

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN/DUBUQUE DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	No. CR 08-1324 LRR
)	
vs.)	
)	
AGRIPROCESSORS, INC.,)	
)	
Defendant.)	

GOVERNMENT’S MEMORANDUM IN RESISTANCE TO MOTION TO SUPPRESS

The United States resists defendant’s June 15, 2009, Motion to Suppress and submits the following memorandum in support of its resistance.

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I. INTRODUCTION

Defendant Agriprocessors' motion seeks to suppress evidence from a search of its facility in Postville, Iowa, on May 12, 2008. Defendant asserts three grounds in support of the motion. First, defendant claims the "Government's use of an administrative warrant to enter, search for and arrest persons for the purpose of prosecuting them criminally was a violation of fundamental constitutional principles." (Memorandum in Support of Defendant Agriprocessors, Inc. Motion to Suppress ("Defendant's Memorandum"), at 1). Second, defendant claims that, "even if the use of an administrative warrant was proper, the agents exceeded its scope by detaining and questioning all Hispanic workers without reasonable, articulable suspicion that any particular worker was an illegal alien." Id. Third, defendant argues that, to the extent the government "relied on the criminal search and arrest warrants, they were invalid because they did not identify the person to be arrested with requisite particularity and were not supported by probable cause." Id.¹

Defendant's motion to suppress is without merit. First, the government in good faith seized the undocumented workers pursuant to proper administrative authority pursuant to a *Blackie's* warrant. This was after a judicial officer found probable cause to believe defendant was harboring illegal aliens. Second, defendant lacks standing to challenge the arrest of the undocumented workers pursuant to ICE administrative

¹ In defendant's motion, it relies upon the "Fourteenth Amendment [] to the United States Constitution." Defendant's Motion to Suppress. The Fourteenth Amendment does not apply to the federal government. *Killscrow v. United States*, 451 F.2d 323, 325 (8th Cir. 1971); *Howard v. United States*, 274 F.2d 100, 104 (8th Cir. 1960).

authority. Regardless, the agents did not exceed the scope of the *Blackie's* warrant because the temporary detention of the workers was permissible both pursuant to the *Blackie's* warrant and also during the execution of the criminal search warrant. Third, the government did not violate the company's constitutional rights when it arrested, pursuant to ICE administrative authority, undocumented workers. Defendant lacks standing to challenge the particularity of the arrest warrants. Moreover, the workers were arrested pursuant to administrative authority, not pursuant to the criminal arrest warrants. They were seized pursuant to the *Blackie's* warrant that has a relaxed particularity requirement. Finally, even assuming the Court finds any infringement on defendant's constitutional rights, suppression of the evidence is an inappropriate remedy in this case because the government acted in good faith.

II. BACKGROUND

Criminal Arrest Warrants

On April 16, 2008, the Court issued criminal arrest warrants for 697 people believed to be employed at Agriprocessors. Each criminal complaint was supported by an affidavit setting forth evidence showing the unlawful use of a social security number. The complaints and warrants were so-called "Doe" warrants because the true name of each defendant was unknown. What was known, as shown by the affidavits supporting the criminal complaints, was that each individual was working at Agriprocessors using a social security number that was either invalid or was assigned to a person other than the name used by the employee.

The Criminal Search Warrant Application

On May 9, 2008, the government applied for a criminal search warrant pursuant to Rule 41 of the Federal Rules of Criminal Procedure. A copy of the criminal search warrant is attached hereto as Exhibit 1. The criminal search warrant application included a 56-page affidavit setting forth a factual basis supporting a finding of probable cause. The affidavit summarized evidence obtained by a confidential informant who worked at Agriprocessors (Affidavit, ¶¶ 10-14, 35-61), a former Agriprocessors supervisor (Affidavit, ¶¶ 15-19), and 10 undocumented aliens who had worked at Agriprocessors and had been arrested prior to May 12, 2008, for, among other things, possession of fraudulent documents (Affidavit, ¶¶ 20-34, 62-75). This information generally revealed that a large number (as many as 80%) of the workers at Agriprocessors were illegal aliens who used false identification documents to gain employment at Agriprocessors.

The affidavit also contained information showing that, between 2005 and 2006, Agriprocessors was notified by the Social Security Administration (“SSA”) that hundreds of its employees were using social security account numbers that did not match the name associated with that number (the so-called “no-match” letters). (Affidavit, ¶ 77). In addition, the affidavit showed immigration agents obtained information from SSA that, in the last two quarters of 2007, Agriprocessors employed 833 people whose social security number did not match the name associated with the number. (Affidavit, ¶ 81). The affidavit contained further information showing an analysis of records regarding the employees believed to be working at Agriprocessors at the time of the search included 737 employees. Of this group, 147 were using social security numbers

that were invalid and 506 were using social security numbers assigned to other people. (Affidavit, ¶ 83). This information was combined with information from other databases reflecting activity tied to the use of social security numbers. The analysis revealed that, in 2007, between 42% and 78.6% of the social security numbers used by Agriprocessors employees did not appear to be associated with the person assigned to that number or did not appear to be associated with any person. (Affidavit, ¶ 85-89).

After reviewing the affidavit in support of the criminal search warrant, United States Magistrate Judge Jon Stuart Scoles signed the search warrant. He found there was probable cause to support a search of Agriprocessors to, among other things, search for individuals for whom the government had obtained criminal arrest warrants. The criminal search warrant authorized the seizure of, among other things, "All 695 people on the attached list for whom there is a criminal complaint on file, and any identification documents pertaining to those people." (Exhibit 1, Attachment #2, ¶ 16).

Blackie's Warrant

Also on May 9, 2008, the government applied for a so-called *Blackie's* warrant² that permits entry into the premises of an employer to search for illegal aliens. A copy of the *Blackie's* warrant and its application are attached hereto as Exhibit 2. The affidavit used to support the criminal search warrant was also used to support the *Blackie's* warrant with only minor stylistic changes.

Simultaneous Authority Under a Criminal Search Warrant and a *Blackie's* Warrant

The affidavits submitted in support of both the criminal search warrant and the

² A "*Blackie's* warrant" is so-named because of the case of *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211 (D.C. Cir. 1981).

Blackie's warrant stated permission to enter the Agriprocessors facility was being sought for both administrative and criminal investigatory purposes.

This criminal search warrant is sought simultaneously with an application for a so-called *Blackie's* warrant and in connection with the issuance of 697 criminal complaints and arrest warrants against persons believed to be current employees of Agriprocessors for which the court determined there was probable cause to believe those people violated federal criminal laws. Of the approximately 697 charged by complaint, the government currently possesses copies of photo identification for only about 15 individuals. Based upon the entire investigation to date, it is believed the photo identification cards depict the actual person who has possessed and used the identification. These photos will assist in identifying persons using the name on the photo identification. However, for the vast majority of subjects, the government does not possess photo identification using the alias name on the complaint and warrant. It will be necessary to attempt to identify, among those present at the facility during the search, those individuals for whom there are currently arrest warrants. Further, based on the information developed in the criminal investigation, there is reason to believe there will be other employees present at the Agriprocessors facility whose lawful authority to reside and work in the United States is unknown, or who lack such authority. Accordingly, in conjunction with the execution of this criminal search warrant, ICE intends to question any alien or person found on the Agriprocessors property believed to be an alien as to his or her right to be or remain in the United States (8 U.S.C. § 1357(a)(1)), for purposes of determining whether the alien should be administratively processed for removal from the United States.

(Affidavit in Support of Criminal Search Warrant, ¶ 5).³

Defendant takes a portion of this paragraph out of context, distorting the meaning and the government's intent. Defendant claims "the Government stated that it sought the *Blackie's* warrant 'to identify among those present at the facility during the search individuals for whom there are currently arrest warrants' and to identify 'other employees present at the Agriprocessors facility whose lawful authority to reside and

³ Similar language was contained in the affidavit filed in support of the *Blackie's* warrant explaining the simultaneous application for a criminal search warrant pursuant to Rule 41 of the Federal Rules of Criminal Procedure.

work in the United States is unknown, or who lack such authority.” (Defendant’s Memorandum at 3). As can be seen in the full paragraph above, the affidavit does not say it was seeking a *Blackie’s* warrant for this purpose. Rather, the affidavit explains the criminal search warrant was being sought simultaneously with the issuance of criminal arrest warrants and that one of the tasks during the criminal search would be to look for those people for whom the government had arrest warrants. The *Blackie’s* warrant was requested, as explained in the above-referenced paragraph, because the government also anticipated encountering uncharged employees who lacked lawful authority to reside or work in the United States.

Thus, the Court authorized the government to enter defendant’s property under two grants of authority – one authorizing agents to search for illegal aliens, the other authorizing law enforcement officers to look for, among other things, persons for whom the government had pending arrest warrants.

Execution of the Search Warrant and *Blackie’s* Warrant

On May 12, 2008, at approximately 10:00 a.m., agents with United States Immigration and Customs Enforcement (“ICE”) executed the two warrants simultaneously at the Agriprocessors facility in Postville. When the ICE agents made entry into the plant, they temporarily detained all persons present. This was done to secure the premises for purposes of officer safety and to ensure evidence was not destroyed. A large number of these individuals were temporarily held in the Agriprocessors workers’ cafeteria.⁴

⁴ Defendant inaccurately states the agents “rounded up all Hispanics at gunpoint, [and] moved them to the basement,” (Defendant’s Memorandum at 9). First, defendant provides no factual support for this assertion. In truth, no agent drew a

ICE agents then conducted administrative field interviews of persons unable to provide identification showing themselves to be United States citizens or otherwise authorized to work lawfully in the United States.⁵ If an ICE agent determined there were grounds to believe an individual was an undocumented worker, the person was taken into ICE administrative custody.⁶

ICE Agents encountered approximately 389 undocumented aliens who were working at the plant. None of the undocumented alien workers were in possession of documents allowing them to work or reside in the United States legally. ICE agents took 327 of these undocumented workers into administrative custody. ICE released 62 other undocumented workers for humanitarian purposes, such as when the individual was the sole care-giver for minor children. The last bus of undocumented workers left Agriprocessors at about 5:00 p.m. ICE agents continued to execute the criminal search warrant until approximately 8:00 p.m. The criminal search warrant was still being executed after all of the undocumented workers had been removed from Agriprocessors.

weapon during the search. Furthermore, Agriprocessors had an old workers' cafeteria located in the basement of one of the buildings. The agents, however, detained the workers in a newer cafeteria on the first floor of the building. The room had restroom facilities available and, while the workers were detained, ICE agents provided them with food and water.

⁵ Those who did provide proof of United States citizenship were released as soon as the physical security of the operation permitted.

⁶ Defendant alleges, without citation to any factual basis, that agents only briefly questioned Caucasian workers without accents and allowed them to leave but "rounded up" all Hispanic workers. (Defendant's Memorandum at 3). Agents asked for identification from all workers, regardless of apparent race, ethnicity, or accent. When workers were unable to produce documentation demonstrating a lawful authority to reside or work in the United States, they were detained. Among these were Caucasians.

Criminal Arrest and Prosecution of Workers

Workers taken into ICE administrative custody were transported off-site where they first went through administrative processing by ICE detention officers, not criminal investigators. Once the administrative process was complete, the detainees were questioned by ICE Special Agents after agents read each detainee an enhanced advice of rights.⁷

When an undocumented worker was identified as a person for whom the Court had issued an arrest warrant, the individual was placed under criminal arrest pursuant to the warrant. The government criminally arrested 215 undocumented workers in this manner. Where a warrant did not exist, but probable cause was developed to believe an undocumented worker committed a federal offense, a criminal complaint was filed and a criminal arrest warrant was obtained and executed. The government criminally arrested 89 undocumented workers in this manner. When it was determined no pending warrant existed and there was no probable cause to believe an undocumented worker committed a federal offense, the person remained in ICE administrative custody. This occurred with respect to 21 undocumented workers.

All 304 undocumented Agrprocessors workers charged with criminal offenses pled guilty pursuant to “fast-track” plea agreements that generally resulted in only five-

⁷ The so-called *Miranda* warning was supplemented by advising the detainee that statements previously given to the administrative agents likely would not be admissible against them and advising them that, even if they gave a statement to the administrative agent, they did not have to give a statement to the ICE Special Agent. See Missouri v. Seibert, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring in the result) (stating that such enhanced *Miranda* warnings given prior to a second interview may cure any taint arising from an initial interview when *Miranda* warnings were not provided). Many workers invoked their right to remain silent.

month sentences. A condition of the plea agreement required cooperation with the government's investigation. Approximately 107 of the undocumented workers later testified before the grand jury.

III. AN EVIDENTIARY HEARING IS UNNECESSARY

"Evidentiary hearings need not be set as a matter of course" in relation to motions to suppress, "but if the moving papers are sufficiently definite, specific, detailed, and nonconjectual to enable the court to conclude that contested issues of fact going to the validity of the search are in question, an evidentiary hearing is required." *United States v. Losing*, 539 F.2d 1174, 1177 (8th Cir. 1976) (internal quotation omitted). A hearing is also unnecessary if the Court can determine that suppression is improper as a matter of law. *United States v. Mims*, 812 F.2d 1068, 1074 (8th Cir. 1987).

While there are factual disputes (for example, the government vehemently denies ICE agents detained workers based on ethnicity alone, that anyone was "rounded up at gun point," and that workers were detained in a basement during the search), the facts do not go to the constitutionality of the search so as to require an evidentiary hearing. Rather, for the reasons set forth below, defendant's motion is deficient as a matter of law. Indeed, in its pleadings defendant did not comply with Local Rule 7(c) to properly request an oral argument. See also *United States v. Hernandez*, 2004 WL 1562939, * 1 (8th Cir. July 14, 2004) (per curium) (unpublished - attached) (affirming district court's denial of an evidentiary hearing when defendant did not request an evidentiary hearing).

Accordingly, the Court should not conduct an evidentiary hearing on defendant's

motion to suppress.

IV. THE GOVERNMENT DID NOT IMPROPERLY USE AN ADMINISTRATIVE WARRANT FOR THE PURPOSES OF CRIMINAL PROSECUTION

Defendant first argues its Fourth Amendment right was violated because the government allegedly improperly used a *Blackie's* warrant to enter the premises in furtherance of a criminal investigation. (Defendant's Memorandum at 1, 5).

Defendant's argument is without merit.

The government properly entered the premises using a *Blackie's* warrant based on a judicial finding of probable cause to believe undocumented workers would be found in the Agriprocessors facility. ICE had a legitimate administrative interest in finding and processing for deportation such workers regardless of the co-existing criminal investigation. This was not a bad faith use of administrative powers to clandestinely advance a criminal prosecution. To the contrary, the government made entry pursuant to both administrative and criminal warrants premised on probable cause. Moreover, the government's intent for using a *Blackie's* warrant is not a proper area of inquiry under Fourth Amendment analysis.

 A. Authority Pursuant to a *Blackie's* Warrant

The Immigration and Nationality Act ("The Act"), 8 U.S.C. § 1101 et. seq., was passed by Congress as a means to restrict illegal immigration into the United States. The Act grants ICE agents general powers to investigate violations of immigration laws.⁸ Those powers include the authority to question aliens concerning their status and to

⁸ The Homeland Security Act of 2002, Pub.L.No. 107-296 §§ 441, 451, 471; 116 Stat. 2135, 2136-2137 (2002), abolished the Immigration and Naturalization Service (INS) and transferred responsibility for immigration enforcement to the Department of Homeland Security.

arrest without a warrant aliens illegally in the United States. 8 U.S.C. § 1357.

In addition, the Supreme Court has recognized the need for vigorous enforcement of immigration laws and has sought to strike a balance between that need and individual rights. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

Upon proper application, the United States may obtain judicial process to search for illegal aliens. *Almeida-Sanchez v. United States*, 413 U.S. 266, 274-5 (1973). In his concurring opinion, Justice Powell said a showing of probable cause may enable immigration agents to obtain a warrant to assist an investigation in which the immigration agents use their statutory authority to question and detain aliens. *Id.* at 282-85.

The use of civil orders to authorize the entry upon premises where illegal aliens are believed to be present and to permit their questioning and arrest, where appropriate, was expressly sanctioned by the decision in *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1218-1227 (D.C. Cir. 1981), cert. denied, 455 U.S. 940 (1982). Accord *Kotler Industries v. I.N.S.*, 586 F. Supp. 72, 75 (N.D. Ill. 1984) (immigration agents may obtain a warrant to search a business for illegal aliens).

While the warrant in *Blackie's* did not specifically name any of the suspected illegal aliens to be questioned, the court found it was as descriptive as was reasonably possible with respect to the persons sought ("aliens in the United States without legal authority"), the place to be searched (premises named by a street address), and the time within which the search might take place (daylight hours within 10 days of the date of the order). The warrant also restricted immigration agents to search only where

aliens were likely to be hiding. *Blackie's*, 659 F.2d at 1214, 1226. Further, the affidavits supporting the application for the warrant gave credible reasons for the affiants' suspicions persons sought on the premises were possibly illegal aliens. *Id.* at 1226.

In upholding the *Blackie's* warrant as "reasonable" within the meaning of the Fourth Amendment, the court held the warrant need not specifically name the suspected illegal aliens as long as the warrant and accompanying affidavits narrowed down the field of potentially vulnerable persons to those whom Immigration agents might reasonably believe to be aliens. *Id.* at 1226; accord *Kotler*, 586 F. Supp. at 76. As such, *Blackie's* upheld the use of a civil order to gain entrance to premises to search for, question, and arrest unnamed aliens who were believed to be present on the premises. *Blackie's*, 659 F.2d at 1226.

"The duty of the judge issuing a search warrant is to make a 'practical, common sense decision' whether, considering all the circumstances, a reasonable person would have reason to suspect that evidence would be discovered." *United States v. Gruber*, 994 F. Supp. 1026, 1036 (N.D. Iowa 1998) (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). The Eighth Circuit Court of Appeals states:

The fourth amendment's specificity requirement has been construed by the courts to provide a practical margin of flexibility in the degree of specificity required in search warrant descriptions. . . . [T]he standard used to determine the adequacy of the warrant description is one of "practical accuracy," *United States v. Johnson*, 541 F.2d 1311, 1313 (8th Cir.1976), and that the degree of specificity may necessarily vary according to the circumstances and type of items involved. *Id.* at 1314. "Where the precise identity of goods cannot be ascertained at the time the warrant is issued, naming only the generic class of items will suffice." *Id.* See also *United States v. Peters*, 791 F.2d 1270, 1278 n. 3 (7th Cir.1986); *United States v. De Luna*, 763 F.2d 897, 908 (8th Cir.), cert denied, 474

U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985) and cases cited therein.

United States v. Porter, 831 F.2d 760, 764 (8th Cir. 1987).

The Ninth Circuit reached a similar conclusion in *International Molders' and Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547 (9th Cir. 1986), where the panel stated:

We have held that an application for a search warrant "must have sufficient specificity to enable the judge to make an independent determination of whether probable cause exists and to prevent the agents from having uncontrolled discretion to rummage everywhere in search of seizable items once lawfully within the premises."

Id. at 552-553 (citing *United States v. Condo* 782 F.2d 1502, 1505 (9th Cir. 1986)

(emphasis in original)). Further, the court in *Molders*"stated:

[t]he requirement "to identify the suspect(s) by name" or to provide "enough specific identifying information to assure that the search for that person is reasonably likely to result in finding that person" imposes an unreasonable and impractical burden on the INS. We agree (with the *Blackie's* court) that "warrants and accompanying affidavits that narrow down the field of potentially vulnerable persons to those employees whom INS agents might reasonably believe to be aliens . . . satisfy the requirements of the Fourth Amendment even where the targeted persons are not identified by name."

Id. at 553.

Agents may also make warrantless civil immigration arrests of aliens unlawfully present in the United States. Such arrests, however, must be based on probable cause. The agent also must have reason to believe that subjects are "likely to escape before warrant[s] can be obtained for [their] arrest." 8 U.S.C. § 1357(a)(2), INA § 287(a)(2).

B. The Search Pursuant to the *Blackie's* Warrant Did Not Violate the Fourth Amendment

The search of Agriprocessors, pursuant to the administrative *Blackie's* warrant, did not violate defendant's rights under the Fourth Amendment. As discussed above, a *Blackie's* warrant requires a showing of probable cause. *Blackie's*, 659 F.2d at 1218-19. Defendant suggests *Blackie's* warrants "requires a lower standard of probable cause." (Defendant's Memorandum at 7). To the contrary, *Blackie's* warrants, like Rule 41 criminal search warrants, require a showing of probable cause to search. The test for probable cause does not change whether it is in the context of a *Blackie's* warrant or a criminal search warrant. See *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (probable cause exists when there is a "fair probability that contraband or evidence of a crime will be found in a particular place."). Only the particularity requirement regarding the items to be seized is relaxed in a *Blackie's* warrant. *Blackie's*, 659 F.2d at 1218-19.

Defendant's citation to *United States v. Utecht*, 238 F.3d 882 (7th Cir. 2001), is inavailing. There, the court was concerned about the "Government's use of civil subpoenas (or other kinds of administrative measures) that do not require probable cause . . ." *Utecht*, 238 F.3d at 886-87. In particular, in *Utecht* the government used an IRS subpoena that did not require a showing of probable cause to obtain documents. *Utecht*, 238 F.3d at 886. Here, the Court granted the government's application for permission to enter Agriprocessors under a *Blackie's* warrant upon a showing there was probable cause to believe illegal aliens were on the premises.

As explained above, a *Blackie's* warrant authorizes immigration officials to search a premises for undocumented aliens. That was done in this case. Each of the

undocumented workers found during the search was administratively processed by ICE for deportation. There existed a legitimate, administrative purpose for searching for and processing these undocumented aliens. This immigration-related purpose existed even though there also existed, at the same time, a criminal investigation.

Defendant cites *Abel v. United States*, 362 U.S. 217, 226 (1960), arguing the search pursuant to the *Blackie's* warrant violated its rights under the Fourth Amendment. (Defendant's Memorandum at 6). In *Abel*, Immigration and Naturalization Service ("INS") agents arrested a defendant pursuant to an administrative arrest warrant, searched his person and hotel room, and seized evidence of espionage. The Federal Bureau of Investigation had initiated the investigation of Abe, FBI agents were present at his arrest, and the government later charged and convicted Abel of espionage. Abel argued his arrest and search violated his Fourth Amendment rights because the administrative arrest was mere subterfuge to advance the criminal investigation. *Abel*, 362 U.S. at 226. The Supreme Court found that allegation unsupported by the record but stated, in dicta, that "[t]he deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts." *Id.* The Court found INS was "exercising its powers in the lawful discharge of its own responsibilities" and not "serving as a tool for the FBI in building a criminal prosecution against the petitioner . . ." *Id.* The Court said that "to hold illegitimate, in the absence of bad faith, the cooperation between I.N.S. and F.B.I. would be to ignore the scope of rightful cooperation" between the two agencies. *Abel*, 362 U.S. at 228.

Thus, *Abel* does not help defendant. Defendant has not alleged, let alone

shown, bad faith by the government. The government had both administrative and criminal interests in locating undocumented workers at Agriprocessors. ICE was lawfully discharging its administrative duties when it took the undocumented workers into custody for administrative deportation proceedings. Far from conducting an operation with subterfuge, the government obtained both a *Blackie's* warrant and a criminal search warrant and explicitly stated its intention in the affidavits in support of the warrants. The government did nothing to conceal its plan or intent. Rather, the government clearly stated what it was doing and under what authority it was acting. This was not a case where the government used an administrative warrant in bad faith for the purpose of advancing a criminal investigation. The government did not need to rely on an administrative warrant to advance its criminal investigation – it had a criminal search warrant that granted even broader search authority.

In *Michigan v. Tyler*, 436 U.S. 499 (1978), and later in *Michigan v. Clifford*, 464 U.S. 287 (1984), the Supreme Court revisited, in the context of arson investigations, the use of administrative searches for the purpose of advancing criminal prosecutions. In *Tyler*, the Court held administrative search warrants issued without probable cause can be used to investigate the cause of a fire, but a search warrant based on probable cause must be used where authorities seek evidence that will be used in a criminal prosecution. *Tyler*, 436 U.S. at 508. In *Clifford*, the Supreme Court held that, if the officer's primary purpose is to determine the cause of a fire, an administrative warrant to search premises would suffice, but if the primary purpose is to gather evidence of criminal activity, a criminal search warrant is necessary. *Clifford*, 464 U.S. at 294. Defendant cites these cases in support of his argument this Court must look to the

government's purpose for using the *Blackie's* warrant, and, if the Court finds it was primarily to advance the criminal prosecution, then suppression is required.

The purpose of the *Blackie's* warrant was to search Agriprocessors for undocumented workers and to initiate deportation proceedings against them. Deportation proceedings were initiated against all undocumented workers found at the plant. Twenty-one such workers were deported without any criminal charges being brought against them. The government had a criminal search warrant at the same time for the purpose of discovering evidence to be used in the criminal investigation against the company and its management. The government did not, however, obtain the administrative *Blackie's* warrant to advance the criminal investigation.

In support of its argument that the government intended to use the *Blackie's* warrant to advance the criminal prosecution, defendant again mischaracterizes the Affidavit, contorting the meaning to support its argument. Defendant claims "the Government told the Court that it intended to use the administrative *Blackie's* warrant to identify the persons referred to in the complaint so that they may be prosecuted." (Defendant's Memorandum at 8). Though defendant gives no citation to support this assertion, presumably defendant is referring to its earlier quotation of paragraph 5. (Defendant's Memorandum at 3). As the government demonstrated above, the affidavit makes no such statement. ICE had legitimate, administrative interests in searching for and detaining for purposes of deportation proceedings undocumented workers found in Agriprocessors.

Defendant apparently finds significant that ICE removed the undocumented workers from Agriprocessors pursuant to its administrative authority instead of arresting

them on the then-existing criminal arrest warrants. (Defendant's Memorandum at 8). Defendant misses the point. The administrative arrest of the workers under ICE authority demonstrates ICE was acting pursuant to its administrative authority and not as a tool to advance the criminal case. While the government was authorized to search the plant for workers for whom it had criminal arrest warrants, nothing required the government to execute on those criminal arrest warrants. When ICE agents determined the workers were undocumented, ICE had administrative authority to detain the workers regardless of whether there also existed at the time a criminal arrest warrant for the same worker. In any event, the government did not have arrest warrants for all of the undocumented workers encountered at Agriprocessors on May 12, 2008.

Moreover, defendant acknowledges it took "days" to determine the identity of the workers sufficient to tie them to existing arrest warrants. (Defendant's Memorandum at 4). While at Agriprocessors, ICE was able to determine those detained were undocumented workers. ICE was not able to determine that any particular worker was a person identified in a criminal arrest warrant. That determination required further investigation, including questioning the workers and examining documents found on them and in the plant files. Defendant apparently suggests ICE had either to execute the criminal arrest warrants on the spot or walk away from the undocumented workers despite the legitimate government interest in detaining and deporting illegal aliens. That proposition is unfounded. The government did not have arrest warrants for all of the workers. Of the 389 undocumented workers discovered in the plant, the government had existing arrest warrants for 220 of them. New criminal complaints

were filed against an additional 89 undocumented workers after further investigation in the days following their detention on administrative grounds. Finally, 21 undocumented workers were never charged criminally.⁹

What further distinguishes this case from the *Abel*, *Tyler*, and *Clifford* cases is the *Blackie*'s warrant was no ordinary administrative warrant. Unlike an administrative subpoena or an administrative search conducted pursuant to a fire department's policy, a *Blackie*'s warrant is supported by a probable cause finding by a judicial officer. The concern, under the Fourth Amendment, is whether the government is invading privacy unreasonably. Where, as here, there was a judicial finding of probable cause to enter Agriprocessors for the purpose of searching for undocumented workers, then the concern that the government attempted to evade constitutional restrictions does not apply. In any event, as explained below, the continuing validity of these cases is in doubt.

C. The Government's Purpose for Using a *Blackie*'s Warrant is Irrelevant Under Fourth Amendment Analysis

Defendant's legal argument is fatally flawed. Long after its decisions in *Abel*, *Tyler*, and *Clifford*, the Supreme Court abandoned the effort to evaluate Fourth Amendment claims by delving into the motive or purposes of law enforcement officers.

⁹ Incidentally, defendant has failed to carry its burden of demonstrating a link between the alleged violation and the evidence. Defendant acknowledges that "80" workers detained did not have pending criminal arrest warrants pending against them. Assuming, as defendant argues, that the government violated defendant's Fourth Amendment right when the government detained workers pursuant to administrative authority instead of executing criminal arrest warrants, then defendant must demonstrate the evidence it seeks to suppress derived from those 220 workers for whom the government had criminal arrest warrants, and not the 80 workers for whom it did not. Defendant has made no such showing.

In *Whren v. United States*, 517 U.S. 806 (1996), the Supreme Court flatly rejected the attempt to analyze constitutionality based on whether the government acted out of pretext or subterfuge. *Whren* involved a traffic stop for driving offenses, and the defendant alleged the stop was a pretext to investigate defendant's drug trafficking. The Supreme Court held that "[s]ubjective intentions play no role in ordinary, probable cause Fourth Amendment analysis." 517 U.S. at 806. This "principle is applicable to all police activities for which probable cause is required." *United States v. Clarke*, 110 F.3d 612, 613-14 (8th Cir. 1997).

For example, in *Cross v. Mokwa*, 547 F.3d 890 (8th Cir. 2008), defendant challenged as pretextual the warrantless entry of officers into a building under the authority of a housing inspector. Law enforcement officers were concerned that violent protesters would disrupt the World Agricultural Forum in St. Louis and believed some of these individuals were occupying a condemned building. *Cross*, 547 F.3d at 893. Federal authorities worked with local law enforcement officers and the building code enforcement department. Pursuant to this cooperation, a housing inspector and several police officers entered a condemned building without a warrant and pursuant to the inspector's administrative authority. *Id.* The protesters found in the building later sued the officers, claiming a violation of their constitutional rights. They argued that the "'extraordinary manner' of the officers' warrantless entry requires a 'balancing analysis' focused on the officers' intent to arrest protesters and seize their property." *Cross*, 547 F.3d at 895. The Eighth Circuit Court of Appeals rejected this argument, citing *Whren* and noting subjective intent of the officers plays no role in Fourth Amendment analysis. *Id.*

Thus, Fourth Amendment analysis is objective. In other words, regardless of the government's motive, the question is whether the government's conduct was permissible under the Fourth Amendment. If the government had probable cause to conduct a *Blackie's* search of Agriprocessors to look for undocumented workers, regardless of what the government intended to do with the evidence of their presence, the search was not unreasonable under objective Fourth Amendment analysis.

The *Blackie's* warrant was supported by probable cause. Indeed, defendant does not even allege the government lacked probable cause to support the *Blackie's* warrant. Its only complaint is the government used the *Blackie's* warrant for the purpose of advancing the criminal investigation. When, as here, the *Blackie's* warrant was supported by probable cause, the search was lawful under the Fourth Amendment regardless of the government's purpose for using the *Blackie's* warrant. Accordingly, defendant's argument is without merit and its motion should be denied.

V. THE ICE AGENTS DID NOT EXCEED THE SCOPE OF THE ADMINISTRATIVE WARRANT

Defendant's second argument is, at best, vague. Defendant argues that the agents exceeded the scope of the *Blackie's* warrant "by detaining and questioning all Hispanic workers without a reasonable, articulable suspicion that any particular worker was an illegal alien." (Defendant's Memorandum at 1). Later in its memorandum, defendant argues, "[e]ven assuming ICE's use of an administrative *Blackie's* warrant was appropriate, the arrest on May 12, 2008, and the subsequent seizure of documents and computers violated Agriprocessors, Inc. [sic] constitutional rights because, in executing the *Blackie's* warrant, the ICE [sic] substantially exceeded its scope."

(Defendant's Memorandum at 8). Thus, it is not clear whether defendant is arguing it was the detention of the workers or the seizure of documents and computers that exceeded the scope of the administrative warrant.

In any event, defendant's argument is without merit. To the extent defendant challenges the seizure of documents and computers, that evidence was seized pursuant to the simultaneous criminal search warrant, not the *Blackie's* warrant. To the extent defendant is claiming the detention of the workers exceeded the scope of the *Blackie's* warrant, defendant lacks standing to make such a challenge. Regardless, the detention of the workers did not exceed the scope of permissible conduct in the execution of the *Blackie's* warrant and the criminal search warrant.

A. Defendant Lacks Standing to Challenge the Detention of the Workers

Defendant appears to seek suppression of evidence, in part, based upon the alleged "[detention] and questioning of all Hispanic workers without a reasonable, articulable suspicion that any particular worker was an illegal alien." (Defendant's Memorandum at 1-2). Because defendant lacks standing to assert third party constitutional rights, the Court should reject this portion of defendant's motion. See *Rakas v. Illinois*, 439 U.S. 128, 133 (1978) (defendant may not assert violation of the Fourth Amendment rights of a third party entitled him to have evidence suppressed at his trial).¹⁰

¹⁰ While courts often refer to "standing," that nomenclature should be replaced with "legitimate expectation of privacy." See *United States v. Sturgis*, 238 F.3d 956, 958 (8th Cir. 2001); see also *Rakas*, 439 U.S. at 139:

Rigorous application of the principle that the rights secured by [the Fourth] Amendment are personal, in place of a notion of "standing," will produce no additional situations in which evidence must be excluded. The inquiry under

“The Fourth Amendment protects people, not places.” *Katz v. United States*, 389 U.S. 347, 351 (1968); see also *United States v. Pierson*, 219 F.3d 803, 806 (8th Cir. 2000) (Fourth Amendment rights are personal and cannot be vicariously asserted).

“The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure.” *Id.* at 131 n. 1 (citing *Simmons v. United States*, 390 U.S. 377, 389-90 (1968)).

None of the alien workers’ constitutional rights were violated. However, even assuming the workers were unlawfully “seized” during the course of the May 12, 2008, search, defendant clearly was not “seized.” In this regard, defendant fails to assert a violation of its own constitutional rights, and it cannot seek to suppress the fruits of any allegedly unlawful seizure of its alien workers.

A similar claim of standing was rejected by the Eighth Circuit Court of Appeals in *United States v. Barber*, 557 F.2d 628, 634 (8th Cir. 1977). In *Barber*, both Barber and Keller were convicted of crimes relating to the passing of a counterfeit Federal Reserve Note. Among the evidence at trial were several counterfeit notes seized from the back of a police car where Keller had been placed following his arrest. The Eighth Circuit Court determined Keller’s arrest was unlawful and the notes should have been suppressed as to Keller. As to Barber, however, the Court held the notes were properly used to convict him. The Court explained:

either approach is the same. But we think the better analysis forthrightly focuses on the extent of a particular defendant’s rights under the Fourth Amendment, rather than any theoretically separate, but invariably intertwined concept of standing.

Id. (footnote omitted).

The only fourth amendment violation which occurred in this case was the "seizure" of Keller's person, by an arrest without probable cause. The arrest of Keller did not infringe upon any constitutional rights of Barber. Accordingly, Barber has no standing to urge the arrest's invalidity in order to suppress its fruits.

Id.; see also *Wong Sun v. United States*, 371 U.S. 471, 487 (1963) (evidence tainted by violation of one codefendant's Fourth Amendment rights remained admissible against other codefendant).

Accordingly, to the extent defendant challenges the manner in which its alien workers were questioned and detained, defendant lacks a legitimate expectation of privacy and its claim should be denied.

B. The Temporary Detention of the Workers Was Permissible Pursuant to the Execution of the *Blackie's* Warrant

Pursuant to a *Blackie's* warrant, ICE Special Agents may detain a person, without seizure warrants, arrest warrants, or exigent circumstances, if they possess reasonable, articulable, and individualized suspicion of violations of immigration or criminal law. Violations of immigration law include: (1) a person's unlawful presence in the United States, (2) an alien's failure to carry on his or her person immigration documents required by law to be carried, or (3) possession of fraudulent or stolen documents. Persons who claim to have immigration documentation, but not in their possession, may be detained under civil authority if such detention "lasts only so long as is necessary to carry out its purpose and the investigative methods used [are] the least intrusive means readily available to confirm or dispel the officer's suspicion." *Martinez v. Nygaard*, 831 F.2d 822, 827 (9th Cir. 1987). During execution of a *Blackie's* warrant, agents may engage in systematic consensual questioning of employees. *INS*

v. Delgado, 466 U.S. 210, 216-19 (1984).

In this case, ICE agents entered a facility employing hundreds of potentially undocumented workers. ICE agents systematically worked to question employees, seeking to determine if they were lawfully authorized to reside or work in the United States. Given the number of workers involved, ICE agents processed the workers as quickly as was reasonably possible and in the most reasonable manner possible.

Defendant makes the allegation, without citation to any factual support, that ICE agents relied solely on race to detain workers. (Defendant's Memorandum at 9-10). ICE agents detained everyone at the plant long enough to determine if they were lawfully authorized to reside or work in the United States. This included the detention of workers regardless of race. Moreover, ICE agents detained, and ultimately arrested for deportation, Caucasians as well as workers of Hispanic ethnicity.¹¹

Defendant asserts the detention of the workers constituted an arrest. (Defendant's Memorandum at 10). First, as explained above, regardless of whether detention of the workers constituted an arrest, defendant lacks standing to challenge the detention. Second, the detention of the workers was lawful. The detention lasted only long enough for the ICE agents to determine whether the person had legal authorization to reside and work in the United States. Moreover, as explained below, the ICE agents simultaneously had the legal authority to detain the workers during the

¹¹ Regardless, whether a person is of Hispanic origin is a relevant factor for officers to consider, among others, in determining whether to detain someone. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975) ("The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican Americans to ask if they are aliens.").

execution of the search warrant.

C. The Temporary Detention of the Workers Was Also Permissible Pursuant to the Execution of the Criminal Search Warrant

In *Michigan v. Summers*, 452 U.S. 692, 705 (1981), the Court held that a search warrant implicitly includes authority to detain occupants of premises during a search. “An officer’s authority to detain incident to a search is categorical; it does not depend on the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.” *Muehler v. Mena*, 544 U.S. 93, 98 (2005). See also *United States v. Martinez-Cortes*, 566 F.3d 767, 770 (8th Cir. 2009) (a warrant to search founded on probable cause implicitly carries with it authority to detain occupants of the premises while the search is conducted). Detention serves three law enforcement purposes: 1) it prevents suspects from fleeing; 2) it minimizes the risk an officer or occupant will be harmed during the search; and 3) it expedites the search. *Summers*, 452 U.S. at 702-703. Under these circumstances, a person is detained under the authority recognized in *Terry v. Ohio*, 392 U.S. 1 (1968). *United States v. Hernandez-Hernandez*, 327 F.3d 703, 706 (8th Cir. 2003). Detention is permissible to determine the suspect’s identity or to maintain the status quo while obtaining more information. *Adams v. Williams*, 407 U.S. 143, 146 (1972). Authority to detain people during searches extends to occupants during the search of a business. *Dawson v. Seattle*, 435 F.3d 1054, 1065 (9th Cir. 2006).

In *Muehler*, the Supreme Court found that an INS Agent did not violate a person’s Fourth Amendment right against unreasonable seizure when he asked her name, date and place of birth, and immigration status while she was detained in

handcuffs during a search. *Muehler*, 544 U.S. at 100-101. See also *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (questioning occupants during search does not violate person's Fourth Amendment right against unreasonable seizure); *INS v. Delgado*, 466 U.S. 210, 216 (1984) ("Interrogation as to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure."); *Hernandez-Hernandez*, 327 F.3d at 706 (an officer may ask "a moderate number of questions to determine a person's identity and to try to obtain information confirming or dispelling the officers' suspicions.") (internal quotations and citations omitted).

Thus, during the execution of a search warrant, officers may ask people basic identification information. *Muehler*, 544 U.S. at 100-101 (officers may ask name, date and place of birth, and immigration status); *Bostick*, 501 U.S. at 434-35 ("[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage). See also *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 185 (2004) ("In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment.").

Accordingly, the detention of the workers was permitted during the duration of the execution of the criminal search warrant. The detention of the workers was completed as fast as was reasonably possible given the number of workers. All were either released or detained pursuant to ICE administrative authority and removed from Agriprocessors before the criminal search was completed.

VI. THE SEARCH WARRANT WAS SUFFICIENTLY PARTICULAR REGARDING THE PEOPLE TO BE SEIZED AND WAS SUPPORTED BY PROBABLE CAUSE

Defendant argues that, “to the extent the Government claims that the arrests on May 12, 2008, were pursuant to the criminal search warrant and criminal arrest warrants,” they “were legally invalid because (1) none of them identified the persons to be arrested with particularity and (2) the arrest warrants were not supported by probable cause, which tainted the search warrant to the extent that it authorized the agents to search for those persons.” (Defendant’s Memorandum at 10). Defendant’s argument is flawed.

First, the workers were arrested at Agriprocessors pursuant to ICE administrative authority, not pursuant to the criminal arrest warrants. Second, defendant lacks standing to challenge the arrest of the workers. Third, in the alternative, the criminal search warrant was sufficiently particular as to the items to be seized and the criminal arrest warrants were supported by probable cause.

A. The Workers Were Arrested Pursuant to the ICE Administrative Authority

Defendant acknowledges all workers were arrested on administrative charges not on criminal charges. (Defendant’s Memorandum at 10). Therefore, the extent of particularity of the criminal search warrant and whether the criminal arrest warrants were supported by probable cause are irrelevant. As stated above, a *Blackie’s* warrant has a relaxed particularity requirement. By the very nature of a search for undocumented workers, courts acknowledge ICE agents cannot be expected to be able to identify with particularity illegal aliens being sought pursuant to a *Blackie’s* warrant.

Here, ICE agents entered the plant under the authority of a *Blackie’s* warrant that

granted the agents permission to search for people who were not authorized to reside or work in the United States. The *Blackie's* warrant did not need to identify the actual workers. Rather, the *Blackie's* warrant permitted the agents to enter the plant and look for illegal aliens. The validity of the criminal search warrant's particularity and the criminal arrest warrants is not relevant to determine the validity of the agent's discovery of undocumented workers pursuant to a *Blackie's* warrant and their arrest on ICE administrative charges.

Defendant's citation to *Groh v. Ramirez*, 540 U.S. 551 (2004), is inapposite. First, *Groh* involved a criminal search warrant, not a *Blackie's* warrant. In this case, the undocumented workers were seized for removal proceedings after being discovered as the result of the execution of a *Blackie's* warrant. As stated, a criminal search warrant carries a greater particularity requirement than the *Blackie's* warrant. Second, *Groh* involved a situation where, by accident, an agent omitted completely a list of the items to be seized during the search and in its place repeated the address of the location to be searched. That is not the case here.

Because the workers were not seized at the plant pursuant to the criminal search warrant, whether the criminal search warrant identified the people to be seized with sufficient particularity is moot.

B. Defendant Lacks Standing to Challenge the Arrest of the Workers

Defendant claims the arrest warrants were issued without probable cause and were based on affidavits that were misleading because, according to defendant, the affidavits did not note legitimate explanations that may exist when a person is using a social security number that is either invalid or assigned to another person. (Defendant's

Memorandum at 12-13).¹² As with its argument relating to the detention and questioning of its workers, defendant lacks standing to challenge the validity of arrest warrants executed following the May 12, 2008, search. See *Rakas*, 439 U.S. at 133 (defendant may not assert violation of third party's Fourth Amendment rights in a motion to suppress).

Foremost, because no arrest warrants were executed during the search of defendant's business, defendant's challenge to the validity of the warrants is a red herring. Nonetheless, even assuming employees were arrested pursuant to such warrants in violation of the Fourth Amendment, any challenge to such arrests could only be brought by the employees themselves. "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Alderman v. United States*, 394 U.S. 165, 174 (1969); see also *Barber*, 557 F.2d at 634; *Wong Sun*, 371 U.S. at 487; cf. *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995) (defendant submitted no affirmative evidence to satisfy standing requirements).

Defendant attempts to manufacture standing by drawing upon alleged defects in

¹² Defendant claims the effect of not acknowledging possible innocent reasons for a "no-match" between a name and social security number was "misleading." Defendant never alleges the agent was intentionally misleading or acted with reckless disregard of the truth, so as to require a *Franks* hearing. *Franks v. Delaware*, 438 U.S. 154 (1978). Even assuming defendant is making such an allegation, however, an evidentiary hearing is uncalled for. "To be entitled to a hearing on a motion to suppress evidence obtained pursuant to a search warrant that was issued in response to an affidavit, a defendant's assertions with respect to the trustworthiness of the affidavit must be more than conclusory." *United States v. Hall*, 171 F.3d 1133, 1143 (8th Cir. 1999) (internal quotation omitted). Indeed, defendant has a burden of making a "substantial preliminary showing" of deliberate falsehood or reckless disregard of the truth. Id. First, defendant attacks the affidavit of the arrest warrants, not the search warrant. Second, defendant has failed to make any showing sufficient to require an evidentiary hearing. Defendant has not established in the least that anything in the affidavit was not true. Accordingly, the Court need not hold an evidentiary hearing.

the arrest warrants and claiming such defects “tainted” the search warrant.

(Defendant’s Brief at 13 (“the arrest warrants were not supported by probable cause, which necessarily tainted the search warrant to the extent that it authorized the search for persons named in those arrest warrants”)). However, defendant’s argument turns the “fruit of the poisonous tree” doctrine on its head. There is no authority for defendant’s claim that an alleged violation of another’s Fourth Amendment rights may be vicariously used to challenge a search warrant under a “taint” analysis. Indeed, the authority is to the contrary. See Barber, 557 F.2d at 634 (“Barber has no standing to urge the [invalidity of another’s arrest] in order to suppress its fruits”).¹³

Accordingly, defendant may not challenge the validity of arrest warrants for its employees, and any such claim should be denied for failure to properly alleged a Fourth Amendment interest.¹⁴

¹³ In order to properly challenge the search warrant, defendant must allege a defect in the search warrant itself. Defendant must allege “the probable cause determination relied on an affidavit containing false statements or omissions made knowingly and intentionally or with reckless disregard for the truth.” *United States v. Snyder*, 511 F.3d 813, 816 (8th Cir. 2009). There is no such allegation in this case. Moreover, even if additional information regarding no-match information were added to the affidavit (such as the ICE website excerpt from August 20, 2008, identified at page 13 of defendant’s brief), the affidavit would still establish probable cause for the search. This is so due to the fact, among others, that approximately 80% of defendant’s workforce had been identified as working under mismatched social security numbers. In any event, even if the search warrant were found to be defective, defendant’s motion should be denied based upon the good faith of the officers who executed the warrant. See *United States v. Leon*, 468 U.S. 897, 922 (1984); *United States v. Murphy*, 69 F.3d 237, 241 (8th Cir.1995).

¹⁴ Even if defendant did have standing to challenge the affidavits in support of the arrest warrants, defendant would need to meet the *Franks* standard of showing a deliberate falsehood or of reckless disregard for the truth. See, e.g., Bagby v. Brondhaver, 98 F.3d 1096, 1099 (8th Cir.1996) (considering the application of qualified immunity in the context of a *Franks* challenge to an arrest warrant in a Section 1983 case). Defendant has not done so.

C. The Criminal Search Warrant Was Sufficiently Particular as to the Items to be Seized and the Criminal Arrest Warrants Were Supported by Probable Cause

It is clear the undocumented workers were arrested administratively, as a result of the *Blackie's* warrant, and not seized as evidence as a result of the criminal search warrant or arrested pursuant to the criminal arrest warrants. Nevertheless, in the event the Court finds otherwise, the criminal search warrant was sufficiently particular and the criminal arrest warrants were supported by probable cause.

The Fourth Amendment requires that a search warrant describe with particularity the items to be seized. *Andresen v. Maryland*, 427 U.S. 463, 480 (1976). Thus, general or exploratory searches are prohibited. *Id.* The particularity requirement, however, is not a stringent one. See *United States v. Johnson*, 541 F.2d 1311, 1313 (8th Cir. 1976) (where precise identity or description of evidence cannot be ascertained at the time the warrant is obtained, describing the generic class of evidence is sufficient). For example, merely referencing a criminal statute “can sufficiently limit the scope of a search and thus provide the necessary particularity.” *Rickert v. Sweeney*, 813 F.2d 907, 909 (8th Cir. 1987). A search warrant is legally sufficient if “the description is sufficiently definite so as to enable the officer with the warrant to reasonably ascertain and identify the . . . objects to be seized.” *United States v. Copping*, 635 F.2d 683, 686-87 (8th Cir. 1980). The Court is to apply “a standard of ‘practical accuracy’ in determining whether a description is sufficiently precise to satisfy the requirements of the Fourth Amendment, recognizing that the degree of specificity required necessarily depends upon the circumstances of each particular case.” *United States v. Coleman*, 957 F.2d 1488, 1491 (8th Cir. 1992). Accord, *United States v.*

Peters, 92 F.3d 768, 769-70 (8th Cir. 1996) (particularity requirement “is a standard of ‘practical accuracy’ rather than a hypertechnical one.” (quoting *United States v. Lowe*, 50 F.3d 604, 607 (8th Cir. 1995)); *United States v. Jansen*, 470 F.3d 762, 766 (8th Cir. 2006) (“standard used to determine whether a warrant description is sufficiently specific is one of ‘practical accuracy’ and the degree of specificity may change according to circumstances.” (quoting *United States v. Porter*, 831 F.2d 760, 764 (8th Cir. 1987))).

In this case, the criminal search warrant identified the undocumented workers with as much particularity as was possible under the circumstances. By the nature of the crime, defendant was employing and harboring illegal aliens who, for the most part, used false names and social security numbers that were either invalid or belonged to other people. The government did not have physical descriptions of these workers, but the criminal search warrant affidavit explained that workers were issued proximity cards bearing their work names that were used to access buildings at Agriprocessors. The criminal search warrant authorized ICE agents to search for workers using the names set forth in the warrant; agents could identify those workers based on the proximity cards in their possession. Accordingly, the criminal search warrant provided sufficiently definite so as to enable the agents to reasonably ascertain and identify the undocumented workers who were the subject of the criminal search warrant.¹⁵

Nor does the government concede, by arguing for rejection of defendant’s

¹⁵ Even if the undocumented workers were seized pursuant to an overly-broad description, the proper remedy would be to suppress only the evidence derived from those workers. *United States v. Timley*, 443 F.3d 615, 622 (8th Cir. 2006) (“[W]here the warrant is invalid only in part, the warrant is ‘severable,’ and items seized pursuant to valid portions of the warrant need not be suppressed.”). Defendant, however, has failed to identify any specific workers it alleges were thus seized, nor has it identified the evidence it claims came from the workers.

argument on lack of standing, that the arrest warrants lacked probable cause. The affidavits filed in support of the arrest warrants demonstrated each worker was either using a social security number that was invalid or using a social security number assigned to a person with a different name. Defendant finds fault with this on the ground that there may be an innocent explanation for this mismatch. That an innocent explanation could, in theory, explain a discrepancy does not negate probable cause to believe a particular person has falsely used a social security number. This is especially so when facts exist showing the person was employed using a social security number that was either invalid or belonged to another person. The question of probable cause does not involve the determination of actual innocence or guilt. "Probable cause for an arrest exists if, at the moment the arrest was made, the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent person in believing that an offense had been committed." *United States v. Rivera*, 370 F.3d 730, 733 (8th Cir. 2004). Here, the agents had, and the magistrate judge found, probable cause to arrest workers at Agriprocessors based on their use of social security numbers that records showed were either invalid or belonged to other persons.

VII. IN THE ALTERNATIVE, SUPPRESSION OF THE EVIDENCE IS NOT AN APPROPRIATE REMEDY

Defendant argues that "[t]he illegality of the arrests on May 12, 2009 [sic] should result in the exclusion at trial of all of the evidence that flows from those arrests unless the court finds that the taint has been attenuated by subsequent events, or the court finds that the Government acted in 'good faith,' as that term is defined in the cases."

(Defendant's Memorandum at 14). While the government did not violate defendant's constitutional rights, in the alternative, suppression should not be ordered. First, the government acted in good faith and the evidence. Second, the government would have inevitably discovered through other contemporaneous investigations. Third, the connection between the alleged unconstitutional violations and the evidence sought to be suppressed is too attenuated.

A. Suppression Is Inappropriate Because the Government Acted in Good Faith

Should this Court find that probable cause was lacking in any way, or that the warrant failed to identify with sufficient specificity the items to be seized, suppression of the evidence is still inappropriate because the officers acted in good faith. In *United States v. Leon*, 468 U.S. 897 (1984), the United States Supreme Court recognized a good faith exception to the exclusionary rule, finding that the intent to deter improper police conduct is not furthered when officers act in reasonable reliance on a detached and neutral magistrate's determination of probable cause in the issuance of a search warrant. *Leon*, 468 U.S. at 905. The *Leon* good faith rule does not apply, however, if: (1) the magistrate judge issuing the warrant was misled by statements made by the affiant that were false or made "in reckless disregard for the truth"; (2) the issuing magistrate wholly abandoned her judicial role; (3) the affidavit in support of the warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; or (4) the warrant is "so facially deficient . . . that the executing officers cannot reasonably presume it to be valid." 468 U.S. at 923.

In this case, the application for the search warrant was reviewed by a detached

and neutral magistrate. Defendant does not contend otherwise. The officers were permitted to rely upon the magistrate judge's superior knowledge of the law and his finding the application established probable cause. Even if a different judge disagrees with the magistrate judge's finding of probable cause, that does not detract from the fact that the officers were, at all times, acting in good faith. Further, in this case, none of the factors that may negate application of the *Leon* good faith exception are present.

The only factor defendant appears to rely upon is the last, arguing the warrant was facially deficient because the agents used an administrative warrant for the purpose of advancing a criminal investigation. (Defendant's Memorandum at 15). First, defendant cites *Able* and *Utecht* as holding the test under the good faith exception to the exclusionary rule turns on the intent of the officers. Both cases speak of whether the government acted in bad faith regarding the purpose for executing the administrative action. *Abel*, 362 U.S. at 226; *Utecht*, 238 F.3d at 887. As discussed above, the government here did not act in bad faith. The government overtly used both administrative and criminal warrants, simultaneously, to advance both administrative and criminal interests.

Second, the administrative search warrant was not deficient on its face. Defendant's citation to *Groh* (Defendant's Memorandum at 15), again, is inapposite. The particularity requirements for a *Blackie's* warrant, with respect to the identification of the illegal aliens believed to be present at a facility, are relaxed. The workers were adequately identified for purposes of the *Blackie's* warrant.

B. Suppression is Inappropriate Because of Inevitable Discovery

As there was no constitutional violation, the issue of inevitable discovery need

not be reached. If necessary, however, the government could establish that the evidence leading to the charges against defendant would have been inevitably discovered through other means, if defendant actually identified which workers are subject to suppression. Evidence unlawfully acquired is admissible if the prosecution can show by a preponderance of the evidence it “inevitably would have been discovered by lawful means.” *Nix v. Williams*, 467 U.S. 431, 444 (1984). The exclusionary rule should not operate to put law enforcement “in a worse position than they would have been in if no unlawful conduct had transpired.” 467 U.S. at 445. The exclusionary rule does not apply in situations where “common sense” leads to the conclusion that evidence would have been acquired in the absence of an illegal search. *United States v. Evans*, 454 F.2d 813, 819 (8th Cir., 1972). When assessing whether evidence is admissible under this “inevitable discovery” exception, the Eighth Circuit asks whether there existed a “reasonable probability that the evidence would have been discovered by lawful means and that the government was actively pursuing a parallel investigation at the time of the constitutional violation . . .” *United States v. Lee*, 356 F.3d 831, 835 (8th Cir. 2003) (*applying Nix v. Williams*, 467 U.S. 431, 444 (1984)). In *Lee*, the Court held that, since police already had a warrant to search the premises, evidence discovered during an unlawful search was admissible. 467 U.S. at 835-36 (Police “were actually pursuing a substantive, alternative line of investigation at the time of the alleged constitutional violation.” (internal punctuation omitted)).

The government had other contemporaneous investigations that could have led to the same evidence. For example, a separate contemporaneous investigation of Agriprocessors and several supervisory and human resources employees was

underway and would have led to a search of Agriprocessors, resulting in the same—and perhaps additional—documentary seizures.¹⁶ For more than a year prior to May 12 the FBI, ICE, the Iowa Department of Transportation, and the U.S. Postal Service had been investigating mail, tax, and licensing fraud relating to car sales to Agriprocessors employees by 16th Avenue Auto Sales in Cedar Rapids. As of the May 12 search, the government had a plan in place to search Agriprocessors during the shift worked by individuals involved in the 16th Ave Auto fraud. Such a search is routine procedure when individuals under criminal investigation are likewise suspected of being illegal aliens. Among other documents, the government would have seized I-9 employment forms from the Agriprocessors Human Resources Department, resulting in much the same outcome as the May 12 search. Nearly 40 Agriprocessors employees, including Laura Althouse, Martin De la Rosa, and Hosam Amara, would have been questioned in connection with the 16th Ave Auto investigation alone. Many of these employees were arrested during the May 12, 2008, search.

The Court need not reach the inevitable discovery issue, however, because the government did not violate defendant's constitutional rights. The Court cannot reach that issue at this time, in any event, because defendant has failed to identify the specific undocumented workers it alleges were seized in violation of its Fourth Amendment rights. Assuming some merit to the defendant's motion and assuming

¹⁶ Similarly, there was an on-going investigation by state and federal authorities into reports of child labor. The government also had already initiated a bank fraud investigation of Agriprocessors. The government had an on-going investigation into an explosive device seized from an Agriprocessors worker. ICE agents repeatedly took into custody illegal aliens who worked at Agriprocessors, including shortly before the May 12, 2009, search, many of whom became cooperators and provided information to the government.

defendant could identify the specific workers whose testimony it claims should be suppressed, the government could then address in detail the inevitable discovery source that would have led to the same information. But again, due to defendant's lack of specificity in its allegation the government is unable to do so at this time.

C. Suppression is Inappropriate Because the Linkage Between the Alleged Constitutional Violation and the Evidence is Too Attenuated

Even assuming a constitutional violation resulted from the search, suppression is not appropriate when, as here, the connection between the alleged violation and the evidence to be suppressed is too attenuated. Defendant claims the government violated its constitutional rights when it "seized" undocumented workers. Defendant then asserts, without actually demonstrating a linkage, that all other evidence used against it flowed from statements made by the undocumented workers. This linkage, besides being too vague, is also too attenuated.

Even assuming the search was unconstitutional, it does not follow that voluntary statements made by the undocumented workers (and therefore any evidence flowing from those statements) are themselves subject to suppression. Not all statements that occur after an illegal search are subject to suppression. See, e.g., *United States v. Marasco*, 487 F.3d 543, 547 (8th Cir. 2007) (unauthorized search of defendant's purse and motel room did not result in suppression of incriminating statements when defendant could not meet her burden of establishing that causal nexus between the illegal search and her statements); *United States v. Gray*, 491 F.3d 138, 155 (4th Cir. 2007) (voluntary statements made by defendant's drug customers who arrived at an illegal search are admissible); *United States v. Thompson*, 35 F.3d 100, 105 (2nd Cir.

1994) (voluntary statements made a month after an illegal ICE search admissible). No reason exists to exclude evidence if “police misconduct is not even a but for cause of discovery of the evidence.” *Hamilton v. Nix*, 809 F.2d 463, 465 (8th Cir. 1987). Not all evidence resulting from an unlawful search or arrest is considered fruit of the unlawful search warrant. The test is not “but for the illegal actions of the police;” it is whether the evidence has been obtained by “exploitation” of the unlawful conduct or has been obtained by other means “sufficiently distinguishable to be purged of the primary taint.” *Wong Sung v. United States*, 371 U.S. 471, 488 (1963).

Where the link between the illegal conduct and the evidence seized is sufficiently attenuated to dissipate the taint of the illegal conduct, the evidence should not be excluded or suppressed. *United States v. Ceccolini*, 435 U.S. 268, 273-80 (1978); *Hamilton v. Nix*, 809 F.2d 463, 465-66 (8th Cir. 1987). Thus, defendant’s argument weakens as the linkage lengthens. For example, even assuming, as defendant argues, that the government’s prosecution of Carlos Guerrero and Martin DeLarosa (mid-level production supervisors) flowed from the seizure of the undocumented workers, voluntary statements made by Guerrero and DeLarosa are too attenuated from the alleged violation to merit suppression.

As with the inevitable discovery issue, however, the attenuation analysis is impossible to conduct when defendant has failed to identify specific undocumented workers it claims were unconstitutionally seized, from whom defendant claims evidence flowed, and what evidence defendant alleged constituted the fruit of the alleged unlawful conduct. It is not enough for defendant simply to make a conclusory allegation that all evidence used against it is the fruit of the search at Agriprocessors.

Accordingly, even assuming defendant can establishing standing to challenge the constitutionality of the search, and can establish a constitutional violations, the Court should deny the motion to suppress.

VII. CONCLUSION

The United States requests the Court deny defendant's Motion to Suppress "testimony of all of the witnesses who were arrested, charged, pled guilty and agreed to cooperate." (Defendant's Memorandum at 14).¹⁷

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically served a copy of the foregoing document to which this certificate is attached to the parties or attorneys of record, shown below, on July 2, 2009.

UNITED STATES ATTORNEY

BY: s/ S. Van Weelden

COPIES TO: Counsel of Record

¹⁷ Defendant has not sought suppression of any documents or other items seized during the criminal search warrant. At page 8 of its memorandum, defendant claims the "seizure of documents and computers violated Agriprocessors, Inc. [sic] constitutional rights because, in executing the *Blackie's* warrant, the ICE [sic] substantially exceeded its scope." (Defendant's Memorandum at 8). That passing reference, however, relates to the *Blackie's* warrant, not the criminal search warrant. Even if the prayer for relief related to the criminal search warrant, the Court would need to excise that portion of the affidavit pertaining to the undocumented workers and determine if the remaining portions of the affidavit established probable cause to support the seizure of documents and other items. The government has not further briefed this issue because defendant has not sought that relief.