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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEVON CHRISTOPHER WENGER,

Defendant.

Case No.: 4:23-CR-00269-JSW-3

(Hon. Jeffrey S. White)

**DECLARATION OF MICHAEL L.
RAINS IN SUPPORT OF MOTION
DEFENDANT DEVON WENGER'S
MOTION TO DISMISS BASED
UPON PROSECUTORIAL
MISCONDUCT AND
INEFFECTIVE ASSISTANCE OF
COUNSEL IN THE ALTERNATIVE
DEFENDANT REQUESTS A
CHANGE OF VENUE**

Date: December 10, 2024

Room.: 5

Time: 1:00 PM

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DECLARATION OF MICHAEL L. RAINS

I, MICHAEL L. RAINS, declare as follows:

1. I am a principal attorney with the law firm RAINS, LUCIA, STERN, ST. PHALLE AND SILVER, and I am counsel of record for Defendant BROCK MARCOTTE, in his discipline appeal following his termination from Antioch Police Department. I am licensed to practice in the state of California and before the Court. I am personally familiar with mass terminations of Antioch Police Officers in 2023 and their procedural and media history. The facts stated in this declaration are based on my personal knowledge. Accordingly, I submit this declaration based upon such knowledge, unless stated upon information and belief. If called to testify, I can, and will, competently testify to the facts herein.

2. On October 25, 2024, I represented former Antioch Police Officer Brock Marcotte, at his discipline appeal (arbitration hearing) which was held in Antioch. The subject matter of the hearing was Marcotte's appeal of his termination from the Antioch Police Department, which occurred when private text messages he had sent or received from Antioch Police Officers on his personal cellphone were released to the media and public by a Contra Costa County Superior Court Judge.

3. Present at the arbitration were myself, my client, Brandon Marcotte, Alfonson Estrada, Esq. (Hanson Bridgett), Kathleen B. Roney, Esq. (Hanson Bridgett) Chief Brian Addington of the Antioch Police Department, Kevin W. Kuninger (City Attorney), Jennifer Puza Esq., (observer from Hanson Bridgett), Darlene Mayfield (paralegal for (Hanson Bridgett), Marie Masters, Esq. (Rains Lucia observer), Ana Cortez, HR Director, City of Antioch, and Larry Wallace (Contra Costa District Attorney Investigator (hereafter CCDAI)), and Najeeb Khoury, Esq. (Arbitrator).

4. During the October 25, 2024, arbitration hearing, the City of Antioch called CCDAI Larry Wallace to testify.

1 5. Wallace is currently employed as a Senior Inspector at the Contra
2 Costa District Attorney's Office. He reports directly to the Chief of Inspectors,
3 Arnold Threats, and is tasked with investigating public corruption in law
4 enforcement. He has held this position for a period of nearly five years. Wallace
5 testified that he has in sum approximately 34 years of law enforcement
6 experience.

7 6. Prior to working at the Contra Costa DA's Office, Larry Wallace was
8 employed by the Berkely Police Department. Following that assignment he began
9 working with the California Department of Justice. In 2004, Wallace began
10 working at the San Francisco District Attorney's Office for then District Attorney
11 Kamala Harris, where he served as deputy chief of investigations. According to
12 Wallace, he oversaw Harris's day-to-day operations and was in charge of public
13 corruption.

14 7. When Kamala Harris became Attorney General of the State of
15 California, she appointed Wallace as director of law enforcement for the
16 California Department of Justice (DOJ). Wallace testified he oversaw 1500
17 employees and ten regional offices.

18 8. While Wallace was at the California DOJ, he was also a
19 commissioner assigned to the Peace Officer Standards and Training.

20 9. When Attorney General Kamala Harris became a United States
21 Senator, Wallace went with her to Washington D.C. and became her senior
22 advisor of law enforcement. During his testimony Wallace estimated that occurred
23 in either 2016 or March of 2017 to December of 2018.

24 10. As a result of a sexual harassment lawsuit filed against him by a
25 female subordinate, Wallace ultimately resigned from his position with Harris.
26 Thereafter, Wallace was employed by the Contra Costa District Attorney's Office
27 as an investigator.
28

1 11. Wallace testified that in November 2021, he received an anonymous
2 postcard from the Pittsburg Police Department as well as information from the
3 Federal Bureau of Investigation (FBI) regarding steroid use amongst Antioch
4 Police Officers and Pittsburg police officers and a joint investigation was
5 launched by the FBI and the Contra Costa County DA's office.

6 12. It was communicated to Wallace that the Chief of Pittsburg Police
7 Department gave the post card to Chief of Inspectors Arnold Threets, who then
8 assigned the investigation to Wallace.

9 13. "Almost simultaneously", upon receipt of the postcard Wallace was
10 visited by FBI Agent Thuy Zobach regarding issues in the wiretap room
11 concerning Officer Timothy Manly Williams of the Antioch Police Department.
12 Notably, the postcard never mentioned Devon Wenger or cy client, Brock
13 Marcotte by name.

14 14. According to Wallace's testimony, the investigation was initiated in
15 November of 2021 and it was apparent after he obtained the cellphones of Officer
16 Eric Rombough and Officer Morteza Amiri in 2022 pursuant to a search warrant
17 dated March 23, 2022, that there were concerns for civil rights violations.

18 15. On March 23, 2022, Wallace seized 8 cell phones from Pittsburg
19 Police Department and Antioch Police Department police officers. Wallace
20 testified that he "began a thorough review of those cellular telephones as well as
21 investigations into steroid abuse, perjury, excessive force, and potential wire fraud
22 investigations."

23 16. According to Wallace's testimony forensic experts at the Contra
24 Costa DA's office downloaded Officer Rombough's phone on March 23, 2022.
25 The FBI also executed a federal search warrant of Officer Rombough's phone and
26 they downloaded information and data from the phone as well.

27 17. Wallace testified at arbitration that he was the author of the state
28 warrant and that he prepared it on March 22, 2022.

1 18. Wallace testified that he reviewed all of the text messages contained
2 on the 8 seized cell phones multiple times over the course of a year.

3 19. Despite seizing the phones in 2022, Wallace by his own admission
4 did not write a report describing text messages on the phones until March 27,
5 2023.

6 20. Wallace testified he authored the March 27th report after his review of
7 the cellular telephones he had seized – primarily those of Officer Eric Rombough,
8 Officer Morteza Amiri and Andrea Rodriguez. He testified the phones “contained
9 concerning language demonizing people of color” so he began a review of those
10 text messages.

11 21. Wallace testified at the arbitration hearing that the two reports he
12 prepared in connection to the investigation on March 27 and March 28, 2023, did
13 not capture all the “inappropriate” texts he had discovered.

14 22. Wallace testified further that he was directed at some unspecified
15 time by the Chief Assistant Attorney to do a report pursuant to the California
16 Racial Justice Act (Penal Code Section 745) documenting text messages of
17 officers that occurred in connection with arrests of two defendants charged with
18 murder. He testified that at another unspecified date, he was ordered by an
19 (unidentified) judge to provide text messages that were derogatory, but were not
20 relevant to the criminal cases he was investigating.

21 23. Wallace also testified at arbitration that he discovered my client,
22 Marrocotte’s, text messages while investigating Officer Eric Rombough, Officer
23 Morteza Amiri and Officer Devon Wenger for violation of individuals’ civil rights
24 in the City of Antioch.

25 24. Wallace admitted in his testimony that he had last received training
26 on search warrants in 2004, and never received any training concerning CalECPA,
27 which became law in 2021, as it pertains to writing search warrants.
28

1 25. According to California Penal Code Section 1546.1 also known as
2 CalECPA, it is a legal requirement of law enforcement to seal any information
3 obtained through the execution of a search warrant that is unrelated to the
4 objective of the warrant. Any such sealed information should not be subject to
5 further review, use, or disclosure except pursuant to a court order or to comply
6 with discovery as required by Sections 1054.1 of the Penal Code.

7 26. When I questioned Wallace at arbitration as to whether he had
8 complied with the requirements of CalECPA he admitted that (1) he neither sealed
9 the information nor (2) did he seek any further order from the court to use the
10 information for any other purpose. From my involvement in discipline cases
11 involving several Antioch officers, I know the text messages relied upon by the
12 City of Antioch to terminate officers, did not result from a Court Order
13 authorizing such use.

14 27. Wallace further admitted at arbitration that California Penal Code
15 section 745, also known as the Racial Justice Act, identifies a defense that a
16 defendant can raise following arrest, but does not identify a substantive crime.
17 Wallace conceded that under his knowledge of the law a violation of Penal Code
18 745 by a police officer is not a crime and would not provide a basis to obtain a
19 search warrant.

20 28. Throughout my questioning of Wallace, I was able to elicit that
21 Wallace never attempted to substantiate whether my client, Marcotte, was on duty
22 or engaged in any police activity at the time Marcotte allegedly sent objectionable
23 texts.

24 29. Wallace also testified that on March 22, 2023, he was at a meeting
25 with Antioch Mayor Lamar Thorpe, City Manager Cornelius Johnson, Contra
26 Costa County District Attorney Diana Becton and Chief of Inspectors Threats.
27 Notably, the Police Chief of Antioch Police Department was excluded from that
28

1 meeting. This meeting occurred the same day that Wallace's state warrant was
2 signed.

3 30. The subject matter of the meeting was to tell Mayor Thorpe and City
4 Manager Cornelius Johnson that Contra Costa DA's Office was going to be
5 conducting police activity at Antioch Police Department on March 23, 2023 with
6 a follow-up meeting set for the next morning. During the meeting, DA Becton
7 requested that Thorpe and Johnson keep the investigation confidential.

8 31. At arbitration, Wallace made the representation to the arbitrator that a
9 text from Officer Rombough to Officer Marcotte that read "You take 40" was a
10 reference by Rombough to a 40-millimeter weapon. However, I asked if in fact,
11 the question related to police unit #40, which was assigned to Rombough and
12 Marcotte, and not a weapon, to which Wallace stated he did not know.

13 Executed on November 3, 2024, in the City of Pleasant Hill, California.
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15 RAINS, LUCIA STERN ST.PHALLE &
16 SILVER, PC

17
18 By: 

19 MICHAEL L. RAINS

20 Attorney for Brock Marcotte
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