Bryan J. Hackett
SBN 262367
289 Water Street
Santa Cruz, CA 95060
Telephone: (831) 295-3513
Facsimile: (831) 789-1831

Attorney for Defendant
Gabriella Celeste Ripleyphipps

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CRUZ

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. Gabriella Celeste Ripleyphipps, Defendant	Case No.: F22198 **NOTICE OF MOTION AND MOTION TO SET ASIDE THE INFORMATION UNDER *CALIFORNIA PENAL CODE* §995 : POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: March 11, 2013 Time: 1:30 p.m. Dept.: 3

TO THE ABOVE ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF SANTA CRUZ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on March 11th, in Department 3 of the above entitled court at 1:30 p.m. or as soon thereafter as the matter may be heard, the defendant, Gabriella Celeste Ripleyphipps, will move that the Court set aside the information under Penal Code §995 because the defendant was not legally committed by the magistrate and/or the defendant was committed without reasonable or probable cause.

This motion will be based on the attached memorandum of points and authorities, the preliminary hearing transcript and on argument at the hearing on this motion.

Dated: March 7, 2013

Respectfully Submitted,

Bryan J. Hackett
Attorney for Defendant
Gabriella Celeste Ripleyphipps

MEMORANDUM OF POINTS AND AUTHORITIES

I.
STATEMENT OF THE CASE:

On February 7, 2012 Gabriella Celeste Ripleyphipps was charged in Case F22198 with ten other co-defendants in a criminal complaint alleging four Counts: (1) Conspiracy to Commit a Crime in violation of *California Penal Code* Section 182(a)(1), with the listed target crimes of *California Penal Code* Sections 602(o), 602 (m), and 594(b)(1); (2) Felony Vandalism in violation of *California Penal Code* Section 594(b)(1); (3) Trespass by Entering and Occupying in violation of *California Penal Code* Section 602(m); and (4) Trespass and Refusing to Leave Private Property in violation of *California Penal Code* Section 602(o). All of the charges stemmed from arrests made and allegations levied regarding the period between November 28th, 2011 and December 4, 2011 during which a crowd of people allegedly entered, and remained in, an abandoned building at 75 River Street in Santa Cruz. Ms. Ripleyphipps pleaded not guilty to all charges and the case ultimately proceeded to a Preliminary Examination before the Honorable Judge Paul P. Burdick on January 7th and 8th, 2013. That hearing resulted in the dismissal of Counts 1 and 3 and a holding order's being issued for Counts 2 and 4. Those remaining Counts will be the subject of this Motion.

II.
A MOTION TO DISMISS THE INFORMATION MUST BE GRANTED IF THE DEFENDANT WAS COMMITTED WITHOUT REASONABLE OR PROBABLE CAUSE.

Reasonable or probable cause has been defined as "such a state of facts as would lead a man of ordinary caution and prudence to believe, and consciously entertain, a **strong** suspicion of the guilt of the accused." *People v. Mardian* (1975) 47 Cal.App.3d 16, 38 (emphasis added). In *People v. Superior Court (Mendella)* (1983) 33 Cal.3d 754, the

California Supreme Court discussed the Preliminary Hearing, and Motions pursuant to *Penal Code* Section 995, and their purposes:

> "It bears emphasis that 'the preliminary examination is not merely a pretrial hearing' (citations omitted). 'Rather **it is a proceeding designed to weed out groundless or unsupported charges of grave offenses** and to relieve the accused of the degradation and expense of a criminal trial' (citations omitted). '…The obvious purpose of section 995 **is to eliminate unnecessary trials** and to prevent…from encroaching on the right of the person to be free from prosecution for crime unless there is some rational basis for entertaining the possibility of guilt'. 'Thus, together the preliminary hearing and the section 995 motion operate as a judicial check on the exercise of prosecutorial discretion'."
>
> *Id.* at 758-759*, (emphasis added)*

Accord with this evaluation can be found as recently as in *People v. Herrera* (2006) 39 Cal.Rptr.3d 578, which reminds us that "...binding a defendant over for trial is not a perfunctory exercise…" *Id.* at 586. *See also People v. Plengsengtip* (2007) 56 Cal.Rptr.3d 165. With that reasoning in mind, this motion will address the lack of requisite probable cause to hold the defendant to answer on Counts 2 and 4 of the Complaint, which became Counts 1 and 2 of the Information.

III.

THERE WAS INSUFFICIENT PROBABLE CAUSE TO HOLD THE DEFENDANT TO ANSWER ON COUNT 4.

A: THERE WAS NO EVIDENCE WHATSOEVER THAT THE DEFENDANT WAS EVER IN THE BUILDING

At no point in the voluminous video, audio, and written reporting was there any evidence whatsoever offered that established Gabriella Ripleyphipp's actual presence inside the building at 75 River Street. A cellphone was allegedly provided to one of the people who was determined, at least by the police, to be inside the building. (Reporter's Transcript (Hereafter "RT") 1/7/13 p. 16.) It was repeatedly established that any and all telephone

exchanges had between the police and Ms. Ripleyphipps were conducted on a phone other than the phone that they sent in the building. (RT, 1/7/13 p. 47.) Indeed, Lieutenant Larry Richard of the SCPD testified that he could not even confirm who was on the other end of the phone that he called on December 1st at 10:21. (RT, 1/7/13, p. 47, ll. 15-21.) Moreover, even assuming arguendo it was Ms. Ripleyphipps on the other end of the phone, he had no information as to where she was. He conceded that her role was to take the information Lieutenant Richards gave to her and to convey it to the people inside the bank through whatever means at her disposal, including via cellphone. (RT, 1/7/13, p. 48, ll. -17.) Despite initially testifying on direct examination that he could "visualize" Ms. Ripleyphipps inside the building while she was on the phone with him, the Lieutenant clarified upon request that he was visualizing her "in his head' not "with his eyes." (RT, 1/7/13, p. 31.)

When Lieutenant Richards went to the bank at 15:37 on December 2nd he was told Ms. Ripleyphipps was not there. He testified further that he had no idea where Ms. Ripleyphipps had been when he spoke with her on the phone again at 4:11 on December 2nd and had no knowledge of her actually being involved in the discussions of plans that presumably went on inside the building. (RT, 1/7/13, p. 49, ll. 7-17.) Again at 18:32 that day he spoke with her on the phone and, again, had no idea where she was. (RT, 1/7/13, p. 49-50.) On December 3, 2011 he had personal contact with Ms. Ripleyphipps but it was outside the building. He did not see where she went, but he never saw her in the building before or after that conversation. (RT, 1/7/13, p. 50, ll. 5-14.)

When Sergeant Michael Harms of the SCPD testified he stated that he had been at the threshold of the door to the bank at around 4:30 p.m. on November 30th. He was having a conversation with a handful of people inside the building, roughly 20-25 by his estimation.

Ms. Ripleyphipps was not among the people he saw or spoke to inside the building. (RT, 1/7/13, p. 97.) It was Sergeant Harms' understanding that she was somewhere outside the building. When Sergeant Harms ultimately did make contact with Ms. Ripleyphipps, sometime later, she was in the parking lot, not inside the building. (RT, 1/7/13, p. 99.) In fact, to Sergeant Harms' knowledge she was "never in the building, but on the sidewalk or front lawn or parking lot." (RT, 1/7/13 p. 100, ll. 20-23.)

Similarly, Officer Michael Hedley of the SCPD testified that none of the hundreds and hundreds of still photos taken ever depicted Ms. Ripleyphipps inside the building at 75 River Street. (RT, 1/7/13, p. 189-190.) He could only confirm that when he went to the bank on December 2nd that she was not there. (RT, 1/8/13, p. 15.) Despite one piece of disputed testimony by Officer Hedley that he had seen Ms. Ripleyphipps walking into or out of the building at some point during review of the video tapes, he could not pinpoint where in the video. (RT, 1/8/13, p. 47.) However, Officer Hedley conceded that he had "no independent recollection of seeing Ms. Ripleyphipps during this 'real time'." (RT, 1/8/13, p. 48,.) Upon vehement objection from Counsel, the Court itself made a ruling that there "is no videotape depicting her coming into the building or going out of the building." (RT, 1/8/13, p. 51, ll. 20-22.) Thus, Officer Hedley's unsupported assertion that he witnessed such an event was not supported by the video offered into evidence, was inaccurately depicted or entitled in the District Attorney's outline provided to the Officer, and was ultimately obviated by the Court's own ruling. Thus, the only piece of testimony even temporarily purporting to place Ms. Ripleyphipps inside the building was essentially stricken from the record, being wholly unsubstantiated by the evidence. As such, there was no evidence whatsoever that Ms. Ripleyphipps was ever in the building.

B: ALL REFERENCES TO WARNINGS MADE BY THE POLICE, AND THE COURT'S RULING ITSELF, REFER TO BEING "IN THE BUILDING"

Neither was there any documented reference to Officers notifying or even "shoo-ing" people on the lawn, sidewalk, or parking lot area at 75 River Street that they were trespassing and needed to leave. All references to the warnings given, and even the officers' testimony at the hearing supports the notion that the trespass was considered to be "in the building." Lieutenant Larry Richard of the SCPD testified that the conversation he had with Ms. Ripleyphipps at the Santa Cruz Police Department included "essentially the same thing from **all** my conversations; that the group needed to leave **the building** immediately; that they were trespassing." (RT, 1/7/13, p. 19, ll. 3-5 (emphasis added).) When he spoke with Ms. Ripleyphipps on the telephone at 22:11 on the night of December 1st, 2011 he repeated to her, "Same as always; that they were illegally trespassing; that they needed to **exit the facility**." (RT, 1/8/13, p. 20, ll. 23-24 (emphasis added).) Indeed all of the fliers the [police claim to have posted in reference to the alleged trespass were posted on the "**doors of the building** at 75 River Street." (RT, 1/7/13, p. 22, ll. 25-26 (emphasis added).) None were placed in the parking lot, on the trees on the lawn, or anywhere on the sidewalk.

When asked on direct examination about his conversation with Ms. Ripleyphipps on December 3rd outside of the building Lieutenant Richard testified that he told her; "Same thing. They were illegally trespassing. They needed to **leave the building immediately**." (RT, 1/7/13 p. 32, ll. 25-26 (emphasis added).) Indeed Judge Burdick, in summarizing some of Lieutenant Richard's testimony stated that the Court had heard him say he gave verbal warnings to "**leave the building**." (RT, 1/7/13, p. 43, ll. 20-22 (emphasis added).) Clarification on that point can be offered by the following colloquy that occurred on cross examination:

> Q: Okay. And just a quick clarification on something the Judge asked you at the end. He asked you about giving verbal commands. And any verbal commands you gave to Miss Ripleyphipps were (A) given to her outside the building, correct?
>
> A: That's correct.
>
> Q: And were largely designed to have her convey to those **inside the building**, whoever they were, to get out?
>
> A: It was for everyone **in the building.**
>
> Q: In the building? O.K.
>
> RT, 1/7/13 p. 51, ll. 4-13 (emphasis added)

Officer Hedley later qualified his conversation with one of the people at the scene as follows: "Just so you know, you're trespassing **by going inside** and might end up getting arrested." (RT, 1/8/13 p. 12, ll. 14-16 (emphasis added).) The Court, too, understood and summarized the evidence as follows: "Everyone that was going **into the building** understood, given the prior history of the bank and the events that were occurring , this was not a museum. It was not a government building. It was not an open commercial place of business. It was a property that the persons who were entering did not have a right to go into. That being said, I'm not seeing anything by way I can reasonably infer an agreement to **trespass in this building** until the building became open and persons started to spontaneously go into it." (RT, 1/8/13, p. 129, ll. 16-26 (emphasis added).) The Court later ruled that "People were not removed but clearly everyone understood they didn't have a right to **enter the building**." RT, 1/8/13, p. 131, ll. 15-17. The Court also ruled that law enforcement had made it clear that they "had the authority to have **the building cleared** on behalf of the owners." (RT, 1/8/13, p. 132, ll. 5-7 (emphasis added).) Therefore, if all orders to leave regarded those actually present in the building, and no evidence was offered putting Ms.

Ripleyphipps in the building, the People failed to establish even a prima facie case of trespass pursuant to *California Penal Code* Section 602(m).

C: THE COURT MADE TWO CRITICAL MISSTATEMENTS OF THE TESTIMONY AND EVIDENCE IN APPLYING THE FACTS TO MS. RIPLEYPHIPPS

In the course of its ruling on this portion of the case, as it pertains to Ms. Ripleyphipps, the Court made two critical errors:

1) the Court stated that, as to Mr. Adams, Mr. Alcantara, Ms. Ripleyphipps, and Mr. Laurendeau, "they were there on multiple days. They were **present in the building** after it was announced that the agents had given the law enforcement the authority to order persons out and they were being asked to leave or they would be in violation of trespassing laws." RT, 1/8/13, p. 130, ll. 4-8 (emphasis added).)

2) upon asking how one engages in meetings unless they are in the building and being told by Counsel that she had not engaged in any meetings the Court replied, "We disagree on that." RT, 1/8/13 p. 135, ll. 7-11.

As to the first misstatement, it appears that over the course of a two day, seven co-defendant preliminary examination the Court may have conflated some of the facts as they applied to individual defendants. As has been painstakingly shown above, there was not one piece of evidence offered, let alone received, that placed Ms. Ripleyphipps in the building. Ever. As such, that fact cannot be used to establish a holding order against her.

As to the second misconception, the Court is entitled to disagree with Counsel but the record speaks for itself. There was not one piece of evidence offered that placed Ms.

Ripleyphipps personally present in any of the meetings that presumably occurred inside the building at 75 River Street. Indeed, and as stated above, the only reference to the meetings being had was by Lieutenant Richards who stated that he had no knowledge of Ms. Ripleyphipps actually being involved in the discussions of plans that presumably went on inside the building. (RT, 1/7/13, p. 49, ll. 7-17.) Thus, the Court mischaracterized the evidence regarding Ms. Ripleyphipps' alleged participation in those meetings.

Therefore, with no evidence placing Ms. Ripleyphipps inside the building at 75 River Street, and all warnings verbal or otherwise focusing on being inside the building, the defendant was committed on Count 4 without reasonable or probable cause.

IV.

THERE WAS INSUFFICIENT PROBABLE CAUSE TO HOLD THE DEFENDANT TO ANSWER ON COUNT 2.

A: NO EVIDENCE AS TO WHEN THE ALLEGED VANDALISM EVEN OCCURRED

In order to establish anyone's culpability for the damages allegedly resulting from vandalism said to have occurred, the People must first establish whether or not that vandalism even occurred in the timeframe of that person's alleged presence. The building at 75 River Street had been abandoned, according to Officer Hedley, for a least several months prior to November 30th, 2011. Moreover, he stated that when he arrived at the bank the doors were unlocked. (RT, 1/7/13, p. 190.) When asked if he had any information about what the condition inside the bank was before the protestors went inside Officer Hedley replied; "No." (RT, 1/8/13, pp. 53-4.) He had not checked to see if there had been reports of other trespasses made in the three and a half years the bank was vacant. (RT, 1/8/13, p. 54.) He sought out no

evidence from Wells Fargo about the condition prior to this alleged trespass. (RT, 1/8/13, p. 54.) Later he admitted on cross-examination that they had no idea when the vandalism occurred, or who had committed it. (RT, 1/8/13, pp. 195-6.) Thus, with no evidence of what the condition of the inside of the building was prior to November 30th, and no evidence of when to vandalism occurred or by whom, and certainly no evidence attributing the vandalism to Ms. Ripleyphipps, she cannot reasonably be held to answer on Count 2.

B: THE AIDDING AND ABETTING THEORY PURSUANT TO THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE RULED BY THE COURT IS UNSUPPORTED BY THE LAW AND THE FACTS

In holding four defendants to answer for Count 2, the felony vandalism charge, the Court ruled that one "aids and abets the vandalism by his active trespass." (RT, 1/8/13, p. 143, ll. 17-22.) Clearly, there having been no evidence whatsoever of who the direct perpetrator of the vandalism may have been, only by way of the "natural and probable consequences" doctrine could one attempt to bootstrap the felony vandalism charge to a misdemeanor trespass. Cited by the defense, and distinguished by the Trial Court, is the case of Wawanesa Mutual Insurance Company v. Matlock in which the Court stated, "we are unaware of any legal authority which does [state] that by merely trespassing on property one necessarily becomes liable for all damage that can be linked to a fellow trespasser." The Court in this case distinguished the Wawanesa case on the basis that it was a Tort liability case and factually inapposite. (RT, 1/8/13, pp. 147-8.) What the Court failed to acknowledge is that the case need not be distinguished when the Court of Appeal clearly stated that it was **unaware of any legal authority** that would support the idea that vandalism is a natural and probable consequence of a trespass. If there is no authority to support such a groundbreaking legal doctrine, there is probably a good reason. Furthermore, the Court misstated the facts of

Wawanesa when it said, "[a]pparently that's the only case that's addressed the issue of whether vandalism or property damage can be attributed to an act of trespassing when there's no direct proof of vandalism." (RT, 1/8/13, p. 148, ll. 5-8.) First, it's the only case to acknowledge that there is no case allowing for such liability. Second, in Wawanesa there was direct proof of vandalism: the case established that Eric and Timothy Matlock were identified undeniably as the two trespassers and Eric was equally undisputed to have dropped the cigarette that caused the fire that resulted in the damage to the property in question. Contrast that with the facts of this case where there were up to 150 trespassers alleged, at least 139 of whom were never identified, and **not one person** has been established or even alleged as the direct perpetrator of the alleged vandalism, and it was not established what the condition of the property was prior to the alleged trespass (thus making it possible that the vandalism occurred any time in the three and a half years since the bank had been vacant), and Ms. Ripleyphipps has never even put in the building and it becomes clear how thin the thread of the bootstrap has become. Moreover, it was established at the hearing that one of the posted rules inside the bank was that there be "no vandalism" and that people "pick up after themselves." (RT, 1/7/13, p. 191.)

Assuming, arguendo, that this Court desires to co-sign the Trial Court's decision to make bold and unsupported new law in the area of trespasser liability pursuant to the doctrine of natural and probable consequences, that does not change the fact that the vandalism must indeed be a natural and probable consequence of the trespass in order for liability to follow.

> "When defendant assists or encourages confederate to commit one crime, and confederate commits another, more serious crime, which triggers application of natural and probable consequences doctrine, for defendant to be criminally responsible as accomplice, trier of fact must find that defendant, acting with knowledge of

> unlawful purpose of perpetrator, and intent or purpose of committing, encouraging, or facilitating commission of predicate or target offense, by act or advice aided, promoted, encouraged, or instigated, commission of target crime, that defendant's confederate committed offense other than target crime, and offense committed by confederate was natural and probable consequence of target crime that defendant aided and abetted."
>
> *People v. Prettyman* (1996) 14 Cal.4th 248

First it must be established that Ms. Ripleyphipps assisted or encouraged a confederate to commit one crime (the trespass) and that that confederate commits another (the vandalism) AND the vandalism must be found to be a natural and probable consequence of the target crime. Putting aside the fact that NOBODY knows who the "confederate" is, as nobody knows who committed the vandalism or when, in this case there was only evidence that Ms. Ripleyphipps attempted to aid in the transfer of information from the police to the people inside and facilitate an exit, not encourage or assist anyone in actually trespassing. "She was just the messenger," according to Lieutenant Richard. (RT, 1/7/13, p. 48.) The Lieutenant further stated that his and Ms. Ripleyphipps' "efforts to assist a smooth and painless exit from the building were ultimately successful." (RT, 1/7/13, pp. 50-1.) Similarly, Sergeant Harms testified that Ms. Ripleyphipps conveyed his message to the group and was "helping facilitate sort of a seamless departure or quelling of that situation." (1/7/13, p. 100, ll. 11-14.) Far from assisting or facilitating in an entry or a trespass, she, if anything, was assisting and facilitating in a smooth and problem-free exit, according the People's own witnesses.

Next the People would have to prove that, after Ms. Ripleyphipps assisted or encouraged a confederate to commit one crime (the trespass which, as stated above, the People DID NOT PROVE) that confederate commits another crime (the vandalism.) As stated above, there is no evidence whatsoever as to who committed the vandalism, when it happened, or even that it occurred during the period between November 30th and December

3rd, 2011. (RT, 1/8/13, pp. 195-6.) How to then link an unnamed confederate to Ms. Ripleyphipps is a tenuous task, at best. There was no evidence who that alleged confederate was, let alone that he or she indeed committed another crime (the vandalism.)

Finally, after failing to prove either of the first two elements of the crime, the People would then have to prove that the vandalism was, indeed, a natural and probable consequence of the target crime, the trespass. "The criminal law thus is clear that for liability to be found, the cause of the harm not only must be direct, but also not so remote as to fail to constitute the natural and probable consequence of the defendant's act." *People v. Roberts* (1992) 2 Cal.4th 271 at 319. It is worth noting that in *People v. Durham* (1969) 70 Cal. 2d 171 at pages 182 and 183, the Supreme Court formulated the question as whether the collateral criminal act was the ordinary and probable effect of the common design or was a fresh and independent product of the mind of one of the participants, outside of, or foreign to, the common design. (See also *People v. Luparello* (1986) 187 Cal. App. 3d 410, 444) In this case, even if the People established that Ms. Ripleyphipps had assisted and encouraged anyone to trespass into 75 River Street (which Counsel does not concede was ever established) it is clear that the objective of said trespass was in relation to the Occupy Santa Cruz movement or an offshoot of it. Vandalism was clearly **outside of and foreign to the common design**, and, thus, neither naturally foreseeable nor probable. This fact is further established by the existence of the rules testified to that there be "no vandalism" and that people "pick up after themselves." (RT, 1/7/13, p. 191.) Surely one cannot say, with a straight face, that vandalism falls under the definition of and ordinary and probable effect of the common design to not vandalize.

Thus, there being no law to support vandalism being a natural and probable consequence of a trespass, there being no evidence that Ms. Ripleyphipps assisted or

encouraged any confederate to trespass in the first place, there being no evidence whatsoever of who that confederate might have been, and it having been established that vandalism would have been outside the common design of such a trespass anyway, the defendant was committed on Count 2 without reasonable or probable cause.

CONCLUSION

For any and/or all of the reasons set forth above, the Motion to Set Aside the Information should be granted pursuant to *Penal Code* §995.

Dated: March 7, 2013

Respectfully Submitted,

Bryan J. Hackett
Attorney for Defendant
Gabriella Celeste Ripleyphipps

PROOF OF SERVICE

I, Bryan J. Hackett, personally served this NOTICE OF MOTION AND MOTION TO SET ASIDE THE INFORMATION PURSUANT TO *PENAL CODE* SECTION 995

on the 25th day of February, 2013, upon the following:

1. Santa Cruz County District Attorney
   701 Ocean Street, 2nd Fl.
   Santa Cruz, CA 95060

2. Superior Court of Santa Cruz County
   701 Ocean Street, Rm. 120
   Santa Cruz, CA 95060

I am a United States Citizen over the age of eighteen, and am employed by The Law Office of Bryan J. Hackett in the County of Santa Cruz, California.

Dated this 25th day of February 2013.