Rev. 7/87) Affidavit for Search Warrant

FILED

United States District Court

NORTHERN DISTRICT OF CALIFORNIA

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NO. DIST. OF CA, S.J.

In the Matter of the Search of
(Name, address or brief description of person, property or premises to be searched)

116 Alta Heights Court
Los Gatos, California

APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT

CASE NUMBER: 5 01 027 PVT

I Jeff Novitzky being duly sworn depose and say:

I am a(n) Special Agent, IRS-CID and have reason to believe
Official Title

that ☐ on the person of or ☒ on the property or premises known as (name, description and/or location)

116 Alta Heights Court
Los Gatos, California
described in more detail in Attachment A

in the Northern District of California

there is now concealed a certain person or property, namely (describe the person or property to be seized)

(See Attachment B)

which is (state one or more bases for search and seizure set forth under Rule 41(b) of the Federal Rules of Criminal Procedure)
evidence of the commission of a criminal offense, the fruits of the crime, and property designed or intended for use or which is or has been used as a means of committing a criminal offense,

concerning a violation of Title 18 Section(s) 1341, 1957; 26 U.S.C. Sec. 7201

The facts to support a finding of Probable Cause are as follows:

Please see attached affidavit.

Continued on the attached sheet and made a part hereof. ☒ Yes ☐ No

Approved As To Form: AUSA Jeffrey D. Nedrow

Signature of Affiant

Sworn to before me, and subscribed in my presence

Jun 25, 2001 at San Jose, California
Date City and State

EDWARD A. INFANTE, Chief U.S. Magistrate Judge
Name and Title of Judicial Officer

Signature of Judicial Officer

This form was electronically produced by Elite Federal Forms, Inc.

AO 106 (Rev. 7/87) Affidavit for Search Warrant

FILED

JAN 25 2001

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

United States District Court

NORTHERN DISTRICT OF CALIFORNIA

In the Matter of the Search of
(Name, address or brief description of person, property or premises to be searched)

Susan Powell's Personal Workspace, Personal Computer, and the Computer Network at Fitness Holdings Worldwide, located at #8 Columbus Street, San Francisco, California

APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT

CASE NUMBER:

5 01 028 PVT

I Jeff Novitzky being duly sworn depose and say:

I am a(n) Special Agent, IRS-CID and have reason to believe
Official Title

that ☐ on the person of or ☒ on the property or premises known as (name, description and/or location)

Susan Powell's Personal Workspace, Personal Computer, and the Computer Network at Fitness Holdings Worldwide, located at #8 Columbus Street, San Francisco, California

in the Northern District of California

there is now concealed a certain person or property, namely (describe the person or property to be seized)

(See Attachment B)

which is (state one or more bases for search and seizure set forth under Rule 41(b) of the Federal Rules of Criminal Procedure)
evidence of the commission of a criminal offense, the fruits of the crime, and property designed or intended for use or which is or has been used as a means of committing a criminal offense,

concerning a violation of Title 18 Section(s) 1341, 1957; 26 U.S.C. Sec. 7201

The facts to support a finding of Probable Cause are as follows:

Please see attached affidavit.

Continued on the attached sheet and made a part hereof. ☒ Yes ☐ No

Approved As To Form: AUSA: Jeffrey D. Nedrow

Signature of Affiant

Sworn to before me, and subscribed in my presence

Jan 25, 2001 at San Jose, California
Date City and State

EDWARD A. INFANTE, Chief U.S. Magistrate Judge
Name and Title of Judicial Officer

Signature of Judicial Officer

This form was electronically produced by Elite Federal Forms, Inc.

AFFIDAVIT OF JEFF NOVITZKY IN SUPPORT OF
APPLICATION FOR SEARCH WARRANT

Introduction

1. This affidavit is submitted in support of search warrants relating to a kickback scheme, mail fraud violations, related money laundering violations and tax evasion violations undertaken by Susan Powell, the current vice president of branding for Fitness Holdings Worldwide (the parent company of 24-Hour Fitness), and former vice president of marketing for 24-Hour Fitness. The locations to be searched are Powell's residence located at 116 Alta Heights Court in Los Gatos, California, and Powell's workspace, her computer, and the computer network at Fitness Holdings Worldwide located at 8 Columbus Street in San Francisco, California, as described more fully in attachments A and A-1 respectively.

I. Affiant's Background

2. I am a Special Agent with the Internal Revenue Service, Criminal Investigation Division ("IRS-CID"), and have been so employed since 1993. I received five months of training at the Federal Law Enforcement Training Center in Glynco, Georgia. This included training in the investigative techniques of criminal violations of Title 26 U.S.C. (Internal Revenue Code), Title 18 U.S.C. Sections 1956 and 1957 (Money Laundering Control Act), and Title 31 U.S.C. (Bank Secrecy Act).

3. During my eight years with the IRS-CID, I have conducted and/or participated in hundreds of criminal investigations involving income tax violations, money laundering violations and currency violations. I have participated in the execution of numerous search warrants and have written affidavits in support of search warrants on sixteen (16) different locations. Additionally, I am the Title 31 (Bank Secrecy Act) coordinator for the Internal Revenue Service, Criminal

Investigation Division, San Jose post of duty. My duties as the Title 31 coordinator include the monitoring of all suspicious currency activity through financial institutions in Santa Clara, Santa Cruz and Monterey Counties. As the San Jose CID Title 31 Coordinator, I am routinely contacted by bank officials with reports of suspicious currency transactions taking place at their institutions. The information that I have received has led to numerous investigations concerning possible violations of Title 18 U.S.C. Sections 1956 and 1957 (Money Laundering Control Act), Title 31 U.S.C. (Bank Secrecy Act), and related financial violations. I periodically attend meetings and conferences with other Title 31 Coordinators from across the country, as well as banking officials who monitor suspicious currency transactions and potential money laundering activities. At these conferences, discussions are held regarding common money laundering and suspicious currency transaction activity that is prevalent throughout the country.

II. Case Background

4. This investigation was initiated in June of 2000, when a confidential informant (hereinafter CI), came to the San Jose, California, IRS-CID office to report that her ex-boyfriend and business partner, Michael P. Johnston, was involved in a kickback scheme with the vice president of Marketing of the 24-Hour Fitness exercise chain, Susan Powell. The CI disclosed that the kickback scheme defrauded 24-Hour Fitness out of hundreds of thousands of dollars, which was split between the two participants, Johnston and Powell.

5. Based upon the information provided by the CI, and corroborated by subpoenaed bank records, corporate filings, court filings, tax return information and an audio-taped conversation between the CI and Michael Johnston, there is probable cause to believe that in furtherance of their kickback scheme, Johnston and Powell have committed violations of mail fraud (Title 18 USC § 1341), as

well as federal money laundering violations (Title 18, USC § 1957) when they deposited the proceeds of the kickback scheme facilitated by the mail, into bank accounts that they controlled. Furthermore, based upon the facts set forth below, there is probable cause to believe that evidence of the kickback scheme, related mail fraud, money laundering and tax evasion by Powell will be found at the residence of Susan Powell located at 116 Alta Heights Court in Los Gatos, California, and Susan Powell's work space, her computer, and the computer network at Fitness Holdings Worldwide located at 8 Columbus Street in San Francisco, California, as both described more fully in attachments A and A-1 respectively.

6. On January 17, 2001, affidavits in support of search warrants for the residence and business of Michael Johnston were submitted to the Hon. Patricia V. Trumbull. On that same date, the Hon. Judge Trumbull approved search warrants for the residence of Michael Johnston, the president of Transcend Advertising and Design, and the business location of Transcend Advertising, both in Los Gatos, California. A copy of the signed and filed affidavit in support of the application for those search warrants is attached as Exhibit 1 and hereby incorporated into this affidavit. In addition to the numerous points of evidence presented in that affidavit that Susan Powell orchestrated a kickback scheme, was involved in the laundering of the proceeds and failed to report any of the payments to her on her federal income tax returns, additional evidence implicating Powell in those violations was uncovered during the warrants and subsequent interview of Michael Johnston. The following paragraphs include a detailing of that additional evidence.

7. After making entry into the residence of Michael Johnston via a search warrant on January 18, 2001, Johnston was asked if he would answer questions about his involvement and knowledge of the payments he made over

the last several years to Susan Powell. From the onset of the warrant and interview with Johnston, I personally informed him that he was not under arrest and he could stop answering questions and/or leave at any time he wished. I also told Johnston several times that even if he cooperated with me and answered questions I could offer him no promises or guarantees as to the outcome of his criminal case and as of the submission of this affidavit, no promises, guarantees or agreements have been made with Johnston regarding his case. Johnston indicated that he understood this and wished to cooperate and answer questions. During the subsequent interview, Johnston provided many statements which directly inculpated him in the kickback scheme and provided considerable additional evidence of his involvement in illegal, fraudulent activities against 24-Hour Fitness.

8. Johnston stated that while he acknowledged that the payments made to Susan Powell were unethical and immoral, he did not believe that what he was doing with Powell was illegal. While Johnston refused to categorize his activities with Powell as illegal throughout the interview, the facts which he described during the interview clearly outline an illegal kickback scheme between Powell and Johnston.

9. Specifically, Johnston provided a detailed description of the manner in which the kickback scheme operated. Johnston met Powell in 1995 or 1996 through a mutual acquaintance. After completing some small graphic design jobs for 24-Hour Fitness through Susan Powell, Powell approached Johnston and told him that "we can make more money on this." Johnston stated that he submitted an estimate to Powell for a job she presented to him and Powell responded to the estimate by saying that her budget for the job was a lot more and that if he wanted to increase the price of the job they could split the increased portion. I displayed copies of the numerous checks I had subpoenaed

from Johnston's business and personal account that were written to Susan Powell. Johnston admitted that the majority of those checks were Powell's portion of the increased billing portion that he submitted through her to 24-Hour Fitness.

10. Johnston stated that throughout their overbilling scheme, Powell would typically tell him to increase a typical bill by $20,000 to $60,000. According to Johnston, she then stated something like "I want $20,000." Johnston stated that Powell told him that whatever amount they were increasing the bill by should be placed into the printing expense portion of the invoice. Johnston stated that he followed Powell's instructions and always factored the increased billing amount into the printing expense on his invoices to 24-Hour Fitness.

11. While Johnston stated that the estimates and revised estimates sent back and forth between him and Susan Powell were usually done via telephone or e-mail, he was sure that every check he received from 24-Hour Fitness, including those which included increased expenses via the request of Susan Powell, were sent to him via the United States mail.

III. Further Evidence of Title 26 (Tax Evasion) Violations

12. The January 17, 2001 search warrant affidavit contained a summary of evidence establishing probable cause that Powell did not report any of the proceeds paid to her by Johnston on her federal income tax returns. See, Exhibit 1, Section F, page 8. During my January 18, 2001 interview with Johnston, Johnston provided additional specific information regarding Powell's knowledge and willful evasion of federal income tax. Johnston stated that he wanted to give Powell a form 1099 (misc. income payment) detailing the payments that he and his business made to her. He stated that Powell specifically told him she did not want a 1099 because she didn't want to report

the payments for tax purposes. Johnston stated that he was upset about this arrangement because he paid the tax on Powell's portion of the increased bill when he claimed it as income coming in for his company. Johnston stated that he knew Powell was not paying income tax on his payments to her. He stated that Powell was bringing him a lot of business, however, and he had to put up with things like that in order to retain 24-Hour Fitness's business.

IV. Specific Evidence Possessed by Susan Powell

13. During the interview with Johnston I specifically asked him if he knew where Susan Powell kept ledgers and records of the kickback scheme. Johnston stated that he was aware that Powell kept records of the overbilling and her payments from Johnston in a "day-planner" type organizer. Johnston specifically remembers Powell flipping to a page to write something down and seeing details of payments he made to her. Although Johnston has seen the organizer with Powell, he does not know where she specifically keeps it.

14. Johnston stated that lately, he and Powell have been very concerned about the overbillings and payments. Powell recently told Johnston that she was worried that Araceli Zarate, Johnston's ex-financee, would use the information against Johnston as leverage in their civil suit. Johnston stated that Powell was pleading with him to settle the ongoing civil case with Zarate out of court. Johnston stated that in order to remedy his and Powell's concerns, he created a false document that legitimized the payments made to Powell. He stated that he created a false contract that reflected that Powell was a contracted employee of Johnston's business. Johnston stated that he recently provided a copy of this false contract to Powell but that neither of them ever signed it nor did she ever return it. Johnston stated that these discussions with Powell occurred in the latter part of 2000.

Additional Statements by Powell to Johnston

15. Johnston stated that during his and Powell's recent conversations regarding concern over the overbilling of 24-Hour Fitness and the payments he made to her, Powell told him that she had discussed the situation with her accountant, who works out of New York. Powell stated that the accountant told her that if Johnston is ever audited she "better not be in town." Additionally, Johnston stated that Powell talked about there being a "7-year statute of limitations" on their activity.

16. Johnston also stated that Powell told him several times that she did not feel she was being treated fairly at 24-Hour Fitness. Johnston believes that she had even filed a sexual harassment grievance. He said Powell felt she wasn't being compensated fairly and may have used that to justify the overbilling scheme with him to get more money out of 24-Hour Fitness.

17. Although Johnston stated during his interview that he and Powell are no longer participating in the overbilling and kickback scheme, Johnston admitted that he gave $5,000 to Andrew Powell, Susan's husband, just a few weeks ago. Johnston stated that he did it as a favor to Andrew because Andrew's dad had a stroke and the Powells were short on money. Despite the claim that the Powells were short on money, subpoenaed bank records associated with Susan and Andrew Powell show that as of November 13, 2000, the Powell's had a balance of in excess of $10,000 in their personal checking account. Additionally, a review of the account for the year 2000 shows that over $500,000 in deposits were made to the account.

18. Documentary evidence seized via the search warrant on Johnston's business as well as a conversation conducted by Johnston with Powell's personal assistant in the presence of agents during the execution of the search warrant, indicate that Johnston and his company are currently involved in projects with Fitness Holdings Worldwide through Susan Powell.

19. Based upon Johnston's history and admission of kickback payments to Powell, his recent $5,000 payment to Andrew Powell, his explanation that the payment was requested because the Powell's were short on money, the Powell's bank records showing over $500,000 deposited in the year 2000 and the evidence that Johnston and Powell are still involved on projects together, I believe that probable cause exists that Johnston and Powell are still involved in illicit financial transactions regarding advertising work outsourced to Johnston by Powell.

Basis for Searching Powell's Residence at 116 Alta Heights Court, Los Gatos

20. Based upon my training and eight years experience as a special agent, and specifically my experience on the sixteen (16) locations on which I have personally written affidavits in support of search warrants and conducted search warrants on, I know that individuals keep records of personal income (reported and unreported, legal and illegal) and personal expenditures in the form of various invoices, receipts, contracts, account statements, loan documents, tax returns, information used to prepare tax returns, bank records, letters and correspondence. I also know that these records are routinely stored at the individual's residence and that records of this type are normally kept for extended periods of time as they are frequently used in financial, tax and legal matters, as well as to prove ownership of assets for warranty and other purposes.

21. I have run DMV records for Susan Powell and her husband Andrew Powell. A 1999 Land Rover registered to Andrew Powell is registered to the address of 116 Alta Heights Court, Los Gatos, California. I have driven by the location and observed this Land Rover parked in the driveway of the residence. Additionally, on January 18, 2001, Los Gatos Police Department Detective Randy Bishop spoke with Kirsten Duggins, a resident of Los Gatos. Duggins is

an acquaintance of Marjie Doyle, the owner of the property at 116 Alta Heights Court in Los Gatos. Duggins confirmed to Detective Bishop that Susan and Andrew Powell currently are renting from Doyle and reside at the address.

22. Finally, Michael Johnston provided information that Susan Powell possesses specific evidence of the overbilling scheme ("day-planner" organizer) and evidence of their attempted remedy to make the payments appear legitimate in the form of a false contract employee document created by Johnston and given to Powell. It has been my experience as a special agent that individuals who are involved in illegal financial transactions and the related evasion of federal income tax on those transactions frequently maintain records of such transactions similar to record keeping of legitimate transactions. Furthermore, based on my training and experience, my personal knowledge, and the knowledge of other IRS/CID agents, such records are generally retained for long periods of time at the individual's place of residence or business, often years after the actual fraudulent scheme and laundering of the illicit proceeds occurred. These records often include ledgers, documents created to conceal the schemes, evidence identifying co-conspirators the location of bank accounts used to launder the illegal profits, nominee names used to maintain these accounts, and the identification of property, both real and personal, belonging to the subject which were purchased with illegally laundered funds and often placed in nominee names.

Basis for Searching Powell's Workspace and Computer at Fitness Holdings Worldwide at #8 Columbus, San Francisco, California

23. Johnston stated that Susan Powell was promoted from her position at 24-Hour Fitness sometime in the year 2000 to the position of Vice President of Branding at Fitness Holdings Worldwide, the parent company of 24-Hour

Fitness. Documentary evidence obtained from the search warrant on Johnston's business location confirms that Powell is currently working at Fitness Holdings Worldwide located at 8 Columbus Street in San Francisco, California.

24. As stated earlier in the affidavit, both documentary evidence and aforementioned conversation between Johnston and Powell which occurred in front of agents demonstrate that Johnston has an ongoing business relationship with Powell, and that Powell continues to outsource advertising and design work to Johnston.

25. Based upon my experience as a special agent and executing search warrants and seizing evidence at business locations, I know that individuals involved in businesses that they use to facilitate illegal financial transactions, related money laundering activities, and tax evasion frequently maintain records of the proceeds of those illegal activities within their private workspace areas at their places of employment. These records are often maintained in the form of invoices, receipts, purchase orders, contracts, payment records and correspondence, as well as ledgers and false documents created to obscure the true nature and source of the illegal proceeds. I know that transaction records of which individuals were personally involved are often specifically kept in that individual's working area at their business, and are often in the form of compute files which may be stored on that individual's computer or on the business's computer network. I also know that these records are normally kept for extended periods of time as they are frequently used in preparing statements associated with the business, particularly when the illegal scheme relates to fraud against the person's employer, as is the case here.

26. Additionally, although Susan Powell no longer works as the vice president of marketing for 24-Hour Fitness, the position Johnston stated that she

held during his admitted involvment in the kickback scheme, Fitness Holdings Worldwide, where Powell is now employed, is closely tied to 24-Hour Fitness as its parent company. I believe that due to the close associations of the companies, as well as Powell's apparent continued involvement with outsourcing advertising work to Johnston, there is probable cause to believe that Powell still possesses ledgers and records associated with 24-Hour Fitness and during the kickback scheme as a reference while continuing the scheme in her current position.

27. Based upon all these facts, I believe there to be probable cause to search Susan Powell's work space, her computer, and the computer network at Fitness Holdings Worldwide, located at #8 Columbus Street, San Franscisco, California, for the items to be seized in attachment B. It is intended that the scope of this particular search warrant will be limited specifically to the areas over which Susan Powell had personal control and in which she stored personal information, such as her workspace, her personal computer, any other computer workstations she used, and the computer network.

Basis for Searching Computer and/or Electronic Data Processing

Devices at Powell's Office Space

28. During the interview with Michael Johnston, Johnston stated that e-mail was often used between he and Susan Powell when determining what amounts would be billed to 24-Hour Fitness. Additionally, based upon my experience in executing search warrants on businesses, I know that most businesses provide their employees with a computer for work purposes, especially employees involved in upper management as Susan Powell is. I also know that individuals involved in fraudulent schemes involving illegal financial transactions, the related laundering of the proceeds from those schemes, and tax

evasion often keep files or records on their computer in connection with those illegal activities when they have access to a computer.

29. It is further my experience and understanding that large companies such as Fitness Holdings Worldwide often maintain a network server upon which e-mails and computer files pertaining to individual accounts are compiled and stored. In order to obtain the full scope of the e-mails between Powell and Johnston, and the computer files Powell has created and maintained regarding this scheme, authorization is accordingly requested in this affidavit to download the above-described e-mails and files from both Powell's personal work computer and the computer network maintained by Fitness Holdings Worldwide where these files may be stored.

30. I have spoken with IRS Special Agent Michael P. Farrelly, a seized computer evidence recovery specialist (SCERS), regarding the seizing of evidence contained within computers and electronic data processing devices. Special Agent Farrelly is the senior computer investigative specialist for the IRS San Jose post of duty. He has received extensive training on computer forensics and recovering computer evidence. Special Agent Farrelly has informed me that because of technical reasons, the downloading of evidence stored on a computer at the search warrant location is often difficult. He stated that often he cannot obtain access to the computer or cannot search for or copy information from the computer on site. He also stated that sometimes the volume of material stored on a computer is too great to search on site, and that because of the above reasons it is often necessary to remove the entire computer to a laboratory setting for a sufficient period of time to obtain access to, search for and recover computer records. Additionally, Farrelly stated that making an "image" of hard drives, disks and other storage media, and taking the "imaged" copies of those medias to a laboratory setting to analyze is a less intrusive and preferred method.

Conclusion

31. Based upon the foregoing facts, there is probable cause to believe, and I do believe, that Michael Johnston and Susan Powell engaged in violations of Title 18, USC § 1341 (mail fraud) and Title 18 USC § 1957 (money laundering) relative to a kickback scheme and the subsequent depositing of the proceeds of that scheme. I also believe that probable cause exists that Susan Powell willfully omitted these payments from Johnston on her federal tax returns for the years she or her husband Andrew received payments from Johnston for the years 1996 through 2000 in violation of Title 26 U.S.C. § 7201 (Tax Evasion). I also believe that there is probable cause to believe that financial records and other evidence of the kickback scheme, mail fraud, money laundering and tax evasion, as described more fully in Attachment B to this affidavit, are present at Susan Powell's residence located at 116 Alta Heights Court in Los Gatos, California, and Susan Powell's personal workspace, her computer and the computer network located at Fitness Holdings Worldwide at #8 Columbus, San

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Francisco, California, both described more fully in attachments A and A-1 respectively.

32. I declare under penalty of perjury that the foregoing is true and correct and that this affidavit was executed at San Jose, California, on January 25, 2001.

Jeff Novitzky
Special Agent
Internal Revenue Service
Criminal Investigation Division

Sworn to and subscribed in my presence this 25 day of January, 2001.

Edward A. Infante
Chief United States Magistrate Judge
Northern District of California

Attachment A

Description of Property to be Searched

116 Alta Heights Court, Los Gatos, California
The above listed property to be searched is a gray, single-story residence, located at the corner of Alta Heights Court and Loma Alta Avenue in Los Gatos, California. The residence has a brick walkway leading to the front door, which is located on Alta Heights Court. There is a 2-car attached garage to the left of the residence as viewing it from Alta Heights Court. The number 116 is in gold numbers to the right of the front door. Also, the number 116 is painted on the curb in black with white background in front of the residence on Alta Heights Court.

Attachment A-1

Description of Property to be Searched

Susan Powell's Personal Workspace, Personal Computer, and the Computer Network at Fitness Holdings Worldwide at #8 Columbus Street in San Francisco, California

The personal workspace, office or cubicle used by Susan Powell at Fitness Holdings Worldwide, including her desk, file cabinets, and any other storage areas under her control in her work space, and the personal computer used by Powell in that workspace, as well as any other workstation or server on the computer network where files or e-mails of Powell's may be stored, located at #8 Columbus Street, San Francisco, California.

Attachment B

Description of Property to be Seized:

1. Banking and financial institution records, wire transfer records, bank statements, cancelled checks, deposit slips, check registers, records of money orders, cashier's checks, and official bank checks, savings passbooks and statements of account(s), safe deposit box keys and business and personal ledgers evidencing financial transactions from January 1, 1996 through the present.

2. Records relating to any business relationships with The Source Group, Catapult and Transcend Advertising and Design, more particularly described as: contracts, projects, expenses, estimates, agreements, correspondence, mailings, invoices, billings and payments from January 1, 1996 through the present.

3. Records relating to any business or personal relationship with Michael Johnston, more particularly described as: contracts, agreements, correspondence, invoices, billings, payments, mailings, audio or video tapes, photos, notes and letters from January 1, 1996 through the present.

4. Documents reflecting a kickback scheme between Transcend Advertising & Design, Catapult, The Source Group, Michael Johnston, Susan Powell and 24-Hour Fitness, and evidence of any use of the mail in furtherance of that scheme.

5. Any organizers, day planners, calendar books, notebooks, appointment books containing notations, numerical entries, calculations, personal notes, and ledger entries.

6. Records, documents and deeds reflecting the purchase or lease of real estate, vehicles, vessels, precious metals, stocks, mutual funds, insurance policies, other investments of other assets obtained from January 1, 1996 through the present.

7. Records relating to federal tax returns and the preparation of federal tax returns for Susan and Andrew Powell more particularly described as, federal tax returns, W-2's, 1099's, any receipts or records of income, any workpapers or forms used to prepare federal income tax returns and any correspondence with CPA or accountant from January 1, 1996 through the present.

8. Records relating to the ownership or renting of off-site storage facilities more particularly described as contracts, receipts, keys, notes, bills and any letters of correspondence from January 1, 1996 through the present.

9. All e-mails and document files falling under the specific categories of evidence described above in items (1) through (7) located both on Powell's personal computer and the computer network, including any other personal computer work stations Powell may have used, and any servers for the network.

10. Any and all of the above described information that may be stored on magnetic media. This includes information stored on computer hard drives, diskettes, tapes or any other media capable of storing information in a form readable by a computer. This also includes all copies of the information described above that may be maintained as archive or backup copies. In

addition, if the files and records described in the above paragraphs cannot be read and understood without the software or programs that created those files or records, the agents are authorized to seize such software and any documentation and manuals that describe the software and give instructions on its installation and use.

11. The agents searching for such information are authorized to search any desktop, personal computer or electronic organizer located in the premises to be searched and to copy all above-described information stored on such computer. The search of such computers shall be limited to seeking information that fits within the above described items to be seized.

12. In the event that the agents cannot, for technical reasons, obtain access to any subject computer or cannot search for or copy information contained on that computer, or if the volume of material stored on any computer is too great to search on site, the agents are then authorized to (a) make an "image" of the hard drive, disk or other storage media and bring it to a laboratory setting for a to obtain access to, search for, and recover files and records described above or (b) remove the computer storage media to a laboratory setting for a sufficient period of time to obtain access to, search for, and recover files and records described above. PROVIDED HOWEVER, that no computer shall be seized by the agents without the express authorization to do so by Assistant United States Attorney JEFF NEDROW, or another Assistant United States Attorney acting in his stead.

AFFIDAVIT OF JEFF NOVITZKY IN SUPPORT OF APPLICATION FOR SEARCH AND SEIZURE WARRANT

Introduction

1. This affidavit is submitted in support of search warrants and seizure warrants relating to a kickback scheme, mail fraud violations and money laundering violations undertaken by MICHAEL P. JOHNSTON, the president of Transcend Advertising and Design in Los Gatos, California, and SUSAN POWELL, the vice president of marketing for 24-Hour Fitness, a world-wide exercise chain. The locations to be searched are the business location of Transcend Advertising and Design at #8 Station Way, in Los Gatos, California, and the residence of Michael P. Johnston, at 16505 Englewood Avenue in Los Gatos, California. Both are described more thoroughly in Attachment A to this affidavit, description of property to be searched. The items to be seized at these locations are detailed in Attachment B. The assets to be seized and subject to forfeiture, which were purchased with proceeds involved in money laundering transactions are: one 1997 BMW, vehicle identification number WBABK8320VET99997 (license number 3WNT181), one Nautique Super Sport ski-boat, vessel identification number CTC97006G899 (license number 6141PK) and one 1999 Chevrolet Tahoe, vehicle identification number 3GNEK18R9XG197353 (license number 4FRE998).

2. Section I of the affidavit details the affiant's background. Section II of the affidavit describes the case background. Section III covers the evidence supporting probable cause. Section IV explains the basis for searching the business location and section V explains the basis for searching the residence location. Finally, section VI provides the basis for seizing the assets subject to forfeiture under Title 18 USC § 981.

EXHIBIT 1

I. Affiant's Background

3. I am a Special Agent with the Internal Revenue Service, Criminal Investigation Division ("IRS-CID"), and have been so employed since 1993. I received five months of training at the Federal Law Enforcement Training Center in Glynco, Georgia. This included training in the investigative techniques of criminal violations of Title 26 U.S.C. (Internal Revenue Code), Title 18 U.S.C. Sections 1956 and 1957 (Money Laundering Control Act), and Title 31 U.S.C. (Bank Secrecy Act).

4. During my eight years with the IRS-CID, I have conducted and/or participated in hundreds of criminal investigations involving income tax violations, money laundering violations and currency violations. I have participated in the execution of numerous search warrants and have written affidavits in support of search warrants on fourteen (14) different locations. Additionally, I am the Title 31 (Bank Secrecy Act) coordinator for the Internal Revenue Service, Criminal Investigation Division, San Jose post of duty. My duties as the Title 31 coordinator include the monitoring of all suspicious currency activity through financial institutions in Santa Clara, Santa Cruz and Monterey Countys. As the San Jose CID Title 31 Coordinator, I am routinely contacted by bank officials with reports of suspicious currency transactions taking place at their institutions. The information that I have received has led to numerous investigations concerning possible violations of Title 18 U.S.C. Sections 1956 and 1957 (Money Laundering Control Act), Title 31 U.S.C. (Bank Secrecy Act), and related financial violations. I periodically attend meetings and conferences with other Title 31 Coordinators from across the country, as well as banking officials who monitor suspicious currency transactions and potential money laundering activities. At these conferences, discussions are held regarding common money laundering and suspicious currency transaction activity that is prevalent

throughout the country.

II. Case Background

5. This investigation was initiated in June of 2000, when a confidential informant (hereinafter CI), came to the San Jose, California, IRS-CID office to report that her ex-boyfriend and business partner, Michael P. Johnston, was involved in a kickback scheme with the vice president of Marketing of the 24-Hour Fitness exercise chain, Susan Powell. The CI disclosed that the kickback scheme defrauded 24-Hour Fitness out of hundreds of thousands of dollars, which was split between the two participants, Johnston and Powell.

6. Based upon the information provided by the CI, and corroborated by subpoenaed bank records, corporate filings, court filings, tax return information and an audio-taped conversation between the CI and Michael Johnston, there is probable cause to believe that in furtherance of their kickback scheme, Johnston and Powell have committed violations of mail fraud (Title 18 USC § 1341), as well as federal money laundering violations (Title 18, USC § 1957) when they deposited the proceeds of the kickback scheme facilitated by the mail, into bank accounts that they controlled. Furthermore, based upon the facts set forth below, there is probable cause to believe that evidence of the kickback scheme, and related mail fraud and money laundering will be found at the residence of Michael P. Johnston located at 16505 Englewood Avenue in Los Gatos, California, and the business location of Transcend Advertising and Design located at #8 Station Way in Los Gatos, California, both described more thoroughly in Attachment A. Additionally, this affidavit will present probable cause that with the proceeds of the kickback scheme and related mail fraud and money laundering, Michael Johnston purchased a 1997 BMW 328i, a 1999 Ski Nautique Super Sport ski-boat, and a 1999 Chevy Tahoe and that because these assets are traceable to funds involved in a money laundering transaction,

they are forfeitable under Title 18 USC § 981.

III. Evidence Supporting Probable Cause

a. Information provided by the CI

7. In June of 2000, the CI was referred to me by detective J.R. Langer of the Los Gatos, California, police department. I have personally checked criminal history indices, and am not aware of any criminal history for the CI. The CI is not being paid for providing information relevant to this case. The CI has not been promised any leniency in connection with any criminal investigation, and there are currently no criminal charges pending against her. On October 13, 1999, Michael Johnston filed a civil complaint against the CI, alleging breach of contract, interference with economic relationship, negligent and intentional infliction of emotional distress, and requesting a temporary restraining order and injunctive relief consistent with a settlement agreement which had previously been signed between the parties. The CI filed a cross-complaint. The civil case has recently been settled. In the course of settling the case, the CI agreed to a separation of assets, but did not admit any wrongdoing.

8. The CI contacted Langer in June of 2000 regarding the involvement of her business partner and ex-boyfriend, Michael P. Johnston, in a kickback scheme with the 24-Hour Fitness exercise chain. The CI came to the IRS/CID office in San Jose and stated that in 1995, she and Johnston established a graphics design and advertising business in Los Gatos, California, called The Source Group. The business has since changed names to Catapult, then Transcend Advertising and Design, which it is currently named (hereinafter known as "The Source/Transcend"). The CI stated that although she put forth most of the capital to establish The Source/Transcend and she is the sole shareholder of The Souce/Transcend, Michael Johnston is the director and president of The Source/Transcend and has always been in control of The Source/Transcend's

day-to-day affairs. Although the CI is still the listed sole shareholder of The Source/Transcend, she currently has no involvement whatsoever with the company. Johnston continues to run The Source/Transcend's day-to-day operations.

9. The CI stated that in 1998, her and Johnston's relationship soured, in part because of discoveries she made while performing bookkeeping duties for The Source/Transcend and reconciling The Source/Transcend bank accounts in 1997. The CI explained that The Source/Transcend became extremely profitable during this time largely as a result of its relationship with 24-Hour Fitness and its contact at 24-Hour Fitness, Susan Powell. The CI stated that 24-Hour Fitness, through Susan Powell, accounted for a large percentage of the The Source/Transcend's business. 24-Hour Fitness outsourced a portion of their print advertising to The Source/Transcend. While reconciling the The Source/Transcend's bank records for 1997, the CI came across numerous business checks written personally to Susan Powell, The Source/Transcend's contact with 24-Hour Fitness. The CI estimates that the checks she discovered in 1997 written to Powell totaled between $60,000 and $70,000.

10. The CI asked Michael Johnston for an explanation on the checks written to Susan Powell. Johnston told the CI that Powell had approached him and told him that he could over-bill 24-Hour Fitness for the work he did for them because she was the one who approved the expenses. Johnston told the CI that Powell said they could split the over-billed portion 50/50. Johnston told the CI that he and Powell had been doing this for some time and that unbeknownst to Powell, he was actually keeping a larger percentage of the over-billed portion than he was paying Powell. He told the CI that the checks written from the business account to Susan Powell were Powell's portions of the over-billed expenses. In addition to business checks written to Susan Powell, the CI also

disclosed that she came across company checks used to pay off Powell's American Express account. Johnston told the CI that this was an additional part of the agreement he had with Powell.

b. Corporate Filings

11. I have personally reviewed and examined Source/Transcend's corporate filings made with the California Secretary of State. Specifically, the filings confirm that Michael Johnston is the president of the Source/Transcend and the CI is the Source/Transcend's sole shareholder, holding all 60,000 shares.

c. Court Filings

12. I have personally reviewed and examined the original complaint for breach of contract made by Michael Johnston against the CI. The complaint corroborates the CI's statements that she and Johnston founded the Source/Transcend and that while Johnston has always managed the day-to-day operations of the Source/Transcend, the company remains in the CI's name. Johnston's filing also confirms that the CI worked for the Source/Transcend in 1997 as its office manager.

d. Corroboration of Susan Powell's Position With 24-Hour Fitness

13. The federal tax returns for Susan Powell were examined and show that for the tax years 1996 through 1999, 24-Hour Fitness filed W-2's detailing wages paid to Susan Powell. Additionally, I found a newspaper article printed by the Contra Costa Times on July 19, 1998, highlighting recent promotions made by 24-Hour Fitness. The entirety of the article states:

> "24 Hour Fitness, headquartered in Pleasanton, made six key promotions: Ron Thompson, chief operating officer; Larry Gurney, president of the Southwest division; **Susan Powell, vice president of marketing**; Rod Everett and Steve Clinefelter, both vice presidents of the Southwest division; and Mary Stein, vice president, Central division."

e. Subpoenaed Bank Records

14. I have served grand jury subpoenas for bank accounts belonging to the company, Michael Johnston, the CI and Susan Powell. An analysis of the bank records received to date on the company's Wells Fargo business checking account #0487-098741, reveals that over 90% of the deposits made into the account are checks from 24-Hour Fitness. Specifically, the records received to date reveal that from 12/14/1995 through 8/9/2000, two hundred and sixty seven (267) checks drawn on the accounts of 24-Hour Fitness were deposited into the company's Wells Fargo Account number 0487-098741, a business checking account. These checks totaled over $6.7 million.

15. Additionally, from records received to date from those subpoenas, I have discovered twenty-seven (27) checks written from the company's business checking account, and Michael Johnston's personal Wells Fargo Bank account #0399-241488, to Susan Powell. These checks are written personally to Susan Powell, not to 24-Hour Fitness. A detailing of these checks is as follows:

Check Date	Payee	Account.	Amount
2/16/1996	Susan Powell	Business	628.00
4/1/1996	Susan Powell	Business	2,000.00
11/4/1996	Susan Powell	Business	3,000.00
12/6/1996	Susan Powell	Business	3,000.00
1/15/1997	Susan Powell	Business	5,000.00
1/21/1997	Susan Powell	Business	5,000.00
4/4/1997	Susan Powell	Business	9,750.00
5/29/1997	Susan Powell	Business	5,000.00
7/18/1997	Susan Powell	Business	6,000.00
8/6/1997	Susan Powell	Business	6,000.00
9/17/1997	Susan Powell	Business	1,000.00
10/3/1997	Susan Powell	Business	5,000.00
10/17/1997	Susan Powell	Business	2,500.00
11/4/1997	Susan Powell	Business	3,500.00
11/30/1997	Susan Powell	Business	7,500.00
1/12/1998	Susan Powell	Business	5,000.00
4/5/1998	Susan Powell	Business	10,000.00
5/31/1998	Susan Powell	Personal	5,000.00
6/14/1998	Susan Powell	Personal	8,000.00
7/7/1998	Susan Powell	Personal	5,000.00
8/12/1998	Susan Powell	Personal	5,000.00
9/21/1998	Susan Powell	Personal	5,200.00
10/19/1998	Susan Powell	Personal	5,000.00
1/4/1999	Susan Powell	Personal	4,500.00
1/25/1999	Susan Powell	Personal	5,080.00
3/6/1999	Susan Powell	Personal	3,100.00
6/1/1999	Susan and Andrew Powell		50,000.00
	Total:		175,758.00

16. A further analysis of the checks themselves, as well as subpoenaed bank records from Wells Fargo Bank account 0487-692345, show that 25 of the above 27 listed checks were deposited into the personal bank account of Susan Powell and her husband, Andrew Powell.

17. Additionally, I discovered two checks, one from the company account and one from Johnston's personal account, that were written to American Express. Both checks contained an American Express account number of 3728 198456 91008. One check contained the notation in the memo section "3728 198456 91008 Powell". A detailing of these checks is as follows:

Check Date	Payee	Account	Amount
1/16/1997	American Express (3728 198456 91008 Powell)	Business	6,030.00
1/25/1999	American Express (3728 198456 91008)	Personal	9,000.00
		Total:	17,030.00

f. Examination of Powell's Federal Tax Returns

18. I have examined the federal tax returns and tax return information for Susan Powell and her husband Andrew Powell for the tax years 1995 through 1999. The income reported by the Powells for the tax years 1995 through 1999 is as follows:

Tax Year	Income	Source of Income	
1995	$65,875	HEC Investment W-2 (Susan)	62,989.33
		HEC Investment W-2 (Andrew)	2,627.33
		Refund of State/Local Tax	196.00
		Taxable Interest	63.00
		Total '95 Income	65,875.33
1996	116,383	24-Hour Fitness W-2 (Susan)	73,532.98
		24-Hour Fitness W-2 (Andrew)	41,016.22
		Refund of State/Local Tax	1,834.00
		Total '96 Income	116,383.20

1997	135,800	24-Hour Fitness W-2 (Susan)	78,498.89
		24-Hour Fitness W-2 (Andrew)	55,167.10
		Taxable Interest	300.00
		Refund of State/Local Tax	1,834.00
		Total '97 Income	135,799.99
1998	211,068	24-Hour Fitness W-2 (Susan)	124,881.00
		24-Hour Fitness W-2 (Andrew)	85,368.00
		Taxable Interest	101.00
		Refund of State/Local Tax	717.00
		Total '98 Income	211,067.00
1999	234,453	24-Hour Fitness W-2(Susan)	195,765.00
		24-Hour Fitness W-2 (Andrew)	28,179.00
		Schedule C Income (Andrew)	10,383.00
		Taxable Interest	125.00
			234,452.00

19. As the above return and return information indicates, the only income reported by the Powell's on their 1995 through 1999 federal tax returns was W-2 wages, interest income and state and local refunds. The income generated from the twenty-seven (27) checks given to Powell by Johnston through 1999, and the twenty-five (25) checks deposited into Powell's personal account through 1999, was not reported as income on the Powell's returns.

f. Audio-taped Conversation Between The CI and Michael Johnston

20. On November 30, 2000, at the direction of IRS/CID, the CI arranged for a meeting with Michael Johnston in an attempt to gain audio-taped conversation from Johnston regarding his participation in the kickback scheme with 24-Hour Fitness and Susan Powell. The CI met with Johnston at Bachman Park in Los Gatos, California. IRS/CID agents, including myself, monitored the conversation both visually and through a body transmitter worn by the CI. The conversation was also recorded with a tape recording machine concealed in the CI's purse.

21. During the conversation with the CI, Johnston spoke extensively

about the agreement and payments made to Susan Powell. Johnston denied participating in a kickback scheme and insisted he did nothing wrong, but made statements which corroborated the CI's statement that he was, in fact, participating in an illicit kickback scheme with Susan Powell to defraud 24-hour fitness. The following are excerpts from the conversation between the CI and Michael Johnston:

CI: *Why did you give that money to Susan?*
Johnston: *I loaned money to Susan.*
CI: *You didn't.*
Johnston: *Susan took money and Susan gave me back money. She gave that back to me.*

-Later in the conversation:

Johnston: *You know something, I didn't do anything wrong. Alright? That's the bottom line. I have not done anything wrong. And there's no fucking proof that I did anything wrong. If anything, anyone looks into that company and says that, he's a good businessman. He made a lot of fucking money. So what? I made money. I charged way fucking more than I should have on jobs. So what? That's not a crime. It is not a crime to charge people more money than what a job's worth. You think it's a crime to sell, you know, ten-dollar bottles of water, you know, where there's...out in the desert? No. It's supply and demand.*

-Later in conversation:

CI: *You were paying off her Visa and her American Express Card. You know it's these little things that bug me. It's not honest.*
Johnston: *What's not honest about it? It's what they call in the business industry, tit for tat. It's, um, scratch my back and I'm going to scratch your back. And it's...what's wrong with, what's wrong with someone going off and getting a really big, expensive gift, you know, or what about NFL football players? They get cars, they get houses, they get all kinds of shit, right? From the people who are trying to get them on their team. Is that?...and they write stuff off. Right? They write off the car and they write off all the stuff and they say it's a gift. Why is it a gift? Because I like em. Well, what do you get out of that? He's going to play for your team. Right? Now, if I give Susan...write off her, her uh, bill, guess what? It is a write-off because it's a gift. Right? Why did I give her a gift? Because I want her fucking business. And did I get her business? Yes. It's not wrong. I looks wrong but it's not. That's business. It's business. I kept Susan in my back pocket because she was giving me work. And she gave me work*

and it was easy. It was very easy work. So that's the reason that I did it. Okay?

-Later in conversation:

CI: *You said, fine Ara, I'll tell you. You said Susan approached you, she asked you how much you were doing...markings...you were billing them. You said that she said, mark it up and then she'd approve it.*
Johnston: *Right, she asked me to rob Peter to pay Paul. Okay? That's all it is.*

-Later in conversation:

CI: *And then you said, oh, what she doesn't know is that I'm pocketing more than what...*
Johnston: *What the original agreement was, because she didn't know that. That's my standard markup. That's my markup.*
CI: *I know. But that's what I'm getting at. What you said, aside from the markup, you said, oh, I'm keeping whatever, whatever's left over and we're splitting it. I don't think that's right.*
Johnston: *That's not unethical. Because it's a gift. It's not a kickback. A kickback is when you're being forced to...you know, and, if you...well, that's blackmail. Yeah, a kickback....*
CI: *I'm just saying, how am I going to explain that to....*
Johnston: *Who?*
CI: *When I, when I get audited. Because I'm telling them the same thing I told my attorney's, that you fucking scared me. This is what Michael said, he said he's marking it up and whatever the difference was, they were splitting it. Yet Susan didn't know that I was keeping a bigger portion of it.*
Johnston: *It stayed in the company so what big difference is that of mine? And if I'm giving her money and I'm still paying taxes on it, who cares? IRS doesn't give a shit. You can give...if I came up to you and gave you $50, does the IRS care? No. Do they? No, they don't care. Now, if I gave you $50, and you didn't report the $50 on your...you know...a gift is a gift.*
CI: *I know...but did you...*
Johnston: *Did you earn it? No, she didn't earn it. She gets it...*
CI: *But you told me not to..not to, give her a W-2.*
Johnston: *If, if...*
CI: *That made me nervous.*
Johnston: *If she was working, if she was working as a contract employee.*
CI: *But she wasn't.*
Johnston: *That's right, she wasn't. She got gifts and I paid taxes on them. There's no way to hide the amount of money that was coming in, because when money comes in, to Transcend, it goes straight to the bank. And the bank has, has records. And if your records don't match your financial statements, you get audited. And they go, where did the money go? Right? You still have to pay taxes on it. And the IRS only cares, only cares if you*

don't pay taxes on it. That money I gave Susan, I paid taxes on it. She didn't. Okay? So there's nothing wrong. So you can go into the IRS and say, when you get audited, say, yeah, these are, this is money that was given to her. It was given to her, so what. I still paid taxes on it. So what's the problem?

g. Evidence of Mail Fraud and Related Money Laundering

22. During the CI's tenure as office manager of the Source/Transcend, she observed that the mail was regularly used in Source/Transcend's dealings with 24-Hour Fitness. The CI stated that when the Source/Transcend billed 24-Hour Fitness, invoices were sent through the United States mail. Additionally, when the company received payments from 24-Hour Fitness, the mail was used. Additionally, I have examined the 267 checks that the Source/Transcend received from 24-Hour Fitness. All of the checks are paid to the order of the Source/Transcend's name and have the Source/Transcend's mailing address placed directly below. Based on my training and experience, businesses prepare payments this way when they are mailed using the listed address on the check.

23. As stated earlier in this affidavit, the payments that the Source/Transcend received from 24-Hour Fitness were deposited into the Source/Transcend's business bank account. Since evidence exists that Michael Johnston and Susan Powell were fraudulently involved in over-billing 24-Hour Fitness, these payments from 24-Hour Fitness that were received through the mail are the proceeds of mail fraud, a specified unlawful activity.[1]. Of the 267 checks that I have documented being deposited into the company's account from 24-Hour Fitness, 125 deposits are in excess of $10,000. I believe this to be

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[1] **Title 18 USC § 1956 (7):** the term "specified unlawful activity" means-
(A) any act or activity constituting an offense listed in section 1961(1) of this title...

Title 18 USC § 1961(1): "racketeering activity" means...(B) any act which is indictable under any of the following provisions of title 18, United States Code:...section 1341 relating to mail fraud.

probable cause of violations of Title 18 USC § 1957[2].

IV. Basis for Searching The Business Location of The Source/Transcend

24. Based upon my training and eight years experience as a special agent, sole proprietors and various business entities such as partnerships and corporations that conduct business, derive income, and incur expenses on a regular basis maintain books and records of their activities for, among other reasons, use in financial, tax, and legal matters, as well as for budgeting, forecasting, and to obtain financing. These books and records generally consist of various journals, ledgers, invoices, receipts, loan documents, and bank records (i.e.: monthly account statements, deposit tickets, and canceled checks) and financial statements. Such documents are routinely stored at the business location. Records of this type are normally kept for extended periods of time.

25. In addition to my training and experience that businesses keep records for extended periods of time, Johnston made comments referring to records that he is keeping during the audio-taped conversation with the CI on November 30 ,2000. Johnston referred to records he keeps specifically relating to payments to and from Susan Powell. The following conversation took place regarding records that Johnston possesses:

Johnston: *....If you think that I've done something unethical or if you think that I've done something illegal that's going to affect you later on in life, then you get an auditor and you tell them to come in there...*

CI: *I've been trying to and you've been keeping me from it. That's what you keep saying. All I ask is....I*

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[2] **Title 18 USC § 1957**: (a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(d) The circumstances referred to in subsection (a) are-(1) that the offense under this section takes place in the United States or in the special maritime jurisdiction of the United States.

asked for the financials a long time ago and you won't let me see them.

Johnston: *The financials...you know what? I don't know what financials...what are financials anyway?*

CI: *Bank statements, Michael.*

Johnston: *Bank statements. I have books of bank statements, I have copies of all the bank statements.*

CI: *I wanted the bank statements, I wanted the originals tax returns.*

Johnston: *That's fine. What do you plan to see? All the ones that say Susan Powell?*

CI: *Yeah.*

Johnston: *Okay, do you want to see all of the checks that Susan Powell wrote to me to cover them? Do you wants those? I have copies of them.*

26. I have personally driven by the Source/Transcend's business location at #8 Station Way in Los Gatos, California. A sign reading Transcend Advertising and Design is affixed to the entrance of the location. The inside of the business is clearly visible from the street as the second story that it occupies is entirely fronted by glass. I observed a typical office setting with desks, computers, paperwork and files.

27.Based upon my experience that businesses store financial records for extended periods of time, my personal observation of the business as well as Michael Johnston's own statements that he keeps records which are specifically relative to Susan Powell and payments made to and from her, I believe there to be probable cause to search the business location of Transcend Advertising and Design located at #8 Station Way in Los Gatos, California, for the items to be seized in Attachment B.

V. Basis for Searching Johnston's Personal Residence

28. Based upon my training and eight years experience as a special agent, individuals keep records of personal income and expenditures in the form of various invoices, receipts, account statements, loan documents, and bank records. Such documents are routinely stored at the individual's residence. Records of this type are normally kept for extended periods of time as they are

frequently used in financial, tax, and legal matters, as well as to prove ownership of assets for warranty and other purposes.

29. I have personally driven by the residence at 16505 Englewood Avenue, Los Gatos, California, and have observed vehicles registered to Michael Johnston and/or the company parked in the driveway of the residence.

30. In addition to my training and experience that individuals keep financial records for extended periods of time, evidence exists that Johnston has received financial records relative to his payments to Susan Powell at his residence located at 16505 Englewood Avenue, in Los Gatos, California. Johnston's personal bank account, from which he makes multiple payments to Susan Powell, is addressed to 16505 Englewood Avenue, Los Gatos, California. Also, the CI, who has proven to be reliable and credible on all information she has provided, told me that Johnston keeps archived company records at his residence. Based upon all these facts, I believe there is probable cause to search Johnston's residence, located at 16505 Englewood Avenue, Los Gatos, California, for the items to be seized in attachment B.

Basis for Searching Computer and/or Electronic Data Processing Devices

31. There is probable cause to believe that Michael Johnston keeps evidence of the aforementioned violations on a computer and/or electronic data processing device. The CI has informed me that she personally operated Quickbook financial software from a computer within the business when she was doing company bookkeeping. Additionally, in the following excerpt from the CI's recorded conversation with Johnston, Johnston mentions the business's use of Quickbooks and the storage of company records:

Johnston: *...I am so fucking in sync with what's going on with the IRS, it's incredible. I have so much stuff prepared for an audit. And I don't..look...I have all that stuff, and I don't want you to think that I've done*

> *anything wrong. I've rectified everything. I've had an accountant, a CPA, come in for a month, sit at Quickbooks and reconcile everything and hold everything accountable. And every single check that was ever written.*

32. I have spoken with IRS Special Agent Michael P. Farrelly, a seized computer evidence recovery specialist (SCERS), regarding the seizing of evidence contained within computers and electronic data processing devices. Special Agent Farrelly is the senior computer investigative specialist for the IRS San Jose post of duty. He has received extensive training on computer forensics and recovering computer evidence. Special Agent Farrelly has informed me that because of technical reasons, the downloading of evidence stored on a computer at the search warrant location is often difficult. He stated that often he cannot obtain access to the computer or cannot search for or copy information from the computer on site. He also stated that sometimes the volume of material stored on a computer is too great to search on site, and that because of the above reasons it is often necessary to remove the entire computer to a laboratory setting for a sufficient period of time to obtain access to, search for and recover computer records.

VI. Probable Cause of Forfeitable Assets Under Title 18 USC § 981

33. Because probable cause exists that the proceeds of a specified unlawful activity were deposited into the Source/Transcend's Wells Fargo business checking account #0487-098741, in violation of Title 18, USC § 1957, then any property traceable to those deposited proceeds is subject to forfeiture by the United States under Title 18 USC § 981[3]. An analysis of the

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[3] **Title 18 USC § 981**: (a)(1) Except as provided in paragraph (2), 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 5313(a) or 5324(a) of Title 31, or of section 1956 or 1957 of this title, or any property traceable to such property.

Source/Transcend's business checking account shows that after proceeds from 24-Hour Fitness were deposited into the Source/Transcend's business checking account, two vehicles and one boat were purchased and/or financed with funds from the business checking account. Probable cause that these assets were purchased and/or financed with money laundering proceeds and are thus forfeitable to the United States is as follows:

1997 BMW - License 3WNT181 - Vin#: WBABK8320VET99997

34. On July 18, 1997, check number 1762 from the Source/Transcend's Wells Fargo Business checking account #0487-098741, in the amount of $53,535.40, was written to Stevens Creek BMW for the purchase of the aforementioned BMW. DMV records show that the vehicle was purchased on July 18, 1997, and is registered to Michael J. Johnston and the CI at 16505 Englewood Avenue in Los Gatos, California.

35. Previous to the purchase of the BMW on July 18, 1997, in excess of $1.2 million in payments from 24-Hour Fitness had been deposited into the Source/Transcend's business checking account. Additionally, ten checks had already been written from the business bank account to Susan Powell or her credit card account totaling $45,408.

36. Based upon the facts presented earlier in this affidavit that: a kickback scheme and related mail fraud and money laundering occurred, $1.2 million from 24-Hour Fitness had already been deposited into the business checking account, Susan Powell had already been paid in excess of $44,000 by Michael Johnston and Johnston stated that he kept more than 50% of the over-billing of 24-Hour Fitness, I believe that proceeds of a Title 18 USC § 1957, money laundering, transaction were used to pay for the aforementioned BMW

and that since the money used to purchase the BMW is traceable to the money laundering violation, it is subject to forfeiture by the United States.

1999 Chevrolet Tahoe - License 4FRE998 - VIN#3GNEK18R9XG197353

37. On April 27, 1999, check number 1903 from the Source/Transcend's Wells Fargo Business checking account #0487-098741, in the amount of $35,693.18, was written to Anderson Chevrolet for the purchase of the aforementioned 1999 Chevy Tahoe. Besides the vehicle identification number written in the memo section at the bottom of the check, DMV records also show that the vehicle was purchased in 1999, and is registered to Catapult Design Group (another previous name of the Source/Transcend company) at #8 Station Way in Los Gatos, California.

38. Previous to the purchase of the Chevrolet Tahoe on April 27, 1999, in excess of $3.8 million in payments from 24-Hour Fitness had been deposited into the Source/Transcend's business checking account. Additionally, twenty-eight (28) checks had already been written from the business bank account and Johnston's personal account to Susan Powell or her credit card account totaling $142,788.

39. Based upon the facts presented earlier in this affidavit that: a kickback scheme and related mail fraud and money laundering occurred, $3.8 million from 24-Hour Fitness had already been deposited into the business checking account, Susan Powell had already been paid in excess of $142,000 by Michael Johnston and Johnston stated had kept more than 50% of the over-billing of 24-Hour Fitness, I believe that proceeds of a Title 18 USC § 1957, money laundering, transaction were used to pay for the aforementioned Chevrolet Tahoe and that since the money used to purchase the vehicle is traceable to the money laundering violation, it is subject to forfeiture by the United States.

1999 Nautique Super Sport ski-boat - License 6141PK - VIN# CTC97006G899

40. On April 28, 1999, check number 1905 from the Source/Transcend's Wells Fargo Business checking account #0487-098741, in the amount of $45,925.77, was written to Central Valley Marine for the purchase of the aforementioned skiboat. DMV records show that the vessel was purchased on April 26, 1999, and is registered to Michael J. Johnston at 16505 Englewood Avenue in Los Gatos, California.

41. Previous to the purchase of the ski-boat on April 28, 1999, in excess of $3.8 million in payments from 24-Hour Fitness had been deposited into the Source/Transcend's business checking account. Additionally, twenty-eight (28) checks had already been written from the business bank account and Johnston's personal account to Susan Powell or her credit card account totaling $142,788.

42. Based upon the facts presented earlier in this affidavit that: a kickback scheme and related mail fraud and money laundering occurred, $3.8 million from 24-Hour Fitness had already been deposited into the business checking account, Susan Powell had already been paid in excess of $142,000 by Michael Johnston and Johnston had stated he kept more than 50% of the over-billing of 24-Hour Fitness, I believe that proceeds of a Title 18 USC § 1957, money laundering, transaction were used to pay for the aforementioned Nautique skiboat and that since the money used to purchase the skiboat is traceable to the money laundering violation, it is subject to forfeiture by the United States.

Conclusion

43. Based upon the foregoing facts, there is probable cause to believe, and I do believe, that Michael Johnston and Susan Powell engaged in violations of Title 18, USC § 1341 (mail fraud) and Title 18 USC § 1957 (money laundering) relative to a kickback scheme and the subsequent depositing of the proceeds of that scheme. I also believe that there is probable cause to believe that financial records and other evidence of the kickback scheme, mail fraud and

money laundering, as described more fully in Attachment B to this affidavit, are present at the business location of Transcend Advertising and Design at #8 Station Way in Los Gatos, California, and at the personal residence of Michael Johnston located 16505 Englewood Avenue in Los Gatos, California. Additionally, I believe that probable cause exists to seize one 1997 BMW (Vin WBABK8320VET99997), one 1999 Ski Nautique Super Sport ski boat (VIN CTC97006G899), one 1999 Chevrolet Tahoe (VIN 3GNEK18R9XG197353), based on the evidence that these assets were purchased with funds traceable to money laundering transactions and are forfeitable to the United States under the civil forfeiture statute of Title 18 USC § 981.

44. I declare under penalty of perjury that the foregoing is true and correct and that this affidavit was executed at San Jose, California, on January 17, 2001.

Jeff Novitzky
Special Agent
Internal Revenue Service
Criminal Investigation Division

Sworn to and subscribed in my presence this 17 day of January, 2001.

Patricia V. Trumbull
United States Magistrate Judge
Northern District of California

Attachment A
Description of Property to be Searched

16505 Englewood Avenue, Los Gatos, CA

The above location is a white, single-story home in a residential neighborhood. The numbers 16505 are clearly affixed to a white picket fence, which surrounds the front and side of the residence. The house has a black roof. A garage is located on the left side of the residence as facing it from the street. The residence contains a slightly elevated porch near the front door.

Attachment A

Description of Property to be Searched

#8 Station Way, Los Gatos, CA (Transcend Advertising & Design)

This business location is located on the second story of a two floor commercial complex. A small blue sign is present at the bottom of the main entrance to the business which reads "Transcend Advertising Design, 8 Station Way." There is a staircase on the left side of the business, as facing it from the street, which leads to a second story, glass doored entrance. A large blue sign is present adjacent to this entrance, which also reads "Transcend Advertising Design." A green canopy surrounds the second story business. The first floor of the complex contains a business named Accent of Rugs at 10 Station Way.

Attachment B

Description of Property to be Seized:

1. Banking and financial institution records, wire transfer records, bank statements, cancelled checks, deposit slips, check registers, records of money orders, cashier's checks, and official bank checks, savings passbooks and statements of account(s), safe deposit box keys and business and personal ledgers evidencing financial transactions from January 1, 1995 through the present.

2. Records relating to any business relationships with 24-Hour Fitness, any of it parents companies and holdings, more particularly described as: contracts, projects, expenses, agreements, correspondence, mailings, invoices, billings and payments from January 1, 1995 through the present.

3. Records relating to any business or personal relationship with Susan Powell, more particularly described as: contracts, agreements, correspondence, invoices, billings, payments, mailings, audio or video tapes, notes and letters from January 1, 1995 through the present.

4. Any evidence of a kickback scheme between Transcend Advertising & Design, Catapult, The Source Group, Michael Johnston, Susan Powell and 24-Hour Fitness or evidence of any related use of the mail in furtherance of that scheme.

5. Records, documents and deeds reflecting the purchase or lease of real estate, vehicles, vessels, precious metals, stocks, mutual funds, insurance policies, other investments of other assets obtained from January 1, 1995 through the present.

6. Records relating to the ownership or renting of off-site storage facilities more particularly described as contracts, receipts, keys, notes, bills and any letters of correspondence from January 1, 1995 through the present.

7. Any and all of the above described information that may be stored on magnetic media. This includes information stored on computer hard drives, diskettes, tapes or any other media capable of storing information in a form readable by a computer. This also includes all copies of the information described above that may be maintained as archive or backup copies. In addition, if the files and records described in the above paragraphs cannot be read and understood without the software or programs that created those files or records, the agents are authorized to seize such software and any documentation and manuals that describe the software and give instructions on its installation and use.

8. The agents searching for such information are authorized to search any desktop, personal computer or electronic organizer located in the premises to be searched and to copy all above-described information stored on such computer. The search of such computers shall be limited to seeking information that fits within the above described items to be seized.

9. In the event that the agents cannot, for technical reasons, obtain access

to any subject computer or cannot search for or copy information contained on that computer, or if the volume of material stored on any computer is too great to search on site, the agents are then authorized to seize such computer and remove it to a laboratory setting for a sufficient period of time to obtain access to, search for, and recover files and records described above. PROVIDED HOWEVER, that no computer shall be seized by the agents without the express authorization to do so by Assistant United States Attorney JEFF NEDROW, or another Assistant United States Attorney acting in his stead.