UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellant, v. THOMAS FORSTER GEHRMANN, JR.; ERIC WILLIAM CARLSON, Defendants - Appellees.	No. 16-1208 (D.C. Nos. 1:15-CR-00303-RBJ-1 and 1:15-CR-00303-RBJ-2) (D. Colo.)

ORDER AND JUDGMENT*

(Filed Apr. 24, 2018)

Before **HOLMES**, **MURPHY**, and **PHILLIPS**, Circuit Judges.

During a criminal investigation into two chiropractors, Thomas F. Gehrmann, Jr. and Eric William Carlson (collectively, "Defendants"), the government obtained warrants to search Defendants' businesses and associated storage facility for evidence supporting

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

allegations of criminal tax offenses and healthcare fraud. In support of the warrants, a federal agent furnished a forty-three page probable-cause affidavit; it outlined the government's existing evidence, described certain aspects of independent investigations that had been conducted by other entities, including a state regulatory body, and concluded with the agent's opinion that probable cause existed to believe that Defendants committed various criminal tax and healthcare-fraud offenses and that evidence of those offenses would be found at certain identified locations. A few months earlier, the Colorado Department of Regulatory Agencies ("DORA") had investigated similar allegations of healthcare fraud against Dr. Carlson, and had ultimately issued an admonition letter ("Admonition Letter") that made no mention of the healthcare-fraud allegations. Rather, DORA's Admonition Letter noted Dr. Carlson's failure to "make essential entries on patient records," but declined, largely without explanation, to pursue any "formal action." In crafting the probable-cause affidavit, the agent mentioned DORA's underlying investigation into allegations of healthcare fraud, but omitted any reference to DORA's Admonition Letter.

During the warrants' execution, federal agents and investigators seized responsive materials, and a federal grand jury subsequently charged Defendants with seven separate criminal tax offenses but, notably, no healthcare-fraud offenses. In advance of trial, Defendants moved to suppress the seized evidence and

requested a *Franks* hearing,[1] arguing that the federal agent intentionally or recklessly omitted from his affidavit DORA's Admonition Letter and that the warrant would not have issued if that correspondence had appropriately been included.

The government opposed suppression. Following a *Franks* hearing, the district court found DORA's Admonition Letter material to the probable-cause determination for the suspected healthcare offenses but not the tax offenses. It further concluded that the invalid healthcare portions of the warrants were not severable from the valid tax portions, and suppressed *all* evidence seized under the warrants. The government filed this interlocutory appeal from this suppression ruling, attacking the district court's materiality and severability determinations, but not the court's antecedent conclusion that the agent intentionally or recklessly omitted DORA's Admonition Letter.

Exercising jurisdiction over this appeal pursuant to 18 U.S.C. § 3731, we **reverse** the district court's suppression order on materiality grounds, and **remand** for further proceedings.

I

Drs. Gehrmann and Carlson, along with a nonparty John Davis ("Dr. Davis"), owned and operated Atlas Chiropractic Center at Briargate, Inc. ("Atlas") and SpineMed Decompression Centers of Colorado, LLC

[1] *See Franks v. Delaware*, 438 U.S. 154 (1978).

("SpineMed")—two adjacent chiropractic businesses with separate storefronts, but shared internal office space, employees, bank accounts, and other resources.

In December 2007, a former patient of Dr. Carlson called United Healthcare's ("United") fraud hotline to report Dr. Carlson for overbilling, among other allegedly improper practices. United's special investigative unit, Ingenix, initiated an investigation into Dr. Carlson, Atlas, and SpineMed, ultimately identifying a number of alleged billing improprieties—namely, requiring up-front payment for covered services and submitting duplicate or triplicate billings for certain services. In the end, "Ingenix's analysis disclosed" that Dr. Carlson, Atlas, and SpineMed received "a total of $460,338.10" due to various billing "misrepresentations." Aplt.'s App., Vol. I, at 64 (Rutkowski Aff., dated Sept. 16, 2011).

Ingenix referred these investigative findings to DORA, which opened an investigation and retained Dr. Ben Elder as an investigator. In that capacity, Dr. Elder reviewed eleven patient files and authored a comprehensive report detailing his concerns about Dr. Carlson's failure to maintain adequate patient records, and the evidence that "Dr. Carlson potentially misdiagnosed patients." *Id.* at 275 (Elder Report, dated Apr. 27, 2009). As for allegations of double billing by Dr. Carlson, Dr. Elder explained that the ostensible scheme "involved the patient paying cash to Dr. Carlson, as well as him receiving insurance reimbursement . . . for the same services," without redistributing the "alleged insurance payments . . . to the patients." *Id.* Given "the

limited documentation concerning [Dr. Carlson's financial transactions]," however, Dr. Elder found that "this aspect of the case could not be concluded." *Id.* at 276. Nonetheless, Dr. Elder expressed his belief that, given the "great deal of essential documentation that was missing from every file reviewed in th[e] case[,]. . . . Dr. Carlson and/or his attorney were intentionally trying to defraud [DORA]." *Id.* at 275. He suggested that Dr. Carlson's "absolute[ ]" failure to maintain financial records "warrant[ed] possible consultation with the Internal Revenue Service," *id.* at 276. Indeed, Dr. Elder encouraged DORA to "pass [his findings] along to the appropriate authorities." *Id.*

DORA subsequently provided Investigator Galeassi, a Senior Investigator with the Department of Labor ("DOL"), several documents regarding DORA's investigation into Dr. Carlson, including Dr. Elder's report. Upon receipt, Investigator Galeassi forwarded the materials to the U.S. Attorney's Office. *See* Aplt.'s App., Vol. I, at 144–45 (Letter from Investigator Galeassi to an Assistant U.S. Attorney, dated May 14, 2009). Agent Rutkowski, a Special Agent with the Internal Revenue Service ("IRS") Criminal Investigation Unit, appears to have received the DORA investigative documents in the fall of 2010. After that, the DOL and the IRS proceeded with a joint investigation into Dr. Carlson—and, ultimately also Dr. Gehrmann, Atlas, SpineMed, and non-party Dr. Davis—with Investigator Galeassi focusing on the healthcare-fraud aspect of the investigation, while Agent Rutkowski focused on the tax-fraud dimension.

On March 23, 2011, DORA issued an Admonition Letter to Dr. Carlson. *Id.* at 147 (Letter of Admonition, dated Mar. 23, 2011). DORA indicated that it was doing so in lieu of initiating a "formal action" against Dr. Carlson. *Id.* In the single-page letter, DORA found that Dr. Carlson violated DORA regulations, by failing to "make essential entries on patient records including family and social history and appropriate intake examination information." *Id.* Pointing only to issues with patient documentation—and, importantly, without mentioning the healthcare-fraud allegations that gave rise to the investigation—DORA "admonishe[d] [Dr. Carlson] and warn[ed] [him] that repetition of such conduct [might] lead to imposition of more severe disciplinary sanctions." *Id.* Finally, DORA described the Admonition Letter as "a full and final resolution of the issues raised" in DORA's investigation—but not "any other cases, complaints, or matters"—and stated that, "[p]ursuant to an agreement with [DORA]," Dr. Carlson had "agreed to waive the right . . . to contest th[e] Letter of Admonition through a formal disciplinary proceeding and appeal." *Id.*

Shortly thereafter, on September 16, 2011, Agent Rutkowski executed a forty-three page probable-cause affidavit as part of a search-warrant application for Atlas's and SpineMed's office. At the outset of the affidavit, Agent Rutkowski detailed the outstanding investigation into Drs. Carlson and Gehrmann, and their affiliated businesses, Atlas and SpineMed, for possible violations of the following criminal statutes: (1) 26 U.S.C. § 7201 (Attempt to Evade or Defeat Tax);

(2) 26 U.S.C. § 7206(1) (Filing False Income Tax Returns Under Penalties of Perjury); (3) 18 U.S.C. § 371 (Conspiracy); (4) 18 U.S.C. § 1035 (False Statements Related to Health Care Matters); (5) 18 U.S.C. § 1341 (Mail Fraud (Frauds and Swindles)); (6) 18 U.S.C. § 1343 (Wire Fraud); (7) 18 U.S.C. § 1347 (Health Care Fraud); and (8) 18 U.S.C. § 2 (Aiding and Abetting).[2]

As the basis for these alleged violations, Agent Rutkowski traced the investigation from its beginning, starting with the initial "patient complaint regarding double billing," Aplt.'s App., Vol. I, at 63, Ingenix's investigation and finding, *see id.* at 64, and the subsequent referral of Ingenix's "investigative findings" to DORA, *id.* at 65. Turning then to the results of the investigative subpoenas, Agent Rutkowski stated that a review of Defendants' financial documents—specifically, their personal bank accounts, personal tax returns, and corporate tax returns—revealed that Defendants took part "in a conspiracy to divert corporate receipts from medical patients into their various

[2] In separate attachments, Agent Rutkowski listed the locations to be searched, Atlas and SpineMed, and described the items to be seized—a wide array of financial, business, and patient records. The thirty-one point description of items to be seized included some items seemingly relevant only to tax fraud, others that appeared to relate solely to healthcare fraud, and then some categories of information that were arguably relevant to both offenses. During the *Franks* hearing, Agent Rutkowski expressed his opinion on how to characterize certain categories of seized items. Nonetheless, because we resolve this appeal on materiality grounds, we need not—and thus do not—determine the appropriate characterization of each category of seized evidence, as we would if we were obliged to conduct a severability analysis.

personal bank accounts, for the purpose of Tax Evasion." *Id.* Agent Rutkowski explained that:

> A review of the deposited checks indicate[d] [that] patients [were] given instructions to make the checks payable to a specific doctor. On some of the checks, the patient started to make the check payable to the business, but then crossed out the name of the business and made the check payable to the doctor. It also appears that someone made a designation on the top portion of many of the checks, writing the letter "C", "D", or "G" along with other miscellaneous alpha characters.

Id. at 66. Marrying these checks to the bank account statements of Atlas, SpineMed, and Defendants, Agent Rutkowski classified "the money being deposited into the various personal bank accounts . . . as a 'corporate diversion'" because Atlas and SpineMed "never recorded [the checks] in the books" and Defendants did "not report[]" them "on their individual tax returns." *Id.*; *see also id.* at 69 (estimating the amounts of diverted funds). Against that backdrop, Agent Rutkowski claimed probable cause to believe that Defendants committed various criminal tax-fraud offenses, and that evidence of these offenses would likely be uncovered at the offices of Atlas and SpineMed.

Under a separate heading titled "***Federal Health Care Benefit Programs: Employee Benefit Plans***," Agent Rutkowski offered further information regarding

DORA's investigation.[3] *Id.* at 70. Focusing on the allegations of healthcare fraud, Agent Rutkowski recounted United's investigation, through Ingenix, and Dr. Elder's report (discussing it in considerable detail over several pages). Agent Rutkowski ultimately relied on the findings of both investigations (i.e., of Ingenix and Dr. Elder) in averring that Dr. Carlson exhibited a "pattern of misrepresenting the actual services [he] provided" in connection with insurance reimbursement, *id.* at 77. Importantly, however, Agent Rutkowski made no mention of the "full and final resolution" embodied in DORA's Admonition Letter—"a disciplinary action" that DORA took nearly six months before Agent Rutkowski executed his affidavit. *Id.* at 147. Nonetheless, as in the tax-offenses portion of the affidavit, Agent Rutkowski stated his view that there was probable cause to believe that the offices of Atlas and SpineMed contained evidence of the specified healthcare offenses.

A magistrate judge issued the search and seizure warrant on the same day, and Agent Rutkowski (along with other agents from the IRS and the DOL) executed the warrant on September 22, 2011, seizing patient files, business records, and the like. During the search, the agents learned of a separate storage unit, containing additional business records. Relying on the same

[3] Although not apparent from the face of the affidavit, Investigator Galeassi drafted the healthcare-related allegations, and provided them to Agent Rutkowski for incorporation into a single affidavit concerning both sets of alleged offenses (i.e., tax and healthcare).

underlying affidavit (including its attachments), Agent Rutkowski obtained an additional warrant to search the storage unit and, there, seized responsive materials.

On July 22, 2015, a federal grand jury returned a seven-count indictment, charging Drs. Carlson and Gehrmann each with one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and three counts each of filing false tax returns, in violation of 26 U.S.C. § 7206(1). Notably, the indictment did not charge the Defendants with healthcare-fraud offenses.

Following the indictment, Defendants moved "to suppress [any and all] evidence recovered pursuant to the search of their place of business and related storage unit," *id.* at 33 (Defs.' Mot. to Suppress Evid., filed Nov. 9, 2015), on the theory, as relevant here, that Agent Rutkowski premised his probable-cause affidavit principally "upon the DORA allegations and investigation," *id.* at 52; *see also id.* at 41–43, but "[a]t no time. . . . explain[ed] that ultimately the DORA matter resolved with findings that most of the initial accusations were unfounded," *id.* at 51–52. Pressing this position, Defendants argued that Agent Rutkowski's "fail[ure] to provide a full, fair and frank picture" of DORA's investigation cast doubt on the overall veracity of his affidavit, *id.* at 52, requiring a *Franks* hearing and ultimately the suppression of all evidence "obtained pursuant to the warrants issued based on th[e] affidavit," *id.* at 53; *see also id.* at 176–96 (Defs.' Reply to Mot. to Suppress Evid., filed Jan. 29, 2016)

(restating Defendants' position on the materiality of the DORA letter, and asserting that the affidavit failed to establish probable cause for any tax or healthcare offenses). Opposing Defendants' motion, the government countered, in relevant part,[4] that Agent Rutkowski "accurately recounted the genesis of the DORA proceeding as to defendant [Dr.] Carlson and Atlas," *id.* at 172 (Gov't's Opp'n, filed Nov. 20, 2015), and asserted that Agent Rutkowski's "innocent" omission of DORA's Admonition Letter was immaterial to the magistrate judge's probable-cause determination, *id.* at 173–74. In any event, the government reasoned that DORA's Admonition Letter would have "no relevance" to the probable-cause showing regarding the alleged tax violations. *Id.* at 173.

The district court decided that Defendants had made a sufficient showing to warrant a *Franks* hearing and conducted it on April 13, 2016. The court received testimony from Agent Rutkowski concerning the preparation of his probable-cause affidavit, along with follow-up legal argument. Briefly recounted, Agent Rutkowski testified that he knew of and had reviewed DORA's Admonition Letter during his preparation of the affidavit, and acknowledged that, though he

[4] Aside from contesting the merits of Defendants' suppression motion, the government challenged Defendants' "standing" to contest the warrants, asserting that Defendants lacked a reasonable expectation of privacy in the searched commercial premises. Aplt.'s App., Vol. I, at 155–59. The district court rejected the government's position, and the government mounts no challenge to this determination on appeal. Thus, we deem any such argument to be abandoned and, thus, waived here.

"included the underlying documents that went along with [DORA's] investigation," he elected not to include the resulting Admonition Letter. *Id.*, Vol. II, at 319 (*Franks* Hr'g Tr., dated Apr. 13, 2016).

Nonetheless, Agent Rutkowski attempted to explain away his omission of the Admonition Letter on the following grounds: *first*, he viewed the correspondence as a "settlement letter" or "letter of punishment" with "no bearing on any criminal investigation," *id.*; *accord id.* at 332; *second*, he emphasized that Investigator Galeassi acted as "the primary input mechanism" for the healthcare-related (and thus, presumably, DORA-related) allegations, *id.* at 319–20; and *finally*, he stated that the admonition letter was "ultra vague," in that "[i]t [didn't] tell [him] much about the investigation, the character of it, [or] what happened," *id.* at 335. Rather, he viewed the underlying materials as the "original" and "best" method of "present[ing] [the magistrate judge] with the facts and circumstances behind the investigation." *Id.* at 337.

On April 25, 2016, the district court granted Defendants' suppression motion, making two findings relevant to our disposition. First, the district court concluded 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." *Id.* at 390 (Order, filed Apr. 25, 2016). And, second, the district court found the omission of the letter to be material, because an

explanation that "DORA had investigated the health care fraud allegations, subsequently decided not to sustain the health care fraud charges, and issued the Admonition letter . . . *would have vitiated probable cause* to search the Atlas/SpineMed Office and Storage Unit . . . for evidence of *that* crime," i.e., healthcare fraud. *Id.* at 391 (emphases added). The district court concluded, however, that the affidavit "set[ ] forth facts establishing probable cause of tax evasion," *id.* at 392, but ultimately deemed "the valid portions of the warrant (tax evasion)" inseverable "from the invalid portions of the warrant (health care fraud)," *id.* at 394.[5] Accordingly, the district court reasoned that "[t]he search warrants must be voided completely and the fruits of the searches suppressed in their entirety." *Id.* The government timely filed this interlocutory appeal from the suppression ruling.

III

Under *Franks v. Delaware*,

> [w]e exclude evidence discovered pursuant to a search warrant when (1) a defendant proves by a preponderance of the evidence "the

[5] In reaching the severability determination, the district court questioned "whether the severability doctrine applies to a *Franks* challenge," and construed the affidavit as comprised of valid and invalid "portion[s]" but without specifying any dividing line. Aplt.'s App., Vol. II, at 394. The parties substantively discuss these findings on appeal, but our resolution of this appeal on materiality grounds obviates the need to resolve these severability questions.

> affiant knowingly or recklessly included false statements in or omitted material information from an affidavit in support of a search warrant and (2) after excising such false statements and considering such material omissions we conclude the corrected affidavit does not support a finding of probable cause."

United States v. Campbell, 603 F.3d 1218, 1228 (10th Cir. 2010) (alterations omitted) (quoting *United States v. Garcia–Zambrano*, 530 F.3d 1249, 1254 (10th Cir. 2008)); *see also United States v. Kennedy*, 131 F.3d 1371, 1376 (10th Cir. 1997). "The standards of deliberate falsehood and reckless disregard set forth in *Franks* apply to material omissions as well as affirmative falsehoods." *United States v. Ruiz*, 664 F.3d 833, 838 (10th Cir. 2012) (quoting *United States v. McKissick*, 204 F.3d 1282, 1297 (10th Cir. 2000)). "An omission is material if it is 'so probative as to negate probable cause.'" *Id.* (quoting *Stewart v. Donges*, 915 F.2d 572, 582 n.13 (10th Cir. 1990)).

Probable cause exists to support a search warrant when, "given all the circumstances set forth in the affidavit . . . , there is a *fair probability* that contraband or evidence of a crime will be found in a particular place." *United States v. Artez*, 389 F.3d 1106, 1111 (10th Cir. 2004) (emphasis added) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Probable cause does not require a showing of "proof beyond a reasonable doubt or by a preponderance of the evidence." *See id.* (quoting *Gates*, 462 U.S. at 235); *see also Spinelli v. United*

States, 393 U.S. 410, 419 (1969) ("[O]nly the probability, and not a prima facie showing, of criminal activity is the standard of probable cause."), *abrogated on other grounds by Gates*, 462 U.S. at 238. Probable cause is not a rigid formula, but rather a "fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232; *see also United States v. Leon*, 468 U.S. 897, 958 (1984) (Brennan, J., dissenting) (probable cause is a "relaxed standard").

An "affidavit in support of a search warrant must contain facts sufficient to lead a prudent person to believe that a search would uncover contraband or evidence of criminal activity." *United States v. Edwards*, 813 F.3d 953, 960 (10th Cir. 2015) (quoting *United States v. Danhauer*, 229 F.3d 1002, 1006 (10th Cir. 2000)). We simply must make a "practical, commonsense determination," *id.*, whether, under the totality of the circumstances presented in the affidavit, there is a "*substantial basis*" to conclude that "there is a *fair probability* that contraband or evidence of a crime will be found will be found in a particular place." *United States v. Long*, 774 F.3d 653, 658 (10th Cir. 2014) (emphases added) (quoting *Gates*, 462 U.S. at 236, 238); *cf. United States v. Martin*, 426 F.3d 68, 77 (2d Cir. 2005) ("The fact that an innocent explanation may be consistent with the facts alleged . . . does not negate probable cause.").

As for a district court's ruling regarding suppression after a *Franks* hearing, "we review for clear error

the district court's findings regarding the truth or falsity of statements in the affidavit and regarding the intentional or reckless character of such falsehoods." *Ruiz*, 664 F.3d at 838 (quoting *Garcia-Zambrano*, 530 F.3d at 1254). However, we "review the district court's ultimate determination that the corrected affidavit supports a finding of probable cause de novo." *Campbell*, 603 F.3d at 1228. It ineluctably follows that this same standard (i.e., de novo) governs our review of a district court's essentially obverse ruling that the omitted information, which is incorporated into the corrected affidavit, *is material—viz.*, the court's ruling that the information "is 'so probative as to negate probable cause.'" *Ruiz*, 664 F.3d 833, 838 (quoting *Stewart*, 915 F.2d at 582 n.13); *see United States v. Ippolito*, 774 F.2d 1482, 1484 (9th Cir. 1985) ("The ultimate question, whether the misstatements are material, . . . should be reviewed de novo.").

IV

The district court's suppression decision was based on a series of sequential determinations: *first*, the district court concluded that Agent Rutkowski intentionally or recklessly misled the magistrate judge through his omission of DORA's Admonition Letter; *second*, the court found that Agent Rutkowski's omission was material, because the letter's inclusion would have vitiated probable cause to search for evidence with respect to the healthcare-fraud offenses; *third*, the court opined that the affidavit contained independent probable cause for the tax-based offenses, even if

the affidavit included DORA's Admonition Letter; and *finally*, the court found that the valid tax-related portions of the warrant could not be severed from the invalid healthcare-focused portions.

On appeal, the government challenges only the district court's severability and materiality determinations, arguing that the district court committed reversible error "in holding that the tax portion of the warrant in this case was not severable," Aplt.'s Opening Br. at 14, and that the court also erred when it "characterized the admonition letter as a finding of 'not guilty' to the fraud allegations," and that the letter was actually immaterial "to the probable cause for the suspected healthcare offenses," *id.* at 15. Defendants strongly disagree, contending that the "valid portions of the warrant are not sufficiently distinguishable from the invalid portions to permit severance," Aplees.' Response Br. at 31, and that the government's materiality argument is "meritless," *id.* at 38 (capitalization altered).[6]

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[6] We note that Defendants begin their attack on the government's materiality argument by claiming that it is "waived." Aplee.'s Response Br. at 38 (capitalization altered). However, this argument is patently misguided and merits little attention. Specifically, Defendants argue that the government "conceded the issue of materiality" through a "Notice of Clarification" that the government filed after the *Franks* hearing. Aplees.' Response Br. at 39. The "Notice of Clarification" stated that,

> [i]n reviewing the transcript of the hearing, undersigned counsel became concerned that the government's focus on materiality may have been understood as signaling approval of the agent's decision to omit the letter. *The government recognizes that the warrant*

Although the parties' appellate briefing places greater emphasis on the district court's severability determination, we conclude that the court erred in its materiality determination. This conclusion is sufficient to resolve this appeal. Specifically, by concluding that Defendants have not shown that the Admonition Letter was material to the probable-cause determination regarding the healthcare-fraud offenses, we are essentially saying that Agent Rutkowski's inclusion of the Admonition Letter in the affidavit would *not* have vitiated the probable cause regarding these offenses. And the affidavit's probable-cause showing regarding the tax-related offenses is not at issue here. Consequently, our decision to overturn the district court's

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> *affidavit should have included information about DORA's resolution of a claim*. It believes that the omission was the result of poor judgment by a new agent, and nothing more. But regardless of the agent's intention, the information should have been included.

Aplees.' Suppl. App. at 1 (emphasis added) (Gov't's Notice of Clarification, filed Apr. 15, 2016). Seizing on the "should have included" language, Defendants argue that the "government's clarification conceded . . . that information about the Admonition Letter" was *material* to the probable cause determination. Aplees.' Response Br. at 39. Not so. Nothing in the government's clarification suggests it was conceding the materiality of the Admonition Letter. On the contrary, the notice restates "the government's focus on materiality." Aplees.' Suppl. App. at 1. At most, the notice could be read as a concession by the government that the DORA letter was *relevant* (as opposed to material)—and, consequently, should have been included in the affidavit for the magistrate judge's consideration—and that the Admonition Letter was omitted with reckless disregard (the first prong of *Franks*). Neither the relevancy of the letter nor the agent's intent, however, is at issue here.

materiality determination, related to the healthcare-fraud portion of the affidavit, effectively rejects the only challenge to the probable-cause basis of the affidavit, and this provides a sufficient basis for reversing the district court's suppression order.

A

The Admonition Letter was indisputably relevant and should have been included in Agent Rutkowski's affidavit; however, relevance does not equate to materiality. In our view, the letter was not "so probative as to negate probable cause." *Ruiz*, 664 F.3d at 838. In concluding otherwise, the district court erred in at least two ways. First, it imparted a meaning to the letter that simply is not evident on its face. Second, it focused solely on the letter, rather than the totality of the circumstances, when evaluating the corrected affidavit.

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The Admonition Letter does not draw *any* conclusions or make *any* findings regarding the healthcare-fraud allegations that precipitated DORA's investigation.[7] In spite of this, the district court

[7] Defendants do not even attempt to dispute that DORA did not make "specific findings about alleged healthcare fraud" in the Admonition Letter. Aplee.'s Response Br. at 40 n. 10. Nor could they. They simply ask us to follow the district court's lead by inferring from this decisional silence that DORA exculpated Dr. Carlson and his related entities with respect to the healthcare-fraud allegations. In this regard, they tell us that it matters not

construed the letter as an affirmative adjudication of these allegations. Indeed, during the *Franks* hearing, the district court described the Admonition Letter as a finding that Dr. Carlson "was not guilty" of healthcare fraud. Aplt.'s App., Vol. II, at 368. In its suppression decision, moreover, the district court reiterated the same belief, stating that "DORA did not sustain the health care fraud charges that it investigated." *Id.* at 389; *accord id.* (finding that "DORA examined and investigated those allegations and did not sustain the health care fraud charges").

We discern no significant basis in the text of the Admonition Letter for the meaning the district court attributed to it. True, the letter states that it is a "full and final resolution of the issues raised in" the case before it—which was premised on healthcare-fraud allegations—and DORA ultimately did not take action against Dr. Carlson for healthcare fraud. But aside from referencing the case, the letter is silent regarding the healthcare-fraud allegations. It does not describe the allegations. It does not state what evidence DORA considered. It does not state what findings, if any, DORA made regarding the healthcare-fraud allegations. And, most importantly, it does not state that, after considering all of the evidence before it, DORA found the healthcare-fraud allegations to be meritless.

"why DORA might have resolved its investigation" of these allegations in this manner, "[w]hat matters" is that it did so. *Id.* As we explain *infra*, we are not persuaded.

The letter appears to be a quasi-settlement, and is seemingly drafted in an intentionally vague manner as a result. The district court even acknowledged that "in some sense the Admonition Letter is a 'settlement letter.'"[8] *Id.* at 389. Yet, the court then seemed to conflate the relevance of the letter—which is uncontested here—with its materiality. It is not clear why the district court believed that a state licensing board's unexplained decision to settle a case would vitiate probable cause for the underlying criminal conduct that gave rise to the case. Generally, settlement provides a means of efficiently resolving a case without incurring the expense of litigation,[9] but it does not typically

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[8] The Admonition Letter states, "Pursuant to agreement with [DORA], 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." Aplt.'s App. at 147.

[9] DORA is authorized to discipline licensees for violations of state healthcare-fraud laws. *See* COLO. REV. STAT. § 12-33-117(1)(k) ("[T]he board may issue a letter of admonition to a licensee or may revoke, suspend, deny, refuse to renew, or impose conditions on such licensee's license . . . [for] [v]iolation [or] abuse of health insurance pursuant to COLO. REV. STAT. § 18-13-119 [i.e., criminal healthcare fraud], or commission of a fraudulent insurance act, as defined in COLO. REV. STAT. § 10-1-128 [i.e., civil insurance fraud]. . . ."). However, Dr. Carlson and his affiliated entities would have been entitled to a formal hearing to challenge any such allegations, at which DORA would bear the burden of proof. *See id.* § 12-33-119(9)(a) (giving recipients of admonition letters the "right to . . . formal disciplinary proceedings . . . to adjudicate the propriety of the conduct upon which the letter of admonition is based"); *id.* § 12-33-119(4) ("Disciplinary proceedings and hearings shall be conducted in the manner prescribed by [COLO. REV. STAT. § 24-4-105]."); *id.* § 24-4-105(7) ("[T]he proponent of an order shall have the burden of proof."). And that burden would have been by a preponderance of the evidence. *See id.* § 24–

involve an adjudication on the merits of all matters within the scope of the case, let alone a *sub silentio* adjudication of these matters.

Moreover, it strains credulity to believe that the explicit and strong suggestions of healthcare fraud communicated by Dr. Elder in his report prior to the release of DORA's Admonition Letter could have been addressed and rejected by DORA through such silence. Specifically, Dr. Elder strongly suggested that Dr. Carlson and his affiliated entities were involved in healthcare fraud. Indeed, although the limited documentation provided by Dr. Carlson constrained Dr. Elder from reaching a conclusive determination, he found evidence of a scheme that "involved the patient paying cash to Dr. Carlson, as well as him receiving insurance reimbursement . . . for the same services," without redistributing the "alleged insurance payments . . . to the patients." Aplt.'s App., Vol. I, at 275. Dr. Elder then expressed his belief that "Dr. Carlson and/or his attorney were *intentionally trying to defraud* [DORA]," *id.* (emphasis added), and suggested that Dr. Carlson's "absolute[]" failure to maintain financial records "warrant[ed] possible consultation with the Internal Revenue Service," *id.* at 276. If DORA had actually tackled and rejected these very

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4–105(7) ("The rules of evidence and requirements of proof shall conform, to the extent practicable, with those in civil nonjury cases in the district courts."); *id.* § 13–25–127(1) ("[T]he burden of proof in any civil action shall be by a preponderance of the evidence."); *see generally Gerner v. Sullivan*, 768 P.2d 701, 703–04 (Colo. 1989) (en banc) (discussing the burden-of-proof requirements of § 13–25–127(1)).

serious allegations from the person it charged and entrusted with conducting the misconduct investigation (i.e., Dr. Elder) we find it hard to believe that it would have done so through silence.[10]

To be sure, Defendants suggest that we should defer under a clear-error standard of review to the district court's "characterization" of DORA's Admonition Letter, Aplee.'s Response Br. at 40—specifically, as a finding that Dr. Carlson "was not guilty" of the healthcare-fraud allegations, Aplt.'s App., Vol. II, at 368. This suggestion, however, is misguided. The district court's interpretation of the meaning of the DORA letter was inextricably intertwined with its materiality determination. And our standard of review of a materiality determination—that is, whether the information in a corrected affidavit (here, the DORA Admonition Letter) "is 'so probative as to negate probable cause' "—is de novo. *Ruiz*, 664 F.3d at 838 (quoting *Stewart*, 915 F.2d at 582 n.13); *see Ippolito*, 774 F.2d at 1484. Accordingly, it logically and necessarily follows that our consideration of the meaning of the DORA Admonition Letter also must be de novo. Moreover, applying the standard of review that is typically associated

[10] It seems much more likely that, because Dr. Elder could not definitively bring to a close the "aspect of the case" involving double-billing and other healthcare fraud, because of the "great deal of essential documentation that was missing from every file" that Dr. Carlson supplied during the investigation, DORA decided to side-step the issue of healthcare fraud and secure instead Dr. Carlson's agreement not to contest a disciplinary sanction for the clear and concrete record-keeping violations that Dr. Elder unearthed. Aplt.'s App., Vol. I, at 275–76.

with legal questions—i.e., de novo—seems most appropriate for our consideration of the meaning of DORA's Admonition Letter, for it is effectively a settlement agreement. *See, e.g.*, *Flying J Inc. v. Comdata Network, Inc.*, 405 F.3d 821, 831–32 (10th Cir. 2005) (noting that "[t]he general rules of contract interpretation under state law apply to settlement agreements" and that, under Utah law, "[e]ven if the court refers to extrinsic evidence to make th[e] determination, contractual ambiguity presents a question of law that we review de novo"); *Dillard & Sons*, *Const., Inc. v. Burnup & Sims Comtec, Inc.*, 51 F.3d 910, 914 (10th Cir. 1995) ("Under Oklahoma law, it is well-settled that the interpretation of an unambiguous contract is a question of law for the court."); *see also* 5 AM. JUR.2d *Appellate Review* § 647, Westlaw (database updated Feb. 2018) (noting that the "[d]eterminations of law subject to plenary review on appeal" include "the proper interpretation of the provisions of a consent decree or settlement agreement, contract, or other written instrument" (footnotes omitted)). Furthermore, even assuming *arguendo* that this interpretive task has some embedded, appreciable factual component, we have no doubt that the task still "entails *primarily* legal . . . work" and, therefore, de novo review nevertheless would be appropriate. *U.S. Bank Nat'l Ass'n ex rel. CW Capital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, ___ U.S. ___, 138 S. Ct. 960, 967 (2018) (emphasis added). Applying that standard, we conclude that the district court erred in construing the DORA Admonition Letter as a finding that Dr. Carlson was "not guilty" of healthcare fraud. Aplt.'s App., Vol. II, at 368.

2

The district court also erred in failing to consider "all the circumstances set forth in the [corrected] affidavit," *Artez*, 389 F.3d at 1111; instead, it focused solely on the Admonition Letter. After citing the general standard for probable cause the court simply concluded in one sentence 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.

Aplt.'s App., Vol. II, at 391. The court did not weigh the letter—even under its erroneous interpretation of its meaning—against the other evidence of healthcare fraud included in the affidavit. Rather, the court essentially accorded dispositive effect to DORA's admonition letter. This was error. A proper probable-cause determination requires consideration of "the *totality* of the information" contained in the affidavit. *Barajas*, 710 F.3d at 1108 (emphasis added) (quoting *Roach*, 582 F.3d at 1200). Put differently, a determination of "whether probable cause exists to support a search warrant" requires engagement with "*all* the circumstances set forth in the affidavit." *Artez*, 389 F.3d at 1111 (emphasis added) (quoting *Gates*, 462 U.S. at 238). The district court's failure to engage in this way was error and likely resulted in the court reaching the

wrong conclusion (as discussed *infra*) regarding the materiality of the Admonition Letter. In any event, once we consider "all the circumstances set forth in the affidavit," including the Admonition Letter, we conclude *infra* that there is at least a "substantial basis" to conclude that there was a "fair probability" that evidence of healthcare fraud would be found at Atlas, SpineMed and the storage unit. *Long*, 774 F.3d at 658 (quoting *Gates*, 462 U.S. at 236, 238).

B

In our probable cause determination, we consider whether "all the circumstances set forth in the affidavit" give rise to "a fair probability that contraband or evidence" will be found in the places specified to be searched. *Artez*, 389 F.3d at 1111 (quoting *Gates*, 462 U.S. at 238). Here, based on our review of Agent Rutkowski's affidavit—corrected to include DORA's Admonition Letter—we conclude that there was a fair probability that evidence of healthcare fraud would be found at Atlas, SpineMed, and the storage unit. Under our reading of the Admonition Letter, explicated *supra*, we arrive at this conclusion with no difficulty. We acknowledge that the conclusion would be somewhat less patent if we adopted the district court's erroneous reading of the Admonition Letter—that is, as an affirmative (albeit silent) determination that Dr. Carlson and his related entities were not culpable for the investigated healthcare fraud; however, we nevertheless would arrive at the same destination, given the abundance of evidence of potential healthcare fraud that

Agent Rutkowski detailed in his affidavit. Because the inclusion of the Admonition Letter in the (corrected) affidavit would not have negated probable cause of healthcare fraud—under our interpretation, or even the district court's—the letter cannot be material. And the district court erred by concluding to the contrary.

Turning to the ample evidence of healthcare fraud found in the affidavit, we highlight the following, substantively salient paragraphs (numbered as they appear in Agent Rutkowski's affidavit):

> 13. During the course of this investigation, records were obtained from United Healthcare (United) *relating to a patient complaint regarding double billing*. Specifically, in December 2007, United received a fraud hotline tip from a patient of Carlson's alleging Carlson charged the patient $3,500.00 up front for services that he told the patient United would not cover. Later, the patient received her explanation of benefits (EOBs) from United showing that Carlson did submit billings to United for the services and failed to reimburse the patient for the overpayments. *The patient confronted Carlson about the double billing and he admitted he had done this*. When the patient requested a reimbursement check, he stated that he didn't do anything wrong. Nevertheless, Carlson gave the patient $1,700.00 of the $3,500.00.

14. Subsequent to the fraud hotline tip, United's Special Investigative Unit, Ingenix, initiated an investigation into the billing practices of Carlson, Atlas, and SpineMed. Ingenix determined through ten more patient interviews that Carlson received upfront payments for a treatment plan from nine of the ten patients. Carlson charged these patients approximately $3,500.00 each for the treatment plans and advised each patient the treatment would not be covered by United. *However, Carlson did bill United, retained the insurance reimbursements, and failed to reimburse the nine patients.*

15. Ingenix also learned through the patient interviews the patients received Vax-D/Decompression Table Therapy. Vax-D/Decompression Table therapy is a non-covered service by United. Ingenix found that Carlson, Atlas, and SpineMed submitted billings for Vax-D/Decompression Table Therapy under codes other than the appropriate code in order to obtain payment for this non-covered treatment. *Ingenix alleged Carlson, Atlas, and SpineMed billed under twelve other codes to mask, disguise, and misrepresent the services actually rendered. Ingenix's analysis disclosed a total of $460,338.10 was possibly paid in error due to these misrepresentations.*

16. Ingenix also determined Carlson, Atlas, and SpineMed submitted *duplicate billings and triplicate billings* for services provided under both Carlson's name and one or both of the business names.

. . . .

23(e). The persons listed in the "Patient List" contained within Attachment B, numbered 254–262, represent a list of persons identified by Ingenix, and subsequently investigated by the Colorado State Board of Chiropractic. According to the investigation performed by Ingenix and The Colorado State Board of Chiropractic, *there is a likelihood the Doctors submitted billing to United Healthcare for these patients multiple times under various company names and Employer Identification Numbers, constituting the illegal practice known as double-billing.*

. . . .

29(b). Dr. Elder requested the attorney review patient contracts for Vax-D treatment and the attorney responded that all contracts were *verbal*. Dr. Elder found this highly unusual *considering the large amounts of cash required from patients to pay for the treatments*.

29(c). *No patient records contained a diagnosis.* The only diagnosis Dr. Elder could

find was contained on the claim forms submitted by Dr. Carlson to United Healthcare. *Dr. Elder found no documentation in any file to justify why the patients needed Vax-D treatment and speculated that most patients were existing patients and that after Carlson purchased the Vax-D tables, the patients were all of a sudden candidates for Vax-D without proper work-up or establishing the medical necessity of the treatment*.

29(d). Dr. Elder found evidence that Dr. Carlson *billed United Healthcare for Vax-D treatments under different procedural codes* and also determined *numerous cases involved duplicate billing* as alleged by United Healthcare.

. . . .

29(f). In comparing the patient files to the claim forms received by United Healthcare, Dr. Elder found the United Healthcare claims showed *nearly every patient had a diagnosis of stenosis in the lumbar and thoracic spines yet there was absolutely no documentation to justify such a diagnosis in the patient file*.

29(g). Dr. Elder found that well over 100 patient visits were billed to United Healthcare, yet Dr. Carlson's patient

> files contained absolutely *no documentation or records for the dates of service as billed*.

Aplt.'s App., Vol. I, at 63–64, 68, 71–73 (emphases added).

Simply stated, Agent Rutkowski's affidavit contained detailed allegations of healthcare fraud from two independent reviews of Defendants' files—one by United and the other by Dr. Elder, an expert that DORA retained for purposes of investigating the allegations of healthcare fraud. Importantly, both of these reviews concluded that there was at least a "likelihood," *id.* at 73, that Dr. Carlson, Atlas, and SpineMed were submitting fraudulent claims to United and other insurers—i.e., engaging in healthcare fraud. It is patent that, standing alone, these allegations would have presented to the magistrate judge "a fair probability that contraband or evidence" of healthcare fraud would be found at Atlas, SpineMed and the storage unit, *Artez*, 389 F.3d at 1111 (quoting *Gates*, 462 U.S. at 238). And, though unquestionably relevant, we conclude that DORA's Admonition Letter—as we understand it—would not have had an appreciable effect on the probable-cause calculus. More specifically, we conclude that the letter would not have negated probable cause and, therefore, was not material. The Admonition Letter did not address the healthcare fraud allegations, did not state that there was insufficient evidence to pursue them, and certainly did not bless Defendants' billing practices. It simply identified a distinct, record-keeping violation and disciplined Dr. Carlson for it. Under our view of the letter, it was not material.

Moreover, even under the district court's erroneous interpretation of DORA's Admonition Letter, we would reach the same conclusion, given the expansive and detailed evidence in the affidavit that strongly suggested that Defendants had committed healthcare fraud. Admittedly, the decisional outcome would be less crystal clear, given that the district court interpreted the Admonition Letter as an affirmative determination by DORA that Dr. Carlson and his related entities were not culpable with respect to the investigated allegations of healthcare fraud. But that determination would have constituted just one data point, which the magistrate judge would have weighed against all of the other affidavit evidence, in applying the fair-probability standard—including evidence of two independent investigations that reached conclusions contrary to the one we attribute here to DORA, regarding Dr. Carlson's involvement in healthcare fraud.

Indeed, in cases where panels of our court—including a panel in a precedential decision—have properly considered the totality of the affidavit evidence and found that it pointed with some strength in favor of a finding of criminal conduct under the fair-probability standard, analogous omissions of seemingly exculpatory evidence have been deemed *not* material. *See United States v. McKissik*, 204 F.3d 1282, 1288–89, 1297–98 (10th Cir. 2000) (holding that where detective "stated in the affidavit that he had personally observed the bag of cocaine in plain view in the car when he looked at the sealed car in the impoundment

lot," "the facts contained in the affidavit would have supported the issuance of a search warrant even if [the detective] had noted the other officers failed to mention the cocaine they observed in plain view in their reports"); *see also United States v. Wright*, 350 F. App'x 243, 247–48 (10th Cir. 2009) (unpublished) (concluding that a detective's omission of "several unsuccessful attempts to corroborate allegations" of drug activity against the defendant was immaterial, because the affidavit independently established probable cause through anonymous complaints and confidential informants and information regarding defendant's "failure to report income to federal and state tax agencies for a number of years"); *United States v. Brinlee*, 146 F. App'x 235, 239 (10th Cir. 2005) (unpublished) (holding that an officer's omission of details that allegedly could have led the magistrate judge to infer from "[a cooperating witness's] behavior that she was under the influence of drugs or had a motive to lie," was not material where "the affidavit contained detailed descriptions given by [the witness] along with information from other sources, which enhanced her credibility and corroborated her statements about the presence of drugs in the house"); *United States v. Hutto*, 84 F. App'x 6, 8 (10th Cir. 2003) (unpublished) (concluding that a "factual inaccuracy" in an affidavit was immaterial, because the "affidavit contain[ed] several facts that combine[d] to support a finding of probable cause"); *United States v. Kiister*, 208 F.3d 227, *6 (10th Cir. 2000) (unpublished) (concluding that a detective's omission of prior searches that failed to reveal "drugs or indisputable evidence of drug trafficking" was

immaterial, because other information in the affidavit "overwhelmingly provided probable cause for the issuance of a warrant, even [with] the omitted material").[11]

Finally, our conclusion that DORA's Admonition Letter was not material is fortified by our recognition that, even assuming DORA exculpated Dr. Carlson and his related entities of the investigated allegations of healthcare fraud in its Admonition Letter, DORA would have been making that decision under a different, higher standard of proof than probable cause—specifically, a preponderance-of-the-evidence standard. *Compare* COLO. REV. STAT. § 24-4-105(7) ("The rules of evidence and requirements of proof shall conform, to the extent practicable, with those in civil nonjury cases in the district courts."), *and id.* § 13–25–127(1) ("[T]he burden of proof in any civil action shall be by a preponderance of the evidence."), *with Artez*, 389 F.3d at 1111 (noting that probable cause does not require a showing of "proof beyond a reasonable doubt *or by a preponderance of the evidence*" (emphasis added) (quoting *Gates*, 462 U.S. at 235)), *and United States v. Patane*, 304 F.3d 1013, 1018 (10th Cir. 2002) (explaining that probable cause "*does not require certainty of guilt or even a preponderance of evidence of guilt*, but rather only reasonably trustworthy information that would lead a reasonable person to believe an offense was

[11] Although nonprecedential, we find the foregoing decisions by panels of our court persuasive to the extent they address analogous omissions under a *Franks* analysis.

committed" (emphasis added)), *rev'd on other grounds*, 542 U.S. 630 (2004).

Therefore, DORA's ostensibly exculpatory finding regarding the healthcare-fraud allegations would not be logically inconsistent with a determination by the magistrate judge that, considering the totality of the circumstances, there was probable cause to criminally investigate those same or similar allegations. Put another way, even assuming *arguendo* that it is reasonable to infer from DORA's Admonition Letter that the agency considered the healthcare-fraud allegations and decided that it could not establish them in a formal action—thus, effectively exculpating Dr. Carlson—that would not necessarily mean that a magistrate judge could not have reasonably concluded that there was probable cause to believe that criminal offenses related to those allegations had been committed. And, more to the point, Defendants have failed to make an adequate showing that the magistrate judge could not have reached this probable-cause conclusion.

In sum, for the foregoing reasons, we conclude that the district court erred in finding that DORA's Admonition Letter was material—*viz.*, "so probative as to negate probable cause." *Ruiz*, 664 F.3d at 838 (quoting *Stewart*, 915 F.2d at 582 n.13); *see Ippolito*, 774 F.2d at 1484. Because the court ultimately based its decision to grant Defendants' suppression motion on this materiality finding, its suppression order cannot stand.

V

Based on the foregoing, we **REVERSE** the district court's suppression order on materiality grounds, and **REMAND** for further proceedings consistent with this Order and Judgment.

ENTERED FOR THE COURT

Jerome A. Holmes
Circuit Judge

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.

ORDER

(Filed Apr. 25, 2016)

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 due to the affiant's misrepresentations as to probable cause of other crimes. As explained in more detail in this Court's

[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.

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 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

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

> 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.

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:

/s/ Brooke Jackson
R. Brooke Jackson
United States District Judge

[SEAL] **Dora**
Department of Regulatory Agencies

Division of Registrations
Rosemary McCool
Director

Board of Chiropractic Examiners
Dino Ioannides
Section Director

John W. Hickenlooper
Governor

Barbara J. Kelley
Executive Director

LETTER OF ADMONITION

Eric Carslon, DC
[redacted]

RE: Case #2008-003722

Dear Eric Carlson, DC,

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.

/s/ Dino Ioannides — 23-Mar-2011
Dino Ioannides, Section Director — Date

1560 Broadway, Suite 1350 Denver, Colorado 80202 Phone 303.894.2983
Fax 303.869. 0334 dino.ioannides@dora.state.co.us V/TDD 711

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 15-cr-00303-RBJ

UNITED STATES OF AMERICA.

Plaintiff,

v.

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

Defendants.

GOVERNMENT'S NOTICE OF CLARIFICATION

(Filed Apr. 15, 2016)

The United States files this motion to clarify its position.

In reviewing the transcript of the hearing, undersigned counsel became concerned that the government's focus on materiality may have been understood as signaling approval of the agent's decision to omit the letter. The government recognizes that the warrant affidavit should have included information about DORA's resolution of a claim. It believes that the omission was the result of poor judgment by a new agent, and nothing more. But regardless of the agent's intention, the information should have been included.

Dated this 15th day of April, 2016.

JOHN F. WALSH
United States Attorney

By: *s/ Suneeta Hazra*
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April 2016, I electronically filed the foregoing **GOVERNMENT'S NOTICE OF CLARIFICATION** with the Clerk of the Court using CM/ECF system which will send notification of the same to any and all counsel of record.

s/Grazy Banegas
Legal Assistant
U.S. Attorney's Office