

1 DORON WEINBERG (SBN 46131)
LAW OFFICES OF DORON WEINBERG
2 523 Octavia Street
San Francisco, CA 94102
3 Telephone: (415) 431-3472
Facsimile: (415) 552-2703
4 Email: doronweinberg@aol.com

5 Attorney for Defendant CHRISTINA LIEW

6 KEKER & VAN NEST LLP
STUART L. GASNER - # 164675
7 sgasner@kvn.com
SIMONA A. AGNOLUCCI - # 246943
8 sagnolucci@kvn.com
KATHERINE M. LOVETT - # 276256
9 klovet@kvn.com
633 Battery Street
10 San Francisco, CA 94111-1809
Telephone: 415 391 5400
11 Facsimile: 415 397 7188

12 Attorneys for Defendants WALTER LIEW and
USA PERFORMANCE TECHNOLOGY, INC.

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 UNITED STATES OF AMERICA,

17 Plaintiff,

18 v.

19 WALTER LIEW, CHRISTINA LIEW, USA
20 PERFORMANCE TECHNOLOGY, INC.,
and ROBERT MAEGERLE,

21 Defendants.
22

Case No. CR 11-0573-JSW (NC)

**DEFENDANTS CHRISTINA LIEW AND
WALTER LIEW'S REPLY
MEMORANDUM IN SUPPORT OF
MOTION TO SUPPRESS EVIDENCE**

Date: August 8, 2013
Time: 2:00 p.m.
Place: Courtroom 11, 19th Floor
Dept.: Hon. Jeffrey S. White

MEMORANDUM OF POINTS AND AUTHORITIES

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2 Defendants accept as sincere the government's description of their "rhetoric" as lofty, but
3 take no credit for it. Their rhetoric is based on the Constitution and the writings of courts that
4 adhere to its principles. In contrast, the government's opposition brief pays no homage to a core
5 principle of the Fourth Amendment: respect for the sanctity and security of the home.

6 By the instant motion, defendants have chosen to challenge only the search of their home.
7 They have done so not because they concede the propriety of the warrant underlying the search of
8 USAPTI's business premises – as the government incorrectly suggests – but because they choose
9 not to pursue debatable claims. In defendants' view, the validity of the search of USAPTI may be
10 debatable, but the validity of the search of their home is not. This is so because the warrant
11 underlying the search of their home utterly lacked probable cause and because it was
12 impermissibly overbroad in scope even if the limited probable cause it purported to establish is
13 given credence.

A. The Warrant to Search the Liew's Home Was Not Supported By Probable Cause.

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15 In their opening brief, defendants focused on the only specific pieces of information in the
16 Ho Affidavit that even purported to link the Liew's home to the presence of evidence of criminal
17 activity: (1) Peter Wong's claim that Walter Liew occasionally worked from home; (2) a check
18 written by Christina Liew to Jian Liu, drawn on a bank account with the Liew's home address;
19 and (3) the "experience" of the agent. What emerges from the Government's opposition,
20 however, is not so much a vigorous defense of those facts as supporting probable cause, but,
21 rather, an interpretation of probable cause that is so broad as to functionally eviscerate the
22 protections of the Fourth Amendment in searches of homes based upon allegations of business
23 crimes.

24 Analytically, the government's argument suggests that probable cause to search a home is
25 present every time there is probable cause to believe that a defendant has committed a business or
26 financial crime. Indeed, the government makes this claim explicitly several times. For example,
27 arguing against the staleness of Peter Wong's allegations, the government asserts "the work
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1 habits that Wong described are nothing if not common amongst the working population –
2 working professionals typically bring work home” (Oppo. at pp. 5-6). Similarly, the
3 government responds to the suggestion that Wong’s information was unreliable and vague by
4 arguing that “[t]he information from Wong, while important to establish probable cause, was not
5 so unusual or remarkable that it required corroboration as it simply reflected a common practice
6 of most American professionals.” (Oppo. at p.6). And, in supporting the sufficiency of Special
7 Agent Ho’s assertions, the government states “indeed, the proposition that business records are
8 maintained by people in their homes is so obvious that it barely requires support,” (Oppo. at
9 p.8). Fairly read, the government’s argument is that nothing more is needed to establish probable
10 cause.

11 While it is true that the government has gleaned some overly broad language from the
12 Sixth Circuit’s opinion in *United States v. Abboud*, 438 F.3d 554, 572 (2006) and some support
13 from the Ninth Circuit’s decision in *United States v. Sayakhom*, 186 F.3d 928, 934 (1999), the
14 approach it advocates is in fact antithetical to the appropriate constitutional inquiry. As the
15 Supreme Court stated in *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978): “the critical
16 element in a reasonable search is not that the owner of the property is suspected of crime but that
17 there is reasonable cause to believe that the specific ‘things’ to be searched for and seized are
18 located on the property to which entry is sought.” This inquiry cannot be answered by the
19 generalized assertion that “business records are maintained by people in their homes” or that
20 “working professionals typically bring work home;” it requires specific facts and circumstances.
21 To argue otherwise is to argue that the probable cause requirement of the Fourth Amendment has
22 no substance.

23 The impropriety of relying on such broad and unsupported generalizations is particularly
24 clear in the instant case. Here, the affidavit demonstrated no connection between the work of
25 USAPTI and the Liew’s residence. Indeed, the allegations concerning the residence take up
26 barely one of the 42 pages of the Affidavit, and are contained in just three of its 105 paragraphs.
27 These allegations do not establish that a single relevant event occurred at the Liew residence, that
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1 a single relevant document was ever seen, received at or sent to that residence, or even that
2 anyone involved in the work of USAPTI believed that relevant business documents could be
3 found in the home.

4 Rather, to supplement the constitutionally infirm speculation that relevant evidence would
5 be found at the residence, the affidavit offers two shards of information: the statements attributed
6 to Peter Wong and the check (or checks) written by Christina Liew.

7 Defendants have argued that Peter Wong's testimony is too stale and too vague to provide
8 probable cause. Defendants will address the government's response to these contentions, but
9 believe it appropriate first to address the government's argument at page 6 of the Opposition.
10 There, the government responds to defendants' argument that Wong's assertions are suspect
11 because no other person, including any who worked more closely and/or more recently with
12 Walter Liew, made any similar claims by asserting that there is nothing unusual or inappropriate
13 about the government's reliance on a single witness. Whatever may be the validity of this
14 argument as a general matter, it is astonishing that the government would make it in this case.

15 Although the affidavit says nothing about the circumstances of Peter Wong's employment
16 at USAPTI, or his departure, the fact is that Wong was terminated by Walter Liew in or about
17 August 2010, under extremely contentious circumstances, which left Wong resentful and angry at
18 Walter Liew, as reflected in the FBI report of the interview of Wong by the affiant and others on
19 July 30, 2011 (Exhibit A, attached to the Declaration of Christina Blais filed concurrently
20 herewith). It is, to put it mildly, disturbing that the government would tell this Court that it
21 should not be concerned that no other witness corroborated Peter Wong's allegations without
22 telling the Court of the adversarial history between Wong and Walter Liew.¹

23 ¹ Defendants recognize that allegations suggesting the affiant withheld relevant information, such
24 as Peter Wong's contentious relationship with USAPTI, are generally made in the context of a
25 challenge to the veracity of an affidavit pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978).
26 Defendants note, however, that such a challenge would have required proof that the affiant knew
27 of Wong's antipathy to Walter Liew at the time she prepared the Affidavit. FBI 302 reports
28 provided to the defense reflect that Wong was interviewed on three occasions: June 30, July 11
and July 30, 2011. But it is only the third report that contains information about the
circumstances of Wong's termination, and this report is purportedly based on an interview that
occurred after the Affidavit was prepared and submitted. Although it is difficult to understand
why such a crucial fact would not have been discovered in the first two interviews, the FBI 302

1 As to staleness, the government’s response misapprehends the issue and misconstrues the
2 relevant authorities. Generally, cases that address the matter of staleness involve clear evidence
3 that relevant activity occurred at particular premises at a particular time, and the only question is
4 whether the passage of time diminishes the probability that the conduct continued and/or the
5 evidence still exists. So, for example, in *United States v. Leasure*, 319 F.3d 1092 (9th Cir. 2003),
6 a case relied upon by the government, the defendant complained that some of the information in a
7 search warrant affidavit was six months old. The Court rejected this challenge, not only because
8 there was additional evidence that was only weeks or days old by the time of the search, but more
9 importantly because of the very nature of the criminal activity involved. As the Court stated:
10 “when an affidavit ‘establish[es] the existence of a widespread, firmly entrenched and ongoing
11 narcotics operation . . . staleness arguments lose much of their force.’” 319 F.2d at 1099.
12 Similarly, in *United States v. Dozier*, 844 F.2d 701 (9th Cir. 1988), also relied on by the
13 prosecution, the Court noted that the offense being investigated – marijuana cultivation – was a
14 “long-term crime.” (844 F.2d at 707).

15 These authorities have no relation to the circumstances presented here. Here, there are no
16 allegations that criminal activity ever occurred, or evidence of crime could ever be found, at the
17 Liew’s residence, so there is no cause for an inquiry as to whether the evidence could “still” be
18 found there. *Leasure*, *Dozier*, and the other authorities cited by the government have no
19 relevance to the facts of the instant case, and offer no support for the government’s position.

20 The evidentiary value of the check or checks written by Christina Liew is equally illusory.
21 In its Opposition, the government suggests that Christina Liew’s use of these checks signifies that
22 business activities related to USAPTI were being conducted at her home. Creative though this
23 argument may be, it has no grounding in reality. There is no necessary correlation between the

24 reports, at least on their face, suggest that the affiant did not know of this history when she
25 prepared the Affidavit and, accordingly, undercut the possibility of a *Franks* challenge.

26 However, there can be no question that at the time the government prepared its response to
27 defendants’ instant motion it well knew the entire history of Wong’s relationship with Walter
28 Liew and USAPTI. Given this knowledge, the government should not have argued that the
absence of any corroboration for Peter Wong’s allegations should be a matter of no consequence
to this Court.

1 address at which a check-writer lists his/her account and the location at which relevant activity
2 may have occurred. If it were otherwise, probable cause would exist for the search of an ongoing
3 business simply because a check from that business's account was issued in the course of
4 activities occurring elsewhere which the government alleges to be criminal.

5 Indeed, it appears that the Affidavit's suggestion that Christina Liew's check or checks
6 provide probable cause was an afterthought in the Affidavit. Significantly, it is not mentioned in
7 the paragraphs of the Affidavit that appear under the heading: "Information Regarding The
8 Residence of WALTER and CHRISTINA LIEW." (Affidavit, ¶¶ 69-70). Rather, it appears in the
9 context of probable cause to search the residence for the first time in paragraph 105 of the
10 Affidavit as an isolated fact, without the government's present gloss that it shows Christina Liew
11 "was intermingling her personal finances with the business." (Oppo. at p.7).

12 The weakness of the probable cause showing in the Affidavit is underscored by the
13 government's recurrent references to the "totality of the circumstances" test of *Illinois v. Gates*,
14 462 U.S. 213 (1983), invoking it as a shibboleth in support of the apparent proposition that an
15 affidavit is not required to meet any minimum standard to establish probable cause. But in fact,
16 *Gates* itself required a "substantial basis" for probable cause. In other words, the "totality of the
17 circumstances" must actually be the sum of a group of facts which together establish the
18 reasonableness of searching for evidence at a particular location. The instant Affidavit does not
19 provide that.

20 **B. The Warrant Was Impermissibly Overbroad.**

21 With respect to defendants' challenge to the warrant as overbroad, the government's
22 response fails to recognize that a warrant may direct a search that is appropriate in scope for one
23 location but not another. Thus, a warrant authorizing the seizure of all "address books, telephone
24 lists and directories, and telephone records," or "financial documents and records . . .for the time
25 period of January 1, 2007, to the present" may be appropriate for the search of a business believed
26 to be substantially involved in illegal activity, but not for the private homes of persons involved in
27 that business.

1 The failure to make this distinction, and the resultant misconception of the proper scope of
2 the warrant, is reflected in the government’s Argument B3(b) that the Affidavit establishes that
3 the Liew’s business was permeated by fraud. Even if it were true that their business is permeated
4 with fraud – which defendants strenuously deny – it is not alleged, nor is it true, that their
5 *residence* is so permeated as well. The scope of the search of the Liew’s residence cannot be
6 justified on this ground.

7 As defendants argued, and as the government purports to recognize “[t]he Fourth
8 Amendment requires that there be probable cause for the particular items named in the warrant.
9 That is, that the items seized are within ‘the scope of the probable cause underlying the warrant.’”
10 (Oppo. at p.15). Even if this Court were to conclude that the Affidavit presented sufficient facts
11 to reach some minimal threshold of probable cause, it is indisputable that the Affidavit did not
12 establish probable cause for a broad general search including, for example, all financial records
13 related to both Walter and Christina Liew for a period of four-and-a-half years, as well as all
14 address books, telephone lists, telephone records, directories; tax records; and travel records and
15 documents.

16 The government’s argument that the overbreadth of the warrant can be cured by reference
17 to the Affidavit is misconceived. The only relevance of the Affidavit to the issue of breadth is
18 whether the Affidavit provides sufficient probable cause to justify the breadth of the search: it has
19 no other function or value in narrowing the search. The government is confusing the issue of
20 breadth with the issue of particularity. It is with respect only to this latter element that
21 incorporation of and reference to the Affidavit may be relevant, in helping to narrow terms which
22 may on their face appear to be too general.

23 The government’s response on the issue of overbreadth misses the mark because it is in
24 reality a defense of the warrant to search USAPTI, rather than the warrant to search the Liew’s
25 residence. Accordingly, it does not address, let alone answer, the issues raised by defendants.

26 The government also submits the Declaration of Agent Cynthia Ho in an attempt to
27 establish that, notwithstanding the breadth of the warrant, the search actually conducted by the
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1 agents was more limited and scrupulous. Should there be a hearing on the issue of the scope of
2 the search, these assertions can be subjected to cross-examination. It is noteworthy, however, that
3 nowhere in Agent Ho's Declaration, or in the government's Memorandum, is there any reference
4 to defendants' assertion that the general and unlimited nature of the search is illustrated by the
5 fact that the agents inquired about and seized safe deposit box keys, although neither the warrant
6 nor the Affidavit provide any basis for doing so.

7 **C. The Warrant Cannot Be Upheld On The Basis of The "Good Faith Doctrine."**

8 As to the issue of good faith, both Agent Ho's Declaration and the government's
9 Opposition rely heavily on assertions that Agent Ho consulted frequently with a government
10 attorney, Assistant U.S. Attorney John Hemann, and met personally with the Magistrate Judge
11 who issued the warrant. This may be true, but it is wholly irrelevant. The government has simply
12 ignored the authorities cited by defendants on this point, including *Millender v. County of Los*
13 *Angeles*, 620 F.3d 1016, 1033 (9th Cir. 2010) ("we have held that '[a]pproval by an attorney and
14 a magistrate did not justify reasonable reliance'"") and *United States v. Kow*, 58 F.3d 423, 429 (9th
15 Cir. 1995) ("[W]hen a warrant is facially overbroad, absent *specific assurances* from an impartial
16 judge or magistrate that the defective warrant is valid despite its overbreadth, a reasonable
17 reliance argument fails." (Emphasis in original)).

18 The affiant's assertion of good faith is also called into question by her reliance on
19 information from a single witness, Peter Wong, to establish a connection between Walter Liew's
20 work and his residence. Based on FBI reports recently made available to the defense, Peter Wong
21 was interviewed several times, both before and after the issuance of the warrant. At some point, it
22 became clear that Wong had been terminated from USAPTI by Walter Liew, and had
23 considerable antipathy to Liew. Even if one were to assume that the affiant did not learn this
24 information in either of her first two interviews, which occurred before the Affidavit was
25 submitted, it is clear that she failed to exercise even minimal diligence in establishing the
26 reliability of the central piece of information that she provided the magistrate to justify the search
27 of the Liew residence.

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CONCLUSION

For the foregoing reasons it is respectfully submitted that defendants' motion to suppress the evidence obtained from the search of their residence must be granted.

Dated: July 19, 2013

Respectfully submitted,
LAW OFFICES OF DORON WEINBERG

By: /s/ Doron Weinberg
DORON WEINBERG
Attorney for Defendant CHRISTINA LIEW

Dated: July 19, 2013

KEKER & VAN NEST LLP
By: /s/ Stuart L. Gasner
STUART L. GASNER
SIMONA A. AGNOLUCCI
KATHERINE M. LOVETT
Attorneys for Defendants WALTER LIEW and
USA PERFORMANCE TECHNOLOGY, INC.