finds that they have, only partial suppression is appropriate.

## II. ANALYSIS

### A. ***Franks*** **Hearing**

Defendants assert that they are entitled to suppression of the evidence obtained from the searches of the Atlas/SpineMed Office and Unit 412 because they have established by a preponderance of the evidence that Agent Rutkowski recklessly or intentionally omitted material information from the affidavit that was necessary to the magistrate judge's finding of probable cause. For the reasons discussed below, I agree.

Under *Franks v. Delaware*, 438 U.S. 154 (1978) "a defendant may request an evidentiary hearing regarding the veracity of a search warrant affidavit." *United States v. Artez*, 389 F.3d 1106, 1116 (10th Cir. 2004). Initially, there is a "presumption of validity with respect to the affidavit supporting the search warrant." *Franks*, 438 U.S. at 171. Therefore, before the defendant is entitled to a *Franks* Hearing, the defendant must make a "substantial preliminary showing" that (1) the affiant knowingly or recklessly included a false statement in or omitted material information from a search warrant affidavit; and (2) after removing the false statements and considering the omissions the affidavit no longer supports a finding of probable cause. *Id.* at 155–56; *United States v. McKissick*, 204 F.3d 1282, 1297 (10th Cir. 2000). Finally, if, at the *Franks* Hearing,

> the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause,

> the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

*Franks*, 438 U.S. at 156.

**a. Intentional or Reckless False Statements or Omissions**

Defendants assert that they have established by a preponderance of the evidence that Agent Rutkowski knowingly or recklessly misrepresented the health care fraud allegations by omitting material information relating to the Admonition Letter. For the reasons set forth below, I agree.

When DORA received information from United regarding its concerns that Dr. Carlson was double billing some of his patients, it opened an investigation into Dr. Carlson, Case Number 2008-003722. Defendants' Exhibit D. DORA hired Dr. Elder to investigate the matter. ECF No. 64-1 at 2. Dr. Elder prepared a comprehensive report detailing his concerns regarding Dr. Carlson's failure to keep adequate patient records and the potential misdiagnosis of his patients. *Id.* at 13. Regarding the allegations of double billing, Dr. Elder expressed concern that Dr. Carlson accepted cash payments while not documenting his financial transactions, however, "this aspect of the case could not be concluded with the limited documentation concerning this allegation." *Id.* at 14.

Department of Labor (DOL) Senior Investigator Christina Galeassi provided Assistant United States Attorney Jaime Pena with several documents that she had received from DORA detailing its investigation into Dr. Carlson including (1) Dr. Elder's report; (2) United's Complaint Form and Special Investigative Report; (3) the State of Colorado Report of Investigation; and (4) correspondence from Dr. Carlson's former attorney, Kent Freudenberg. Defendants' Exhibit D. Agent Rutkowski received this email and its attachments at some point in the fall of 2010. ECF No. 73 at 6:1-3. Investigator Galeassi subsequently drafted the health

care fraud portion of the affidavit and sent it to Agent Rutkowski. *Id.* at 35:13–24. That portion of the affidavit reflected the allegations detailed in the documents from DORA. Agent Rutkowski then reviewed the underlying reports to ensure that they were accurately characterized in the affidavit. *Id.* Additionally, Agent Rutkowski reviewed insurance records that he received from the DOL referencing "dates of service and types of treatment and things of that nature" to verify the information in the affidavit. *Id.* at 10:19–24.

On March 23, 2011 DORA issued an Admonition Letter to Dr. Carlson regarding this case. ECF No. 34-5 ("Re: Case #2008-003722"). It stated,

> The Colorado State Board of Chiropractic Examiners ("Board") considered the complaint against you referenced above. After consideration, it was the Board's decision not to commence with formal action, but to issue this Letter of Admonition pursuant to its authority in § 12-33-117(1), C.R.S.
>
> The Board finds that you did not make essential entries on patient records including family and social history and appropriate intake examination information, which violates Board Rule 22.
>
> On the basis of the above finding, the Board hereby admonishes you and warns you that repetition of such conduct may lead to imposition of more severe disciplinary sanctions. This Letter of Admonition is a disciplinary action that will be reflected in the Board's records and is information that is available to the public.
>
> This Letter of Admonition is a full and final resolution of the issues raised in Case Number 2008-003722. This Letter of Admonition does not resolve any other cases, complaints, or matters that are unknown to the Board or Respondent, as of the Effective Date of this Letter of Admonition.
>
> Pursuant to agreement with the Board, you have agreed to waive the right provided by § 12-33-119(a), C.R.S., to contest this Letter of Admonition through a formal disciplinary proceeding and appeal.

*Id.* The letter was signed by Dino Ioannides, the Section Director of the Board of Chiropractic Examiners. *Id.*

On May 9, 2011 Investigator Galeassi informed Agent Rutkowski that the Admonition Letter was available on DORA's website, and Agent Rutkowski downloaded it on approximately the same date. ECF No. 73 at 11:12–12:10; Defendants' Exhibit G. He recognized that the letter was potentially significant. ECF No. 73 at 57:5–6. In deciding whether to include the letter in the search warrant affidavit he read it thoroughly, studied the statutes referenced within it, and made his on-the-job trainer, Jerry Burke, aware of it. *Id.* at 56:25–57:6. However, at the *Franks* Hearing he testified that he ultimately decided not to include the Admonition Letter in the affidavit for the following reasons: (1) it was a "letter of punishment issued by a state licensing authority, answering the question whether or not Eric Carlson should be allowed to continue practicing chiropractic[;]" (2) it was a "settlement letter[;]" and (3) "it had no bearing on any criminal investigation that [Agent Rutkowski] was doing." *Id.* at 41:5–17. Instead of including the Admonition Letter, Agent Rutkowski "included the underlying documents that went along with that investigation that the state board was conducting[,]" including Dr. Elder's report, United's Investigative Report, and the Ingenix Report. *Id.* at 41:3–23.

The Court finds that Agent Rutkowski's first explanation for not including the Admonition Letter in the affidavit—that it was a "letter of punishment"—is not credible. First, when the Court asked whether he would have included the letter "[i]f the DORA investigation had resulted in suspension of Dr. Carlson from the practice of chiropractic for some period," Agent Rutkowski answered, "Yes." *Id.* at 59:13–16. The Court recognizes that Agent Rutkowski was not required to include every piece of incriminating evidence in his affidavit; however, he gave no explanation for why he would exclude "a letter of punishment" admonishing Dr. Carlson but include "a letter of punishment" suspending Dr. Carlson. Second, Agent Rutkowski included a myriad of other inculpatory allegations in the search warrant

affidavit. Similarly, he gave no explanation for why he would exclude the inculpatory Admonition Letter but include the other inculpatory information.

Regarding Agent Rutkowski's second explanation for not including the Admonition Letter in the affidavit, the Court recognizes that in some sense the Admonition Letter is a "settlement letter." The letter states, "Pursuant to agreement with the Board, you have agreed to waive the right provided by § 12-33-119(a), C.R.S., to contest this Letter of Admonition through a formal disciplinary proceeding and appeal." ECF No. 34-5. However, in simply concluding that a settlement letter would not be material to the magistrate judge's probable cause determination, Agent Rutkowski recklessly disregarded the fact that in settling this case, DORA did not sustain the health care fraud charges that it investigated.

Finally, the Court finds that Agent Rutkowski's third justification for not including the Admonition Letter in the affidavit—that it had no bearing on his criminal investigation—also lacks credibility. In support of this justification, Agent Rutkowski testified,

> So to me this is akin to what happened to us in—let's just say we were doing just a traditional IRS investigation. It's not at all uncommon for the civil side of IRS to make a decision about particular parties that the criminal investigation side of the IRS decides in a contrary manner. We have different information. We have access to different pieces of evidence.

ECF No. 73 at 57:9–15. However, in this case, Agent Rutkowski did not have different information. The health care fraud allegations in the search warrant affidavit—with the exception of Agent Rutkowski's verification of "dates of service and types of treatment and things of that nature"—were available to, and in fact acquired from, DORA. Therefore, it is pertinent that DORA examined and investigated those allegations and did not sustain the health care fraud charges.

Agent Rutkowski knew that the information he received from Investigator Galeassi and subsequently included in the affidavit related to health care fraud came from DORA's

investigation. Defendants' Exhibit D; ECF No. 73 at 5:1–3. Additionally, Agent Rutkowski made a calculated decision not to include the Admonition Letter, in which DORA fully and finally resolved its case against Dr. Carlson, in the affidavit. ECF No. 73 at 41:5–17. And, as discussed above, the Court finds that his justifications for doing so are not credible. The Court therefore concludes that Agent Rutkowski misrepresented the health care fraud allegations as though they had not yet been resolved and omitted the Admonition Letter with the intent to mislead—or, at the very least, with a reckless disregard of whether it would mislead—the magistrate judge.

**b. Probable Cause**

Furthermore, defendants have established by a preponderance of the evidence that the magistrate judge would not have issued the search warrants had Agent Rutkowski faithfully represented the facts in his affidavit. Where a search warrant affidavit contains intentional, knowing, or reckless misstatements, the court must strike the misstatements "and assess the affidavit without them." *United States v. Herrera*, 782 F.3d 571, 575 (10th Cir. 2015). Alternatively, where an "affidavit contains intentional, knowing, or reckless omissions, a court must add in the omitted facts and assess the affidavit in that light." *Id.* However, the Tenth Circuit has recognized that

> acts and omissions are often but two sides of the same coin and the one can be (re)cast as the other. But whether we're talking about acts or omissions the judge's job is much the same—we must ask whether a warrant would have issued in a but-for world where the attesting officer faithfully represented the facts. If so, the contested misstatement or omission can be dismissed as immaterial. If not, a Fourth Amendment violation has occurred and the question turns to remedy.

*Id.* (internal citations omitted).

Here, as discussed above, Agent Rutkowski misrepresented the health care fraud allegations by not disclosing that DORA had investigated the allegations presented in his

affidavit—with the exception of his own review of health insurance records detailing dates of service and types of treatment—and resolved them. ECF No. 73 at 10:19–24; ECF No. 34-1 at ¶ 31. He made no mention of the Admonition Letter. Thus, after excising the misstatements and correcting the omissions, this Court must ask whether the corrected affidavit supports a finding of probable cause. *United States v. Garcia–Zambrano*, 530 F.3d 1249, 1254 (10th Cir. 2008). "Probable cause exists when the supporting affidavit sets forth facts that would lead a prudent person to believe there is a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Brinlee*, 146 F. App'x 235, 238 (10th Cir. 2005). The Court finds that had the affidavit explained that DORA had investigated the health care fraud allegations, subsequently decided not to sustain the health care fraud charges, and issued the Admonition Letter, then that information would have vitiated probable cause to search the Atlas/SpineMed Office and Storage Unit 412 for evidence of that crime. Put another way, these material misstatements and omissions "would have altered the magistrate judge's probable cause determination." *United States v. Kennedy*, 131 F.3d 1371, 1377 (10th Cir. 1997).

The government originally argued that defendants could not satisfy the second step in the *Franks* analysis because even if the Court were to excise all of the allegations of health care fraud, the affidavit contained sufficient evidence of tax evasion to establish probable cause for the searches. [1] ECF No. 42 at 21. The Court expressed concerns about the government's stance because it would allow a warrant to be upheld so long as the affidavit contained probable cause to search a location for evidence of any *one* crime, notwithstanding the warrant's over breadth

[1] As described above, the second step of the *Franks* analysis asks whether the affidavit's remaining content—once the court has excised the misstatements and corrected the omissions—is sufficient to establish probable cause. If the answer to that question is "yes," then the Court should deny the defendant's motion to suppress. In all of the cases performing this analysis that this Court has studied, the affidavit sought to establish probable cause of a single crime. Thus, in such cases, this "all or nothing" approach to the probable cause determination makes sense. Here, however, the affidavit was designed to establish probable cause of two crimes—health care fraud and tax evasion.

due to the affiant's misrepresentations as to probable cause of other crimes. As explained in more detail in this Court's previous order, that result could run into conflict with the Fourth Amendment's guarantee that no warrants shall issue "but upon probable cause, supported by Oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized*." U.S. Const. amend. IV (emphasis added); ECF No. 56. Therefore, the second step of the *Franks* analysis must be satisfied when the defendant establishes by a preponderance of the evidence that the misstatements or omissions vitiate probable cause of any one crime for which the search warrant authorizes a search.

After performing the *Franks* analysis, the Court is left with an affidavit that sets forth facts establishing probable cause of tax evasion, but not health care fraud, and a warrant that authorizes a search for evidence of both. The next question facing the Court then is whether complete or partial suppression is the appropriate remedy. The government asserts that partial suppression is appropriate because of the severability doctrine set out in *United States v. Sells*, 463 F.3d 1148 (10th Cir. 2006). ECF No. 73 at 93:24–94:5. On the other hand, defendants argue that the *Sells* severability doctrine applies only to general probable cause or particularity challenges, but not to a *Franks* challenge involving government misconduct. *Id.* at 99:13–18. As far as this Court can ascertain, the Tenth Circuit has not addressed this issue.

However, there are several reasons to believe that the severability doctrine does not apply to a *Franks* challenge. First, several circuits, including the Tenth Circuit, have recognized that the severability doctrine does not apply when police act in bad faith.[2] *United States v. Pitts*, 173

[2] Specifically, courts are concerned with the careless administration of the severability doctrine which might tempt police to frame warrants in general terms with a "few specific clauses in the hope that under the protection of those clauses they could engage in general rummaging through the premises and then contend that any incriminating evidence they recovered was found in plain view during the search for the particularly-described items." *United States v. Fitzgerald*, 724 F.2d 633, 637 (8th Cir. 1983). Defendants

F.3d 677, 681 n.5 (8th Cir. 1999) ("the doctrine of severability does not apply when police act in bad faith or add locations to a warrant as a pretext to conduct otherwise impermissible searches"); *United States v. Freeman*, 685 F.2d 942, 952 (5th Cir. 1982) ("a use of severance to work 'an abuse of the warrant procedure, of course, could not be tolerated'"); *Sells*, 463 F.3d at 1162 (citing *Pitts*, 173 F.3d at 681 n.5 for the proposition that severability does not apply when police act in bad faith). Courts have equated an affiant's misconduct in knowingly or recklessly misstating or omitting material information in a search warrant affidavit to "bad faith." *United States v. Carrillo*, 123 F. Supp. 2d 1223, 1252 (D. Colo. 2000), *aff'd sub nom. United States v. Hinojosa Gonzalez*, 68 F. App'x 918 (10th Cir. 2003). Second, the *Sells* court recognized that

> [p]artial suppression pursuant to the severance doctrine is more consistent with the purposes of the exclusionary rule than total suppression because "[t]he cost of suppressing all the evidence seized, including that seized pursuant to the valid portions of the warrant, is so great that the lesser benefits accruing to the interests served by the Fourth Amendment cannot justify complete suppression." . . . ("[I]t would be harsh medicine indeed if a warrant which was issued on probable cause and which did particularly describe certain items were to be invalidated in toto merely because the affiant and magistrate erred in seeking and permitting a search for other items as well.").

463 F.3d at 1155 n.3. The *Sells* court was describing cases where there was no evidence suggesting that "any of the officers' actions constituted the sort of 'flagrant disregard' for the Fourth Amendment or the permissible scope, duration, and intensity of the search under the redacted warrant that would require the 'extreme remedy' of total suppression." *Id.* at 1162. At least in this Court's view, where the affiant misrepresented or omitted material information from the search warrant affidavit with the intent to mislead the magistrate judge or in reckless disregard of the risk of misleading the magistrate judge, the "harsh medicine" of total suppression is deserved.

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do not claim that that specific kind of bad faith—misconduct relating to the particularity requirement—occurred here.

However, this Court need not decide whether the severability doctrine applies to a *Franks* challenge because even if it does apply, severability is not appropriate here. The *Sells* court held that severability "applies only if the valid portions of the warrant [are] sufficiently particularized, distinguishable from the invalid portions, and make up the greater part of the warrant." 463 F.3d at 1151 (internal citation and quotations omitted). In this case, the valid portions of the warrant (tax evasion) are not completely distinguishable from the invalid portions of the warrant (health care fraud). Agent Rutkowski's testimony at the *Franks* Hearing illustrates this point. When asked whether "applications, contracts, agreements, correspondence to and from, unopened mail, travel records, including tickets and receipts" were being sought in connection with the health care fraud portion of the affidavit or the tax portion, Agent Rutkowski responded, "Both." ECF Nos. 73 at 27:17-24; 34-2 at 5. Further, when asked about paragraphs 8, 10, 14, 15, and 20 of the affidavit (and corresponding warrants) identifying "items to be seized," Agent Rutkowski indicated that these items were also being sought in connection with both the health care portion of the affidavit and the tax portion. ECF No. 73 at 27:17–29:7. Furthermore, this Court cannot say that the tax portion makes up the greater part of the warrant. Thus, the severability doctrine does not apply.

In sum, this Court finds that defendants have established by a preponderance of the evidence that the affiant knowingly or recklessly misrepresented and omitted material information from the search warrant affidavit, and that the corrected affidavit is insufficient to establish probable cause to search for evidence of health care fraud. Assuming without deciding that the severability doctrine applies to a *Franks* challenge, severability is not applicable in this case. Therefore, partial suppression is not appropriate. The search warrants must be voided completely and the fruits of the searches suppressed in their entirety.

## III. ORDER

Defendants' motion to suppress [ECF No. 34] is GRANTED. Defendants' Supplemental Motion to Suppress Evidence Based on Newly Discovered Material Misrepresentations Contained in the Affidavit in Support of Search Warrant [ECF No. 76] is DENIED AS MOOT.

DATED this 25th day of April, 2016.

BY THE COURT:

R. Brooke Jackson
United States District Judge