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| DISTRICT COURT, COUNTY OF DENVER,<br>STATE OF COLORADO<br>Denver City & County Building<br>1437 Bannock St., Room 256<br>Denver, CO 80202                                                                                                                                                                                                                                                                                                                                                                                                                       | <p style="text-align: center;">▲ <b>COURT USE ONLY</b> ▲</p> |
| <p><b>Plaintiff:</b> RUBY JOHNSON,</p> <p><b>v.</b></p> <p><b>Defendants:</b> GARY STAAB, an officer of the Denver Police Department, in his individual capacity, and GREGORY BUSCHY, an officer of the Denver Police Department, in his individual capacity.</p> <hr/> William T. O’Connell, III, #34127<br>Saugat K. Thapa, #51256<br>Thompson, Coe, Cousins & Irons, L.L.P.<br>1700 Broadway, Suite 900<br>Denver, CO 80290<br>Telephone: (303) 830-1212<br>woconnell@thompsoncoe.com<br>sthapa@thompsoncoe.com<br><i>Attorneys for Defendant Gary Staab</i> | <p>Case No: 2022CV33434</p> <p>Div.: 269</p>                 |
| <p style="text-align: center;"><b>DEFENDANT GARY STAAB’S MOTION FOR SUMMARY JUDGMENT</b></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                              |

Defendant Gary Staab, by and through undersigned counsel and pursuant to C.R.C.P. 56, hereby moves for summary judgment on Plaintiff’s Third Amended Complaint and as grounds therefor states as follows:

**CERTIFICATE OF CONFERRAL**

Undersigned counsel conferred with Plaintiff’s counsel regarding the relief requested herein. Plaintiff opposes the relief requested in this motion.

## **INTRODUCTION**

Plaintiff brings a single claim for relief (Unlawful Search pursuant to C.R.S. § 13-21-131 and the Colorado Constitution) in her Third Amended Complaint (“Complaint”) against Denver Police Department (“DPD”) Detective Gary Staab and his supervisor Sergeant Gregory Buschy, stemming from a search of her residence on January 4, 2022. Prior to the search, Detective Staab prepared a Search Warrant and accompanying Affidavit in Support of Search Warrant that was reviewed and approved by Buschy and Denver Deputy District Attorney Ashley Beck. Denver County Court Judge Beth Faragher subsequently signed the Search Warrant and the search was conducted that same day.

Plaintiff alleges that the Affidavit included “knowingly or recklessly false statements of material fact.” (Complaint, ¶ 104). Plaintiff also alleges that Staab, “either intentionally or with reckless disregard, omitted material, adverse facts that made the affidavit substantially misleading.” (Complaint, ¶ 105). Plaintiff concludes that if “the false statements of material facts were deleted from Staab’s affidavit, and if the omitted material facts had been included in Staab’s affidavit, it would have been even more clear that the affidavit failed to provide probable cause.” (Complaint, ¶ 107).

Detective Staab is entitled to summary judgment on Plaintiff’s single claim against him because he neither included any false statements in nor omitted any material facts from the Affidavit. Even if Plaintiff were able to identify an issue of material fact with respect to same, there is absolutely no evidence that Staab acted with the requisite state of mind. Finally, even if Plaintiff were able to identify an issue of material fact with respect to Staab’s state of mind, the revised Affidavit still establishes probable cause.

## PROCEDURAL HISTORY

This case was initially tried to a jury in late February 2024. After erroneously instructing the jury, a verdict in Plaintiff’s favor was returned on March 1, 2024. Defendants timely appealed the adverse verdict to the Colorado Court of Appeals (“COA”). On May 1, 2025, the COA reversed and remanded for a new trial. The COA framed the relevant issue and the trial court’s error as follows:

This appeal requires us to consider whether, for purposes of seeking damages under the statute, a constitutional violation occurs where the officers’ false statements in and omissions from the affidavit were the result of negligence or mistake — as opposed to being made intentionally or with reckless disregard for the truth. We conclude that such negligence or mistake does not create a constitutional violation. And because the jury was not told to treat such negligent or mistaken statements or omissions differently from any misleading statements and omissions made intentionally or recklessly, it was incorrectly instructed. As a result, we reverse the judgment and remand for a new trial.

...

In sum, the jury instruction misstated the law because it did not direct the jury to only excise the false statements from, or correct the omissions in, the affidavit that the jury found were made intentionally or with a reckless disregard for the truth. *Cf. Dailey*, 639 P.2d at 1075; *Reed*, 56 P.3d at 100.

*Johnson v. Staab*, 2025 COA 45, ¶¶ 2, 34, *cert denied*, 2026 WL 125124 (Jan. 12, 2026).

## STATEMENT OF UNDISPUTED MATERIAL FACTS

1. In the early morning hours of January 3, 2022, a truck owned by Jeremy McDaniel was stolen from the Denver Hyatt garage. (Complaint, ¶¶ 12, 13).
2. McDaniel advised the responding DPD officer that he had several firearms, drones, \$4000.00 and an old iPhone in the stolen truck. (Affidavit in Support of Search Warrant/Search Warrant, p. 3, attached hereto as **Exhibit A**)(Staab’s Supplementary Report, p. 1, attached hereto as **Exhibit B**).

3. On the morning of January 4, 2022, DPD Detective Gary Staab, a 28 year veteran assigned to District 6, was assigned to investigate the theft of McDaniel's truck. (**Exhibit B**, p. 1) (Staab 2/27/24 testimony, 215:25 – 216:4, attached hereto as **Exhibit E**).

4. Staab spoke to McDaniel on January 4, 2022. McDaniel informed Staab that he had an old iPhone in his stolen truck and had used the Find My iPhone App ("App") on his current iPhone which "pinged" to a house located at 5380 Worchester Street in Denver ("house"). (**Exhibit A**, p. 3)(**Exhibit B**, p. 1).

5. During the call with McDaniel, Staab began recording the conversation so he could remember what McDaniel was telling him. (Staab 2/27/24 testimony, **Exhibit E**, 232:15 – 233:4)(Staab/McDaniel 1/4/22 telephone call, attached hereto as **Exhibit I**).

6. McDaniel informed Staab that the first ping at the house occurred the previous day, January 3, 2022, at 11:24 a.m. (**Exhibit I**, 00:01 – 00:10).

7. McDaniel advised Staab that he had driven by the house in a rental car on January 3, 2022 and the iPhone pinged at that address. (**Exhibit A**, p. 3).

8. McDaniel further advised that the iPhone's last ping at the house was on January 3, 2022 at 3:55 p.m., the phone had not pinged at the location since then and the phone might have died. (**Exhibit A**, p. 3)(**Exhibit B**, p. 1)(**Exhibit I**, 01:29 – 02:39).

9. In a follow up conversation, McDaniel advised Staab that he had previously found his wife's iPhone in the middle of a field, within five feet, using the App. (Staab 2/27/24 testimony, **Exhibit E**, 317:25 – 318:10).

10. McDaniel provided DPD with a screenshot of his iPhone showing the last location where the phone had pinged. The screenshot reveals a phone icon, a dot on Plaintiff's residence and

the address of 5380 Worchester Street. (**Exhibit A**, p. 1)(Staab 2/27/24 testimony, **Exhibit E**, 236:24 – 238:5).<sup>1</sup>

11. After speaking to McDaniel, Staab spoke to his supervisor Sergeant Gregory Buschy, a 27 year veteran assigned to District 6, and shared his concerns about the time between the last ping at the house and the time he got the case. Buschy instructed Staab to contact the District Attorney's Office. (Staab 2/27/24 testimony, **Exhibit E**, 234:10 – 234:21, 236:12 - 23)(Buschy 2/28/24 testimony, 54:14 – 25, attached hereto as **Exhibit F**).

12. Staab spoke to Deputy District Attorney Ashley Beck. Staab advised Beck of the information he had and his concerns about the time between the last ping and the time he got the case. Beck advised he was "good with the warrant." (Staab 2/27/24 testimony, **Exhibit E**, 264:3 – 6; 317:12 – 24).

13. Beck was familiar with the App and it is incredibly precise based on her experience. Beck has handled many cases where a victim or witness had successfully tracked their iPhone to a specific location utilizing the App. (Beck 2/29/24 testimony, 125:20 – 126:23, attached hereto as **Exhibit H**).

14. During the course of his investigation, Staab researched the address where McDaniel's phone was shown to be located (5380 Worchester Street), the owner of the residence and one of Plaintiff's sons after Staab found that the son had some association with Plaintiff's residence. (Staab 2/27/24 testimony, **Exhibit E**, 319:3 - 19).

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<sup>1</sup> An enlarged version of the screenshot is included at page 6 of Sergeant Buschy's Motion for Summary Judgment.

15. Staab drafted a Search Warrant (“Warrant”) and accompanying Affidavit in Support of Search Warrant (“Affidavit”) and emailed both to Beck for her review and approval. (1/4/2022 email, attached hereto as **Exhibit D**).

16. Beck revised the Affidavit to include information regarding the frequent use of stolen vehicles to perpetrate other crimes and/or the abandonment of the vehicles after a short period of time. Beck also revised the Affidavit to include information regarding thieves retaining the property in an abandoned stolen vehicle. (Staab 2/27/24 testimony, **Exhibit E**, 279:8 - 16).

17. Staab agreed with all of Beck’s revisions to the Affidavit. (Staab 2/28/24 testimony, **Exhibit F**, 16:3 -10).

18. On the first page of the Affidavit, Staab included the screenshot that McDaniel had provided. (**Exhibit A**, p. 1)( Staab 2/27/24 testimony, **Exhibit E**, 237:24 – 238:5).

19. The Affidavit was reviewed and approved by both Buschy and Beck. Beck’s supervisor Victoria Sharp also reviewed the Affidavit and agreed with Beck’s probable cause determination. (**Exhibit A**, p. 4)(Beck 2/29/24 testimony, **Exhibit H**, 115:16 – 116:11).

20. Denver County Court Judge Beth Faragher signed the Warrant and Affidavit finding that there was probable cause to believe that the property described in the Affidavit was located at Plaintiff’s residence. (**Exhibit A**, pp. 4 - 5).

21. Because McDaniel’s truck contained several firearms, execution of the Warrant presented several safety concerns. Accordingly, Buschy contacted the DPD SWAT team regarding potential assistance with execution of the Warrant. (Staab 2/27/24 testimony, **Exhibit E**, 282:1 – 8)(Staab 2/28/24 testimony, **Exhibit F**, 23:16 – 24).

22. Staab and Buschy met with SWAT, specifically Sergeant Perry Speelman, before going to Plaintiff's residence. Staab and Buschy advised of their concerns with Plaintiff's age and asked if there was anything that could be done differently than what SWAT normally does. (Staab 2/27/24 testimony, **Exhibit E**, 282:9 – 23)(Buschy 2/28/24 testimony, **Exhibit F**, 104:6 – 22).

23. The Warrant was executed at Plaintiff's residence on January 4, 2022. (**Exhibit B**, p. 2).

24. At the time the Warrant was executed, Staab and Buschy believed there was probable cause for the search at Plaintiff's residence. (Staab 9/15/23 deposition, 203:10 – 16, attached hereto as **Exhibit C**)(Buschy 2/28/24 testimony, **Exhibit F**, 127:2 - 4).

### **LEGAL STANDARD**

The purpose of summary judgment is to further the prompt administration of justice, expedite litigation by avoiding needless trials, and make it possible to speedily obtain a judgment where appropriate. *See Crawford Rehab. Servs. v. Weissman*, 938 P.2d 540, 550 (Colo. 1997). Summary judgment is proper where the pleadings, affidavits, depositions or admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). "Factual disputes will not defeat an entry of summary judgment if the disputed facts are not material to the outcome of the case." *Svanidze v. Kirkendall*, 169 P.3d 262, 264 (Colo. App. 2007). A material fact is one that will affect the outcome of the case. *W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008). A fact dispute must also be genuine— meaning that a reasonable jury could find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

The obligations of the moving and non-moving party have been long established in Colorado. A moving party meets its initial burden by showing an absence of evidence to support a plaintiff's claims: "When a party moves for summary judgment on an issue upon which the party would not bear the burden of persuasion at trial, the moving party's initial burden of production may be satisfied by showing an absence of evidence in the record to support the non-moving party's case. The burden then shifts to the non-moving party to establish a triable issue of fact and failure to meet that burden will result in summary judgment in favor of the moving party." *Casey v. Christie Lodge Owners Ass'n*, 923 P.2d 365, 366 (Colo. App. 1996). When responding to a properly supported motion for summary judgment, the non-moving party may not simply rest upon the mere allegations of the Complaint but must instead come forward with admissible evidence of specific facts showing that there is a genuine issue for trial. *Cont'l Air Lines, Inc.*, 731 P.2d at 713. If the non-moving party cannot muster sufficient evidence to make out a triable issue of fact, a trial would be useless and the moving party is entitled to judgment as a matter of law. *Id.*

## **ARGUMENT**

**DETECTIVE STAAB IS ENTITLED TO SUMMARY JUDGMENT BECAUSE HE DID NOT INCLUDE ANY FALSE STATEMENTS IN NOR OMITTED ANY MATERIAL FACTS FROM THE AFFIDAVIT AND THERE IS NO EVIDENCE THAT HE ACTED WITH THE REQUISITE STATE OF MIND**

### **C.R.S. § 13-21-131**

Plaintiff asserts a single unlawful search claim, pursuant to C.R.S. § 13-21-131 and Article II, section 7 of the Colorado Constitution, against Staab. Article II, section 7 of the Colorado Constitution prohibits the issuance of a search warrant except upon probable cause supported by oath or affirmation particularly describing the place to be searched and the things to be seized. *People v. Miller*, 75 P.3d 1108, 1112 (Colo. 2003).

Article II, section 7 is the Colorado parallel to the Fourth Amendment to the United States Constitution, which addresses an individual's right to be secure from unreasonable searches and seizures. *See Eddie's Leaf Spring Shop & Towing LLC v. Colo. PUC*, 218 P.3d 326, 333 (Colo. 2009). Accordingly, federal jurisprudence is instructive on the issue. *Cf. People v. Rodriguez*, 945 P.2d 1351, 1358-59 (Colo. 1997)(viewing the Colorado and federal Constitutions as “co-extensive” and therefore following federal precedent).

### **Probable cause**

Probable cause “exists when an affidavit alleges sufficient facts for a person of reasonable caution to believe that contraband or other evidence of criminal activity is located at the place to be searched.” *Henderson v. People*, 879 P.2d 383, 391 (Colo. 1994). Probable cause is not measured by a “‘more likely true than false’ level of certitude but by a common-sense, nontechnical standard of reasonable cause to believe, with due consideration being given to a police officer’s experience and training in determining the significance of his observations to the ultimate issue of probable cause.” *People v. King*, 16 P.3d 807, 813 (Colo. 2001)(quoting *People v. Ratcliff*, 778 P.2d 1371, 1375 (Colo. 1989)). In determining whether probable cause exists a judge must look to the totality of the circumstances, and the inquiry is not governed by rigid legal rules. *People v. Pacheco*, 175 P.3d 91, 94 (Colo. 2006)(citations omitted). “Judges must make a ‘practical, commonsense decision whether a fair probability exists that a search of a particular place will reveal contraband or evidence of a crime.’” *Id.* (quoting *People v. Altman*, 960 P.2d 1164, 1167 (Colo. 1998)).

## **Warrant affidavits**

“[W]arrant affidavits ‘are normally drafted by nonlawyers in the midst and haste of a criminal investigation.’” *U.S. v. Clenney*, 631 F.3d 658, 665 (4<sup>th</sup> Cir. 2011)(citing *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965)). “If we ‘desire to encourage use of the warrant process by police officers,’ *Illinois v. Gates*, 462 U.S. 213, 237 n. 10, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), the worst course of action would be to pick apart warrant affidavits from the pristine perch of hindsight or to penalize officers for securing what the law requires. Obtaining a warrant is a process overseen by a neutral magistrate. Magistrates make an independent judgment about the sufficiency of the warrant affidavit. They are free to reject warrant applications that provide scant or insufficient evidence.” *Clenney*, 631 F.3d 665.

## **Review of affidavit**

A trial court’s determination that an affidavit in support of a search warrant adequately establishes probable cause is given “great deference on review.” *Feigin v. Digital Interactive Assoc., Inc.*, 987 P.2d 876 (Colo. App. 1999)(citing *People v. Pate*, 878 P.2d 685 (Colo. 1994). Doubts must be resolved in favor of a judicial officer’s determination of probable cause because such deference supports the preference for law enforcement to seek a judicial determination of probable cause. *Id.* “Just as reviewing courts give ‘great deference’ to the decisions of judicial officers who make probable-cause determinations, police officers should be entitled to rely upon the probable-cause determination of a neutral magistrate when defending an attack on their good faith for either seeking or executing a warrant.” *U.S. v. Corral-Corral*, 899 F.2d 927, 939 (10<sup>th</sup> Cir. 1990).

## **I. False statements**

In determining whether a search warrant lacked probable cause based on false statements, courts consider three issues in sequence: (1) whether the warrant affidavit contains false statements; (2) whether the false statements must be excised; and (3) if the statements are excised, whether the remaining statements establish probable cause to authorize the search. *People v. Young*, 785 P.2d 1306, 1308 (Colo. 1990). A warrant is not invalidated simply because it contains a misstatement. Statements made negligently or due to a good faith mistake do not require excision from the affidavit. *See Johnson*, 2025 COA 45, ¶ 28 (“[A] warrant may be supported by probable cause even if the supporting affidavit contains negligent or mistaken misstatements.”).

## **II. Material omissions**

An affidavit need not describe all steps taken, information obtained, and statements made during an investigation but must contain any material adverse facts. *See People v. Kerst*, 181 P.3d 1167, 1171 (Colo. 2008). The omission of material adverse facts may vitiate probable cause. *Id.* An adverse fact is material in this context only if its omission would render the affidavit “substantially misleading as to the existence of probable cause.” *Id.* In such a case, a reviewing court adds the material omitted information to the affidavit and determines whether the revised affidavit establishes probable cause. *Id.* at 1172.

## **III. State of mind**

To prove a constitutional violation based on false statements or material omissions, a plaintiff must establish that they were made intentionally or with reckless disregard for the truth without which the affidavit would not establish probable cause. *Johnson*, 2025 COA 45, ¶ 31. “A statement is made with a ‘reckless disregard for the truth’ if the person making the statement

‘entertained serious doubts as to the truth of the statement or acted with a high degree of awareness of its probable falsity.’” *Johnson*, 2025 COA 45, ¶ 40 (citations omitted). Omissions are made with reckless disregard for the truth when an officer recklessly omits facts that any reasonable person would know that a judge would want to know in making a probable cause determination. *Reedy v. Evanson*, 615 F.3d 197, 213 (3<sup>rd</sup> Cir. 2010) (internal quotation marks and citations omitted).

**A. The alleged false statements**

The COA identified the alleged false statements in the Affidavit, each of which was conveyed by McDaniel to Staab, as follows:

1. The victim “reported the first ping occurred on 01/03/2021, at 1124 hours.”
2. The victim reported that “the last ping was on 01/03/2021, at 1555 hours.”
3. “During this time the phone had not moved.”
4. The victim stated that the stolen truck “could be in the garage.”
5. “Victim has used iPhone app on other occasions . . . .”
6. “A photo of the app shows a red dot, signifying the phone being inside the house . . . .”

*Johnson*, 2025 COA 45, ¶ 14<sup>2</sup>

Certain statements Plaintiff characterizes as false are completely accurate as demonstrated by Staab’s recorded conversation with McDaniel, while other statements are at worst innocuous mistakes. In any event, there is no evidence that Staab entertained any doubts, let alone serious doubts, as the truth of McDaniel’s statements or acted with a high degree of their probable falsity. Thus, none of these statements must be excised from the Affidavit.

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<sup>2</sup> The Court did not consider the issue of whether the Affidavit contained any false statements or omitted any material facts.

### **Nos. 1 & 2**

It is undisputed that McDaniel informed Staab that the first ping at 5380 Worchester Street occurred on January 3, 2022, at 11:24 a.m. and the last ping at that address was on the same day at 3:55 p.m. The only inaccuracy with respect to these two statements is the misdated year of the first and last pings. Instead of writing 01/03/2022, Staab wrote 01/03/2021 because the calendar had just turned from 2021 to 2022. (Staab 2/28/24 testimony, **Exhibit F**, 18:4 – 13). Staab’s reference to 2021 is at worst a mistaken misstatement which does not invalidate the warrant or require excision. *See Johnson*, 2025 COA 45, ¶ 28 (“[A] warrant may be supported by probable cause even if the supporting affidavit contains negligent or mistaken misstatements.”).<sup>3</sup> Any contention by Plaintiff that this statement is false because the phone may have pinged at other locations prior to pinging at her house is baseless. Staab’s statement was clearly referring to the first ping at Plaintiff’s house on the day in question, not the first time the phone had pinged that day. (Staab 2/28/24 testimony, **Exhibit F**, 35:17 – 36:12).

### **No. 3**

Plaintiff’s sole basis for contending this statement is false is a January 3, 2022 - 11:30:45 entry in the Incident Detail Report (“CAD”) allegedly indicating that McDaniel’s stolen vehicle was in the area of Falcon Park. (CAD, p. 2, attached hereto as **Exhibit G**). Staab did not have the CAD when he prepared the Affidavit and does not know when the phone was actually pinging in the area of Falcon Park. (Staab 2/28/24 testimony, **Exhibit F**, 38:5 – 40: 12). Moreover, the time stamp in the CAD (11:30:45) does not necessarily equate to the actual time McDaniel’s vehicle

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<sup>3</sup> Judge Faragher was evidently not concerned about the misdated pings because she signed the Affidavit on January 4, 2022.

was near Falcon Park. Rather, the time stamp indicates when dispatch entered it into the CAD. (Staab 2/27/24 testimony, **Exhibit E**, 313:9 - 17). Even if the phone were pinging in the Falcon Park area at 11:30:45 and Staab had knowledge of same, there is no evidence demonstrating that Staab entertained any doubts, let alone serious doubts, as to the truth of the statement that the phone had not moved between 1124 and 1555 hours on 01/03/2022 or acted with a high degree of its probable falsity given the information reported by McDaniel.

**No. 4**

It is undisputed that McDaniel informed Staab that when he drove by Plaintiff's residence, he did not see his stolen vehicle at the location but advised that it could be in the garage. (Staab 2/27/24 testimony, **Exhibit E**, 307:9 - 17).

**No. 5**

The full statement at issue reads "Victim has used this iPhone app on other occasions, where he found his wife's phone in the middle of a field, with an accuracy of five foot." Because McDaniel informed Staab of a single instance in which he found an iPhone with the App, Plaintiff takes issue with Staab's use of the word "occasions" instead of "occasion." (Staab 2/28/24 testimony, **Exhibit F**, 49:20 - 50:13). Staab's use of the plural instead of the singular is at worst a mistaken misstatement which does not invalidate the warrant or require excision. *See Johnson*, 2025 COA 45, ¶ 28 ("[A] warrant may be supported by probable cause even if the supporting affidavit contains negligent or mistaken misstatements.").

**No. 6**

At the time he prepared the Affidavit, Staab held a good faith belief that the dot and the address of 5380 Worchester St, Denver, CO 80239, showed the exact location of the phone. Further

confirming that this was the precise location in Staab's mind was the information McDaniel had previously conveyed that the phone was pinging as he drove by that address. (Staab 2/27/24 testimony, **Exhibit E**, 315:17 – 316:3)(Staab 2/28/24 testimony, **Exhibit F**, 16:20 – 17:5).

**B. The alleged material omissions**

The COA identified the alleged material omissions in the Affidavit as follows:

1. Staab believed that there was not probable cause when he prepared the Affidavit.
2. Buschy had the same concerns about probable cause.
3. Staab and Buschy were concerned about probable cause when they called the deputy district attorney and thought she would tell them there was not probable cause.
4. The phone pinged all over Denver the day the truck was stolen.
5. Staab had no experience with, training on, or knowledge about the App that he was relying on.
6. Buschy had no experience with, training on, or knowledge about the App that he was relying on.
7. The truck was not at the house.
8. Staab never considered Johnson, a seventy eight year old woman, to be a suspect.
9. While doing surveillance at the house, officers saw no suspicious activity.
10. The victim reported to Staab that later in the morning after the truck was stolen, someone tried to use his wife's debit card online.

*Johnson*, 2025 COA 45, ¶ 15

None of this information is material to the probable cause analysis. Even if this information were material, there is no evidence that Staab intentionally or with reckless disregard for the truth omitted same. Therefore, none of this information needs to be added to the Affidavit.

**Nos. 1, 2, 3, 5 & 6**

Any initial doubts Staab and/or Buschy may have had about the existence of probable cause and their inexperience with the App are wholly immaterial because omission of these facts does not render the Affidavit “substantially misleading as to the existence of probable cause.” *Kerst*, 181 P.3d at 1171.<sup>4</sup> Moreover, Staab and/or Buschy’s subjective beliefs are irrelevant because it is well established that probable cause determinations are governed by an objective standard. *See e.g., Ewing v. City of Stockton*, 588 F.3d 1218, 1231, n. 20 (9<sup>th</sup> Cir. 2009)(noting that the officer “expressed doubt as to the existence of probable cause, but his subjective beliefs are irrelevant; the standard is objective”); *United States v. Moses*, 796 F.2d 281, 284-85 (9<sup>th</sup> Cir. 1986)(officer’s testimony that she did not believe probable cause existed did not alter the court’s conclusion that it did). It is undisputed that Staab and Buschy believed there was probable cause for the search at Plaintiff’s residence at the time the warrant was executed.

**No. 4**

The purported pings throughout Denver occurred before the first ping at 5380 Worchester Street. (Ex 2, p. 2)(Staab 2/28/24 testimony, **Exhibit F**, 37:6 – 12). Thus, this fact is immaterial. Indeed, inclusion of this information would have likely only strengthened probable cause because

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<sup>4</sup> Staab’s only concern relative to probable cause was potential staleness or the time between the last ping at Plaintiff’s house and the time he got the case. (Staab 2/27/24 testimony, **Exhibit E**, 316:15-21).

it is consistent with the movements of a stolen vehicle. (Beck 2/29/24 testimony, **Exhibit H**, 152:1 – 20).

**Nos. 7 & 9**

Failure to observe the truck or suspicious activity near Plaintiff's residence is immaterial because neither support a reasonable inference that a crime has not been committed. The truck could have obviously been hidden in the garage, and it is implausible to infer that a lack of suspicious activity near a residence that may be housing a stolen vehicle amounts to a material fact given that the activities inside the house are unknown. (Staab 2/27/24 testimony, **Exhibit E**, 307:14 -17)(Staab 2/28/24 testimony, **Exhibit F**, 20:5 - 19).

**No. 8**

This type of standard identifying information is immaterial because it is typically not included in Affidavits given its limited value since friends or family members living in the house may have committed the crime. (Staab 2/28/24 testimony, **Exhibit F**, 18:14 – 19:11)(Beck 2/29/24 testimony, **Exhibit H**, 146:10 – 147:20).

**No. 10**

The online use of McDaniel's wife's debit card by an unidentified individual the day the truck was stolen is immaterial to the probable cause analysis because it has no bearing on whether the stolen truck was at Plaintiff's residence. (Staab 2/28/24 testimony, **Exhibit F**, 19:12 – 20:4).

**C. Revised Affidavit**

None of the statements Plaintiff challenges must be excised from the Affidavit because they are either entirely accurate or at worst innocuous mistakes, and there is no evidence that Staab made any such statements with the requisite state of mind. Moreover, none of the information

Plaintiff maintains should have been included in the Affidavit needs to be added because it is immaterial to the probable cause analysis, and there is no evidence that Staab acted with the requisite state of mind in any event. As such, there is no reason to analyze the contents of a revised Affidavit. Nevertheless, a revised Affidavit with all statements that could liberally be construed as “false” excised and all omissions that could generously be construed as “material” included, as summarized below, would still establish probable cause:<sup>5</sup>

- McDaniel has an old iPhone in his truck and he uses the Find My iPhone App.
- McDaniel utilized the App in an attempt to track down his truck and the phone pinged to a house, 5380 Worchester Street, Denver, CO 80239.
- He reported the first ping occurred on January 3, 2022 at 11:24 and the last ping occurred on January 3, 2022 at 3:55.
- The phone has not pinged at the location since and the victim believes the phone might have died.
- McDaniel rented a car and drove by the address and didn’t see his truck at the location.
- The phone was pinged at the address when McDaniel drove by.
- McDaniel has used the App on another occasion, where he found his wife’s phone in the middle of a field, with an accuracy of five feet.

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<sup>5</sup> The statements related to the dates of the first and last pings do not require excision from the Affidavit because it is undisputed that Staab mistakenly wrote the date of 01/03/2021 instead of 01/03/2022. *See* p. 13. The statement regarding the victim’s use of the App on other “occasions” likewise does not require excision from the Affidavit because it is undisputed that Staab mistakenly used the plural instead of the singular. *See* p. 14. Instead of excision, the year of the pings and the word “occasions” are corrected for purposes of a revised Affidavit. With respect to the omissions, the statements regarding Staab and Buschy’s initial doubts about probable cause do not require inclusion in the Affidavit because they are not material to the probable cause analysis. *See* p. 16.

- Neither Staab nor Buschy have any prior experience with or training on the App.
- A screenshot of the iPhone App shows a dot on a house and the address of 5380 Worchester Street, Denver, CO 80239.
- The owner of the house is a 78 year old woman and is not a suspect.
- The officers observed no suspicious activity while surveilling the house.
- McDaniel reported that after the truck was stolen, someone tried to use his wife's debit card online.
- The phone was pinging all over Denver the day the truck was stolen.
- Individuals who steal motor vehicles often use those vehicles to commit other crimes and/or frequently abandon recently stolen vehicles after a short period of time.
- When valuable items, such as electronics, cell phones firearms, are in a stolen vehicle, thieves often abandon the vehicle and retain the property.
- Firearms, drones and cell phones are easily transportable and can be hidden in a home or garage.

These facts, which demonstrate a fair probability that a search of Plaintiff's residence would reveal contraband or other evidence of a crime, establish probable cause.

### **CONCLUSION**

For the reasons set forth above, Defendant Gary Staab respectfully requests that the Court grant summary judgment in his favor on Plaintiff's unlawful search claim and dismiss Plaintiff's Third Amended Complaint against him with prejudice.

Dated this 31<sup>st</sup> day of July 2026.

Respectfully submitted,

**THOMPSON, COE, COUSINS & IRONS, L.L.P.**

*s/ William T. O'Connell, III*

William T. O'Connell, III, #34127

Saugat K. Thapa, #51256

***Attorneys for Defendant Gary Staab***

**CERTIFICATE OF SERVICE**

I hereby certify that on this 31st day of July, 2026, a true and correct copy of the foregoing **DEFENDANT GARY STAAB'S MOTION FOR SUMMARY JUDGMENT** was electronically filed and served through the Colorado Courts E-Filing System pursuant to C.R.C.P. 121, §1-26(3) upon all counsel of record.

*s/ Barbara McCall*\_\_\_\_\_

Barbara McCall, Legal Assistant

*[Original Signature on File at the Office of Thompson,  
Coe, Cousins & Irons, L.L.P.]*