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**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

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DIVISION OF
ADMINISTRATIVE
HEARINGS

**DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,**)
)
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 Petitioner)
)
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vs.)
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)
)
DISCOVERY EXPERIMENTAL AND)
DEVELOPMENT, INC., et al.,)
)
)
 Respondents.)
)
 _____)

Case Nos. 93-6184 *CSH*
 95-2255
 97-3836
 98-4364
(Consolidated)

**MOTION TO SUPPRESS EVIDENCE DERIVED FROM
SEARCHES EXECUTED ON MAY 12, 1993**

COMES NOW Respondents, JAMES T. KIMBALL ("KIMBALL"), *pro se*, DISCOVERY EXPERIMENTAL AND DEVELOPMENT, INC. ("DEDI"), DISCOVERY TOUR WHOLESALERS, INC. ("TOURS") and JOSEPHINE KIMBALL ("MRS. KIMBALL") by and through their undersigned attorney, and move the Court to suppress all the evidence obtained in the searches described in this motion, and for grounds, says:

GENERAL ALLEGATIONS

1. On May 12, 1993, acting under federal search warrants, Government agents, conducted searches and seizures at the KIMBALLs' home, and at the business premises of "DEDI". These Government agents were accompanied by agents of the Florida Department of Health ("DOH"), the U.S. Customs Service ("CUSTOMS"), the U.S. Food and Drug Administration ("FDA"), United States Postal Service ("POSTAL SERVICE"), the Federal Bureau of Investigation ("FBI"), California Bureau of Narcotics ("CBN"), the Florida Department of Law Enforcement

(“FDLE”), Internal Revenue Service (“IRS”), Tampa Police Department Bomb Squad (“TPD”), and others. All of these agents were supposed to assist in the execution of the federal search warrants.

2. Prior to the execution of the May 12, 1993 federal search warrants, DOH, and Somerset Pharmaceuticals, Inc. (“SOMERSET”), with the assistance of the FDA, were individually, as well as jointly, investigating DEDI and KIMBALL for the purpose of filing civil actions against them, which both DOH and SOMERSET subsequently did.

3. Task Force Meetings (“MEETINGS”) were also held prior to the issuance of the search warrants to be executed at DEDI and at the KIMBALLs’ home. In these MEETINGS, the exact role each agency would play in the execution of the warrants was discussed. It was decided that DOH agents would use the federal warrant as “cover” to enter the KIMBALLs’ home, as well as the premises of DEDI, and after such entrance, that they would conduct their own warrantless search and seizure for their own purposes. FDA agents agreed to assist DOH in conducting DOH’s searches. DOH did, in fact, conduct warrantless searches of both places on May 12, 1993, with the aid of FDA agents.

4. In individual meetings between representatives of the Federal Government and SOMERSET, the Government proposed to supply SOMERSET carte blanche with information and documentation obtained from the planned searches. As a matter of fact, SOMERSET was advised by the Government as early as 1992 that the Government was planning a search and seizure of KIMBALL’s home, DEDI and other related companies, and the Government kept SOMERSET briefed on the status until the day of the search, and even thereafter.

5. When the warrants were obtained to search at the KIMBALLs’ home and at DEDI, the affiant did not disclose to the magistrate judge that the Government’s plan after obtaining the

warrants was to allow DOH to conduct their own warrantless search for a state civil action while the federal search warrants were being executed. Nor did the Government disclose to the magistrate judge that the Government planned to act on behalf of SOMERSET in its searches, and feed SOMERSET information to use in its civil action against DEDI and KIMBALL. This was done to reward SOMERSET for its help, and resulted in SOMERSET getting some of DEDI's trade secrets directly from the Government. Nor did the Government disclose to the magistrate judge that the Office of Statewide Prosecution, through the FDLE, was planning to conduct its own warrantless search for its own investigation for the State of Florida. In essence, the Government completely withheld from the magistrate judge facts that showed that the Government had actively planned to violate the KIMBALLS' and DEDI's Fourth Amendment rights prior to obtaining the federal search warrants.

6. The Government cannot claim ignorance regarding their plan to violate these constitutional rights, since the person overseeing these meetings was an Assistant United States Attorney in California. Additionally, an attorney from DOH was present at these meetings when the plan was conceived, and was fully aware that federal search warrants were to be obtained without full disclosure of their plan to conduct illegal searches and seizures, and to give information to SOMERSET and thereby violate the constitutional rights of DEDI and the KIMBALLS.

7. Upon obtaining the search warrants, Government officials executed the warrants as planned on May 12, 1993, and while executing these federal search warrants, the Government allowed DOH to conduct searches and confiscate material at DEDI's premises and the KIMBALLS' home for the State of Florida civil case. In fact, the Government was so bold that it allowed DOH to confiscate for its own purposes, articles listed in the federal search warrant which were supposed

to be seized by the Government, not by DOH. While the Government was executing the search warrants, they also allowed the FDLE unfettered access to search and seize items for the FDLE's own internal investigation for the Florida Office of Statewide Prosecution. Furthermore, the Government allowed the FDA to assist DOH in its warrantless searches and seizures. And while all of this was going on, under the guise of the Government's execution of the search warrants, the Government was seizing documents that it gave to SOMERSET. All of these actions took place under the umbrella of an ongoing grand jury investigation in California. Such conduct clearly violated the constitutional rights of DEDI and the KIMBALLs.

8. Upon the completion of the searches on May 12, 1993, which were supposedly conducted under the federal search warrants, both DOH and SOMERSET filed civil suits against DEDI and KIMBALL because they were now armed with the fruits of the May 12 search.

THE SEARCH OF THE KIMBALLS' HOME

9. DOH Agent Greg Jones ("JONES") accompanied the government agents to the KIMBALLs' home May 12, 1993 ostensibly for the purpose of assisting in the execution of the federal search warrant whose subject matter was "documents". However as aforesaid, DOH, and JONES in particular, was looking for violation of state law.

10. During the course of the search at the KIMBALLs' home, some unidentified agent came to JONES and told him that two large drums, or containers, had been found in a closet, and that JONES should come and look at them. JONES went and examined the drums and determined that they were 50 kg drums of ephedrine. Because JONES believed these drums to contain a prescription drug, he concluded their presence in the KIMBALLs' home was unlawful, and he seized

them under State authority.

11. Assuming for the sake of argument that JONES had a right to enter the KIMBALLs' house, and that the containers were actually incriminating, and therefore subject to an otherwise lawful seizure for that reason, since the Federal warrant only sought "documents", the containers would have to have been in "plain view" to justify their seizure without a warrant.

12. First of all, JONES used the federal warrant as a pretext to enter the KIMBALLs' home to look for violations of State law. He was not present to aid in the conduct of the Federal search, and this is demonstrated by JONES' own testimony that DOH planned in advance of the search to conduct its own warrantless inspection. When State agents are assisting federal agents in the execution of a federal search warrant, they may not conduct their own search and thereby convert a single entry and search into multiple lawful searches. Unites States v. Medlin, 842 F.2d 1194 (10th Cir. 1988); United States v. Foster, 897 F. Supp. 526 (E.D. Okl. 1995); United States v. Johnson, 994 F.2d 740 (10th Cir. 1993). Also, see Tagavore v. United States, 291 F.2d 262 (9th Cir. 1961) (rejecting pretextual search); United States v. Roberts, 928 F.Supp. 910 (W.D. Mo. 1996) (same).

13. Secondly, the containers were not in the "plain view" of any one so as to justify their seizure under that exception to the warrant requirement of the Fourth Amendment. Nor is there any evidence, other than JONES' own conclusion, that the containers were actually incriminating. In order to justify a seizure pursuant to the plain view doctrine, the officer or agent must not violate the Fourth Amendment in arriving at the place from the evidence can be plainly viewed, and the incriminating character of the evidence must be immediately apparent. See United States v. Borno, 946 F.Supp. 972, 976 (M.D. Fla. 1996) (citing Horton v. California, 496 U.S. 128, 131 (1990)).

JONES himself said some one came to him and told him that containers had been found; they were not plainly visible to him, nor is there any evidence to suggest that they were plainly visible to anyone else. JONES' presence in the home was pretextual. Finally, the fact that the federal agents chose not to seize the containers themselves demonstrates their belief that the presence of the containers in the KIMBALLS' home did not violate any federal law. Nor was JONES able, on his own, to make a determination that the presence of these containers in the KIMBALLS' home constituted a violation of Florida law.

14. Under these circumstances, the containers seized should be suppressed, along with any testimony regarding such containers. Moreover, because the containers were illegally seized, they should be returned to KIMBALL.

THE SEARCH OF DEDI'S PREMISES

15. When DOH agents entered DEDI's premises on May 12, 1993, they were accompanying federal agents as part of a Federal Task Force executing a federal search warrant. These DOH agents entered DEDI's premises under the "second wave" after the premises had been closed and sealed by the federal agents. All of DEDI's employees had been ordered to vacate the premises. At some point in time subsequent to all of DEDI's personnel leaving the premises, the DOH agents determined that they would conduct a warrantless inspection pursuant to state authority. At the time they made the determination to conduct the warrantless inspection, they did not announce this fact, nor did they identify themselves to any DEDI representative since no representative of DEDI was present on the premises. Neither had the DOH announced any inspection nor had they identified themselves to any DEDI representative prior to DEDI's personnel

being ordered to vacate the premises. As a matter of fact, DOH Agent Deborah Orr admitted that she did not notify anyone that she intended to conduct an inspection on May 12, 1993. MRS. KIMBALL, owner and operator of TOURS, was the only person present on the premises other than the agents participating in the search. The warrantless inspection, and the resulting seizure and stop-sale was not completed until after 8:00 o'clock p.m. on May 12, 1993.

16. The warrantless inspection conducted on May 12, 1993 should be invalidated, and the property seized or stop-saled by the DOH during the so-called warrantless inspection should be suppressed, and it returned to DEDI because DEDI was permitted as a drug manufacturer at that time, and the DOH did not follow the law which dictates how a warrantless inspection must be conducted with respect to a permitted facility. § 499.051(1), F.S. (1991) provides:

(1) The agents of the Department of Health and Rehabilitative Services and of the Department of Law Enforcement, after they present proper identification, may inspect, monitor, and investigate any establishment permitted pursuant to ss. 499.001-499.081 during business hours for the purpose of enforcing ss. 499.001-499.081, chapters 465, 501, and 893, and the rules of the department that protect the public health, safety, and welfare.

This provision would require DOH agents to identify themselves and announce their intent to conduct an inspection of any permitted facility, and to conduct the same during business hours. DEDI was a permitted facility on May 12, 1993, and therefore, to properly conduct a warrantless inspection, DOH agents were required to identify themselves to DEDI, to announce their intention to conduct an inspection, and to conduct such inspection during business hours.

17. Warrantless inspections have been held constitutionally permissible only as long as three criteria are met: (1) the State has a substantial interest in regulating the industry in question; (2) regulation of the industry in question reasonably serves the State's substantial interest; and (3)

the provision for warrantless inspection provide a constitutionally adequate substitute for a warrant. **New York v. Burger**, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987). To satisfy the criteria as a constitutionally adequate substitute for a warrant, the statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. **Marshall v. Barlow's, Inc.**, 436 U.S. 307, 323, 98 S.Ct. 1816, 1826, 56 L.Ed.2d 305 (1978). The significance of these United States Supreme Court decisions is that they emphasize the importance of a statute which authorizes warrantless inspections in controlling the discretion of officers by limiting the time, place and scope of any inspection. **United States v. Biswell**, 406 U.S. 311, 315, 92 S.Ct. 1593, 1596, 32 L.Ed.2d 87 (1972). So, the limitations upon making or conducting warrantless inspections contained in the regulatory statute are very important. As evidence of that concept, it has been held that when the legislature provides that an administrative power shall be exercised in a certain way, such prescription precludes the doing of it another way. **Kirk v. Publix Super Markets**, 185 So.2d 161 (Fla. 1966).

18. Since the DOH agents admittedly entered DEDI's premises initially under the authority of the federal search warrant, and as part of the Federal Task Force, for the purpose of assisting the federal agents, when they decided to "switch hats" and conduct a warrantless inspection under the authority of state law, they did not follow, nor could they have followed, the procedure prescribed by State law. The reasons are that when the decision to inspect was made, there was no representative of DEDI present to whom the DOH agents could identify themselves, and the business of DEDI had been closed down by Federal agents. Additionally, the DOH continued its "inspection" well into the nighttime hours which were beyond any "business hours" observed by

DEDI. Finally, and most importantly, DOH Agent Deborah Orr admitted that she did not notify anyone that she intended to conduct an inspection on May 12, 1993.

19. It has been held that cooperation between federal and state law enforcement agencies in the execution of a search is not impermissible per se. United States v. Evans, 572 F.2d 455 (5th Cir. 1978). However, as pointed out above, when state agents are assisting federal agents in the execution of a federal search warrant, they may not conduct their own search and thereby convert a single entry and search into multiple lawful searches. Medlin; Foster, supra. Here, the federal agents who executed the search warrant on May 12, 1993 were supposedly “assisted” by not only DOH agents, but agents from many other agencies, both State and Federal. This fact alone would not make the search faulty; however, once the DOH agents began to conduct their own warrantless inspection with the help of FDA agents pursuant to their state authority to inspect drug manufacturing establishments, then the search could no longer be considered a single entry under the federal search warrant. DOH agents have admitted that they entered DEDI’s premises under the “second wave” after the premises had been closed and sealed by Federal agents, and DEDI’s employees had been ordered to vacate the premises. When the DOH agents made the determination to conduct a warrantless search pursuant to State authority, all of DEDI’s personnel had been removed from the premises, and DOH did not, because it could not, announce its intention to conduct such a warrantless search. Nor had DOH announced any inspection prior to DEDI’s personnel being ordered to vacate the premises. DOH seized a number of documents and other items for its own use during its warrantless search. Under § 499.051(1) F.S. (1991), DOH is given the authority to conduct a warrantless inspection of any establishment permitted under Chapter 499 (Florida Drug Law) if the agents identify themselves, announce their intent to conduct an inspection,

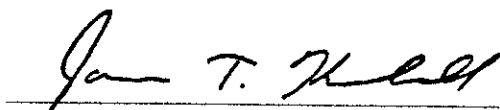
and conduct the same during business hours. However, this statute does not give DOH any other authority, nor does it authorize DOH to combine its own warrantless search with a search conducted under a warrant. Such warrantless search constituted a separate entry, and therefore exceeded the scope of the Federal warrant. Under Medlin and Foster, supra, this taints the entire search, and all items seized should be suppressed.

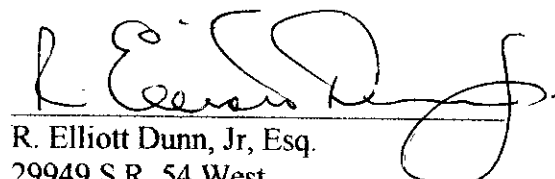
Summary

For the reasons set forth herein, any articles seized in the search of the KIMBALLs' home, or in the search of DEDI should be suppressed, and ordered returned to either the KIMBALL's or to DEDI. In addition, Respondents request a hearing on this motion.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by facsimile and by US Mail to Robert P. Daniti, Esquire, Assistant General Counsel, Florida Dept. of Health, 4052 Bald Cypress Way, BIN A02, Tallahassee, FL 32399; and by US Mail to Toni A. Kimball, 3122 49th Avenue North, St. Petersburg, FL 33714, this 6th day of April, 2001.


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