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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF SAN MATEO

13)
14 THE PEOPLE OF THE STATE OF)
CALIFORNIA,)

15 Plaintiff,

16 vs.

17)
18 [REDACTED]

19 Defendant.

) Case No.: [REDACTED]
) DA Case No: [REDACTED]

) **NOTICE OF MOTION AND MOTION TO**
) **SUPPRESS EVIDENCE AND TO**
) **TRAVERSE AND TO QUASH SEARCH**
) **WARRANT**

) DATE: February 18, 2009
) TIME: 10:00 a.m.
) PLACE: 2A

) **[Submitted Concurrently With: Proposed**
) **Order; Supporting Declarations Of Randall**
) **Garteiser And [REDACTED]**

1 **NOTICE OF MOTION**

2 **PLEASE TAKE NOTICE THAT** on February 18, 2010, at 10:00 a.m., or as soon
3 thereafter as the matter may be heard in the courtroom cited in the above-entitled court, Defendant
4 [REDACTED] will move **TO SUPPRESS EVIDENCE AND TO TRAVERSE AND TO QUASH**
5 **SEARCH WARRANT.**

6 Defendant moves to suppress (1) all evidence seized from the Defendant's car; (2)
7 all evidence seized from the defendant's iPhone is suppressed; (3) all evidence obtained
8 pursuant to the warrant; and (4) all fruits thereof.

9 The motion will be made on the concurrently filed memorandum of points and authorities,
10 the supporting declarations of Randall Garteiser and [REDACTED] and any additional briefing or
11 oral argument the Court may allow.

12
13 DATED: February 3, 2010

14 By _____
15 Randall Garteiser, Esq. (Cal Bar # 231821)
SINGER & GARTEISER LLP

16 Jennifer Granick, Esq. (Cal Bar # 168423)
17 Marcia Hofmann, Esq. (Cal Bar # 250087)
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18 Attorneys for Defendant
19 [REDACTED]

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1 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO
2 SUPPRESS EVIDENCE AND TO TRAVERSE AND TO QUASH SEARCH WARRANT

3 I. INTRODUCTION

4 [REDACTED] is charged with two counts of identity theft, commercial burglary, and attempted
5 grand theft.

6 This suppression motion relates to the improper search of Defendant [REDACTED] car and
7 iPhone,¹ and the improper issuance of a warrant purporting to authorize more extensive analysis of
8 the iPhone based on the initial illegal searches.

9 On November 3, 2009, [REDACTED] attempted to purchase Blackberry phones from a Sprint
10 PCS ("Sprint") store for his company, [REDACTED]. He is the
11 founder of [REDACTED]. His company assists with issuing prepaid Visa credit cards with artists
12 and celebrities on the cover of the cards. ([REDACTED] Decl., ¶ 3, Ex. 1.)² [REDACTED] wanted to purchase
13 30 phones to provide them to his independent contractors working for [REDACTED] to get in
14 contact with celebrities to promote his business idea. (*Id.* at ¶¶ 4, 7.) For example [REDACTED]
15 [REDACTED] worked with the Jackson family to put pictures of the late Michael Jackson on one of its
16 credit cards. (*Id.* at ¶ 3.)

17 To avoid customers opening up accounts with incorrect Tax ID numbers and defaulting on
18 accounts, Sprint has a fraud avoidance checklist. (Garteiser Decl., Ex. A.)³ On November 3, 2009,
19 the sales clerk at the Sprint store informed [REDACTED] that although he had a valid driver's license
20 indicating his name as [REDACTED] he was lacking additional required documentation for his
21 company – its Articles of Incorporation and tax ID information. ([REDACTED] Decl., ¶ 4.)
22

23 ¹ An iPhone is a smartphone sold by Apple. It integrates cell phone technology, iPod, camera, text
24 messaging, email, and Web browsing. Data and applications can be sent to this device via a
25 wireless signal or Apple's iTunes software, which is used to organize music, videos, photos, and
26 applications. (*See* PC MAGAZINE, Encyclopedia, available at http://www.pcmag.com/encyclopedia_term/0,2542,t=iPhone&i=45393,00.asp, as visited on February 3, 2010.)

27 ² An example of a [REDACTED] marketed credit card is attached to the supporting declaration of
28 [REDACTED] as Exhibit 1 (hereinafter, [REDACTED] Decl.).

³ Attached as Exhibit A to the supporting declaration of Attorney Randall Garteiser (hereinafter, "Garteiser Decl.").

1 Mr. [REDACTED] informed the clerk he would return the next day and did so. As soon as [REDACTED].
2 [REDACTED] arrived at the Sprint store, a Sprint employee called the police. Daly City Police Officers
3 Palaby, Green, and Keyes were dispatched to the Sprint Store. Officer Palaby immediately arrested
4 [REDACTED] without providing him the opportunity to present his valid documentation, including
5 Articles of Incorporation for [REDACTED], a facsimile from the I.R.S. directed to [REDACTED] as
6 President of [REDACTED] and providing the company's tax ID number, and his valid Arizona
7 driver's license indicating his name as [REDACTED] – documents that proved he was not
8 committing fraud. ([REDACTED] Decl., Ex. 2.)

9
10 Officer Green handcuffed [REDACTED] and asked where his car was parked. [REDACTED] told
11 Officer Green that his car was parked in front of the store. Officer Green asked [REDACTED] if they
12 could search the car. [REDACTED] refused to consent to the search. (Garteiser Decl., ¶ 7.) [REDACTED]
13 [REDACTED] allegedly claimed that he had money in his car and wanted to retrieve it. Officer Palaby
14 obtained the car keys, entered the car, searched the entire car from top to bottom, including the
15 passenger compartment and the trunk, and seized a small luggage bag containing a notebook and
16 money, as well as an old empty plastic shopping bag that had a few documents inside of it at the
17 bottom. The latter was located in the trunk of the car. (Garteiser Decl., ¶ 7.) Officer Keyes then
18 informed [REDACTED] that his car would be impounded incident to arrest.

19 [REDACTED] was transported to the prisoner processing center. Detective Bocci met the
20 officers at the processing center. Officer Green gave Detective Bocci the iPhone that the officers
21 obtained from [REDACTED] when he was arrested. [REDACTED] iPhone was password protected.
22 ([REDACTED] Decl., ¶ 8.) Rather than placing the phone in inventory, as is appropriate when an item is
23 seized incident to arrest, Officer Bocci bypassed the password on the phone and searched its
24 contents. ([REDACTED] Decl., ¶ 11; Garteiser Decl. ¶ 11.)

25 More than two hours later after his arrest, the officers interviewed [REDACTED] Detective
26 Bocci told [REDACTED] that he knew how to access iPhone information because he used to own one.
27 The officers then questioned [REDACTED] about information they found during the search of the
28

1 iPhone, including questions about why his girlfriend needed a nice new outfit to wear on Friday.
2 [REDACTED] responded to these questions. ([REDACTED] Decl., ¶ 11; Garteiser Decl. ¶ 11.)

3 The information officers found stored on the iPhone, or by accessing [REDACTED] email
4 accounts via his iPhone includes, but is not limited to, the number 510-378-**** displayed on the
5 phone, the number Defendant provided on the booking sheet, a large amount of information,
6 including phone book contacts, called phone numbers, emails, text messages, Internet search
7 history, and photos. Officer Bocci proceeded to write down the information, but found it was too
8 extensive. He then placed the iPhone into evidence with the intention of seeking a warrant. The
9 information the officer retrieved from the search was incorporated into the search warrant, which he
10 did not apply for and which did not issue until November 12, 2009. (Garteiser Decl., ¶¶ 12; 13.)

11
12 **II. THERE WAS NO PROBABLE CAUSE TO ARREST [REDACTED]**

13 The Fourth Amendment guarantees the right to be free of unreasonable searches and
14 seizures by law enforcement personnel. (U.S. Const., 4th Amend.; *People v. Thompson* (2006) 38
15 Cal.4th 811, 817; *People v. Camacho* (2000) 23 Cal.4th 824, 829-830; *People v. Williams* (2006)
16 145 Cal.App.4th 756, 761.) A warrantless search or seizure is presumed to be illegal (*People v.*
17 *Williams, supra*, at 761; *Miranda v. City of Cornelius* (9th Cir.2005) 429 F.3d 858, 862), and the
18 prosecution has the burden of showing the officers' actions were justified by an exception to the
19 warrant requirement. (*People v. Strider* (2009) 177 Cal.App.4th 1393, 1400.) Here, as explained
20 below, search incident to arrest and inventory search are not applicable exceptions to the warrant
21 requirement.

22 A prerequisite to an inventory search or search incident to arrest is that probable cause
23 existed to make the arrest in the first place. Here, probable cause did not exist. On November 3,
24 2009, [REDACTED] went to a Sprint store to purchase 30 phones for his business [REDACTED]. In
25 response, the clerk informed him that as part of Sprint's fraud protection plan [REDACTED] would
26 have to send an email to the store, provide a copy of his company's tax ID number, his company's
27 articles of incorporation, a photo identification card issued by a state or the U.S. government, and
28

1 send an email to the Sprint store from his business account. [REDACTED] Decl., ¶ 4; Garteiser Decl., Ex.
2 A.)

3 [REDACTED] complied and sent an email to the store. [REDACTED] Decl., ¶ 4.) He informed the
4 clerk that he would return the next day with the requested information. When he did so, the clerk
5 stalled [REDACTED] until the police came. The police arrested [REDACTED] without any investigative
6 questioning whatsoever, and stated as a basis for probable cause that he was "providing false
7 financial statements." (Garteiser Decl., Ex. B - Arrest Probable Cause Determination. [REDACTED]
8 had in his hands when he was arrested actual (not fraudulent) financial statements for [REDACTED]
9 [REDACTED] including a copy of the Articles of Incorporation for [REDACTED] and the tax ID
10 number issued to [REDACTED] ([REDACTED] Decl., ¶¶ 4,5, Ex. 2.)

11
12 The sole basis for probable cause is the allegation that [REDACTED] allegedly provided the
13 Sprint PCS sales clerk an incorrect address. (Garteiser Decl., Ex. B.) Although the Sprint PCS
14 sales clerk wrote the proper name [REDACTED] at the top of the fraud protection checklist
15 used by Sprint, he appears to have conducted one of the last steps in the fraud detection analysis, the
16 reverse look-up test, on the wrong company, [REDACTED]. The sales clerk then called the owner
17 of [REDACTED], Ms. Kate Bright, who said she did not know who [REDACTED] was and did not
18 recognize the tax ID number was for his company but could say with confidence that it wasn't the
19 tax ID for her company. However, the Internal Revenue Service fax [REDACTED] had in his hands
20 when he was arrested provided to Sprint the proper address of [REDACTED] as [REDACTED],
21 [REDACTED]. (See [REDACTED] Decl., Ex. 2 at 4.)

22 Accordingly, probable cause did not exist to arrest [REDACTED] and the later searches of his
23 iPhone and car were unconstitutional under the Fourth Amendment.

24 **III. UNCONSTITUTIONAL WARRANTLESS INVESTIGATORY SEARCH OF THE**
25 **CAR**

26 [REDACTED] has standing to challenge the search of his car. A person driving another's
27 vehicle with the owner's full permission and knowledge has a legitimate expectation of privacy.
28 (See, e.g., *U.S. v. Cooper* (11th Cir. 1998) 133 F.3d 1394, 1398; *U.S. v. Portillo* (9th Cir. 1980) 633

1 F.2d 1313, 1317 [defendant, who had both permission to use friend's automobile and the keys to the
2 ignition and trunk, and could exclude all others except the owner, had a legitimate expectation of
3 privacy necessary to challenge the propriety of a search of the vehicle].)

4 An inventory search is constitutionally unreasonable when used as a ruse to conduct an
5 investigatory search. (*Colorado v. Bertine* (1986) 479 U.S. 367, 371-372; *People v. Steeley* (1989)
6 210 Cal.App.3d 887, 891-892.) In *South Dakota v. Opperman* (1976) 428 U.S. 364, the United
7 States Supreme Court held that police may constitutionally impound vehicles that jeopardize public
8 safety or the efficient movement of traffic, as part of their "community caretaking functions." (*Id.*
9 428 U.S. at 368-369.) Whether impoundment is warranted under the community caretaking
10 doctrine "depends on the location of the vehicle and the police officers' duty to prevent it from
11 creating a hazard to other drivers or being a target for vandalism or theft." (*People v. Williams*,
12 *supra*, 145 Cal.App.4th at 761.)

13 "If officers are warranted in impounding a vehicle, a warrantless inventory search of the
14 vehicle pursuant to a standardized procedure is constitutionally reasonable." (*People v. Williams*,
15 *supra*, 145 Cal.App.4th at 761; *see also People v. Aguilar* (1991) 228 Cal.App.3d 1049, 1053.)
16 Police officers may exercise discretion in conducting an inventory search, "so long as that discretion
17 is exercised according to standard criteria and on the basis of something other than suspicion of
18 evidence of criminal activity." (*Colorado v. Bertine, supra*, 479 U.S. at 375; *Florida v. Wells*
19 (1990) 495 U.S. 1, 3-4.)

20 However, "an inventory search must not be a ruse for a general rummaging in order to
21 discover incriminating evidence." (*Florida v. Wells, supra*, 495 U.S. at 4; *People v. Needham*
22 (2000) 79 Cal.App.4th 260, 266.) Where there is no standardized criteria or established routine
23 whatsoever, an inventory search is "not sufficiently regulated to satisfy the Fourth Amendment."
24 (*Florida v. Wells, supra*, 495 U.S. at 4; *People v. Williams* (1999) 20 Cal.4th 119, 126.)

25 When an officer impounds a vehicle, her actions must be reasonable in light of the
26 justification for the impound and inventory exception to the warrant requirement. (*People v.*
27
28

1 *Williams, supra*, at 145 Cal.App.4th at 761.) In *People v. Williams, supra*, 145 Cal.App.4th 756,
2 the court concluded that an impound of a legally parked vehicle was unreasonable because it did not
3 serve a community caretaking function. A police officer observed the defendant driving without a
4 seat belt and made a traffic stop. A computer check revealed an outstanding arrest warrant for the
5 defendant, and the officer placed him under arrest. The officer decided to impound the vehicle
6 “because ‘the driver in control of that vehicle was being arrested.’” (*Id.* at 759-760.) The court
7 suppressed the evidence because the car could have been locked and lawfully left where the
8 defendant had parked it, but the officer did not give the defendant the opportunity to do so. (*Id.*)

9 Here, [REDACTED] car was legally parked in a mall parking lot space. There is no evidence
10 that the car needed to be towed to serve a community caretaking function. The car did not impede
11 the flow of traffic. There is no evidence that there was any concern that the car may be stolen or
12 vandalized. [REDACTED] could have simply locked and left the car where it was. Also, another
13 individual, such as the owner of the automobile (his girlfriend), could have come to get the vehicle.
14 In fact, his girlfriend did go and pick up the car from impound that day. An officer called and told
15 her where to retrieve it from as he transported [REDACTED] from the Sprint store to the prisoner
16 processing center. ([REDACTED] Decl., ¶ 10.)

17
18 The search was non-consensual, investigatory, and warrantless. Officer Green obtained [REDACTED]
19 [REDACTED] car keys from his pocket while he was in handcuffs. The officer rummaged through [REDACTED]
20 [REDACTED] car searching the glove compartment, underneath the seats and even inside closed
21 containers, including a small luggage bag that was in the back seat of the car and plastic bags in the
22 trunk. Inside the luggage bag was cash and a notepad. The plastic bag contained documents.
23 (Garteiser Decl., ¶ 8.)

24
25 The “inventory search” was simply a pretext for investigatory exploration, and any
26 information found in the car must be suppressed. The vehicle report does not indicate a single other
27 piece of property that was located in the car. (Garteiser Decl., Ex. E – Completed CHP 180 Form,
28 signed by Officer Palaby.) No officer completed a list of the actual contents of the vehicle. This is

1 because the search was investigatory, and not allowed under the inventory search exception. (*Id.*)

2 Further support that Officer Green's "inventory search" was a ruse is that he did not have
3 the car towed to the police impound yard. The car was available for pick up from the tow truck lot
4 as soon as it got there. It was never delivered to any police impound facility for safekeeping.
5 (Garteiser Decl., Ex. E; [REDACTED] Decl., ¶ 10.)

6 To preserve any evidence of a crime that might have been in the Defendant's car, Officer
7 Green could have impounded the car and held it until he obtained a warrant. Instead, Officer Green
8 "impounded" the car incident to arrest as a ruse to conduct an improper investigatory search in a
9 private strip mall parking lot.

10 Furthermore, Officer Green should have obtained, but did not, a warrant to open the
11 containers inside the car, including the small luggage bag and the plastic bag located inside the
12 trunk containing receipts from a Sprint store. (*People v. Needham, supra*, 79 Cal.App.4th at 267.)
13 Police may exercise discretion in opening containers during inventory searches provided that
14 discretion is exercised according to "standardized criteria" or "established routine" based on some
15 standard other than suspected criminal activity. (*Id.* at 266.) There is no indication that the search
16 of [REDACTED] car occurred pursuant to policy. Nor did the search conform with the rationale for
17 allowing warrantless inventory searches. Officers did not need to read any documents in the car in
18 order to protect [REDACTED] property or safeguard the police from danger. Accordingly, the search
19 of the car without a warrant was unconstitutional and evidence obtained pursuant to that search
20 must be suppressed. (*Murray v. U.S.* (1988) 487 U.S 533; *Wong v. U.S.* (1963) 371 U.S 471, 485-
21 486.)

22 23 **IV. UNCONSTITUTIONAL SEARCH OF [REDACTED] IPHONE**

24 The search incident to arrest doctrine likewise does not justify Detective Bocci's warrantless
25 search of [REDACTED] iPhone at the police station hours after his arrest.

26 Search incident to arrest is an exception to the general constitutional requirement that law
27 enforcement officers must obtain a warrant to perform a search. (*U.S. v. Hudson* (9th Cir. 1996)
28

1 100 F.3d 1409, 1419.) The purpose underlying this exception is the “need of law enforcement
2 officers to seize weapons or other things which might be used to assault an officer or effect as
3 escape, as well as the need to prevent the loss or destruction of evidence.” (*U.S. v. Park* (N.D. Cal.
4 May 23, 2007) 2007 WL 1521573 (unpublished) at *6, citing *Hudson*, 100 F.3d at 1419.) The
5 Supreme Court has found that “property seized at the time of an arrest cannot be justified as
6 incident to that arrest either if the search is remote in time or place from the arrest, or no exigency
7 exists.” (*U.S. v. Chadwick* (1977) 433 U.S. 1, 15, abrogated on other grounds, *Cal. v. Acevedo*
8 (1982) 500 U.S. 565.)

9
10 The search incident to arrest exception does not give police free rein to search an arrestee’s
11 private information for investigatory purposes. The exception is intended to provide safety to law
12 enforcement and bystanders and to prevent the destruction and concealment of evidence. (*See*
13 *Chimel v. Cal.* (1969) 395 U.S. 752.) Law enforcement may also collect an arrestee’s property to
14 ensure that it is not stolen. (*Illinois v. Lafayette* (1983) 462 U.S. 640, 646.) But such searches “must
15 not be a ruse for a general rummaging in order to discover incriminating evidence.” (*U.S. v.*
16 *Feldman* (9th Cir. 1986) 788 F.2d 544, 553.)

17 This case is similar to *Park*, in which law enforcement officers used the search incident to
18 arrest doctrine to search several suspects’ cell phones for telephone numbers during the booking
19 process, approximately an hour and a half after the suspects’ arrests. (2007 WL 1521573, *supra*, at
20 *5.) Judge Illston held that the government did not meet its burden to establish that an exception to
21 the warrant requirement applied to justify the searches. (*Id.*) Specifically, she found that cell
22 phones should be considered “possessions within an arrestee’s immediate control” -- which receive
23 full Fourth Amendment protection at the police station -- rather than part of “the person,” an area in
24 which there is a reduced expectation of privacy after arrest. (*Park*, 2007 WL 1521573 at * 8, citing
25 *Chadwick, supra*, 433 U.S. at 16 n.10.) Critical to her decision was the fact that “[i]ndividuals can
26 store highly personal information on their cell phones, and can record their most private thoughts
27 and conversations on their cell phones through email and text, voice and instant messages.” (*Id.*)
28

1 Furthermore, the court noted that the searches went “far beyond the original rationales for searches
2 incident to arrest, which were to remove weapons to ensure the safety of officers and bystanders,
3 and the need to prevent concealment or destruction of evidence.” (*Id.* at *8.)

4 Like the defendants in *Park*, [REDACTED] was at the prisoner processing center when
5 Detective Bocci searched his password-protected iPhone “that evening” — hours after [REDACTED]
6 arrest at 3:45 p.m. (Garteiser Decl., ¶ 11.) At the time of the search, [REDACTED] was in custody and
7 posed no danger to any member of law enforcement, nor any threat of destroying evidence. [REDACTED]
8 Decl., ¶ 8.) Detective Bocci bypassed the iPhone’s password to access the device and find further
9 leads into the investigation, including text messaging, contact phone numbers, photographs and
10 emails which were too extensive to copy down. (Garteiser Decl., ¶¶ 11-13.)⁴ Like the search in
11 *Park*, Detective Bocci’s warrantless search of [REDACTED] iPhone is not justified by the search
12 incident to arrest doctrine. For this reason, all evidence obtained from the iPhone should be
13 suppressed.

14 V. STORED COMMUNICATIONS ACT

15 Detective Bocci may have illegally accessed email stored on the iPhone in violation of the
16 Stored Communications Act. The iPhone was configured to pull email off of a remote third-party
17 server. [REDACTED] Decl., ¶ 9.) Detective Bocci was not authorized to access this remote server,
18 especially because both the email account and the iPhone were password-protected. [REDACTED] Decl.,
19 ¶ 8.) By circumventing the passwords, Detective Bocci unlawfully accessed [REDACTED] email
20 messages in violation of 18 U.S.C. § 2701(a), which prohibits anyone from “intentionally
21 access[ing] without authorization a facility through which an electronic communication service is
22 provided” and “thereby obtain[ing] . . . access to a wire or electronic communication while it is in
23 electronic storage in such system.” (18 U.S.C. § 2701(a).) That illegal act is another reason why
24 the evidence should be suppressed as a matter of due process.

25
26 ⁴ A password may demonstrate that an individual had a reasonable expectation of privacy. (*U.S. v.*
27 *Heckenkamp* (9th Cir. 2007) 482 F.3d 1142, 1147; *U.S. v. Buckner* (4th Cir. 2007) 473 F.3d 551,
28 554 n.2.) The fact that [REDACTED] password-protected his phone confirms that the contents of the
device were private.

1 **VI. INSUFFICIENCY OF THE WARRANT**

2 A reviewing court assesses the totality of the circumstances under which a warrant is issued
3 and invalidates the warrant when those circumstances fail to establish probable cause. (*Illinois v.*
4 *Gates* (1983) 462 U.S. 213; *Massachusetts v. Upton* (1984) 466 U.S. 727.) Mere suspicion,
5 common rumor, or even strong reason to suspect are not enough to establish probable cause.
6 (*Henry v. United States* (1959) 361 U.S. 98, 101.) “Sufficient information must be presented to the
7 magistrate to allow that official to determine probable cause; his action cannot be a mere ratification
8 of the bare conclusions of others.” (*Illinois v. Gates, supra*, 462 U.S. at 239.) Additionally, there
9 must be a sufficient likelihood that seizable property “will be found in a particular place.” (*Id.* at
10 238.)

11 “If lawfully obtained information in a search warrant affidavit supports probable cause for
12 issuance of a warrant, the warrant will be upheld even if additional, illegally obtained, information
13 is also contained in the warrant affidavit.” (*People v. Angulo* (1988) 199 Cal.App.3d 370, 375;
14 *People v. Luttenberger* (1990) 50 Cal.3d 1, 10; *People v. Torres* (1992) 6 Cal.App.4th 1324, 1334
15 [Per Smith, J., “the observations [in the affidavit] gained [from illegally obtained evidence] must be
16 stricken and the affidavit retested for probable cause.”].) It is the prosecution’s burden to “establish
17 by a preponderance of the evidence that the information ultimately or inevitably would have been
18 discovered by lawful means.” (*Nix v. Williams* (1984) 467 U.S. 431, 444.)

19 Here, the allegations in the search warrant affidavit on Page 4, lines 10 through 13 must be
20 stricken because they refer to information found during the illegal car search. Additionally, Page 6,
21 lines 1 through 15 must be stricken. The first sentence describes information found in the illegal
22 search of [REDACTED] car. The remaining sentences describe information found in the illegal
23 search of the database of [REDACTED] iPhone.

24 Without these sentences, there is no factual support for the claim on Page 9, lines 1-3 that
25 evidence of criminal activity could be found in the voicemail messages and “stored electronic data
26 within” [REDACTED] iPhone. No legally obtained information provides a nexus between the
27 contents of the iPhone and any of [REDACTED] efforts to buy phones at the Sprint Store with a false
28

1 address. The store clerk did not observe [REDACTED] using his phone during the transaction, nor was
2 there any reason to believe that [REDACTED] had used the device to communicate with third parties
3 about the attempted purchase. The only reason to believe that anything relevant to the case might
4 be on the phone derived from the officer's search of the device after [REDACTED] was already arrested
5 and transported to jail.

6
7 Moreover, there is no reason to believe, absent the unlawful search of the iPhone, that
8 officers would have decided to obtain a warrant to search the device in the first place. The
9 inevitable discovery exception requires the court "to determine, viewing affairs as they existed at
10 the instant before the unlawful search, what would have happened had the unlawful search never
11 occurred." (*People v. Hughston* (2008) 168 Cal.App.4th 1062,1072.) In *Hughston*, the defendant
12 was selling illegal drugs from inside a vehicle parked in a tent structure he'd built in the parking lot
13 at a Mendocino County music festival. An undercover officer observed the defendant make two
14 hand-to-hand sales of what he suspected, based on his training and experience, were narcotics. The
15 officer arrested the defendant, and then located the vehicle covered by a tarp structure. The officer
16 entered the tarp structure and then the vehicle, where he found narcotics. The court suppressed the
17 evidence as an illegal search of the tarp structure and vehicle. It was not enough that there was
18 probable cause to search the vehicle. Instead, to justify application of the inevitable discovery
19 exception, law enforcement must demonstrate by a preponderance of the evidence that, due to "a
20 separate line of investigation, application of routine police procedures, or some other circumstance,"
21 the evidence would have been discovered by lawful means. *Id.* The showing must be based not on
22 speculation but on "demonstrated historical facts capable of ready verification or impeachment."
23 (*Hughston, supra*, 168 Cal.App.4th at 1072, citing *Nix, supra*, 467 U.S. at 444-445, fn. 5.) The
24 inevitable discovery exception requires the court "to determine, viewing affairs as they existed at
25 the instant before the unlawful search, what would have happened had the unlawful search never
26 occurred." (*Hughston, supra*, 168 Cal.App.4th at 1072, citing *U.S. v. Cabassa* (2d Cir.1995) 62
27 F.3d 470, 473.) The government provided no evidence that the defendant's companions would not
28

1 have gained access to the interior of the vehicle and removed or destroyed the drugs. (*Hughston*,
2 *supra*, 168 Cal.App.4th at 1073, (citing a number of courts for the proposition that if someone
3 would have removed or destroyed the evidence at issue, the independent source exception does not
4 apply)).

5 Here, there is no indication that the Daly City Police would have retained and sought a
6 warrant to search [REDACTED] phone if not for the initial illegal review of its contents. There was
7 no independent line of investigation, routine police procedure, or other circumstance that would
8 have led them to the phone. Rather, [REDACTED] would have been released from jail and given back
9 his property, including the iPhone. At that point, he would have been free to continue to use the
10 device, or erase its contents. The officers would never have searched it. Therefore, the warrant
11 must be traversed and any evidence or information obtained also suppressed.

12 //

13 //

1 **VII. CONCLUSION**

2 There was no probable cause to arrest [REDACTED] Neither the search of his vehicle nor the
3 search of his iPhone was justified by any exception to the warrant requirement. And because any
4 probable cause in support of the warrant that did eventually issue relied on evidence obtained in
5 these illegal searches, it must be traversed and quashed, and any evidence obtained pursuant to it
6 suppressed.
7

8
9 DATED: February 3, 2010

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