

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA,

v.

**DEVOS LTD. d/b/a GUARANTEED
RETURNS, et al.**

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CRIMINAL ACTION

NO. 14-574

MEMORANDUM

Tucker, C.J.

January 10, 2017

Before the Court are Defendants’ Pretrial Motions (Doc. 127), Defendants’ Memorandum of Law in Support of Their Pretrial Motions (Doc. 128), Government’s Response thereto (Doc. 132), and Defendants’ Reply Memorandum of Law in Further Support of Their Pretrial Motions (Doc. 135). Upon consideration of the parties’ submissions, declarations, exhibits, and Oral Argument on Defendants’ Pretrial Motions held on September 19, 2016, Defendants’ Pretrial Motions are DENIED.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. “Returns Company” or “Reverse Distributor” Business Model

As in other industries, when a pharmaceutical retailer such as a pharmacy, hospital, or government healthcare provider purchases too much of a pharmaceutical product, the retailer can return the extra product to the product’s manufacturer for a full or partial refund. Superseding Indictment 2 ¶ 6. Each manufacturer maintains its own policies and procedures for requesting and obtaining refunds for any surplus product. *Id.* As there is a variety of pharmaceutical products and manufacturers, the policies and procedures for obtaining refunds are, not surprisingly, diverse and complicated. *Id.* To navigate these diverse and complicated policies and procedures, pharmaceutical retailers will frequently hire an expert with specialized

knowledge of the varied refund policies and procedures to process all returns and refunds on the retailers' behalf. *Id.* at 3 ¶¶ 8–9. These experts are known as “returns companies” or “reverse distributors.” *Id.*

Returns companies benefit retailers by streamlining the refunds process. In exchange, these returns companies take a commission on the amount refunded by the products' manufacturers. *Id.* at 4 ¶ 11. Among the types of products that returns companies handle on behalf of pharmaceutical retailers are “indates” or “indated drug products.” *Id.* at 4 ¶ 12. These indates are products that are not yet eligible for refund, but may become eligible at a later date as the indates age. *Id.* The indates return process involves the returns company taking possession of the indates in order to store them until such time as they become refundable under the manufacturer's policies. *Id.* After these indates are returned for refunds, the returns company would then take a commission on the amount it successfully recovered on behalf of its pharmaceutical retailer client. *Id.* at 4 ¶ 11.

B. Defendant Guaranteed Returns is a Returns Company

Defendant Devos Ltd., doing business as Guaranteed Returns (“Guaranteed Returns”), is a returns company.¹ As a returns company, Guaranteed Returns was hired by various pharmaceutical retailers, including the United States Department of Defense (“Department of Defense”), to manage the returns and refunds of a variety of pharmaceutical products. *Id.* at 2 ¶¶ 2–3.

On January 30, 2001, the Department of Defense awarded a contract to Guaranteed Returns (“2001 DoD Contract”) to manage the return of pharmaceutical products, including

¹ At all relevant times, Defendant Dean Volkes was President and Chief Executive Officer of Guaranteed Returns (“Volkes”), and Defendant Donna Fallon was Executive Vice President and Chief Financial Officer of Guaranteed Returns (“Fallon”).

indates, on behalf of various health-related government agencies. *Id.* at 7 ¶ 22. Under the terms of the 2001 DoD Contract, Guaranteed Returns would collect a five percent fee on all refunds collected on behalf of the Department of Defense. *Id.*

On October 1, 2007, the Department of Defense awarded another contract to Guaranteed Returns (“2007 DoD Contract”) that, among other things, clarified Guaranteed Returns obligations relating to indates. Under the 2007 DoD Contract, Guaranteed Returns promised to “inventory, warehouse, and age all in-dated products free of charge.” *Id.* at 7 ¶ 23. As the indates aged and became eligible for refunds, Guaranteed Returns would then “process all items for credit and contracted service fees [would] apply.” *Id.*

C. Department of Defense Investigation

Beginning in 2008, special agents working for the Department of Defense’s Defense Criminal Investigative Service (“DCIS”) were assisting a federal grand jury investigation into allegations that Defendants were stealing pharmaceutical products and funds owed to the Department of Defense under the 2001 DoD Contract and 2007 DoD Contract. Superseding Indictment Count 55 ¶ 2. To this end, in late 2009, DCIS agents served a federal grand jury subpoena on Guaranteed Returns and Defendant Volkes seeking the production of documents relating to the contracts. Superseding Indictment 31–32 ¶¶ 4–7.

D. 2011 Search Warrants

On March 29, 2011, the Government applied for warrants to search various locations alleged to house evidence of Guaranteed Returns’ theft of Department of Defense funds that were, under the 2001 DoD Contract and 2007 DoD Contract, owed to the Department of Defense. Grover Decl. Ex. 1. In support of its warrant application, the Government submitted the affidavit of DCIS agent Joan Woodring (“2011 Woodring Affidavit”). *Id.*

Upon consideration of the warrant application and the 2011 Woodring Affidavit, a federal magistrate judge issued five search warrants: (1) Guaranteed Returns' business office and warehouse at 100 13th Avenue, Ronkonkoma, NY 11779 (Grover Decl. Ex. 2); (2) Guaranteed Returns' safe deposit box (Grover Decl. Ex. 3); (3) personal residence 206 Burlington Avenue (Grover Decl. Ex. 4), (4) Guaranteed Returns business office and warehouse at 100 Colin Drive, Holbrook, NY (Grover Decl. Ex. 5), (5) personal residence 58 Highview Drive, Selden, NY 11784 (collectively "2011 Search Warrants").

E. Grand Jury Indictment

On October 28, 2014, based, in part, on the information seized under the 2011 Search Warrants, a Grand Jury issued a 44-count Indictment against Defendants for, among other things, fraud, obstruction, and money laundering. *See generally* Indictment. The Indictment further included two Notices of Forfeiture. *Id.* at 43–44. In Notice of Forfeiture #2, Defendants were notified that the Government would seek the forfeiture of a number of assets that were allegedly involved in, or traceable to property involved in, Defendants' fraudulent schemes and conspiracy to commit money laundering including, among other things, two financial accounts, and four parcels of real property. *Id.* at 44.

F. 2014 Search Warrants

Following the issuance of the Indictment, the Government applied for additional search warrants and a seizure warrant ("2014 Search Warrants" and "2014 Seizure Warrant," respectively). In support of its application for the 2014 Search Warrant, the Government submitted the Affidavit of FBI Agent Matthew Callahan ("Callahan Affidavit"). Grover Decl. Ex. 12. In support of its application for the 2014 Seizure Warrant, the Government further submitted the Affidavit of DCIS Agent Joann Woodring ("2014 Woodring Seizure Affidavit").

Grover Decl. Ex. 14. Upon consideration of the warrant applications, a federal magistrate judge issued the 2014 Search Warrants and the 2014 Seizure Warrant. The 2014 Seizure Warrant authorized the Government to seize the two bank accounts that were identified in the Notice of Forfeiture #2 included in the Indictment. Grover Decl. Ex. 13. Separately, the Government declined to seize the four pieces of property listed in the Notice of Forfeiture #2 and, instead, filed notices of *lis pendens* on the four pieces of property to place potential buyers on notice that the property was implicated in an ongoing case and would be subject to forfeiture upon Defendants' conviction as involved in, or otherwise traceable to property involved in, money laundering.

G. Superseding Indictment

On February 11, 2016, the Grand Jury issued a superseding indictment ("Superseding Indictment") charging Defendants with 15 additional counts of mail fraud, and five counts of wire fraud. *See generally* Superseding Indictment. The Superseding Indictment also included the same two notices of forfeiture of assets that had been included in the original Indictment. *Id.* at 49–51.

II. MOTION TO SUPPRESS EVIDENCE

Defendants seek the suppression of evidence seized pursuant to the 2011 Search Warrants, and the 2014 Search Warrants. Regarding the 2011 Search Warrants, Defendants argue that the evidence should be suppressed because: (1) the warrants were unconstitutional "general warrants," and (2) Agent Woodring's Affidavit, on which the 2011 Search Warrants were based, did not provide sufficient facts to support a finding of probable cause.

Alternatively, Defendants argue that the 2011 Search Warrants and 2014 Search Warrants are collectively invalid, and the evidence seized thereunder should be suppressed, because the

affidavits submitted in support of the warrant applications contained material false statements and/or omissions without which no probable cause could have been found. To demonstrate the existence of these false statements and/or omissions, Defendants request that the Court grant them a *Franks* hearing, the procedural pathway established by the United States Supreme Court for challenging facially legitimate warrants.

The Court disagrees with each of Defendants' arguments and addresses each below, in turn. The Court concludes, ultimately, that no *Franks* hearing is necessary on these facts.

A. The 2011 Search Warrants Were Not Unconstitutional General Warrants

It is well-established that “[g]eneral warrants . . . are prohibited by the Fourth Amendment.” *Andresen v. Maryland*, 427 U.S. 463, 480 (1976). The Fourth Amendment prohibits the use of general warrants because such warrants “essentially authorize ‘a general exploratory rummaging in a person’s belongings.’” *United States v. Yusuf*, 461 F.3d 374, 392 (3d Cir. 2006) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971)). To protect against exploratory rummaging, the Fourth Amendment, therefore, requires that a warrant be sufficiently particular as to the things sought so as to limit the authority of the executing officers. *United States v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars and Fifty-Seven Cents*, 307 F.3d 137, 149 (3d Cir. 2002) (citing *United States v. Christine*, 687 F.2d 749, 753 (3d Cir. 1982)). This particularity requirement acts to prevent law enforcement officers from claiming “unbridled discretion to conduct an exploratory rummaging through [a defendant’s] papers in search of criminal evidence.” *Id.*

While the Fourth Amendment requires that warrants be particular, courts have recognized that “the Fourth Amendment’s commands . . . are practical and not abstract.” *United States v. Christine*, 687 F.2d 749, 760 (3d Cir. 1982) (quoting *United States v. Ventresca*, 380 U.S. 102,

108 (1965)). The recognition of the practical and pragmatic way in which the Fourth Amendment applies in reality informs the way in which courts evaluate the sufficiency of warrants. Accordingly, when reviewing warrants for sufficient particularity, the courts must test the warrants “in a commonsense and realistic fashion.” *Id.*

The Third Circuit has consistently emphasized the need for such pragmatism and flexibility when evaluating warrants for particularity especially in the context of complex cases and corporate financial crimes. *See Yusuf*, 461 F.3d at 395 (providing that “[w]e have repeatedly stated that the government is to be given more flexibility regarding the items to be searched when the criminal activity deals with complex financial transactions.”). Such flexibility is also important when reviewing warrants involving alleged financial crimes that have unfolded over a long period of time. *See Christine*, 687 F.2d at 760 (providing that flexibility is especially appropriate in cases involving complex schemes spanning many years that can be uncovered only by “exact[ing] scrutiny of intricate financial records”).

That greater flexibility is necessary in cases involving complex schemes taking place over many years has been a guiding principle in the Third Circuit. The Third Circuit case *United States v. Yusuf* succinctly illustrates the application of this principle on facts that are analogous to those in the present case. 461 F.3d 374.

In *Yusuf*, the Third Circuit reversed the decision by the trial court to grant a motion to suppress evidence seized under purportedly invalid general search warrants. 461 F.3d at 397. The warrants were issued upon the application of the Government and its investigation into a number of alleged complex financial crimes including: money laundering, tax violations, currency structuring, mail fraud, obstruction of justice, and conspiracy of a corporation and its individual owners/operators. *Id.* at 378.

The defendants argued for the suppression of evidence seized under several warrants because: (1) the warrants lacked sufficient particularity and were, therefore, unconstitutional general warrants, (2) the warrants failed to identify the crimes by reference to the United States Code, and (3) a catch-all provision included in the warrant that allowed executing agents to search for any evidence of “money laundering and illegal activities” provided the agents with “unfettered discretion to conduct their search.” 461 F.3d at 393. The Third Circuit rejected each of these three arguments.

In rejecting the defendant’s arguments, the Third Circuit concluded that the warrants were not unconstitutional general warrants because they limited any search to be conducted in three respects. First, the warrants limited the search by referencing specific crimes for which evidence was sought. *Id.* at 395. Second, the warrants limited the search to evidence of the specific crimes over a 10 year period. *Id.* at 395. Third, the warrants limited the search to records pertaining to the corporate Defendants, “any affiliated companies, as well as their principals, officers, managers, and employees (including but not limited to [several named Defendants]).” *Id.* at 395. These three limitations provided the warrants with sufficient particularity, the Third Circuit held, especially in view of “the nature of the crime[s] . . . [including] money laundering and other complex white collar crimes.” *Id.* at 395.

In the present case, the 2011 Search Warrants were not only limited in the same three respects as the warrants at issue in *Yusuf* were limited, but were also further limited by the issuing magistrate judge who handwrote clarifications onto the warrants. These limitations, when viewed in the context of the alleged complex corporate financial crimes under investigation, provided sufficient particularity to satisfy the particularity requirement of the Fourth Amendment.

First, just as the warrants in *Yusuf* limited the search to be conducted by reference to specific federal crimes, so too were the 2011 Search Warrants here limited by reference to specific crimes. Each of the 2011 Search Warrants included a Schedule B that provided that items were to be seized in connection with the following federal crimes:

- a. theft of [Department] of Defense checks in violation of 18 U.S.C. §§ 641, 1031, 1343;
- b. destruction of documents and computer files in violation of 18 U.S.C. §§ 371, 1512(b)(2)(B), 1512(c)(1), and 1519;
- c. a scheme to defraud the Department of Defense and other customers in violation of 18 U.S.C. §§ 371, 641, 1031, 1341, 1343 and 1349;
- d. a scheme to convert funds diverted from clients, including the Department of Defense in violation of 18 U.S.C. §§ 371, 641, 1031, 1341, 1343 and 1349;
- e. a scheme to defraud pharmaceutical manufacturers in violation of and other customers [sic] 18 U.S.C. §§ 371, 641, 1031, 1341, 1343 and 1349.

Grover Decl. Ex. 2, at 3. The 2011 Search Warrants, were, by including this list, particular as to the crimes that were alleged to have occurred, and further particular as to the specific statutory provisions allegedly violated. In this regard, the 2011 Search Warrants are analogous to the warrants at issue in *Yusuf*. The 2011 Search Warrants' list of alleged crimes hews closely to the list of crimes in the warrant at issue in *Yusuf*, namely, the crimes of “money laundering, mail fraud, obstruction of justice, and conspiracy.” 461 F.3d at 378. Accordingly, the 2011 Search Warrants were limited in the same manner as the warrants in *Yusuf* were limited.

Second, just as the warrants in *Yusuf* limited the search to be conducted to evidence of crimes alleged to have occurred over a period of 10 years, the 2011 Search Warrants limited the search to evidence of crimes alleged to have occurred over a period of 10 years. Each of the 2011 Search Warrants included specific language limiting the Government's search to evidence relating to several enumerated federal crimes alleged to have occurred “between March 2001 and [April 2011],” the month in which the warrants were executed. Grover Decl. Ex 2, at 3. Given

the complex nature of the alleged crimes at issue and the fact that the types of documents sought would normally be retained for a relatively long period of time, such as financial records and pharmaceutical inventory records, this temporal limitation provided still further particularity to the 2011 Search Warrants.

Third, just as the warrants in *Yusuf* limited the search to be conducted by reference to particular individuals and categories of persons, so too did the 2011 Search Warrants limit the search by reference to the named corporate Defendant, Guaranteed Returns, and several categories of persons. Each of the 2011 Search Warrants specified that the various categories of documents to be searched pertained to named Defendant Guaranteed Returns and its involvement in the enumerated crimes set forth in the warrant. *See generally* Grover Decl. Ex. 2, at 3 (identifying, for example, records maintained by Defendant “Guaranteed Returns” relating to their customers’ contractual relationships). The 2011 Search Warrants otherwise specified throughout that the documents to be seized pertained to Guaranteed Returns “employees,” and “officers,” just as the warrants in *Yusuf* specified that the search to be conducted pertained to the “principals, officers, managers, and employees,” of the corporate defendant. *See generally* Grover Decl. Ex. 2, at 3–4 (identifying for seizure “internal correspondence . . . between employees of Guaranteed returns,” and “personnel records for officers and employees.”).

Fourth, the 2011 Search Warrants were limited further by the issuing magistrate judge who made handwritten edits to the proposed form warrant provided as part of the Governments’ application. The issuing magistrate judge, for example, limited the search relating to “[l]icenses, permits, and compliance records” to such documents so long as the items “relat[ed] to pharmaceuticals.” Grover Decl. Ex. 2, at 3. The issuing magistrate also restricted the type of personnel records permitted to be seized by limiting the search to “[p]ersonnel records for

officers and employees . . . relating to employment status and dates of employment.” *Id.*

These four limitations to the 2011 Search Warrants, when viewed in the context of the Government’s on-going investigation into the alleged complex financial crimes that occurred over a period of 10 years, provided sufficient particularity to meet the demands of the Fourth Amendment. This result is in accordance with the Third Circuit’s advice that flexibility must be afforded to warrants, such as the 2011 Search Warrants, that involve “large-scale, document-intensive corporate offenses.” *Yusuf*, 461 F.3d at 379. The 2011 Search Warrants are not unconstitutional general warrants.

B. The 2011 Search Warrants Were Based Upon A Proper Finding Of Probable Cause

Just as Defendants have failed to show that the 2011 Search Warrants were unconstitutional general warrants, Defendants have failed to show that the 2011 Search Warrants were improperly issued without a substantial factual basis to support a finding of probable cause.

1. Standard Of Review Of Magistrate Judge’s Probable Cause Determination

When a warrant is “issued and later challenged, a deferential standard of review is applied in determining whether the magistrate judge’s probable cause decision was erroneous.” *Ninety-Two Thousand Four Hundred Twenty-Two Dollars and Fifty-Seven Cents*, 307 F.3d at 147 (citing *United States v. Hodge*, 246 F.3d 301, 305 (3d Cir. 2001)). The reviewing court’s sole “inquir[y] [is] whether there was a ‘substantial basis’ for finding probable cause.” *Id.* In addressing the question of whether the magistrate judge had such substantial basis, the Third Circuit has advised that “[t]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.” *Id.* (citing *United States v. Jones*, 994 F.2d 1051, 1057–58 (3d Cir. 1993)). Accordingly, where the issuing magistrate judge

had a substantial basis on which to base a finding of probable cause, the magistrate judge's determination must be left undisturbed.

Probable cause, in turn, may be found when "viewing the totality of the circumstances, 'there is a fair probability that . . . evidence of a crime will be found in a particular place.'" *Ninety-Two Thousand Four Hundred Twenty-Two Dollars and Fifty-Seven Cents*, 307 F.3d at 146 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1982)). The probable cause determination "does not require absolute certainty that evidence of criminal activity will be found at a particular place, but rather that it is reasonable to assume that a search will uncover such evidence." *Yusuf*, 461 F.3d at 390 (citing *United States v. Ritter*, 416 F.3d 256, 263 (3d Cir. 2005)).

2. The Issuing Magistrate Judge Had A Substantial Basis On Which To Base A Finding Of Probable Cause In Connection With The 2011 Search Warrants

In this case, the 2011 Woodring Affidavit, on which the 2011 Search Warrants were based, provided more than sufficient information to establish a fair probability that the places to be searched housed evidence of five alleged crimes under investigation. The five alleged crimes were:

1. *Theft from the Department of Defense*: the theft by Guaranteed Returns' employee Ryan Kasper of checks belonging to the Department of Defense. Grover Decl. Ex. 1, ¶ 4(A);
2. *Scheme to Defraud Manufacturers*: a scheme by Clinicare Health Services LLC ("Clinicare"), an alleged shell company and client of Guaranteed Returns, to defraud various pharmaceutical product manufacturers. Grover Decl. Ex. 1, ¶ 4(E);

3. *Scheme to Divert Funds to Clinicare*: A scheme by Guaranteed Returns and its employees to convert funds belonging to the Department of Defense, among others, to Guaranteed Returns' own use or for the use of one of its clients, Clinicare. Grover Decl. Ex. 1, ¶ 4(D);
4. *Scheme to Divert Indate Refunds*: A scheme by Guaranteed Returns and its employees to defraud the Department of Defense, among others, of indate refunds. Grover Decl. Ex. 1, ¶ 4(C); and
5. *Destruction of Records*: A campaign by Guaranteed Returns to destroy documents responsive to a Grand Jury subpoena in order to conceal evidence of wrongdoing. Grover Decl. Ex. 1, ¶ 4(B).

Defendants argue that the information provided in the Government's application for the 2011 Search Warrants regarding these five crimes was deficient in three respects. First, Defendants argue that the information provided relating to crimes 1 through 3 was stale at the time of the Government's application for the warrants. Second, Defendants argue that the information provided relating to crime 4 was unreliable as it was uncorroborated informant hearsay. Third, Defendants argue that the information provided relating to crime 5 was insufficient to permit the issuing magistrate judge to determine that any crime had been perpetrated. The Court rejects these arguments.

a. The Information Concerning Alleged Crimes 1 Through 3 Was Not Stale In Light Of The Protracted And Continuous Nature Of The Crimes

While the "age of the information supporting a warrant application is a factor that must be considered in determining probable cause . . . [a]ge alone . . . does not determine staleness." *United States v. Williams*, 124 F.3d 411, 420 (3d Cir. 1997) (citing *United States v. Harvey*, 2

F.3d 1318, 1322 (3d Cir. 1993)). Whether information is too stale to support a finding of probable cause depends “on a number of variables such as the nature of the crime, of the criminal, of the thing to be seized, and of the place to be searched.” *Id.* Under some circumstances, for example, “[w]here ‘an activity is of a protracted and continuous nature, ‘the passage of time becomes less significant.’” *United States v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars and Fifty-Seven Cents*, 307 F.3d at 148 (internal quotation omitted). The passage of time is similarly less significant “where the items to be seized are created for the purpose of preservation, as are business records.” *Id.* (emphasis added).

Regarding crime 1 (Theft from the Department of Defense), crime 2 (Scheme to Defraud Manufacturers), and crime 3 (Scheme to Divert Funds to Clinicare), the 2011 Woodring Affidavit provided a more than substantial basis for the issuing magistrate judge to find probable cause despite the relative age of the information. In this case, the passage of time was less significant than it would normally be because the information provided about crimes 1 through 3 established the crimes’ protracted and continuous nature and the fact that the type of evidence generated in the course of perpetrating these crimes would have been financial documents and records that would normally be retained by Defendants in their usual course of business.

In connection with crime 1, the 2011 Woodring Affidavit provided ample information to support the magistrate judge’s determination that evidence of theft of Department of Defense funds would be found at various locations. For example, while one instance of alleged theft occurred at some time in 2005, it was not until 2008, three years later, that Guaranteed Returns produced 16 checks, dated between 2005 and 2006, as purported proof that Guaranteed Returns had properly passed funds through to its client. *See* Grover Decl. Ex. 1, at 6 ¶ 12; Grover Decl. Ex. 1, at 7 ¶ 13) (showing that the checks were dated between 2005 and 2006). That Guaranteed

Returns was able to produce detailed records of payments made to the Department of Defense three years after the time of an alleged theft demonstrates that Guaranteed Returns routinely retained detailed financial documents as part of its normal business operations. It was, therefore, reasonable for the issuing magistrate to conclude that evidence of the theft would likely be in Guaranteed Returns' possession in 2011 and even later than 2011.

This conclusion is further supported by the fact that the Department of Defense was a client of Guaranteed Returns for more than 10 years by the time the 2011 Search Warrants were issued. Grover Decl. Ex. 1, at 5 ¶ 8. The Department of Defense, as a client, required Guaranteed Returns to retain all Department of Defense-related records "for at least three years after" their relationship ended, if ever. Grover Decl. Ex. 1, at 18 ¶ 45. For this reason, it was reasonable to believe that Guaranteed Returns would have retained records and data about its long-term client including records and data that were likely to be evidence of the theft of its clients' funds dating back years. The information relating to crime 1, in short, was not stale.

Similarly, the 2011 Woodring Affidavit's information as to crime 2 (Scheme to Defraud Manufacturers) and crime 3 (Scheme to Divert Funds to Clinicare) was not stale. Instead, the 2011 Woodring Affidavit provided a substantial basis for the issuing magistrate judge's probable cause determination. Among other things, the 2011 Woodring Affidavit explained that in order to perpetrate the scheme to divert funds to Clinicare, the computer code and computer program used to manage inventory and refunds was altered in such a way that the alternations would remain in the computer system. Grover Decl. Ex. 1, at 15 ¶ 34. This provided a reasonable basis for the issuing magistrate judge to believe that evidence of the scheme was likely to be found upon investigation into the computer systems used by Guaranteed Returns. Accordingly, the information provided relating to crime 2 was not stale.

As with crime 2, the information provided to support a finding of probable cause as to crime 3 was not stale. Among other things, the 2011 Woodring Affidavit explained that between 2005 and 2006, at least 18 shell companies were created and used to defraud various pharmaceutical manufacturers that had relationships with Guaranteed Returns. Grover Decl. Ex. 1, at 16 ¶ 36. Further, as a result of the various transactions among these shell companies, Guaranteed Returns, and the pharmaceutical manufacturers, a variety of financial records, inventory records, and receipts would have been generated and maintained for great lengths of time in the normal course of business. *See* Grover Decl. Ex. 1, at 18 ¶ 42; Grover Decl. Ex. 1, at 18 ¶ 43. Accordingly, the information provided relating to crime 3 was not stale.

b. The Issuing Magistrate Judge Properly Relied On The Information Concerning Crime 4, Including Hearsay Evidence

It is well-established that an “affidavit or a complaint [in support of a warrant application] may be validly based on hearsay information.” *United States v. Caple*, 403 F. App’x 656, 659 (3d Cir. 2010) (citing *United States v. Schartner*, 426 F.2d 470, 473 (3d Cir. 1970)). Accordingly, an affidavit relying on hearsay should not be deemed insufficient simply because of its reliance on hearsay “so long as a substantial basis for crediting the hearsay is presented.” *Gates*, 462 U.S. at 241–42. When reviewing the decision by a magistrate judge to credit hearsay information, the reviewing court must keep in mind that the “task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity[] and basis of knowledge[] of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Caple*, 403 F. App’x at 659.

Here, the magistrate judge had a substantial basis for relying on the hearsay information submitted in the Woodring Affidavit about crime 4 (Scheme to Divert Indate Refunds) because the information had been corroborated by four witnesses with knowledge of Guaranteed Returns' sales and marketing protocols and because their statements were corroborated by written documents.

First, the four witnesses supplying information about the scheme to divert indate refunds were all former employees of Guaranteed Returns with knowledge of the business. Grover Decl. Ex 1, at 11 ¶ 23. Each of the witnesses provided corroborating accounts of Guaranteed Returns' marketing and sales practices relating to indate pharmaceuticals. *See, e.g.*, Grover Decl. Ex. 1, at 20 ¶ 50 (indicating that witness 2 supplied information that was consistent with witness 3); Grover Decl. Ex. 1, at 11 ¶ 24 (indicating that witnesses 2, 3, and 4 supplied corroborating information regarding sales and marketing policies at Guaranteed Returns).

Second, Agent Woodring was able to corroborate the information supplied by the four witnesses with two Guaranteed Returns documents. The first document was a note authored by Defendant Dean Volkes confirming the information provided by the witness regarding the existence of "managed" and "unmanaged" indate accounts, a critical fact in the alleged scheme to divert indate refunds from Guaranteed Returns' clients. Grover Decl. Ex 1, at 12–13 ¶ 26. The second of these documents was a page of handwritten notes by a Guaranteed Returns manager confirming the existence of a special account into which Guaranteed Returns would allegedly divert indate refunds that otherwise should have been passed through to Guaranteed Returns' clients. Grover Decl. Ex. 1, at 13 ¶ 28.

The submission of information from four witnesses, all former employees of Guaranteed Returns, as well as the submission of information originating from Guaranteed Returns' own

records and documents formed a substantial basis on which the magistrate judge could find probable cause. The magistrate judge's finding of probable cause was reasonable, pragmatic, and sufficiently supported in view of the complex nature of the alleged crime.

c. The Information Concerning Alleged Crime 5 Provided A Substantial Basis On Which The Issuing Magistrate Judge Could Properly Find Probable Cause

Finally, as to crime 5 (Destruction of Records), the issuing magistrate judge had more than a substantial basis on which to find probable cause. While under a grand jury subpoena for records relating to the Government's investigation into Guaranteed Returns, Defendants conducted a data purge that destroyed computer records that were responsive to the subpoena. Grover Decl. Ex. 1, at 8 ¶ 15. Although Defendants assert that the records were destroyed in accordance with normal operating procedures, the 2011 Woodring Affidavit provided ample information to support the conclusion that the data purge was intentional and designed to hinder the Government's investigation and violate the Grand Jury subpoena. Three facts, in particular, provided a strong basis on which to find probable cause that evidence of criminal destruction of records would be found.

First, a former Guaranteed Returns employee who was involved in the initial production of documents responsive to the grand jury subpoena explained to Government agents that information technology employees were specifically directed by Defendant Dean Volkes to purge computer data permanently after having been served with the grand jury subpoena. Grover Decl. Ex. 1, at 8 ¶ 17. This directive from Defendant Volkes stood in sharp contrast to Guaranteed Returns' general practice of retaining all computer data and further maintaining backups of that data.

Second, two other witnesses, one who had worked in the IT department at Guaranteed

Returns, and the other who worked as a vice president at Guaranteed Returns, confirmed that during their employment there had never been a routine purge of computer data. Grover Decl. Ex. 1, at 10 ¶¶ 21–22.

Third, it was unlikely that Guaranteed Returns had conducted a “routine data purge” because under the 2001 DoD Contract and 2007 DoD Contract, Guaranteed Returns was obligated to retain records pertaining to the DoD Contract for three years after termination of the DoD contract. Grover Decl. Ex. 1, at 18 ¶ 45. The DoD Contracts had not been terminated at the time of the Government’s application for the 2011 Search Warrants. *See* Grover Decl. Ex. 1, at 5 ¶ 8 (providing that as of April 2011, Guaranteed Returns “continue[d] to be one of [the Department of Defense’s returns] vendors”). Accordingly, that Guaranteed Returns would conduct a purge of its computer records despite its ongoing duty to retain documentation of its dealings with the Department of Defense provided still further grounds for the magistrate judge to find probable cause that evidence of obstruction would be found in Defendants’ possession.

The foregoing factual allegations, thus, formed a substantial basis on which the magistrate judge found probable cause to search in connection with each alleged crime. The issuances of the 2011 Search Warrants were proper.

C. A *Franks* Hearing Is Not Justified Because The Alleged False Statements And Omissions In The 2011 Woodring Affidavit And The Callahan Affidavit Were Not Material To Probable Cause

Separate from Defendants’ argument that the 2011 Search Warrants were unconstitutional general warrants and/or that the 2011 Search Warrants were not based upon probable cause, Defendants’ argue that they are entitled to a *Franks* hearing to show that but for a number of purportedly false statements and omissions made by the Government in its warrant applications, the magistrate judges who issued the 2011 Search Warrants and the 2014 Search

Warrants could not have found probable cause to issue the warrants. Defendants, however, have failed to establish their entitlement to a *Franks* hearing and the Court, therefore, rejects Defendants' challenge to the 2011 Search Warrants and the 2014 Search Warrants on these grounds.

As it relates to the 2011 Search Warrants, Defendants assert that the 2011 Woodring Affidavit recklessly omitted two material facts that would have undermined a probable cause finding had they been included. The two facts purportedly omitted were: (1) the existence of "key contractual terms" that authorized Defendants to retain all refunds for indates, and (2) a statement regarding the "limited scope of [Defendants'] indate business." Defs.' Mem. of Law in Supp. 19, 21. As a corollary to the second omitted fact, Defendants assert that the 2011 Woodring Affidavit's statement regarding, and characterization of, Defendants' business as "permeated by fraud" was "without factual basis" and constituted a materially false assertion. Defs.' Mem. of Law in Supp. 21.

As it relates to the 2014 Search Warrants, Defendants similarly assert that the Callahan Affidavit, submitted by the Government in its application for the warrants, failed, as the Woodring Affidavit failed, to (1) disclose certain "key contractual terms" that purportedly authorized Defendants to retain all refunds made for indates, and (2) include a statement regarding the "limited scope of [Defendants'] indate business." The Court disagrees with Defendants' assertions regarding both the 2011 Search Warrants and the 2014 Search Warrants as discussed below.

1. Standard for Granting a *Franks* Hearing

In *Franks v. Delaware*, the Supreme Court created a pathway through which a defendant could challenge a magistrate judge's finding of probable cause and issuance of a search warrant.

Franks, 438 U.S. 154 (1978). *Franks* provides that where a defendant shows that but for the knowing, intentional, or reckless inclusion of a false statement in warrant application, there could be no finding of probable cause to justify the government’s search, any evidence derived from the exercise of that warrant must be excluded from a criminal trial. *See Wilson v. Russo*, 212 F.3d 781, 787 (3d Cir. 2000). The defendant must prove two things to qualify for relief under *Franks*: “(1) that the affiant knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that created a falsehood in applying for a warrant; and (2) that such statements or omissions were material, or necessary, to the probable cause determination.” *Yusuf*, 461 F.3d at 383 (emphasis added).

Prior to any hearing, however, a defendant seeking relief under *Franks* must first “make a substantial preliminary showing that the affidavit contained a false statement [or omission], which was made knowingly or with reckless disregard for the truth, which is material to the finding of probable cause.” *United States v. Livingston*, 445 F. App’x 550, 556 (3d Cir. 2011) (citing *Yusuf*, 461 F.3d at 383) (emphasis added). In order to make this preliminary showing, “the defendant cannot rest on mere conclusory allegations or a ‘mere desire to cross-examine,’ but rather must present an offer of proof contradicting the affidavit.” *Yusuf*, 461 F.3d at 383 n. 8.

a. Determining The Materiality Of An Omission Or An Assertion

The Third Circuit has acknowledged two lines of analysis to determine whether a purported omission or false assertion is “material” to a finding of probable cause. If “faced with an omission, the court must remove the ‘falsehood created by an omission by supplying the omitted information to the original affidavit’” and then determine whether probable cause would still exist upon the facts provided to the magistrate judge. *Yusuf*, 461 F. 3d at 384. By contrast, if “faced with an affirmative misrepresentation, the court is required to excise the false statement

from the affidavit” and determine whether, without the false statement, probable cause would still exist. *Yusuf*, 461 F. 3d at 384.

While Defendants have asserted that the 2011 Search Warrants and the 2014 Search Warrants were based upon affidavits containing material omissions and false statements, the Court finds that the alleged omissions and false statements were immaterial to the magistrate judge’s finding of probable cause. That the purported omissions and false statements were immaterial defeats Defendants’ argument for a *Franks* hearing. For this reason, the Court need not analyze whether the omissions and false statements were made knowingly or recklessly.

2. The Alleged Omissions In The 2011 Woodring Affidavit And The Callahan Affidavits Were Immaterial

Defendants assert that the Woodring and Callahan Affidavits omitted two material facts that, had they been included, would have barred a finding of probable cause. First, Defendants assert that the Affidavits omitted certain “key contractual terms” that purportedly authorized Defendants to retain all refunds made for indates. Second, Defendant asserts that the Affidavits omitted a statement indicating the “limited scope of [Defendants’] indate business.” Defs.’ Mem. of Law in Supp. 19, 21. Neither of these two facts, however, were material, within the meaning of *Franks*, to the finding of probable cause since inclusion of either or both of the facts in the Affidavits would not have precluded a finding of probable cause.

a. The Omission Of “Key Contractual Terms”

Regarding the “key contractual terms,” Defendants maintain that language printed on a “Return Authorization form” (“RA form”) and language appearing on Guaranteed Returns’ website established Defendants’ contractual right to retain any and all indate drug refunds instead of passing those funds through to their clients minus a service fee. Defs.’ Mem. of Law in Supp. 19. Had the Woodring Affidavit included the RA form language and language from

Guaranteed Returns website, Defendants contend, the magistrate judge could not have found probable cause because the magistrate judge would have concluded that Guaranteed Returns was entitled to retain all refunds for indates. *Id.* at 20. In so reasoning, however, Defendants neglect to acknowledge that the Woodring Affidavit included information that directly contradicted such a conclusion.

Among other things, information from four witnesses, all former Guaranteed Returns employees, explained that:

[Guaranteed Returns'] clients were told that Guaranteed Returns would accept "in-date" product, retain it until it was ripe for return under the manufacturer's policy, and then return it for the client's credit. Guaranteed Returns did sort "in-date" product. However, Guaranteed Returns routinely kept the resulting refund for itself rather than remitting the return funds to the client.

Grover Decl. Ex. 1, at 11 ¶ 24 (emphasis added). This information shows that notwithstanding any contractual terms or disclaimers to the contrary, Guaranteed Returns' clients were led to believe that they would receive refunds for indates sent to Guaranteed Returns.

Three of these four witnesses further provided a specific example of Guaranteed Returns' improper retention of indate refunds. The witnesses explained that "Guaranteed Returns retained the funds owed to the DoD for 'in-date' product" rather than passing the funds through to the Department of Defense. Grover Decl. Ex. 1, at 14 ¶ 29. That Guaranteed Returns had retained all of these indate refunds directly contradicted the payment scheme established by the 2001 DoD Contract and the 2007 DoD Contract. *See* Grover Decl. Ex. 1, at 5 ¶ 9 (providing that under these contracts Guaranteed Returns was required to "remit [refunds] to the DoD Guaranteed Returns received a fee of approximately seven percent of the estimated return value for each return made."). Supplying the RA form language and the language from Guaranteed Returns' website regarding purported contract terms would not foreclose a determination of

probable cause. Therefore, the purported omission of certain “key contractual terms” from the 2011 Woodring Affidavit was immaterial under *Franks*.

The omission of these contractual terms from the Callahan Affidavit similarly was immaterial to the finding of probable cause as it relates to the 2014 Search Warrants. Just as the 2011 Woodring Affidavit included information to support the conclusion that Guaranteed Returns was required, or had promised, to pass indate refunds through to its clients in exchange for a fee despite any purported contractual language to the contrary, so too did the Callahan Affidavit include such information.

Among other things, the Callahan Affidavit provided that Guaranteed Returns’ “marketing materials promise that [Guaranteed Returns] will handle the tracking of pharmaceutical products returns and related credits for its clients.” Grover Decl. Ex. 12, at 6 ¶ 10. Regarding indate drugs, “clients were told that [Guaranteed Returns] would accept ‘indate’ product, retain it until it was ripe for return under the manufacturer’s policy, and then return it for the client’s credit.” Grover Decl. Ex. 12, at 6 ¶ 11. Instead of passing the refunds through to their clients, however, the Affidavit provided that Guaranteed Returns “routinely converted the ‘indate’ product to its own use . . . rather than remitting the return funds to the client.” Grover Decl. Ex. 12, at 6 ¶ 11. This information provided a substantial basis on which to find probable cause that Guaranteed Returns was improperly retaining and converting indate drug refunds that belonged to its clients. Such a conclusion would have been justified even if any or all of the “key contractual provisions” that purportedly authorized Guaranteed Returns to keep all indate refunds for its own benefit had been included in the Callahan Affidavit. Accordingly, the purported omission of certain “key contractual terms” from the Callahan Affidavit was immaterial under *Franks*.

b. The Omission Of A Disclosure Regarding The Purportedly “Limited Scope of [Defendants’] Indate Business”

Regarding the purported omission of a statement indicating the “limited scope of [Defendants’] indate business,” even if the 2011 Woodring Affidavit had included a statement indicating that Guaranteed Returns’ indate refunds accounted for ten percent of the company’s total refunds volume, this fact would not have foreclosed a finding of probable cause. Therefore, the alleged omission was immaterial under *Franks*.

As discussed in Section II.B, above, the 2011 Woodring Affidavit provided more than sufficient facts on which to find probable cause as to each of the five alleged crimes for which evidence was sought. Indeed, even if the 2011 Woodring Affidavit included a statement that Guaranteed Returns’ indate refunds were a “limited” portion of its overall business, such a statement would not negate the facts set forth in the affidavit in support of the reasonable conclusion that Guaranteed Returns had engaged in the theft of indate refunds properly belonging to its clients. That Guaranteed Returns was committing theft of indate refunds that constituted only ten percent of its total business volume would not alter the fact that the theft had occurred or was occurring. For this reason, the purported omission of a statement disclosing the “limited scope of [Defendants’] indate business” was immaterial to the probable cause determination under the meaning of *Franks*.

3. Alleged False Statement In The Woodring Affidavit Was Immaterial

In their effort to establish entitlement to a *Franks* hearing, Defendants also argue that the 2011 Woodring Affidavit’s statement that Guaranteed Returns was a business “permeated by fraud” was a material and false statement the omission of which would have precluded the magistrate judge’s finding of probable cause. Again, however, as discussed in Section II.B,

above, the magistrate judge's probable cause determination as to each of the five alleged crimes under investigation was sufficiently supported. Excision of the "permeated by fraud" statement would not alter the facts undergirding the probable cause determination as to each crime. Thus, the statement that Guaranteed Returns was "permeated by fraud" even if false, was not material to the probable cause determinations within the meaning of *Franks*.

III. MOTION TO DISMISS COUNT 54 (MONEY LAUNDERING CONSPIRACY) OF THE SUPERSEDING INDICTMENT

Defendants also move to dismiss Count 54 of the Superseding Indictment in which the Government alleges Defendants' involvement in a conspiracy to commit concealment money laundering. The Government alleges that Defendants conspired to launder funds received by Guaranteed Returns as part of its mail and wire fraud scheme to submit stolen indate drugs to various drug manufacturers for refunds. Defendants' base their motion to dismiss on the theory that Count 54 fails to state facts that, even if assumed to be true, would not establish the alleged crime. Defendants argue that Count 54 is flawed in four respects.

First, Defendants assert that Count 54 fails to allege a "financial transaction" on which the charge of conspiracy to commit money laundering is based. A "financial transaction" is an essential element of the crime of money laundering, therefore, Defendants reason, Count 54 fails as a matter of law.

Second, Defendants assert that to the extent that the Government intends to show that Defendants' commingling of stolen and legitimate pharmaceutical products constituted the crux the crime of money laundering, then Count 54 fails as a matter of law because it fails to allege that Defendants engaged in any financial transactions involving the "proceeds of a specified unlawful activity."

Third, Defendants assert that because the conspiracy to commit money laundering charge

stems from the act of batching the submission of stolen and legitimate drugs to the drug manufacturers, then the money laundering charge is identical to, and redundant of, the mail and wire fraud crimes with which Defendants have already been charged. For this reason, the crime alleged in Count 54 essentially merges with the mail and wire fraud crimes alleged elsewhere in the Superseding Indictment.

Fourth, Defendants contend that to the extent the money laundering charge stems from the financial transactions that occurred after Defendants received the proceeds of the purported mail and wire fraud crimes, these financial transactions could not constitute money laundering because these proceeds were transferred into accounts held by Defendants. Accordingly, Defendants contend that Count 54 should be dismissed because there are no facts on which a jury could find that Defendants had the requisite intent to conceal the proceeds.

The Court disagrees with Defendants' views and, instead, finds that Count 54 of the Superseding Indictment alleges sufficient facts that, if true, could result in a guilty verdict. Below, the Court first analyzes Count 54 and concludes that it is legally sufficient on its face. Then, the Court addresses each of Defendants four arguments in order.

A. Legal Standard

Prior to trial, a defendant may test the legal sufficiency of a criminal indictment under Federal Rule of Criminal Procedure 12(b)(3)(B). An indictment is sufficient if it: (1) "contains the elements of the offense intended to be charged," (2) "sufficiently apprises the defendant of what he must be prepared to meet," and (3) "allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution." *United States v. Huet*, 665 F.3d 588, 595 (3d Cir. 2012) (quoting *United States v. Vitillo*, 490 F.3d 314, 321 (3d Cir. 2007)). In evaluating an indictment for sufficiency, the court must

“accept[] as true the factual allegations set forth in the indictment.” *United States v. Besmajian*, 910 F.2d 1153, 1154 (3d Cir.1990). Further, as Defendants note in their Reply Memorandum of Law, such factual allegations must be taken from “within the four corners of the indictment, not the evidence outside of it.” *Vitillo*, 490 F.3d at 321. Accordingly, “[r]eview of a motion to dismiss an indictment ‘is a narrow, limited analysis geared only towards ensuring that legally deficient charges do not go to a jury.’” *United States v. Stock*, 728 F.3d 287, 292 (3d Cir. 2013).

B. Count 54 Of The Superseding Indictment States Sufficient Allegations That, If True, Could Result In A Guilty Verdict For Conspiracy To Commit Concealment Money Laundering

To prove conspiracy to commit money laundering at trial, the Government must establish three elements:

- (1) the conspiracy, agreement, or understanding to commit money laundering was formed, reached or entered into by two or more persons;
- (2) at some time during the existence or life of the conspiracy, agreement, or understanding, one of its alleged members knowingly performed one of the overt acts charged in the indictment in order to further or advance the purpose of the agreement; and
- (3) at some time during the existence or life of the conspiracy, agreement, or understanding, the defendant knew the purpose of the agreement, and then deliberately joined the conspiracy, agreement or understanding.

United States v. Conley, 37 F.3d 970, 977 (3d Cir. 1994). “[T]he government may allege and prove conspiracy even if the underlying substantive object of the conspiracy is never completed. For this reason, a conspiracy indictment need not allege every element of the underlying offense, but need only put defendants on notice that they are charged with a conspiracy to commit the underlying substantive offense.” *Conley*, 37 F.3d at 981 n. 5.

The underlying crime of money laundering involves “transactions [] conducted with the

‘proceeds’ of specified unlawful activity . . . committed with the intent *either* to promote the specified unlawful activity or to conceal the nature or source of the income.” *Conley*, 37 F.3d at 978 (emphasis in the original). Accordingly, money laundering comes in two forms: concealment money laundering and promotional money laundering.

In the case of concealment money laundering, the question of whether a transaction involving the proceeds of a specified unlawful activity is committed with the requisite intent to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity under 18 U.S.C. § 1956 is a question for the trier of fact. *See generally United States v. Clouden*, 534 F. App’x 117, 122 (3d Cir. 2013). The trier of fact may weigh various forms of evidence when making the determination as to intent including, for example:

Statements by a defendant probative of intent to conceal; unusual secrecy surrounding the transaction; structuring the transaction in a way to avoid attention; depositing illegal profits in the bank account of a legitimate business; highly irregular features of the transaction; using third parties to conceal the real owner; a series of unusual financial moves cumulating in the transaction; or expert testimony on practices of criminals.

United States v. Richardson, 658 F.3d 333, 340 (3d Cir. 2011) (citing *United States v. Garcia-Emanuel*, 14 F.3d 1469, 1475–76 (10th Cir.1994)).

In the present case, Count 54 of the Superseding Indictment is legally sufficient because it properly states the elements of the crime and satisfactorily apprises Defendants of the crime for which they are to stand trial. On its face, Count 54 references the criminal statutory provision, 18 United States Code, Section 1956(a)(1)(B)(i), under which Defendants will be prosecuted. More than simply referring the Defendants to the criminal code, however, Count 54 further states each of the three elements that constitute the alleged conspiracy to commit money laundering.

First, Count 54 provides that “[f]rom at least 1999 . . . through on or about October 28,

2014” Defendants “conspired and agreed together and with others known and unknown to the grand jury, to conduct and attempt to conduct [money laundering].” Superseding Indictment 27 ¶ 2.

Second, Count 54 provides that “[o]n or about February 17, 2011 . . . an employee of defendant Guaranteed Returns” committed two overt acts, among others, in furtherance of the conspiracy. Superseding Indictment 29–30 ¶¶ 1–2.

Third, Count 54 provides that Defendants knowingly and deliberately joined the conspiracy with full knowledge that the property involved “represented the proceeds of some form of unlawful activity,” and that the conspiracy was “designed in part to conceal or disguise the nature, location, source, ownership and control of [such] proceeds.” Superseding Indictment 27 ¶ 2. Count 54, accordingly, adequately sets forth the elements of the charged crime and there can be no confusion as to the crime for which Defendants are to stand trial.

In addition to referencing the criminal statutory provision under which Defendants have been charged, and in addition to stating the three elements of the crime explicitly, Count 54 alleges additional facts, that if proven true, would support the conclusion that the object of the alleged conspiracy was to commit or to further the substantive crime of concealment money laundering.

As to the first element of concealment money laundering—conducting transactions with the proceeds of specified unlawful activity—the Government alleges that Guaranteed Returns engaged in two specified unlawful activities, wire fraud and mail fraud. Superseding Indictment 27 ¶ 2. In short, the alleged wire fraud and mail fraud, as stated in the Superseding Indictment as Counts 1 through 52, consisted of Guaranteed Returns’ submission of fraudulent refund requests for stolen pharmaceutical products. *Id.* at 28 ¶¶ 4–5.

As to the second element of concealment money laundering—intent to conceal—the Government alleges, that Guaranteed Returns either attempted to, planned to, or did, in fact, “conceal or disguise the nature, location, source, ownership and control” of the proceeds of these specified unlawful activities. *Id.* at 27 ¶ 2. To support this allegation, the Government asserts that Guaranteed Returns attempted to conceal the proceeds of their fraud scheme by (1) intentionally commingling tainted funds with untainted funds, and (2) by transferring the commingled funds through various financial accounts.

First, the Government alleges that Guaranteed Returns took its fraud proceeds and deposited them into an account along with untainted funds derived from its legitimate business operations in order to conceal the fraud proceeds. Such activity can evince an intent to conceal. *See Richardson*, 658 F.3d at 340 (stating that the trier of fact may consider as evidence of intent to conceal the fact of defendant’s “depositing illegal profits in the bank account of a legitimate business”). Count 54 provides that “[t]hese fraud proceeds were concealed by commingling them with refunds due to the company’s healthcare provider clients, as well as with the service fees owed to defendant Guaranteed Returns for the returned products that were not diverted,” as part of its scheme to defraud. Superseding Indictment 28 ¶ 6. Count 54 further provides that “[w]hen the bundled funds reached Guaranteed Returns’ general operating account, fraud proceeds . . . were concealed among legitimate client funds.” *Id.* These funds were further transferred to other financial accounts and “among various other funds in th[ose] accounts.” *Id.* at 29, ¶ 11. These actions, if true, can lend support to the conclusion that Defendants intended to conceal the proceeds of its mail and wire fraud schemes.

Second, in further support of the proposition that Guaranteed Returns intended to conceal the proceeds of its fraud scheme, the Government identifies the irregularity of certain

transactions involving these proceeds, and unusual financial moves made by Defendants. These facts, if true, could support the conclusion that it was Defendants' intent to conceal the funds. *See Richardson*, 658 F.3d at 340 (stating that "highly irregular features of the transaction; using third parties to conceal the real owner; a series of unusual financial moves cumulating in the transaction; or expert testimony on practices of criminals" can support a finding of intent to conceal). The irregularities consisted of "a series of complex transactions," and the fact that "[s]ome of these transactions involved multiple movements through various other accounts." Superseding Indictment 29 ¶ 9. In view of these allegations, the charged crime of conspiracy to conduct concealment money laundering is legally sufficient as set forth in the Superseding Indictment.

C. The Court Rejects Each Of Defendants' Four Arguments In Favor Of Dismissal

Having determined that Count 54 is legally sufficient on its face, the Court turns specifically to each of the four arguments asserted by Defendants and explains why each must be rejected.

The first three of Defendants' arguments against Count 54 are premised upon a misreading of Count 54. In essence, Defendants contend that Count 54 points to the fraudulent transmission of batches of stolen and legitimate drugs to pharmaceutical manufacturers as the crux of the alleged, underlying money laundering crime. If, as Defendants reason, the Government contends that the fraudulent and batched submission of drugs to the drug manufacturers constitutes the money laundering act itself, then such activity, despite its fraudulent nature, cannot satisfy the elements of the crime of conspiracy to conduct concealment money laundering. Contrary to Defendants' assertion, however, it is not the fraudulent and batched submission of drugs that constitutes the underlying crime of money laundering, but

rather, Defendants actions with the proceeds of the fraudulent scheme. The fraudulent scheme, by the plain terms of Count 54, constitutes the underlying “specified unlawful activity” the proceeds of which had been, or were intended to be, concealed and laundered by Defendants. With this understanding, that the fraudulent scheme and batching constitute the “specified unlawful activity” and not the money laundering itself, Defendants first three arguments fail.

First, Count 54 provides that the financial transactions at issue are those transactions taken with the proceeds of the wire and mail fraud scheme. For example, the Government alleges that Guaranteed Returns took the proceeds of its fraud and deposited them “either as a wire transfer or in the form of checks” into Guaranteed Returns “operating account” in which other legitimate funds were held. Superseding Indictment 29 ¶¶ 7–8. Still other financial transactions at issue are Defendants’ transfer of the commingled funds out of the “general operating account” and into “various other accounts” through a “series of complex transactions.” *Id.* at 29 ¶ 9. These various other accounts included an account in the form of an irrevocable trust fund created for the benefit of a third-party beneficiary who is related to Defendant Dean Volkes, but is otherwise unrelated to this case. Grover Decl. Ex. 14, at 16 ¶¶ 42–45; Defs.’ Mem. of Law in Supp. 58 n. 22. Count 54, thus, sufficiently identifies financial transactions for the purposes of meeting the “financial transactions” element of the conspiracy to commit money laundering charge.

Second, just as Count 54 identified financial transactions sufficient, if true, to satisfy the financial transactions element of the charged crime, so too does Count 54 allege that the financial transactions involve the proceeds of the specified unlawful activities of mail and wire fraud. The Government plainly states in Count 54 that the “bundled reimbursement funds that the various manufacturers remitted to Guaranteed Returns through their authorized wholesaler constituted

proceeds of the underlying fraudulent transfer of in-dated product from clients' accounts.”

Superseding Indictment 28 ¶ 6 (emphasis added). Count 54 provides throughout that the fraudulent refunds constitute the alleged proceeds to be laundered. *See, e.g., id.* at 29 ¶ 8 (referring to the bundled refunds as the “fraud proceeds that corresponded to the product that had been . . . concealed among legitimate client funds.”); *id.* at 29 ¶ 11 (alleging that Guaranteed Returns engaged in transfers to conceal “proceeds [of the wire and mail fraud] among various other funds.”). Thus, Count 54 sufficiently identifies alleged proceeds for the purposes of meeting the “proceeds of specified unlawful activity” element of the conspiracy to commit money laundering charge.

Third, as Count 54 distinguishes the mail and wire fraud crimes as the specified unlawful activity, the proceeds of which Defendants allegedly conspired to launder and conceal, Defendants' contention that Count 54 merges with the mail and wire fraud counts cannot stand.

Fourth, the Court also rejects Defendants' argument based on the assertion that any financial transactions involving proceeds of the alleged mail and wire fraud schemes, to the extent that they occurred, could not, as a matter of law, constitute money laundering because the proceeds ultimately were transferred to accounts bearing the names of the Defendants. This assertion is unpersuasive for two reasons: (1) Defendants' assertion that any fraud proceeds were deposited exclusively into accounts bearing the names of Defendants is based upon information not contained within the four corners of the Superseding Indictment and, therefore, cannot be properly considered for purposes of a motion to dismiss, and (2) even if such information were considered at this point in the case, the mere fact that fraud proceeds were deposited into accounts with Defendants' names does not preclude the possibility that a jury may find intent to conceal.

The Superseding Indictment does not rest simply on the alleged fact that the fraud proceeds were transferred to Defendants’ personal accounts to show Defendants’ intent to conceal, but rather alleges that the fraud proceeds were subject to “multiple movements,” and “complex transactions.” Superseding Indictment 29 ¶ 9. As Defendants note in their Reply Memorandum of Law, it is inappropriate at this juncture to consider information and evidence beyond the four corners of the Superseding Indictment. Defs.’ Mem. of Law in Supp. 29 n. 14. Accordingly, any granular evaluation of the alleged transactions at this time would constitute an impermissible weighing of the sufficiency of the Government’s evidence in advance of trial. Instead, the issue of whether the alleged multiple movements and complex transactions evinces Defendants’ intent to conceal should be submitted to a jury.

Even if it were permissible to consider evidence outside the Superseding Indictment at this stage of the case, the evidence to which Defendants point in support of their motion to dismiss Count 54 does not compel dismissal of the charge. In arguing that transfers between accounts bearing the names of Defendants cannot demonstrate intent to conceal or disguise the nature, location, source, ownership, or control of the fraud proceeds, Defendants rely principally on the decision in *Conley*. 37 F.3d 970. Contrary to Defendants’ contention, however, *Conley* does not mandate dismissal of Count 54 as *Conley* is inapposite on the facts of this case.

In *Conley*, the Third Circuit, in dicta, acknowledged the general proposition that the money laundering statute does not seek to regulate all dispositions of criminal proceeds, but only those that are intended to promote or conceal the nature of the funds, their source, ownership, or control. 37 F.3d at 979.² The Third Circuit explained that the money laundering statute would

² In *Conley*, the Third Circuit was faced with a narrow issue irrelevant to the present case. The issue in that case was whether illegal gambling could qualify as a specified unlawful activity under the money laundering statute. The present case neither involves illegal gambling, nor does

generally not apply to the situation in which a defendant deposited “the proceeds of unlawful activity in a bank account in his own name and us[ed] the money for personal purposes.” *Id.* at 979. In so reasoning, the Third Circuit sought to distinguish cases in which it is clear that a defendant simply takes the proceeds of criminal activity and merely spends the proceeds on personal expenses from those cases that are more complex and that, in fact, involve intent to conceal and disguise criminal proceeds. In short, the Third Circuit aimed to reiterate the well-established proposition that the money laundering statute prohibits the laundering of criminal proceeds but not simply the spending of criminal proceeds. *United States v. Sanders*, 928 F.2d 940 (10th Cir. 1991).

The situation articulated by the Third Circuit in *Conley*, of simple receipt and spending of criminal proceeds, however, is not present in this case. Here, Defendants are not accused of merely receiving and then spending the proceeds of its alleged mail and wire fraud schemes on personal expenses, rather, the allegations set forth in Count 54 are that Defendants engaged in irregular financial transactions with those proceeds. Superseding Indictment 29 ¶¶ 8, 9, 11. These irregular financial transactions were made with the intent to disguise the nature of the funds, their source, ownership, and control. The Government alleges that Defendants did or intended to accomplish this goal of disguising or concealing these proceeds by “multiple movements,” and “complex transactions.” *Id.* 29 ¶ 9. The concern that the Third Circuit expressed in *Conley* is, therefore, not present in this case.

IV. MOTION FOR A BILL OF PARTICULARS

Defendants move for a bill of particulars regarding four aspects of the Superseding

it present any question regarding whether the alleged mail and wire fraud activities that Defendants engaged in qualify as specified unlawful activities under the money laundering statute.

Indictment. Defendants contend that a bill of particulars is necessary to clarify: (1) what transactions are at issue relating to the mail and wire fraud claims and who the victims are, (2) what obstructive acts and false statements Defendant Dean Volkes and Defendant Donna Fallon made, (3) who the coconspirators are relating to various charged crimes, and (4) what transactions are at issue in connection with Count 54 (money laundering conspiracy).³ The Court, however, disagrees that these aspects of the Superseding Indictment are deficient or require clarification as explained below.

A. Legal Standard

Federal Rule of Criminal Procedure 7(f) provides that a defendant may move for a bill of particulars. Fed. R. Crim. P. 7(f). A bill of particulars is intended “to inform the defendant of the nature of the charges brought against him to adequately prepare his defense, to avoid surprise during the trial and to protect him against a second prosecution for an inadequately described offense.” *United States v. Belkin*, No. CRIM. 93-240, 1993 WL 505652, at *5 (E.D. Pa. Dec. 8, 1993) (citing *United States v. Addonizio*, 451 F.2d 49, 63–64 (3d Cir. 1971)). A trial court may order that the government provide a defendant with a bill of particulars when the charging indictment “is too vague and indefinite for such purposes.” *Id.* at 5.

In this context, the charging indictment is sufficient so long as it “substantially follows the language of the criminal statute, provided that its generality does not prejudice a defendant in preparing his defense nor endanger his constitutional guarantee against double jeopardy.”

Knight, 2013 WL 3367259, at *2 (citing *United States v. Eufrazio*, 935 F.2d 553, 575 (3d Cir. 1991)). As stated previously, in connection with Defendants’ Motion to Dismiss, an indictment

³ Defendants initially identified five aspects of the Superseding Indictment for which a bill of particulars is necessary. However, in Defendants’ Reply Memorandum of Law, the aspects at issue were narrowed to four.

generally (1) “contains the elements of the offense intended to be charged,” (2) “sufficiently apprises the defendant of what he must be prepared to meet,” and (3) “allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution.” *Huet*, 665 F.3d at 595. “A bill of particulars is intended to give the defendant ‘only the minimum amount of information necessary to permit the defendant to conduct his *own* investigation.’” *Caruso*, 948 F.Supp. at 393(quoting *United States v. Smith*, 776 F.2d 1104, 1111 (3d Cir.1985))

Ultimately, “the decision to grant a bill of particulars is left to the sound discretion of the trial court.” *Knight*, 2013 WL 3367259, at *3 (citing *United States v. Armocida*, 515 F.2d 49, 54 (3d Cir. 1975)). When making its decision, the trial court may consider the extensiveness of discovery. *Id.* at 3. Generally, the more considerable the discovery produced by the government to defendant, the weaker defendant’s case for a bill of particulars. *Id.* at 3.

B. No Bill Of Particulars Is Necessary Because The Superseding Indictment Adequately Apprises Defendants Of The Alleged Crimes For Which They Are To Stand Trial And Provides Sufficient Factual Orientation To Allow Defendants To Prepare A Defense

The Court disagrees with Defendants regarding each of the purported deficiencies in the Superseding Indictment for which Defendants contend that a bill of particulars is necessary to remedy. In this case, the Superseding Indictment does precisely what it should; it apprises Defendants of the crimes for which they are to stand trial. The Superseding Indictment, in fact, goes beyond the minimum requirement that it substantially follow the language of the criminal code by providing specific factual allegations against Defendants. The Court addresses each of the areas of purported deficiency in the Superseding Indictment for which Defendants seek a bill of particulars below.

As a preliminary matter, the Parties agree that discovery in this case has been significant.

See Defs.’ Mem. of Law at 52 (stating that Defendants have received a “mass of documents produced in discovery”); Defs.’ Mem. of Law at 56 (stating that Defendants have received “over seven terabytes of discovery”); United States’ Resp. to Defs.’ Pretrial Mots. at 65 (stating that the Government produced “several terabytes of data and over a million pages of documents derived both from the searches at Guaranteed Returns’ premises and from third parties who supplied records during the grand jury’s investigation.”). The thoroughness of discovery in this case, therefore, generally militates against the need for a bill of particulars. *See Knight*, No. 2013 WL 3367259, at *3 (citing *Armocida*, 515 F.2d at 54).

1. Mail and Wire Fraud Victims and Transactions

There is no general requirement that the prosecution identify the victims of alleged wire or mail fraud in an indictment. In fact, federal courts have denied requests by defendants seeking such information. *See, e.g., United States v. Brown*, No. CRIM.A. 12-0367, 2013 WL 3463585, at *13 (E.D. Pa. July 9, 2013) (denying defendant’s request that the government provide a bill of particulars setting forth the names of the victims of an alleged scheme to defraud).

Defendants argue that regarding Counts 1 through 40, the Government must identify each of the alleged fraud victims, and each of the transactions by which they were defrauded.

Defendants believe that the Government must be specific as to the victims and transactions because Defendants would otherwise be unable to identify the victims and transactions on their own. For this reason, Defendants assert that their preparation for trial would be prejudiced. The Court is unpersuaded, however, principally because Defendants are already in possession of the information they seek and possess the expertise necessary to analyze the information.

Guaranteed Returns has held itself out as an expert in pharmaceutical returns and refunds, which entailed, among other things, maintaining accurate inventories and sophisticated accounting.

Defendants should readily be able to decipher its own data to determine the identities of their own clients and the transactions relating to each of those clients.

The allegations set forth in the Superseding Indictment supports the conclusion that Defendants are fully capable of determining the client victims and transactions at issue. The Superseding Indictment provides, for example, that Defendants identified certain drugs that properly belonged to various clients as belonging instead to an entity known as “GRX Store.” Superseding Indictment 9–12 ¶¶ 30–39. As the refunds for these drugs were received, the refunds would be deposited into an account assigned to the GRX Store and not the accounts of the various clients that otherwise would have received those refunds. *Id.* Ultimately, the Government alleges that Defendants diverted \$179,907,751.00 worth of drugs into the GRX Store over the lifetime of the scheme. *Id.* at 15 ¶ 50. In order to perpetrate this scheme, Defendants allegedly altered a “computerized inventory control system,” that was used to “track each pharmaceutical product of each healthcare provider client.” *Id.* at 8–9 ¶ 25. The use of such a computerized inventory system is not surprising given the number of drugs and clients with which Guaranteed Returns deals. Tracking its clients, their clients’ drugs, and their clients’ refunds is in essence the core of Guaranteed Returns’ business model as a returns company. Accordingly, Defendants should be well-equipped to determine, by reviewing their own data, from whom, and in connection with what transactions, the allegedly stolen GRX Store money was derived.

2. Obstruction and False Statements by Defendant Dean Volkes and Defendant Donna Fallon

Contrary to Defendants’ assertions, the Court finds that Counts 55 through 64 satisfactorily allege the crimes for which Defendants are to stand trial and allege the crimes with sufficient factual orientation to permit Defendants to prepare their defense. More specifically, as

to Defendants' argument that Counts 56 through 61 are deficient as they apply to Defendant Dean Volkes, the Court rejects this argument because the Superseding Indictment provides a number of factual allegations regarding Defendant Volkes' involvement in the alleged crimes that are satisfactory as stated. Among other things, the Superseding Indictment alleges Volkes' concealment of information pertaining to the Government's investigation⁴ and provision of false statements to investigators regarding information that was sought and ultimately found on two hard drives relating to Person #2 and Person #3. These allegations provide the requisite factual orientation for Defendants to prepare a defense without the need for a bill of particulars.

As to Counts 62 through 64, the Superseding Indictment also sufficiently states the crimes that Defendants are alleged to have perpetrated and provides such factual orientation as to allow Defendants to prepare a defense. In particular, while Defendants argue that Counts 62 through 64 do not provide a factual basis relevant to Defendant Donna Fallon, review of the plain terms of the Superseding Indictment shows that this not the case. Among other things, the Superseding Indictment provides that Defendant Donna Fallon allegedly made false statements to investigators regarding information that was contained on the Guaranteed Returns' FilePro computer system⁵ and further concealed information by misleading investigators,⁶ and/or

⁴ See Superseding Indictment 33 ¶ 10 (stating that Volkes' represented to investigators that information relevant to the Grand Jury investigation did not exist despite the fact that such information was later found); *Id.* at 33 ¶ 11 (providing that Volkes represented that Guaranteed Returns only maintained three years of information when, in fact, more existed), *Id.* at 33 ¶ 11 (providing that Defendants collectively responded to questions by investigators, by asserting that electronic information relating to Person #2 and Person #3 was unavailable when, in fact, Defendant Fallon had allegedly concealed or planned to conceal two hard drives containing such information in a locked cabinet in her office), *Id.* at 37 ¶ 25 (providing that Volkes "concealed the fact that alternative copies of [records requested under the Grand Jury Subpoena] existed.").

⁵ See, e.g., Superseding Indictment 33 ¶ 10 (providing that Defendant Donna Fallon represented that information requested by Grand Jury did not exist though the information did exist); *Id.* at 33 ¶ 11 (providing that Defendant Donna Fallon represented to investigators that information was not retained beyond three years though information was routinely backed up and saved for

destroyed information contained in the FilePro computer system while concealing alternative copies of the information.⁷ These allegations are also sufficient as stated to provide the requisite factual orientation for Defendants to prepare a defense to Counts 62 through 64 without the need for a bill of particulars.

3. Identity of Coconspirators Need Not Be Revealed

Regarding Count 54 (Money Laundering Conspiracy) and Count 55 (Conspiracy to Obstruct Justice), Defendants argue that the identities of all unindicted coconspirators must be disclosed to allow Defendants to prepare their defense. In support of this argument, Defendants point to a handful of cases in which trial courts have ordered the disclosure of unindicted coconspirators.

In drawing the Court's attention to these cases, many of which are from other jurisdictions, the Defendants, however, fail to acknowledge the existence of other cases in which trial courts within this jurisdiction have denied bills of particulars seeking disclosure of the identities of unindicted coconspirators. For example, in *United States v. Stocker*, the Court denied a defendant's request for the disclosure of "known and unknown" coconspirators in an alleged drug ring. No. CRIM. A. 89-00463-01, 1990 WL 157153, at *2-3 (E.D. Pa. Oct. 10, 1990). The Court reasoned that "[t]he government need not provide such specificity in the form of an indictment or bill of particulars because the indictment . . . [c]oupled with the many disclosures already made by the government [provided] sufficient grounds on which defendant may build a defense." *Id.* In particular, the Court found that the indictment's provision of a

longer periods); *Id.* at 35 ¶ 21 (providing that Defendant Donna Fallon met with government agents to discuss the Grand Jury subpoena and did not disclose information to the agents despite a duty to do so).

⁶ *Id.* at 35 ¶ 21.

⁷ *See, e.g., id.* at 37 ¶ 25 (providing that Defendant Donna Fallon failed to disclose existence of alternative copies of information sought by investigators).

timeframe in which the conspiracy was alleged to have taken place and the indictment's charges relating to other known and named coconspirators was sufficient to allow the defendant to investigate the claims and prepare his defense. *Id.*

In this case, the Court finds that a bill of particulars regarding the identities of the unknown and/or unindicted coconspirators in connection with Counts 54 and 55 is unnecessary because the Superseding Indictment, coupled with the extensive discovery in this case, provides sufficient information to Defendants to allow Defendants to build their defense. The Superseding Indictment provides, as the indictment in *Stocker* provided, both a timeframe over which the conspiracies are alleged to have occurred, and the names of some coconspirators who are known and have been charged. *See* Superseding Indictment at 27 (alleging that the money laundering conspiracy occurred “[f]rom at least 1999 . . . through on or about October 28, 2014” and involved coconspirators Guaranteed Returns, Dean Volkes, and Donna Fallon); *id.* at 36 (alleging that the conspiracy to obstruct justice occurred “[f]rom on or about September 14, 2009 to on or about April 5, 2011” and involved coconspirators Guaranteed Returns, Dean Volkes, and Donna Fallon); *id.* at 37 ¶ 24 (further alleging that Defendant Ronald Carlino was a coconspirator in the conspiracy to obstruct justice). These allegations relating to the timeframe and some of the coconspirators when viewed in tandem with the extensive discovery in this case are sufficient to provide factual orientation to Defendants without the need for an additional bill of particulars.

4. Money Laundering Charge Is Not Vague

Finally, Defendants argue, in their Reply Memorandum of Law, that as to Count 54 (Money Laundering Conspiracy), a bill of particulars is required to clarify what financial transactions are the subject of the Government's prosecution. Here, too, the Superseding

Indictment, coupled with the extensive discovery produced in this case, provides sufficient factual orientation to Defendants to allow them to prepare a defense.

As the Court discussed in Section III, above, Count 54 states sufficient factual allegations to alert Defendants about the crimes for which they are to stand trial. These factual allegations are further bolstered by the discovery produced in this case that included, among other things, the 2014 Woodring Seizure Affidavit. The 2014 Woodring Seizure Affidavit provides additional factual orientation to Defendants regarding the financial transactions that form the basis of the alleged money laundering conspiracy. For example, the 2014 Woodring Seizure Affidavit states that Defendants passed commingled funds through various accounts, including accounts containing untainted funds, and a fund in the name of Defendant Donna Fallon in the form of an irrevocable trust fund for the benefit of a third-party beneficiary who is otherwise not a part of this case. Grover Decl. Ex. 14, at 16 ¶¶ 42–45. Once these proceeds were transferred into these various accounts, the funds were allegedly converted, in some cases, into securities and stocks to further obfuscate the nature of the funds as commingled proceeds of wire and mail fraud. *Id.* These additional factual allegations, and other facts that Defendants may derive from the extensive discovery produced in this case, provides more than enough direction for Defendants to form a defense. Accordingly, no bill of particulars is necessary to clarify Count 54.

V. MOTION FOR RELEASE OF ASSETS

Defendants move for the removal of four notices of *lis pendens* that the Government filed on four parcels of real property as well as the release of two financial accounts that were seized under the 2014 Seizure Warrant. Regarding the notices of *lis pendens*, Defendants argue that the notices should be removed because the Government failed to show that the properties on which the notices were placed are traceable to the proceeds of the alleged mail and wire fraud, or

otherwise to the the money laundering conspiracy. Regarding the two financial accounts, Defendants argue that the accounts should be released because the Magistrate Judge who issued the 2014 Seizure Warrant erroneously found probable cause for their seizure.

A. Notices of *Lis Pendens*

A notice of *lis pendens* “simply serves to notify prospective purchasers or other interested persons who are not parties to the suit that particular property is the subject of pending litigation.” *United States v. Thomas*, 440 F. App’x 148, 152 (3d Cir. 2011). In the context of forfeiture, “*lis pendens* have been characterized as falling short of ‘restraint’ or ‘seizure’ in the context of pretrial restraint.” *United States v. Lebed*, No. CRIM.A. 05-362-01, 2005 WL 2495843, at *1 (E.D. Pa. Oct. 7, 2005) (citing *United States v. Miller*, 26 F. Supp. 2d 415, 432 n. 15 (N.D.N.Y. 1998)); *see also Thomas*, 440 F. App’x at 152 (stating that regarding the government’s pretrial filing of notices of *lis pendens* on various properties located in Georgia “were not impermissible pretrial restraints” and, therefore, the defendant was otherwise “free to liquidate the properties as he saw fit.”). Notices of *lis pendens* are not seizures within the context of pretrial restraints even though “[f]or practical purposes, it would be virtually impossible to sell or mortgage the property.” *Lebed*, 2005 WL 2495843 at *10 (citing *United States v. Register*, 182 F.3d 820 (11th Cir. 1999)). This is because, among other reasons, the “*lis pendens* does not affect the use to which the property may be put during the pendency of the action.” *Id.* (citing *Aronson v. City of Akron*, 116 F.3d 804, 811 (6th Cir. 1997)). Thus, the notice of *lis pendens*, unlike other forms of seizure such as arrest of the property in an *in rem* proceeding, does not remove or alienate the owner from the property as the owner can, among other things, enter the property at will.

In this case, the notices of *lis pendens* need not be removed because they were properly

filed and because such notices of *lis pendens* do not constitute seizures in the context of pretrial restraints. Here, the notices of *lis pendens* perform the function for which they were created, that is, the notices alert prospective buyers that the properties are subject to pending litigation having been identified by a grand jury as forfeitable as a result of the properties' involvement in, or traceability to property involved in, the crime of money laundering conspiracy. Indictment 44 ¶ 1; *see also* Superseding Indictment 50 ¶1 (providing same). Since the notices of *lis pendens* were proper, and since such notices do not rise to the level of pretrial restraint, the Court is unpersuaded that such notices should be removed from the four properties.

B. Seizure of Two Bank Accounts

The two bank accounts at issue were seized under the 2014 Seizure Warrant because the accounts are allegedly forfeitable as a result of their connection with Defendants' wire and mail fraud scheme, and the alleged conspiracy to commit money laundering. In essence, Defendants challenge the seizure of these accounts by asserting that the Magistrate Judge who issued the 2014 Seizure Warrants could not have found probable cause to support the seizure.⁸

Accordingly, the Court must review the Magistrate Judge's determination of probable cause with the proper level of deference as set forth in Section II.B.1, above.

Before discussing the specific probable cause determination made by the Magistrate Judge, the Court will first discuss the critical statutory provisions under which the Government sought pretrial restraint of the bank accounts involved in Defendants' money laundering offense. 18 U.S.C. § 981 (Civil Forfeiture) and 18 U.S.C. § 982 (Criminal Forfeiture) authorize the forfeiture of certain property related to the perpetration of the crime of money laundering under

⁸ Defendants advance other theories in favor of release, however, as the Court discusses below, since the issuing Magistrate Judge's finding of probable cause was adequate to support the issuance of the 2014 Seizure Warrant, this fact standing alone is enough to resolve the present motion.

18 U.S.C. § 1956. Section 981 provides that:

(a)(1) The following property is subject to forfeiture to the United States:

(A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 1956, 1957 or 1960 of this title, or any property traceable to such property.

18 U.S.C. § 981 (emphasis added). Section 982 similarly provides that:

(a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

18 U.S.C. § 982 (emphasis added). Property is “involved in” the offense when it “facilitates the commission of money laundering in violation of 18 U.S.C. § 1956.” *United States v. Eleven Vehicles*, 836 F. Supp. 1147 (E.D. Pa. 1993). Accordingly, where the proceeds of specified unlawful activity—tainted property—is hidden and laundered among untainted property in an attempt to conceal or disguise the nature, location, source, ownership, or control of the proceeds, the untainted property becomes “involved in” the commission of the concealment money laundering offense. *See id.* at 1153 (stating that the facilitation of money laundering “would allow forfeiture of ‘innocent’ property serving as a cover for ‘tainted’ property). The act of mixing these funds is part of the money laundering activity and, therefore, the newly-combined funds become “involved in” the commission of the money laundering offense. *See, e.g., United States v. Nicolo*, 597 F.Supp.2d 342 (W.D.N.Y. 2009) (citing *United States v. Puche*, 350 F.3d 1137, 1153 (11th Cir. 2003)) (stating that “[i]ndeed, in many cases ‘[i]t is precisely the commingling of tainted funds with legitimate money that facilitates the laundering and enables it to continue.’”).

By contrast, where the money laundering crime is completed and the money laundering proceeds and untainted funds are then combined, after various intervening deposits and

withdrawals, to purchase new property, the new property cannot be seized before conviction, but instead, may be seized only as “substitute assets” after conviction. *United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996). In *Voigt*, the Third Circuit addressed the situation in which the government attempted to seize jewelry that had been purchased with “funds from an account in which money laundering proceeds had been commingled with other funds.” *Id.* at 1082. The Third Circuit held that the government’s attempt, after a conviction for money laundering, to forfeit the jewelry directly was inappropriate because the government failed to prove by a preponderance of the evidence that the jewelry was not “traceable to money laundering proceeds.” *Id.* at 1088. The jewelry was not traceable to money laundering proceeds because the money laundering proceeds had been commingled in a bank account with untainted funds and subjected to “numerous intervening deposits and withdrawals into his account subsequent to the deposit of the tainted funds,” that is, the money laundering proceeds. *Id.* The situation addressed in *Voigt* is specific and the Third Circuit’s holding is narrow.

Indeed, that the holding in *Voigt* is limited to the circumstance in which property is purchased using funds from an account containing money laundering proceeds and untainted funds was made clear by the Third Circuit in a later case, *United States v. Stewart*. 185 F.3d 112, 129 (3d Cir. 1999) (emphasis added) (distinguishing the government’s direct forfeiture of a bank account containing commingled funds from the facts in *Voigt* by stating that unlike in *Voigt*, the government was “not seeking to forfeit property purchased with commingled funds” and the financial account had not been subjected to “numerous withdrawals and deposits”). Thus, *Voigt* is generally of limited applicability.

Turning to the seizures in this case, the Court finds that the Magistrate Judge’s determination of probable cause that the two accounts contained funds “involved in” or

otherwise “traceable to” property involved in a money laundering offense was founded on a substantial basis and, therefore, the probable cause determination and the seizures will not be disturbed. The 2014 Woodring Seizure Affidavit submitted in support of the government’s application for seizure warrants was over 20 pages long and detailed regarding the alleged ongoing money laundering offense. The 2014 Woodring Seizure Affidavit further contained details connecting the money laundering offense to the two seized accounts.

Regarding the money laundering offense itself, the 2014 Woodring Seizure Affidavit tracks the language of the 2011 Woodring Affidavit and the Callahan Affidavit, both of which, the Court has determined were properly issued after a finding of probable cause as discussed in Section II, above. Given the totality of the circumstances and presented with facts as asserted in the 2014 Woodring Seizure Affidavit, the Magistrate Judge had a substantial basis to find probable cause that a money laundering offense had and/or was occurring. This is true independent of the Grand Jury’s own determination of probable cause under the original Indictment that money laundering conspiracy had and/or was occurring.

Regarding the two seized accounts, the 2014 Woodring Seizure Affidavit provided a substantial basis on which the Magistrate Judge could, and did, find probable cause that the accounts were “involved in” or otherwise “traceable to” property involved in the alleged money laundering offense. The 2014 Woodring Seizure Affidavit provided detail regarding the purported actions taken by Defendants in order to perpetrate the money laundering offense to support the conclusion that “Target Accounts are subject to forfeiture as property involved in money laundering, as facilitating property, and as accounts containing illicit scheme proceeds.” Grover Decl. Ex. 14, at 15 ¶ 40.

The 2014 Woodring Seizure Affidavit provided, among other things, an example to illustrate how Defendants took wire and fraud proceeds, proceeds of a specified unlawful activity, laundered and hid those proceeds among other money held in various Guaranteed Returns accounts “to promote the fraud scheme, or to [Defendant] Volkes’ personal accounts, through various, often convoluted, methods, which acted as further concealment of the proceeds.” Grover Decl. Ex. 14 at 15 ¶ 41. Through a detailed step-by-step analysis, the Government showed that Defendants appeared to receive fraud proceeds and deposit them into various accounts with non-fraud proceeds to conceal the origin of the tainted funds. Grover Decl. Ex. 14 at 13–14 ¶¶ 35–39. The analysis showed that money that was ultimately used to fund the first of the two targeted accounts, Target Account #1—Merrill Lynch account #843-38521 titled in the name of Dean Volkes, was “involved in money laundering, because the commingling of the fraud proceeds with funds related to legitimate transactions conceals the fraudulent source and nature of the fraudulent funds.” Grover Decl. Ex. 14 at 14 ¶ 39; Grover Decl. Ex. 14 at 16 ¶ 42. Therefore, the funds in Target Account #1 were “involved in [the] massive money laundering conspiracy through which the fraud scheme proceeds were commingled with hundreds of millions of dollars of additional return refunds.” Grover Decl. Ex. 14 at 17 ¶ 46.

The second of the two seized accounts, Target Account #2—Merrill Lynch account #843-14166 titled in the name of Donna Fallon, was alleged to have been funded “exclusively by Target Account #1” and, therefore, the funds contained in Target Account #2 were similarly either “involved in” or otherwise “traceable to” the property involved in the money laundering offense. Grover Decl. Ex. 14 at 17 ¶ 45.

Given the totality of the circumstances set forth in the 2014 Woodring Seizure Affidavit,

the issuing Magistrate Judge permissibly found probable cause that the two accounts were “involved in” or “traceable to” property involved in the alleged money laundering offense. The circumstance described in the 2014 Woodring Seizure Affidavit is not, contrary to Defendants’ assertions, analogous to that addressed in *Voigt*. Here, it was alleged that Defendants mixed the tainted proceeds of its mail and wire fraud, proceeds of specified unlawful activity, with untainted proceeds, for the purpose of concealing the proceeds. The act of commingling the funds could constitute part of the money laundering offense. The untainted funds, therefore, facilitated the money laundering offense and the commingled funds were then “involved in” the perpetration of the offense. For this reason, the seized accounts are not substitute assets.

Voigt, by contrast, involved the distinguishable situation where the money laundering offense is completed and the money laundering proceeds and untainted funds are then combined, after various intervening deposits and withdrawals, to purchase new property. The new property cannot be seized directly before conviction, but instead, may be seized only as “substitute assets” after conviction under 18 U.S.C. § 853(p). As stated in the 2014 Seizure Warrant, the money contained in the seized accounts was, in fact, used to make purchases of other, new property. Grover Decl. Ex. 14 at 16 ¶ 43 (providing that the funds in Target Account #1 were used “to make purchases . . . to paying off credit cards or other personal expenses.”). If the Government were seeking the seizure of the property purchased using funds from the seized accounts, such property may more properly fall within the definition of “substitute assets” as set forth in *Voigt*. However, this is not the case, and as explained above the Magistrate Judge’s determination of probable cause and issuance of the seizure warrant will not be disturbed. In sum, the Court will not order the release of the seized accounts.

VI. MOTION TO UNSEAL

Defendants seek the unsealing of two sealed documents relating to the guilty plea of Ryan Kasper (Dkt. No. 11-CR-570, Docs. 15 and 16), and three sealed documents relating to the guilty plea of Ronald Carlino (Dkt. No. 14-CR-574, Docs. 70, 71, and 72).

The right of access to court records and proceedings is well-established. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 780–81 (3d Cir. 1994). This right, however, is not without limits as “a court, after balancing the need for public access to the record and the parties’ desire for confidentiality, has considerable discretion in deciding whether or not to seal records.” *Haber v. Evans*, 268 F. Supp. 2d 507, 510 (E.D. Pa. 2003) (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994)).

In this case, in addition to interest of protecting the privacy of Ryan Kasper and Ronald Carlino, the Court considers the fact that the charges against Defendants involve various allegations of conspiracy and that the early disclosure of evidence that may be contained in the documents sought by Defendants would effectively divulge the Government’s theories and evidence in advance of trial. Despite the conclusion that this interest outweighs the default that such documents should be open to the public, the Court acknowledges that to the extent that the Government intends to call Ryan Kasper or Ronald Carlino as witnesses, then the Government must turn over to Defendants the requested documents regarding these witnesses’ guilty plea hearings. Accordingly, if the Government identifies Kasper and/or Carlino as witnesses, the Government must immediately produce the documents requested by Defendants for review.

VII. MOTION FOR *BRADY* MATERIAL

Defendants argue that the Government must produce three categories of information: (A) *Brady* material, (B) *Giglio* material, and (C) Jencks Act material.

A. *Brady* Material

It is well-established that pursuant to the holding in *Brady v. Maryland*, 376 U.S. 83 (1963), the government must disclose any material exculpatory evidence to a defendant at such time as to allow for its effective use at trial. *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984). There is no bright line rule establishing when such disclosure must be made. Rather, the question of timing will depend on the particular circumstances of a case. Further, while *Brady* established a duty on the part of the government to disclose such information to a defendant, and to do so without delay, it did not create a constitutional right to discovery. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Accordingly, “where a defendant makes only a general request for exculpatory material under *Brady v. Maryland*, it is the State that decides which information must be disclosed.” *United States v. Rodriguez*, No. CRIM. A. 07-709-01, 2008 WL 4925010, at *3 (E.D. Pa. Nov. 17, 2008), *aff’d*, 489 F. App’x 528 (3d Cir. 2012).

Here, the Government has acknowledged throughout the case that it is under a continuing duty to provide any *Brady* material to Defendants and that the Government has, in fact, supplemented its discovery periodically as such material is identified. Such action suffices under *Brady*. In the absence of an allegation that the Government is in possession of a specific piece of *Brady* material, then the prosecutions’ determinations regarding what must be disclosed at this time is all that is required. The Government, however, must be mindful to ensure that all such material is disclosed in a timely manner to allow Defendants to effectively use the material at trial.

B. *Giglio* Material

Under *Giglio v. United States*, the Supreme Court held that critical impeachment material that may alter a jury’s view of a crucial government witness must also be disclosed to a

defendant. 405 U.S. 150 (1972). In so ruling, however, the Supreme Court did not set a bright line rule for when *Giglio* material must be disclosed. See, e.g., *United States v. Higgs*, 713 F.2d 39 (3d Cir. 1983) (holding that *Giglio* material may be disclosed on the same day that a government witness is scheduled to testify and still suffice). Accordingly, the time for *Giglio* disclosure is a matter within the trial court's discretion. *Id.* at n. 6.

The Government has acknowledged its continuing duty under *Giglio* and has stated that it will supplement its discovery with any *Giglio* material as appropriate. Here, again, the Court encourages the Government, consistent with prevailing practice to provide *Giglio* material without delay and in a timely fashion. However, the Court sees no present need to order the Government to produce *Giglio* material early in light of the Government's good faith regarding its obligations so far in this case.

C. Jencks Act Material

The Jencks Act provides that:

In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

18 U.S.C. § 3500(a). The critical requirements of the Jencks Act are now codified in Federal Rule of Criminal Procedure 26.2. Under Rule 26.2, materials otherwise required to be produced under the Jencks Act must be produced to the defendant upon defendant's motion after the government's witness has testified on direct. Outside of the context of trial, Rule 26.2 provides a limited set of circumstances in which Jencks material must be produced. See Fed. R. Crim. P. 26.2(g) (providing that Rule 26 applies to: preliminary hearings, sentencing hearings, hearings to revoke or modify probation or supervised release, detention hearings, and proceedings under 28

U.S.C. § 2255 (Federal Habeas)).

In this case, Defendants' request for the early disclosure of Jencks material falls outside the normal circumstances under which disclosure is required. Therefore, the Government is not required to disclose Jencks material at this time. Nevertheless, the Court encourages the Government to disclose any Jencks material in such time as to allow Defendants to use it meaningfully in accordance with prevailing practice.⁹

VIII. CONCLUSION

For the reasons set forth herein, Defendant's Pretrial Motions are DENIED. An appropriate order follows.

⁹ As a general matter, the Third Circuit has acknowledged that it is the prevailing practice of United States Attorneys to "deliver[] Jencks material to defense counsel sufficiently in advance of the conclusion of direct examination to obviate trial interruptions solely to permit defense counsel to study the disclosures." *United States v. Murphy*, 569 F.2d 771, 773 n. 5 (3d Cir. 1978). The Third Circuit encourages this practice. *Id.*

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA,

v.

**DEVOS LTD. d/b/a GUARANTEED
RETURNS, et al.**

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CRIMINAL ACTION

NO. 14-574

ORDER

AND NOW, this __10th__ day of January, 2017, upon consideration of Defendants’ Pretrial Motions (Doc. 127), ¹Defendants’ Memorandum of Law in Support of Their Pretrial Motions (Doc. 128), Government’s Response to Defendants’ Pretrial Motions (Doc. 129), Defendants’ Reply Memorandum of Law in Further Support of Their Pretrial Motions (Doc. 135), and Oral Argument on Defendants’ Pretrial Motions held on September 19, 2016, **IT IS HEREBY ORDERED AND DECREED** as follows:¹

1. Defendants’ Motion to Suppress is **DENIED**;
2. Defendants’ Motion to Dismiss Count 54 of the Superseding Indictment (Money Laundering Conspiracy) is **DENIED**;
3. Defendants’ Motion for a Bill of Particulars is **DENIED**;
4. Defendants’ Motion for Release of Assets is **DENIED**;
5. Defendants’ Motion to Unseal is **DENIED**; and
6. Defendants’ Motion for *Brady, Giglio*, and Jencks Act Material is **DENIED**.

IT IS FURTHER ORDERED THAT if and when the Government decides to call Ryan

¹ Defendants’ Pretrial Motions include: (1) Defendants’ Motion to Suppress; (2) Defendants’ Motion to Dismiss Count 54 of the Superseding Indictment (Money Laundering Conspiracy); (3) Defendants’ Motion for a Bill of Particulars; (4) Defendants’ Motion for Release of Assets; (5) Defendants’ Motion to Unseal; and (Defendnats’ Motion for *Brady, Giglio*, and Jencks Act Material.

Kasper and/or Ronald Carlino as witnesses in the trial of the above-captioned matter, the Government shall make the documents requested by Defendants in connection with its Motion to Unseal available to Defendants immediately.

IT IS FURTHER ORDERED THAT pursuant to the Government's continuing obligations to disclose *Brady* materials, the Government shall supplement its document production to Defendants promptly as additional *Brady* materials are identified.

BY THE COURT:

/s/ Petrese B. Tucker

Hon. Petrese B. Tucker, C.J.

¹ This Order accompanies the Court's Memorandum Opinion dated January 10, 2017.