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11 **BEFORE THE**
12 **STATE OF CALIFORNIA**
13 **OCCUPATIONAL SAFETY AND HEALTH**
14 **APPEALS BOARD**

15 In the Matter of the Appeal of:

16 **CALVARY CHAPEL OF SAN JOSE**
17 **dba CALVARY CHRISTIAN ACADEMY,**

18 **Employer.**

19 Inspection No.

20 **1564732**

21 **EMPLOYER'S MOTION TO**
22 **SUPPRESS EVIDENCE**

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1 **INTRODUCTION**

2 The fundamental purpose of the Division of Occupational Safety and Health (“the
3 Division”) is to advance the health and safety of employees in the State of California. Cal. Lab.
4 Code § 6300. However, the authority of the Division is not without statutory and constitutional
5 boundaries. When those limits are exceeded, judicial bodies are empowered to suppress illegally
6 obtained evidence to deter future misconduct. Here, the Division obtained an inspection warrant
7 which, as described in detail below, was grossly constitutionally deficient. That warrant was then
8 used to conduct a wall-to-wall search of a small private school for California Occupational Safety
9 and Health Act violations. While the Division alleges that they ultimately found violations, that
10 “cannot be used to retroactively justify” the constitutional abuses that occurred. *People v.*
11 *Perrusquia*, 150 Cal. App. 4th 228, 234 (2007). This Court ought to suppress all evidence obtained
12 as a result of that illegal search.

13 **STATEMENT OF FACTS**

14 Calvary Christian Academy (“the Academy”) is a private, non-denominational, Christian
15 school located in San Jose, California. The school is a ministry of Calvary Chapel San Jose (“the
16 Church”), a local church, in whose facilities the Academy is run.

17 On November 16, 2021, the Fremont District Office of the Division allegedly received a
18 complaint that the Academy “was not complying with Title 8, section 3205, COVID-19 Prevention,
19 face covering and outbreak reporting requirements.” Haskell Decl. ¶ 3.¹ Two days later, two Safety
20 Engineers from the Division opened an inspection into the Academy and decided to inspect the
21 premises.

22 When they arrived at the school’s administrative office, an employee of the school named
23 Jennie Wood (“Ms. Wood”) greeted them outside. Allegedly, Ms. Wood did not wear a face
24 covering while conversing with the Division agents (“agents”), Haskell Decl. ¶ 4; however, health
25 mandates in effect at the time did not require face coverings outdoors. *Guidance for the Use of*
26 *Masks*, Cal. Dep’t of Pub. Health (July 28, 2021),

27 _____
28 ¹ The Haskell Declaration was submitted in support of the Division’s request for the inspection warrant. It is attached
in full as Exhibit 2.

1 <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/guidance-for-face-coverings->
2 [07-28-2021.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/guidance-for-face-coverings-07-28-2021.aspx); see *Order of the Health Officer of the County of Santa Clara Requiring Use of*
3 *Face Coverings Indoors by All Persons*, Cnty. Of Santa Clara Pub. Health Dep't 1-2 (Aug. 2, 2021),
4 [https://covid19.sccgov.org/sites/g/files/exjcpb766/files/documents/Health-Officer-Order-August-](https://covid19.sccgov.org/sites/g/files/exjcpb766/files/documents/Health-Officer-Order-August-2-2021.pdf)
5 [2-2021.pdf](https://covid19.sccgov.org/sites/g/files/exjcpb766/files/documents/Health-Officer-Order-August-2-2021.pdf). When the agents asked to speak with a school administrator, Ms. Wood told them the
6 administrator was across the street and offered to call him. A few minutes later, Mike McClure
7 (“Mr. McClure”) and Bill Shepherd arrived, and Ms. Wood told the agents that these were the men
8 they needed to meet with. Mr. McClure is the Senior Pastor at Calvary Chapel San Jose and the
9 head of the Academy.

10 The Division agents told Mr. McClure they were there in response to a complaint. Mr.
11 McClure asked the identity of the complainant and the nature of the complaint, but the agents
12 refused to provide this information, citing confidentiality concerns. Mr. McClure explained to the
13 agents that since the Church was involved in litigation, he would not discuss anything further with
14 them.² He provided the agents with the contact information of the Church’s attorney, Mariah
15 Gondeiro, and then politely declined the agents’ request to inspect the Academy premises.

16 Thirteen days later, on November 29, 2021, the Division applied to the Santa Clara Superior
17 Court for a warrant to inspect the Academy for violations of Cal/OSHA regulations. In support of
18 the application, the Division attached a declaration from Richard Haskell in which he noted that his
19 office had received a complaint, and that he had tried to inspect the premises but was turned away.
20 Haskell Decl. ¶ 3-5. He asked that a warrant be issued and that the statutory twenty-four hour notice
21 provision pursuant to Cal. Civ. Proc. Code § 1822.56 be waived. Haskell Decl. ¶ 12.

22 The warrant was granted the same day (with the twenty-four hour notice provision waived),
23 and the Division subsequently inspected the Academy on November 30, 2021 and on December 2,
24 2021.³

25 On March 10, 2022, the Division issued twelve citations to the Academy, totaling \$67,330
26 in proposed penalties. The majority of the fines related to COVID-19 regulations.

27 ² While the Division’s affidavit stated that Mr. McClure claimed the legal action was with the State of California,
28 Haskell Decl. ¶ 5, the litigation is actually with the County of Santa Clara.

³ The warrant is attached in full as Exhibit 1.

1 **ISSUE**

2 Under the Fourth Amendment and California Constitution Article I, section 13, should the
3 Court suppress evidence gained through a Cal/OSHA inspection warrant when the affidavit used
4 to support the warrant application (i) contained only one sentence regarding the complaint
5 precipitating the search, (ii) gave no details regarding the facts alleged in the complaint, (iii) gave
6 no information regarding the source or credibility of the complaint, and (iv) contained no claim that
7 the Division believed violations were ongoing or that the place of employment was unsafe for
8 employees?

9 **ARGUMENT**

10 **I. This Court should grant the motion to suppress because the Division failed to show**
11 **probable cause as required by the Fourth Amendment when it obtained its search**
12 **warrant.**

13 The Fourth Amendment and the California Constitution prohibit unreasonable searches and
14 seizures. U.S. Const. amend. IV; Cal. Const. art I, § 13. A “search” includes any government
15 intrusion into an area where there is a reasonable expectation of privacy. *In re Cody S.*, 121 Cal.
16 App. 4th 86, 92 (2004). Generally, in order to conduct a search without consent, the government
17 must obtain a warrant. *Camara v. Mun. Ct. of City & Cnty. of S.F.*, 387 U.S. 523, 528-29 (1967).
18 When a warrant is required, the standard of “probable cause” is used to determine the
19 reasonableness of the proposed search. *Id.* at 534.

20 In order to incentivize law enforcement agents to comply with these constitutional
21 protections, courts have developed the exclusionary rule. This rule prohibits the use of evidence
22 that was obtained in violation of the Fourth Amendment. *Davis v. United States*, 564 U.S. 229, 231-
23 32 (2011). The precedential decisions of the Occupational Safety and Health Appeals Board make
24 clear the exclusionary rule applies in proceedings before this Court as well. *E.g., In re Bimbo*
25 *Bakeries USA*, No. 03-R1D3-5217, 2010 WL 2706195, at *6 (Cal. Occ. Safety & Health Appeals
26 Bd. June 9, 2010) (decision after reconsideration). The burden of proof is initially on the employer
27 to sufficiently allege that it had an interest protected by the Fourth Amendment (in other words,
28 that it had a “reasonable expectation of privacy”), and that the Division infringed on that interest;
from that point forward, the burden shifts to the Division to prove that their inspection did not

1 violate the employer's Fourth Amendment rights. *Id.* at *9. While the suppression of illegally
2 obtained evidence is not a constitutional right per se, the exclusionary rule is properly applied when
3 exclusion would deter future illegal conduct (which is the primary purpose of the rule). *Illinois v.*
4 *Krull*, 480 U.S. 340, 347 (1987). In those instances where suppression would not deter future
5 violations, the government can attempt to have the evidence allowed in under the "good faith"
6 exception to the exclusionary rule. *See U.S. v. Leon*, 468 U.S. 897, 922 (1984).

7
8 **A. The Academy had a reasonable expectation of privacy which the Division
inspectors infringed upon when they inspected the Academy.**

9 A reasonable expectation of privacy exists when a person subjectively expects privacy, and
10 that expectation is objectively reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan,
11 J., concurring); *People v. Nishi*, 207 Cal. App. 4th 954, 960 (2012). The totality of circumstances
12 is considered in making this assessment, including "whether he has the right to exclude others from
13 that place; whether he has exhibited a subjective expectation that it would remain free from
14 governmental invasion; whether he took normal precautions to maintain his privacy and whether
15 he was legitimately on the premises." *Nishi*, 207 Cal. App. 4th at 961 (quoting *In re Rudy F.*, 117
16 Cal. App. 4th 1124, 1132 (2004)). Because this expectation is not presumed, evidence must be
17 offered to establish it. *In re Bimbo Bakeries USA*, 2010 WL 2706195, at *7.

18 Such evidence is abundant here. The Academy is a private institution run by and out of a
19 church; the religious, private, affiliated character of the Academy renders it a naturally closed
20 community. The Academy additionally fits all the descriptors outlined in *Nishi* and *Rudy*: as a
21 ministry of the Church, the Academy has a possessory right in the Church facilities; the Academy
22 is not open to the public, in that it maintains the right to exclude non-students and others from the
23 property; and the Academy has exhibited its expectation of privacy by, among other things, refusing
24 to initially let the Division inspect. Because the Academy is surrounded by a security fence, it is
25 inherently secluded and private.

1 **B. The Haskell Declaration was wholly inadequate in alleging probable cause for an**
2 **inspection warrant.**

3 The standard for probable cause for an administrative inspection warrant is relaxed from
4 the criminal probable cause standard. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978)
5 (“[P]robable cause in the criminal law sense is not required.”); *see also Salwasser Mfg. Co. v.*
6 *Occupational Safety. & Health Appeal Bd.*, 214 Cal. App. 3d 625, 629 (1989) (*Salwasser II*)
7 (holding that Cal-OSHA warrants need not comply with the Penal Code). Since most administrative
8 inspections (e.g., housing inspections under a municipal code) do not have the primary purpose of
9 revealing criminal activity, a warrant can be obtained by showing that a reasonable legislative or
10 administrative standard for inspection was met by the premises. *Camara*, 387 U.S. at 538. However,
11 this standard does not apply to the Division since Cal/OSHA violations can carry criminal as well
12 as civil penalties; the Division was required to show to the Superior Court judge that the Division
13 reasonably believe a violation was ongoing. *Salwasser Mfg. Co. v. Mun. Ct.*, 94 Cal. App. 3d 223,
14 231-33 (1979) (*Salwasser I*). The standard of probable cause for Cal/OSHA warrants is the same
15 as for federal OSHA warrants predicated on evidence of a violation.⁴ *Salwasser II*, 214 Cal. App.
16 3d at 632.

17 In order to make that showing, the affidavit presented to the judge or magistrate must lay
18 out “some plausible basis for believing that a violation is likely to be found.” *Marshall v. Horn*
19 *Seed Co.*, 647 F.2d 96, 102 (10th Cir. 1981). If a complaint is the catalyst for the inspection, a mere
20 summary statement in an affidavit that a complaint was received will not suffice. *Burkart Randall*
21 *Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1319 (7th Cir. 1980). The judge must be provided
22 with enough details to give a “basis for believing that complaints were actually made, that the
23 complainants were sincere in asserting that a violation existed, and that they had some plausible
24 basis for entering a complaint. A conclusory statement in the warrant application that employee
25 complaints have been received, without more, is insufficient to establish probable cause.” *Cnty of*

26 _____
27 ⁴ Federal case law on the subject is much more plentiful than California case law; since the standard is the same,
28 federal case law is instructive. The Court of Appeal in *Salwasser II* essentially adopted the standards from the 7th,
10th, and 11th federal Circuit Courts. *Salwasser II*, 214 Cal. App. 3d at 632 (“[T]he circuit court guidelines set forth
above are reasonable.”).

1 *Contra Costa v. Humore, Inc.*, 45 Cal. App. 4th 1335, 1347 (1996). The Tenth Circuit laid out a
2 number of helpful criteria for what ought to be included in a warrant application’s affidavit
3 predicated on complaints received: (i) the substance of the complaint, so that the judge can
4 determine if the allegations actually constitute a violation of Cal/OSHA; (ii) whether the complaint
5 was received by the affiant personally, or to some other official known to the affiant; (iii) the source
6 of the complaint—an employee, competitor, customer, etc.—although the name of the complainant
7 does not always have to be divulged; (iv) a copy of the complaint, if it was received in written form
8 (complainant’s name can be redacted); (v) any steps taken by the affiant to verify the information
9 in the complaint; (vi) any personal observations of the premises, and (vii) the employer’s past
10 history of violations. *Horn Seed*, 647 F.2d at 103. “Only with such information can the magistrate
11 actually determine ‘the need for the intrusion’ and execute his duty of ‘assur(ing) that the proposed
12 search will be reasonable.’” *Id.* (quoting *Michigan v. Tyler*, 436 U.S. 499, 507 (1978)).⁵

13 In *Marshall v. Horn Seed Co.*, the Tenth Circuit evaluated an application for a federal
14 OSHA warrant predicated on complaints received and found that probable cause was lacking
15 because insufficient information about the complaints was given to the magistrate. 647 F.2d at 104.
16 A compliance officer from OSHA had applied for a warrant to search Horn Seed Company for
17 workplace violations after receiving complaints—initially by telephone, and then followed up with
18 written complaint forms. *Id.* at 98, 104. The affidavit contained a statement that complaints were
19 received, briefly summarized five alleged workplace conditions, and ended with a template
20 statement that the officer believed violations were occurring.⁶ *Id.* at 98. The Company refused to

21 ⁵ The court was careful to note that they were requiring only that OSHA divulge what information it has regarding
22 each of these, not that each be present in every case; this is enough to ensure that OSHA will not be unduly impeded
23 in its efforts. *Horn Seed Co.*, 647 F.2d at 103. “For instance, we are not holding that the affiant must always have
24 personally received the complaint or have personal knowledge of the facts surrounding the making of the complaint.
25 Nor do we require that the affiant always have taken steps to verify the complaint. However, the degree of firsthand
26 knowledge possessed by the affiant is certainly relevant to the magistrate’s determination of the complaint’s sincerity
and to whether the complaint provides some basis for believing that a violation may exist. A signed, written
employee complaint containing detailed information demonstrating first hand knowledge may be so compelling that
further verification is unnecessary. On the other hand, more may be demanded when the complaint is a simple
allegation by a competitor or an unknown caller that an OSHA violation exists . . .” *Id.*

⁶ The text of the affidavit read:

27 On November 7 and November 15, 1978, complaints were received by the Oklahoma City
28 Area Office of OSHA concerning the following hazards which were alleged to exist at the
above-described employer's work place: (1) No respiratory protection is provided for

1 honor the warrant. *Id.* When faced with the possibility of civil contempt, the Company argued that
2 the affidavit did not have enough details about the complaints to meet the probable cause standard.
3 *Id.* The compliance officer did not receive the initial telephone complaints and did not know who
4 had. *Id.* at 104. The written complaints were never provided to the magistrate. *Id.* The magistrate
5 was also never told that the complainants claimed to be employees, and the agency had done
6 nothing to verify that status. *Id.* Because the magistrate did not have the information needed to
7 verify that “the complaint appears genuine and provides some basis for believing that a violation
8 may exist on the premises,” the court ruled that no probable cause existed and quashed the warrant.
9 *Id.*

10 Similarly, the Seventh Circuit in *Weyerhaeuser Co. v. Marshall* held that probable cause
11 was lacking in an affidavit that contained only “unrelieved boilerplate” language. 592 F.2d 373,
12 378 (7th Cir. 1979) (*Weyerhaeuser II*) *aff’g* 452 F. Supp. 1375 (E.D. Wis. 1978) (*Weyerhaeuser I*).
13 In that case, a corrugated box manufacturer sued after federal OSHA officers conducted an
14 inspection. *Weyerhaeuser I*, 452 F. Supp. at 1376. Initially, the company refused entry to the
15 agency, but the inspection was completed after the officers came back with a warrant. *Id.* at 1377-
16 78. This led to citations for numerous violations. *Id.* The warrant application stated that OSHA had
17 received a written complaint from an employee alleging OSHA violations. *Id.* at 1378-79.
18 Additionally, the application stated that “OSHA has determined that there are reasonable grounds
19 to believe that such violations exist, and desires to make . . . [an] inspection” *Id.* The court
20 rejected this affidavit; this level of detail would only allow the magistrate to “rubber-stamp” the
21 agency’s pre-drawn conclusion that probable cause existed. *Weyerhaeuser II*, 592 F.2d at 378.

22 By contrast, the California Court of Appeal held in *Salwasser II* that probable cause was
23 sufficiently present in an affidavit that contained descriptions of follow-up and investigation done

24 employees working with and around chemicals, insecticides, pesticides, etc.; (2) No safety
25 belts used with ‘Pickers’; (3) No hard hats; (4) Truck drivers operate under influence of
26 drugs; (5) Some trailers have faulty tires; Flammable storage tank (diesel) creates hazard
by leakage; Excessive dust in storage areas.

27 Based on the above complaints, I have reason to believe that there may be violations of the
Occupational Safety and Health Act which could cause serious bodily injury or death to
28 the employees exposed to the above.

Horn Seed Co., 647 F.2d at 98.

1 after receiving a complaint. 214 Cal. App. 3d at 633. An employee of Salwasser Manufacturing
2 had contacted the Division by telephone about multiple unsafe conditions at the plant. *Id.* at 627.
3 An industrial hygienist and two safety engineers with the Division conversed with the complainant
4 on at least three separate occasions. *Id.* This led them to believe that violations were indeed
5 occurring. *Id.* The Division secured a warrant and inspected the premises; Salwasser was cited for
6 nineteen violations. *Id.* The affidavit in support of the warrant application recited how the employee
7 who made the complaint had been employed at Salwasser for more than three years, and the
8 Division believed the complainant was genuinely motivated by safety concerns. *Id.* at 632-33.
9 Further, the Division had followed up numerous times to ensure the conditions still existed before
10 requesting the warrant. *Id.* at 633. The affidavit listed, in detail, thirteen different violations the
11 Division believed were occurring. *Id.* The affidavit was signed by one of the Division agents who
12 had personally interacted with the complainant. *Id.* at 632. Salwasser appealed the citations and
13 moved to suppress the evidence; when their citation appeal was denied, Salwasser filed for a writ
14 of mandate in the Superior Court. *Id.* at 628.

15 In light of case law, the affidavit presented by the Division here was manifestly deficient.
16 The Haskell Declaration contains less pertinent information than even the insufficient affidavit in
17 *Horn Seed Co.* That affidavit at least recited several facts from the complaint that was received.
18 The Haskell Declaration, by contrast, contains no factual details from the complaint; it notes only
19 the legal conclusion that the Academy was “not complying with” regulations. In fact, the Haskell
20 Declaration is ominously similar to the affidavit in *Weyerhaeuser* in that it provides no factual
21 information for the judge to evaluate. The only truly factual allegations in the Haskell Declaration
22 revolve around the Academy’s refusal of entry to the Division. While refusal of entry is a statutory
23 prerequisite for the Division to obtain a warrant, Cal. Lab. Code § 6314(b), it is not a showing of
24 Fourth Amendment probable cause.

25 Conversely, the Haskell Declaration looks nothing like the sufficient affidavit presented in
26 *Salwasser II*. While the *Salwasser II* affidavit explained the source of the complaint received and
27 the numerous contacts with the complainant, the Haskell Declaration recites zero follow-up on the
28 part of the Division. Also, unlike *Salwasser II*, in which the affidavit contained a detailed list of

1 suspected violations, the Haskell Declaration never mentions what violations it hopes to investigate
2 with the warrant.

3 Perhaps the most glaring omission from the Haskell Declaration is the absence of a
4 statement that the Division believed violations were ongoing and/or that employees were working
5 in conditions that threatened their health or safety. Even the insufficient *Weyerhaeuser* affidavit
6 contained such an “unrelieved boilerplate” statement. Since warrants to investigate Cal/OSHA
7 violations must be predicated on a reasonable belief that violations are ongoing, the lack of a sworn
8 statement to that effect is not a mere technical omission. The Haskell Declaration fails in its most
9 basic purpose. An affidavit that does not list the violations to be investigated, or even that any
10 violations are currently suspected by the Division (not just the complainant), cannot possibly show
11 probable cause.

12 In fact, not even the two pieces of the Haskell Declaration that could possibly be cited by
13 the Division can save this warrant : (i) the complaint received by the Division, and (ii) the
14 Division’s initial contact with Ms. Wood. Neither approaches even the relaxed administrative
15 probable cause standard necessary to obtain an inspection warrant.

16 *1. The details about the complaint received are not enough to establish probable*
17 *cause.*

18 The Haskell Declaration is lacking in all but one fact listed by the Tenth Circuit in *Horn*
19 *Seed Co.* as being necessary to properly evaluate an affidavit. First, the substance of the complaint
20 is not given; the allegation is summarized only as “Calvary Christian Academy was not complying
21 with Title 8, section 3205, COVID-19 Prevention, face covering and outbreak reporting
22 requirements.” This is not a factual allegation; this is a legal contention. No facts from the complaint
23 (if indeed the complaint contained any facts) are given so that the judge can determine whether they
24 actually constitute a violation of Title 8.

25 Second, the Haskell Declaration fails to state who at the Fremont District Office received
26 the complaint—the affiant or someone else. The issuing judge had no way of knowing the degree
27 of firsthand knowledge Mr. Haskell had about the complaints received.

28

1 Third, the Haskell Declaration never gives the source of the complaint. Since the Church is
2 currently embroiled in litigation with the County of Santa Clara, the source of the complaint (and
3 perhaps even the identity of the complainant) is critically pertinent. The issuing judge should have
4 had the opportunity to weigh a complaint received from an opposing party differently than the
5 complaint of an employee. The judge was not afforded that opportunity.

6 Fourth, the Haskell Declaration fails to specify how the complaint was communicated—
7 phone, writing, etc.—much less attach a written copy for the judge to see. While the Division cited
8 confidentiality concerns to the Academy when refusing to divulge information, it could easily have
9 kept confidentiality by redacting the name of the complainant (which the *Horn Seed Co.* factors
10 allow for). Confidentiality does not provide a basis for the rest of the complaint to be kept entirely
11 hidden from both the Academy and the issuing judge.

12 Fifth, the Haskell Declaration identifies no steps that were taken to verify the allegations in
13 the complaint before attempting an inspection. Perhaps the explanation for this is that the Division
14 simply refused to do any actual verification before attempting an inspection. If in fact any steps
15 were taken to probe the complaint before inspecting, they were not included in the affidavit for the
16 judge's review.

17 Sixth, Haskell Declaration *did* include brief observations of the property. However, the
18 Division never alleged in the Declaration that they saw anything prompting them to believe that
19 violations were actively occurring. *See* discussion *infra* Section I.B.2.

20 Seventh, the Haskell Declaration mentions nothing regarding whether the Academy has a
21 history of past violation history. Of course, the Academy has no such history; further, no evidence
22 has been brought forward that any of the employees have felt at all unsafe while working there.

23 This gross failure to produce facts a judge could evaluate is fatal to the Division's warrant
24 application. The Haskell Declaration's recitation of the complaint (to the extent it can even be
25 considered that) is entirely insufficient as a basis for probable cause.

1 2. Ms. Wood’s appearance outside without a facemask was not in violation of
2 Division requirements and cannot be a basis for probable cause.

3 The Haskell Declaration makes no claim that the Division observed unlawful behavior at
4 any time prior to the warrant application. However, it mentions that Ms. Wood, an employee of the
5 Academy, came out of the administrative office and talked with the Division agents “not wearing
6 a face covering.” Haskell Decl. ¶ 4. To the extent that this was meant to subtly suggest that the
7 Division witnessed a violation, the Declaration is misleading. Facemasks were not required
8 outdoors at the time the interaction took place. *Guidance for the Use of Masks, supra*. Legal
9 behavior cannot possibly be used as a basis for probable cause.

10 **C. The Good Faith Exception does not apply to the warrant obtained by the Division.**

11 Courts will allow the introduction of illegally obtained evidence when exclusion would
12 serve only to punish law enforcement for the errors of the magistrate and government officials have
13 otherwise acted in good faith in asking for the warrant (the “good faith” exception to the
14 exclusionary rule). *See United States v. Leon*, 468 U.S. 897, 919-20 (1984). However, if
15 government officials have misled the magistrate or presented an affidavit which they cannot
16 reasonably believe to be demonstrative of probable cause, the exception does not apply, and the
17 evidence should be suppressed. *Id.* at 922-23. The exception also does not apply if it is clear that
18 the magistrate “wholly abandoned his judicial role” in evaluating the affidavit. *Id.* This is in keeping
19 with the primary purpose of the exclusionary rule—detering law enforcement from improperly
20 asking for warrants. *Id.* at 916 (“First, the exclusionary rule is designed to deter police misconduct
21 rather than to punish the errors of judges and magistrates.”).

22 1. The Good Faith exception does not apply because the Haskell Declaration was
23 misleading in several respects.

24 When an affidavit is misleading—through negligent, reckless, or dishonest preparation—
25 suppression is appropriate, and the “good faith exception” does not apply. *See id.* at 926; *People v.*
26 *Ivey*, 228 Cal. App. 3d 1423, 1426-27 (1991). The Haskell Declaration was misleading in several
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28

1 respects, which could have changed the way the issuing judge saw the warrant application. These
2 misrepresentations destroy any good faith exception the Division may claim.

3 First, the Division was misleading in the way it portrayed the interaction with Ms. Wood.
4 *See* discussion *supra* Section I.B.2. The Haskell Declaration first averred that the Division received
5 a complaint related to “face covering[s],” and then it mentioned that agents observed Ms. Wood
6 outside “not wearing a face covering.” The Declaration deliberately omits the fact that wearing face
7 coverings outdoors was not required. This could lead a reader to assume that the agents witnessed
8 a violation. The intent to mislead is clear; if the Declaration was not meant to convey this
9 impression, the fact that Ms. Wood was not wearing a mask outside would not have been included.
10 For this reason, the Division should be denied the good faith exception.

11 Secondly, the Division misled the issuing judge on the legal standard regarding issuance of
12 the warrant. The Haskell Declaration reads that “[c]ause for issuance of a warrant shall be deemed
13 to exist ‘ . . . if any complaint that violations of occupational safety and health standards exist at the
14 place of employment has been received by the division.” Haskell Decl. ¶ 10 (citing Cal. Lab. Code
15 § 6314(b)). The Division left its recitation of legal cause for issuance of the warrant at that one
16 sentence. The Division neglected to provide any mention of the constitutional standard required by
17 the Fourth Amendment, which cannot be superseded by state statute. Section 6314(b) is not a
18 definition of the probable cause standard required under the Fourth Amendment; it is in fact a
19 separate, additional statutory standard that the Division must meet. The Division left this distinction
20 either deliberately, negligently, or ignorantly blurred.

21 Third, the Haskell Declaration misled the court by stating that Cal. Lab. Code § 6321
22 required the waiver of the twenty-four hour notice provision in the Civil Procedure Code, allowing
23 for immediate execution of the warrant. Haskell Decl. ¶ 12. The Code of Civil Procedure provides
24 that when administrative warrants are granted, “[w]here prior consent has been sought and refused,
25 notice that a warrant has been issued must be given at least 24 hours before the warrant is executed,
26 unless the judge finds that immediate execution is reasonably necessary in the circumstances
27 shown.” Cal. Civ. Proc. Code § 1822.56. The Declaration made no pretense to show that waiver
28 was “reasonably necessary,” and indeed with its “circumstances shown” hardly could—the warrant

1 was sought 11 days after the Academy declined consent to inspect. Rather, the Declaration asserted
2 only that waiver was appropriate “[b]ecause Labor Code section 6321 prohibits giving advance
3 notice of an inspection.” Haskell Decl. ¶ 12. That statute reads, in pertinent part, “No person or
4 employer shall be given advance warning of an inspection or investigation by any authorized
5 representative of the division unless authorized under provisions of this part.” Cal. Lab. Code §
6 6321. The statute further provides that the chief of the Division has some authority to allow
7 exceptions to this rule. *Id.*

8 The position that the Haskell Declaration held out to the issuing judge was that these two
9 statutes are in conflict and that the Labor Code controls over the Civil Procedure Code. The premise
10 necessarily underlying this assertion is that any mention of an inspection due to take place in the
11 unspecified future would constitute a “warning” under the Labor Code. Under such a construction,
12 if the Division gave twenty-four hours' notice (or more—even several days' notice) that a warrant
13 would be executed at some undisclosed point in the future, the Division would be in violation of
14 Section 6321. The Declaration holds out no case law for this position, and indeed there is none to
15 be found. However, other administrative law judges of this Court have reached the opposite
16 conclusion, finding that these statutes are reconcilable; see *In re Forty-Niner Sierra Resources,*
17 *Inc.*, No. 90-R2D4-165, 1991 WL 528425, at *7 (Cal. Occ. Safety & Health Appeals Bd. July 15,
18 1991) (decision after reconsideration) (finding that Section 6321 is a direction to the Chief of the
19 Division, not to courts issuing inspection warrants; judges can consider the statute as a factor in
20 determining whether to waive the requirements of Section 1822.56, but the facts ultimately provide
21 the basis for waiver).⁷

22 The logical construction of the two statutes reconciles them and holds that “warning” under
23 the Labor Code is necessarily narrower than “notice” under the Civil Procedure Code. This makes
24 sense given the purposes of the statutes; the Labor Code is concerned with employers knowing
25 exactly when to expect a Division inspection, see *In re Pacific Bell*, No. 99-R1D5-2014, 2000 WL
26 36722335, at *6 (Cal. Occ. Safety & Health Appeals Bd. March 23, 2000) (finding the main concern

27 ⁷ It is worth noting that when the California Legislature amended Cal. Civ. Proc. Code § 1822.56 in 1980 to update
28 the statute after the passage of Cal/OSHA, they did not modify the twenty-four hour notice requirement or add any
limitations to it.

1 with advance notice is giving the employer a “heads up”), while the Civil Procedure Code is
2 concerned with ensuring that entities are ready to properly and peacefully admit inspectors, *cf.*
3 *People v. Tillery*, 211 Cal. App. 3d 1569, 1578 (1989) (finding that the purpose of many
4 administrative inspection procedures is to avoid violent confrontations). These goals do not have
5 to be in competition. While notice of the warrant can be given as few as twenty-four hours before
6 inspection, the inspection can take place at any point thereafter as long as the warrant has not
7 expired—up to fourteen days, with a possibility of extension. Inspection Warrant ¶ 8. This variable
8 time frame ensures that even after receiving notice under Section 1822.56, an entity awaiting
9 imminent inspection would not have sufficient information to constitute a “warning” under Section
10 6321. In those instances when even this notice would be detrimental, the Division can always
11 attempt to show that it is “reasonably necessary” for notice not to be given in the “circumstances
12 shown.”

13 If the Division truly wants to interpret Section 6321 to prohibit all communication that an
14 inspection may take place at an unspecified future time, it should be mindful that Division counsel
15 Lisa Brokaw effectively confessed to a misdemeanor in her affidavit. *See generally* Brokaw Decl.
16 (detailing communications with Mariah Gondeiro);⁸ Cal. Lab. Code § 6321 (making it a
17 misdemeanor to give advance notice of an inspection). Apparently, not even the Division can abide
18 by the interpretation they advanced. To represent this as settled law to a judge, particularly in an *ex*
19 *parte* application, was disingenuous at best. This renders the good faith exception inapposite to the
20 warrant obtained by the Division.

21 2. *The Good Faith Exception does not apply because the Division could not in good*
22 *faith have believed that the Haskell Declaration presented probable cause.*

23 Beyond the numerous misleading statements made by the Division to the issuing judge, the
24 good faith exception is also inapposite because the Declaration fails to present even a modicum of
25 probable cause that would allow the Division to apply for the warrant in good faith. The standard
26 for determining whether a lack of probable cause undercuts the good faith exception is whether or
27 not “a well-trained officer should reasonably have known that the affidavit failed to establish

28 ⁸ The Brokaw Declaration is attached in full as Exhibit 3.

1 probable cause (and hence that the officer should not have sought a warrant).’ An officer applying
2 for a warrant must exercise reasonable professional judgment and have a reasonable knowledge of
3 what the law prohibits.” *People v. Pressey*, 102 Cal. App. 4th 1178, 1190-91 (2002) (quoting
4 *People v. Camarella*, 54 Cal. 3d 592, 596 (1991)).

5 As discussed at length *supra*, probable cause was nowhere to be found in the Haskell
6 Declaration. As recited above, the Declaration did not contain basic components: facts surrounding
7 the receipt of the complaint, knowledge of the complainant, the factual substance of the complaint,
8 or even an averment that the Division believed a violation was ongoing. The Division cannot in
9 good faith claim that a warrant application that fails to allege belief that a violation is occurring is
10 enough to satisfy probable cause. This error extended beyond the magistrate who “wholly
11 abandoned” his duty to review the affidavit; the error lies first with the Division for unreasonably
12 presenting the application to begin with. In light of this fact, exclusion of the illegally obtained
13 evidence is appropriate because it will serve to deter such applications in the future.

14 **PRAYER FOR RELIEF**

15 For all the foregoing reasons, the Academy respectfully requests that this Court find that its
16 Constitutional rights were violated by the Division’s inspection and exclude the following:

- 17 1. Any and all statements allegedly made by Academy staff during the illegal inspection;
- 18 2. Any and all observations made by Division agents as a result of their entry into and search
19 of the Academy, and any testimony based thereon;
- 20 3. Any and all photos, videos, or notes made by Cal/OSHA agents as a result of their entry
21 into the Academy and search thereof; and
- 22 4. All evidence, whether tangible or intangible, that could be considered “fruit of the
23 poisonous tree.”

24 Submitted this 18th day of July, 2022.

25 Respectfully submitted,

26 /s/Nicolai Cocis
27 Nicolai Cocis
28 TYLER & BURSCH, LLP
Counsel for Employer

EXHIBIT 1

1 Chris Grossgart, Assistant Chief Counsel (SBN 155060)
2 Lisa Brokaw, Staff Counsel (SBN 2467422)
3 **DEPARTMENT OF INDUSTRIAL RELATIONS,**
4 **DIVISION OF OCCUPATIONAL SAFETY AND HEALTH**
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8 lbrokaw@dir.ca.gov
9 Attorneys for Calif. Dept. of Industrial Relations,
10 Division of Occupational Safety and Health
11 **Filing Fee Exempt – Govt. Code §6103**

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF SANTA CLARA

12 In the Matter of the Inspection of:

13 **Calvary Christian Academy**
14 1175 Hillsdale Ave.
15 San Jose, CA 95118

16 Employer.

Case No.

CIS 50115

INSPECTION WARRANT

(C.C.P. §1822.50, et seq.)

17 THE PEOPLE OF THE STATE OF CALIFORNIA to: The Chief of the Division of
18 Occupational Safety and Health and his authorized representatives, and to Calvary Christian
19 Academy and its officers, agents and employees:

20 1. Proof by declaration having been made before me by Richard Haskell that there is reason
21 to believe that conditions of noncompliance with the Occupational Safety and Health Regulations
22 (Title 8, California Code of Regulations, sections 330, et seq.) exist at Calvary Christian
23 Academy's premises located at 1175 Hillsdale Ave., San Jose, CA 95118, and that there is just,
24 probable, and reasonable cause for an inspection as authorized by Labor Code sections 6307,
25 6309, 6313 and 6314, and for issuance of an inspection warrant as authorized by Code of Civil
26 Procedure sections 1822.50, et seq.

27 ///

1 2. YOU ARE THEREFORE COMMANDED TO INSPECT, and to permit inspection of, in
2 the daytime between the hours of 7:00 A.M. to 6:00 P.M., the premises of Employer located at
3 1175 Hillsdale Ave., San Jose, CA 95118.

4 3. Said inspection is for the purpose of ensuring compliance with all laws and lawful
5 standards and orders and special orders requiring said premises to be safe and healthful, and to
6 enforce and carry out the mandates of Division 5 of the Labor Code and the Occupational Safety
7 and Health Regulations of the State of California, including but not limited to Title 8, California
8 Code of Regulations as they relate to COVID-19 prevention, including but not limited to section
9 3205.

10 4. Said inspection shall encompass all materials, facilities, structures, devices, equipment,
11 tools, documents, inventory, physical conditions and processes, and shall include, as needed,
12 taking photographs, recording video; conducting tests and measurements, including medical
13 surveillance; reviewing medical records; collecting samples; private questioning of any employee
14 or employee representatives at a reasonable time and in a reasonable manner; observations of the
15 activities, operations, and work of employees on the premises; and discussions of the training and
16 use of personal protective devices and other occupational safety measures with employees and
17 personnel at the premises.

18 5. Pursuant to Labor Code section 6309, the inspection shall encompass the entire premises.
19 In the course of this inspection, the Chief, or the Chief's authorized representative(s), may inspect
20 and investigate, in a reasonable manner and to a reasonable extent: the work places or
21 environments or facilities where work is performed by employees of Calvary Christian Academy,
22 its contractor(s) and subcontractor(s), and the employees of the contractor(s) and
23 subcontractor(s); and all pertinent conditions, structures, machines, facilities, apparatuses,
24 devices, equipment, materials, substances and all other things therein (including records, files and
25 papers pertaining to safety and health matters as required by the provisions of the California
26 Labor Code and Title 8 of the California Code of Regulations), bearing on whether all employers
27 at 1175 Hillsdale Ave., San Jose, CA 95118 are complying with occupational safety and health
28

1 standards promulgated under the California Labor Code and the California Occupational Safety
2 and Health Act (the Act) and other rules, regulations, and orders issued pursuant to the Act.

3 6. Pursuant to Code of Civil Procedure section 1822.56, the court finds that prior consent
4 was sought and refused and immediate execution is necessary in the circumstances shown.

5 7. The inspection shall proceed and continue on a day-to-day basis until completed.

6 8. This warrant shall expire in fourteen days, on 12/13/21, 2021, subject to the
7 right of the Division of Occupational Health and Safety to apply for a reasonable extension, and
8 must be served in the presence of an owner or occupant of the premises described herein.

9 GIVEN under my hand this 29 day of November 2021.



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11 
12 JUDGE OF THE SUPERIOR COURT
13 COUNTY OF SANTA CLARA

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15 AUTHORIZATION FOR IMMEDIATE EXECUTION

16 FOR GOOD CAUSE SHOWN, the 24-hour notice requirement of Code of Civil
17 Procedure §1822.56 is hereby waived.



18
19 
20 JUDGE OF THE SUPERIOR COURT
21 COUNTY OF SANTA CLARA

22 Respectfully submitted by
23 DIVISION OF OCCUPATIONAL SAFETY AND HEALTH
24 CHRISTOPHER P. GROSSGART, Assistant Chief Counsel, SBN 155060
25 LISA BROKAW, Counsel, SBN 247422
26 1515 Clay Street, Suite 1901
27 Oakland, California 94612
28 Telephone: (510) 286-7348
Facsimile: (510) 286-7039
E-mail: lbrokaw@dir.ca.gov

Attorneys for the Division of
Occupational Safety and Health

EXHIBIT 2

1 Chris Grossgart, Assistant Chief Counsel (SBN 155060)
2 Lisa Brokaw, Staff Counsel (SBN 2467422)
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9 Attorneys for Calif. Dept. of Industrial Relations,
10 Division of Occupational Safety and Health
11 **Filing Fee Exempt – Govt. Code §6103**

FILED
NOV 29 2021
Clerk of the Court
Superior Court of CA County of Santa Clara
BY [Signature] DEPUTY

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9
10 FOR THE COUNTY OF SANTA CLARA

11 In the Matter of the Inspection of:

12 **Calvary Christian Academy**
13 1175 Hillsdale Ave.
14 San Jose, CA 95118

15 Employer.

Case No.: CIS 50115

DECLARATION OF RICHARD HASKELL
IN SUPPORT OF ISSUANCE OF
INSPECTION WARRANT

(C.C.P. § 1822.50, et seq.)
(In re Inspection No. 1564732)

17 I, RICHARD HASKELL, hereby declare:

18 1. That I am employed by the State of California, DIVISION OF OCCUPATIONAL
19 SAFETY AND HEALTH (hereinafter “the Division”) as an Associate Safety Engineer and
20 assigned to the Fremont District Office. I have been so employed by the Division since January
21 2005. I am authorized by the Chief of the Division to conduct investigations and inspections of
22 places of employment. All of the following facts are within my personal knowledge, and if called
23 and sworn as a witness I could competently testify to them.

24 2. Since joining the Division’s Fremont District Office in 2017, I have completed
25 approximately one hundred and eighty (180) program planned health and safety inspections,
26 accident investigations, and complaint investigations of places of employment.

27 3. On November 18, 2021, pursuant to Labor Code section 6309, I was accompanied by
28 Senior Safety Engineer Charles Jackson on an inspection for the Fremont District Office, of

1 Calvary Christian Academy, at 1175 Hillsdale Ave., San Jose, CA 95118. We were directed to
2 open this inspection in response to a complaint made to the Division's Fremont District Office on
3 November 16, 2021 that Calvary Christian Academy was not complying with Title 8, section
4 3205, COVID-19 Prevention, face covering and outbreak reporting requirements.

5 4. On November 18, 2021, we went to the school's administrative office, where we were met
6 outside by a woman who later identified herself as Jenny Wood. Ms. Wood came from inside of
7 the office and was not wearing a face covering. I explained to Ms. Wood who we were, provided
8 her my business card, and informed her that we needed to speak with a school administrator. She
9 told us that the administrator was across the street and that she would call them to meet with us.
10 After going back into the office for a few minutes, she came back out and told me others were
11 coming to meet us.

12 5. Two men came walking toward us and she indicated that they were who we were to meet
13 with. She gave them my business card. One of the men identified himself to me as Mike McClure
14 and the other refused to identify himself. I showed them my Cal/OSHA identification card and
15 began my opening conference, explaining to Mr. McClure that we were there in response to a
16 complaint. Mr. McClure stopped me and asked me the identity of the complainant and the nature
17 of the complaint. I started to inform him that for the confidentiality of the complainant, some
18 elements of the complaint needed to remain confidential. He again stopped me, and notified me
19 that we would need to contact their attorney, as they were currently involved in a legal action with
20 the State of California. I tried to continue the opening conference, but Mr. McClure again told me
21 that they would not speak to us and we needed to speak to their attorney. He provided us with the
22 name and telephone number of their attorney and then told us that we would need to leave their
23 property now. Cal/OSHA was not permitted to investigate and inspect the premises at 1175
24 Hillsdale Ave., San Jose, CA 95118.

25 6. Labor Code section 6307 provides that the Division has "the power, jurisdiction, and
26 supervision over every employment and place of employment in [California]." Such jurisdiction
27 is necessary to adequately "enforce and administer all laws, lawful standards, orders, and special

28

1 orders requiring such employment to be safe, and requiring the protection of life, safety and health
2 of every employee.”

3 7. Labor Code section 6303(a) defines a place of employment as “any place, and the premises
4 appurtenant thereto, where employment is carried on, except a place where the health and safety
5 jurisdiction is vested by law in, and actively exercised by, any state or federal agency other than
6 the Division.” To the best of my knowledge and belief, the health and safety jurisdiction over the
7 place of employment described herein is vested in no state or federal agency other than the
8 Division. (See Labor Code § 7920, et seq.)

9 8. Labor Code section 6309(a) provides that if the Division “learns or has reason to believe
10 that an employment or place of employment is not safe or is injuries to the welfare of an
11 employee,” it may “summarily investigate the employment or place of employment, with or
12 without notice or hearings.”

13 9. Labor Code section 6314(a) provides that all authorized employees of the Division, upon
14 presenting appropriate credentials to the employer, shall “have free access to any place of
15 employment to investigate and inspect.” During such inspection and investigation, the Division
16 may “obtain any statistics, information, or any physical materials in the possession of the
17 employer that are directly related to the purpose of the investigation or inspection, conduct any
18 tests necessary to the investigation or inspection, and take photographs.”

19 10. Labor Code section 6314(b) provides that if permission to investigate or inspect a place of
20 employment is refused, an authorized representative of the Division may obtain an inspection
21 warrant pursuant to the provisions of Title 13 (commencing with Section 1822.50) of the Code of
22 Civil Procedure. Cause for the issuance of a warrant shall be deemed to exist “...if any complaint
23 that violations of occupational safety and health standards exist at the place of employment has
24 been received by the division.”

25 11. In light of the above circumstances, I request that permission be given to conduct the
26 requested inspection between the hours of 7:00 a.m. and 6:00 p.m.

1 12. Because Labor Code section 6321 prohibits giving advance notice of an inspection, I
2 further request that this Court, pursuant to the powers granted in Code of Civil Procedure section
3 1822.56, waive the 24-hour notice requirement and order immediate execution of the warrant.

4 WHEREFORE, I respectfully request that the Court issue an inspection warrant pursuant
5 to Code of Civil Procedure section 1822.50, et seq., to permit an inspection and investigation of
6 the premises named in the above-referenced caption, as set forth fully in the Inspection Warrant.

7 I declare under penalty of perjury under the laws of the State of California that the
8 foregoing is true and correct.

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10 Dated: November 29, 2021



11 Richard Haskell

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26 STATE OF CALIFORNIA
27 DIVISION OF OCCUPATIONAL SAFETY AND HEALTH
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THE FOREGOING INSTRUMENT IS
A CORRECT COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE

NOV 29 2021

Clerk of the Court
SUPERIOR COURT OF CA COUNTY OF SANTA CLARA

BY _____ DEPUTY



EXHIBIT 3

1 Chris Grossgart, Assistant Chief Counsel (SBN 155060)
2 Lisa Brokaw, Staff Counsel (SBN 2467422)
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4 **DIVISION OF OCCUPATIONAL SAFETY AND HEALTH**
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8 lbrokaw@dir.ca.gov
9 Attorneys for Calif. Dept. of Industrial Relations,
10 Division of Occupational Safety and Health
11 **Filing Fee Exempt – Govt. Code §6103**

FILED
NOV 29 2021
Clerk of the Court
Superior Court of CA County of Santa Clara
BY _____ DEPUTY

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9
10 FOR THE COUNTY OF SANTA CLARA

11 In the Matter of the Inspection of:

Case No: CIS 50115

12 **Calvary Christian Academy**
13 1175 Hillsdale Ave.
14 San Jose, CA 95118

DECLARATION OF LISA BROKAW, ESQ.
IN SUPPORT OF ISSUANCE OF
INSPECTION WARRANT

15 Employer.

(C.C.P. § 1822.50, et seq.)
(In re Inspection No. 1564732)

17 I, LISA BROKAW, hereby declare:

- 18 1. That I am employed by the State of California, DIVISION OF OCCUPATIONAL
19 SAFETY AND HEALTH (hereinafter “the Division”) as Staff Counsel in the Legal Unit. All of
20 the following facts are within my personal knowledge, and if called and sworn as a witness I could
21 competently testify to them.
- 22 2. On November 18, 2021, I was contacted by Richard Haskell and Charles Jackson of the
23 Division’s Fremont District Office. They notified me that they had attempted to open an
24 inspection at Calvary Christian Academy, located at 1175 Hillsdale Ave., San Jose, CA 95118,
25 earlier that day, but were refused the right to inspect. At the time of the attempted inspection, a
26 representative of Calvary Christian Academy had provided them with the name and phone number
27 of Calvary Christian Academy’s attorney, Mariah Gondeiro, Esq.

28
STATE OF CALIFORNIA
DIVISION OF OCCUPATIONAL SAFETY AND HEALTH

1 3. On November 18, 2021, I called Ms. Gondeiro and left a voicemail, requesting that she
2 return my call. I did not hear back.

3 4. On November 19, 2021, I called Ms. Gondeiro again and was able to speak with her. I told
4 her that I was calling in regards to her client Calvary Christian Academy; that Cal/OSHA had
5 received a workplace complaint regarding their 1175 Hillsdale Avenue location; that Cal/OSHA
6 investigators had attempted to open an inspection the day before at that site; and that a
7 representative of Calvary Christian Academy had told the inspectors to contact her, their attorney,
8 before escorting them off of the premises.

9 5. I told Ms. Gondeiro that I was calling to find out if her client would consent to an
10 inspection the week of November 29, as the location at issue would be closed the week of
11 November 22 for the Thanksgiving holiday, and notified her that if her client continued to refuse
12 to consent to an inspection, Cal/OSHA would seek an inspection warrant.

13 6. Ms. Gondeiro told me that this was the first that she had heard of the attempted inspection
14 and that she would contact her client to speak with them. She asked that I email her legal authority
15 for the Division's inspection request and we agreed to speak again on the morning of Monday
16 November 22, 2021. I sent Ms. Gondeiro a confirming email containing the information that she
17 requested. Attached hereto as Exhibit A is a true and correct copy of the emails exchanged
18 between myself and Ms. Gondeiro.

19 7. The morning of Monday November 22, 2021, I received an email from Ms. Gondeiro
20 notifying me that she had not yet had time to speak with her client and asked that she and I speak
21 the following day instead of that morning. I responded that a call the morning of Tuesday
22 November 23, 2021 would be acceptable. See Exhibit A.

23 8. The morning of Tuesday November 23, 2021, I received an email from Ms. Gondeiro
24 stating that she had been in contact with her client but she had come down with the flu and would
25 like to reschedule our call to Monday November 29. I told Ms. Gondeiro that we could not agree
26 to wait until then and requested that she provide a response, by close of business, as to whether her
27 client would consent to an inspection. I notified her that if we did not receive confirmation by
28 day's end that her client would consent to an inspection, the Division would seek an inspection

1 warrant. As of the writing of this declaration on November 24, 2021, no such confirmation had
2 been received and the Division was left with no choice but to seek the instant inspection warrant.
3 See Exhibit A.

4 I declare under penalty of perjury under the laws of the State of California that the
5 foregoing is true and correct.



6
7 Dated: November 24, 2021

8 _____
9 Lisa Brokaw, Esq.

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26 STATE OF CALIFORNIA
27 DIVISION OF OCCUPATIONAL SAFETY AND HEALTH
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EXHIBIT A

From: Brokaw, Lisa@DIR
To: Mariah Gondeiro
Subject: RE: Calvary Christian Academy
Date: Tuesday, November 23, 2021 3:39:00 PM

Hi,

This is not something that is scheduled in advance on a particular day. The Division needs to know if your client will consent to an inspection when the inspectors return to the premises or not. If your client cannot confirm that it will give consent to inspect, an inspection warrant is needed. Please confirm one way or the other.

Thanks,
Lisa

From: Mariah Gondeiro <mgondeiro@tylerbursch.com>
Sent: Tuesday, November 23, 2021 3:29 PM
To: Brokaw, Lisa@DIR <LBrokaw@dir.ca.gov>
Subject: RE: Calvary Christian Academy

CAUTION: [External Email]

This email originated from outside of our DIR organization. Do not click links or open attachments unless you recognize the sender and know the content is expected and is safe. If in doubt reach out and check with the sender by phone.

Are you guys available next Wednesday?

Mariah

From: Brokaw, Lisa@DIR <LBrokaw@dir.ca.gov>
Sent: Tuesday, November 23, 2021 2:26 PM
To: Mariah Gondeiro <mgondeiro@tylerbursch.com>
Subject: RE: Calvary Christian Academy

Hi Mariah,

As I indicated to you during our phone call on Friday, November 19, Cal/OSHA received a complaint that violations of occupational safety and health standards exist at this location, including violations of Title 8, section 3205, COVID-19 Prevention.

Thank you,
Lisa

From: Mariah Gondeiro <mgondeiro@tylerbursch.com>
Sent: Tuesday, November 23, 2021 2:12 PM
To: Brokaw, Lisa@DIR <LBrokaw@dir.ca.gov>
Subject: Re: Calvary Christian Academy

CAUTION: [External Email]

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Lisa - what is the basis for your investigation. Labor Code section 6309(a) provides that if the Division "learns or has reason to believe that an employment or place of employment is not safe or is injurious to the welfare of an employee," it may "summarily investigate the employment or place of employment, with or without notice or hearings."

OSHA has not provided me with any reasoning as to why they believe they are justified in investigating the school.

Mariah

Get Outlook for iOS

From: Brokaw, Lisa@DIR <LBrokaw@dir.ca.gov>
Sent: Tuesday, November 23, 2021 3:02:36 PM
To: Mariah Gondeiro <mgondeiro@tylerbursch.com>
Subject: RE: Calvary Christian Academy

Yes.

From: Mariah Gondeiro <mgondeiro@tylerbursch.com>
Sent: Tuesday, November 23, 2021 1:56 PM
To: Brokaw, Lisa@DIR <LBrokaw@dir.ca.gov>
Subject: RE: Calvary Christian Academy

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Lisa – Does the school need to be open when you inspect the facility?

Mariah

From: Brokaw, Lisa@DIR <LBrokaw@dir.ca.gov>
Sent: Tuesday, November 23, 2021 1:40 PM
To: Mariah Gondeiro <mgondeiro@tylerbursch.com>
Subject: RE: Calvary Christian Academy

Hi Mariah,

No, tomorrow will not work since the school is closed this week. Please let us know today whether your client will consent to an inspection next week when the school is open again or if we should seek a warrant.

Thanks,
Lisa

From: Mariah Gondeiro <mgondeiro@tylerbursch.com>
Sent: Tuesday, November 23, 2021 1:17 PM
To: Brokaw, Lisa@DIR <LBrokaw@dir.ca.gov>
Subject: RE: Calvary Christian Academy

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Lisa – Is OSHA available to go to the school tomorrow for an inspection?

Mariah

From: Brokaw, Lisa@DIR <LBrokaw@dir.ca.gov>
Sent: Tuesday, November 23, 2021 10:33 AM
To: Mariah Gondeiro <mgondeiro@tylerbursch.com>
Subject: Re: Calvary Christian Academy

Hi Mariah,

I am sorry to hear that you are sick. I hope you feel better soon.

Unfortunately, we are not able to wait until Monday. Please let me know, no later than the close of business today, whether your client

will consent to the Division's inspection of its 1175 Hillsdale Avenue premises when it opens again next week. If we do not receive confirmation from you today that your client will permit the Division to conduct its inspection, we will have no choice but to seek an inspection warrant.

Thank you,

Lisa

On Nov 23, 2021, at 9:52 AM, Mariah Gondeiro <mgondeiro@tylerbursch.com> wrote:

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Lisa,

I am sorry but I came down with the flu. I was working 14 hour days these past three days to get two briefs filed yesterday and now I am paying for it. Can we talk first thing Monday morning next week? By the way, the school is closed this week, and I am keeping in touch with my clients to monitor any new COVID-19 cases. Thank you for understanding and have a blessed Thanksgiving.

Mariah

Mariah Gondeiro

Litigation Counsel

<[image001.jpg](#)>

25026 Las Brisas Road
Murrieta, California 92562
Telephone: (951) 600-2733 | Facsimile: (951) 600-4996
mgondeiro@tylerbursch.com

From: Brokaw, Lisa@DIR <LBrokaw@dir.ca.gov>
Sent: Monday, November 22, 2021 9:02 AM
To: Mariah Gondeiro <mgondeiro@tylerbursch.com>
Subject: RE: Calvary Christian Academy

Good morning,

Yes, that should work, but it will need to be in the morning. Are you available before noon?

Thanks,
Lisa

From: Mariah Gondeiro <mgondeiro@tylerbursch.com>
Sent: Monday, November 22, 2021 8:46 AM
To: Brokaw, Lisa@DIR <LBrokaw@dir.ca.gov>
Subject: RE: Calvary Christian Academy

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Hi Ms. Brokaw,

Thank you for this email. Can we talk tomorrow? I have two briefs due today and have not had the time to talk with my clients.

Mariah

From: Brokaw, Lisa@DIR <LBrokaw@dir.ca.gov>
Sent: Friday, November 19, 2021 2:14 PM
To: Mariah Gondeiro <mgondeiro@tylerbursch.com>
Subject: Calvary Christian Academy

Good afternoon Ms. Gondeiro,

Thank you for speaking with me this afternoon. Per your request, here is some of the law relevant to Cal/OSHA's (the "Division") inspection authority.

Labor Code section 6307 provides that the Division has "the power, jurisdiction, and supervision over every employment and place of employment in [California]." Such jurisdiction is necessary to adequately "enforce and administer all laws, lawful standards, orders, and special orders requiring such employment to be safe, and requiring the protection of life, safety and health of every employee."

Labor Code section 6303(a) defines a place of employment as "any place, and the premises appurtenant thereto, where employment is carried on, except a place where the health and safety jurisdiction is vested by law in, and actively exercised by, any state or federal agency other than the Division." To the best of my knowledge and belief, the health and safety jurisdiction over the place of employment described herein is vested in no state or federal agency other than the Division. (See Labor Code § 7920, et seq.)

Labor Code section 6309(a) provides that if the Division "learns or has reason to believe that an employment or place of employment is not safe or is injurious to the welfare of an employee," it may "summarily investigate the employment or place of employment, with or without notice or hearings."

Labor Code section 6314(a) provides that all authorized employees of the Division, upon presenting appropriate credentials to the employer, shall "have free access to any place of employment to investigate and inspect."

Labor Code section 6314(b) provides that if permission to investigate or inspect a place of employment is refused, an authorized representative of the Division may obtain an inspection warrant pursuant to the provisions of Title 13 (commencing with Section 1822.50) of the Code of Civil Procedure.) Cause for the issuance of a warrant shall be deemed to exist if there has been an industrial accident, injury, or illness reported, if any complaint that violations of occupational safety and health standards exist at the place of employment has been received by the division, or if the place of employment to be inspected has been chosen on the basis of specific neutral criteria contained in a general administrative plan for the enforcement of this division.

As I indicated during our call, the Division received a complaint that violations of occupational safety and health standards exist at your client Calvary Christian Academy's 1175 Hillsdale Ave. location. Our investigators attempted to conduct an inspection yesterday but were told that they needed to leave the premises and contact you.

I will look forward to speaking with you on Monday morning about whether your client will permit the Division to return for an inspection following the Thanksgiving holiday break.

Thanks,

Lisa

Lisa Brokaw, Staff Counsel
State of California Department of Industrial Relations
Division of Occupational Safety and Health
1515 Clay Street, Suite 1901
Oakland, CA 94612

Direct Telephone: 510-286-6958
Main Office Telephone: 510-286-7384
Fax: 510-286-7039
Email: lbrokaw@dir.ca.gov

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This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.

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THE FOREGOING INSTRUMENT IS
A CORRECT COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE

NOV 29 2021

Clerk of the Court
SUPERIOR COURT OF CA COUNTY OF SANTA CLARA
BY _____ DEPUTY



1 **PROOF OF SERVICE**

2 *In the Matter of the Appeal of*
3 *Calvary Chapel of San Jose dba Calvary Christian Academy*
4 *Inspection Number 1564732*

5 I am employed in the county of Riverside, State of California. I am over the age of 18 and not a
6 party to the within action; my business address is 25026 Las Brisas Rd., Murrieta, California 92562.

7 On 07-18-22, I caused to be served the foregoing documents described as **EMPLOYER'S MOTION**
8 **TO SUPPRESS EVIDENCE** on the interested parties in this action

9 by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached
10 mailing list: **(SEE ATTACHED MAILING LIST)**

11 **BY MAIL**

12 I deposited such envelope in the mail at or near Murrieta, California. The envelope was
13 mailed with postage thereon fully prepaid.

14 As follows: I am "readily familiar" with the firm's practice of collection and processing
15 correspondence for mailing. Under that practice it would be deposited with U.S. Postal
16 Service on that same day with postage thereon fully prepaid at or near Murrieta,
17 California, in the ordinary course of business. I am aware that on motion of the party
18 served, service is presumed invalid if postal cancellation date or postage meter date is
19 more than one day after date of deposit for mailing in affidavit.

20 **BY PERSONAL SERVICE**

21 Such envelope was delivered by hand to the office(s) of the addressee(s).

22 **BY E-SERVICE/FACSIMILE TRANSMISSION**

23 I caused all of the pages of the above-entitled document to be sent to the recipient(s) noted below
24 via electronic transfer (facsimile) at the respective telephone numbers indicated above.

25 Kathryn Tanner, Staff Counsel, Division
26 of Occupational Safety & Health
27 1515 Clay Street, Suite 1901

Oakland, CA 94612
Email: ktanner@dir.ca.gov

28 **OVERNIGHT MAIL**

I caused such all of the above-described documents to be served on the interested parties noted
above by Overnight Mail.

I declare under penalty of perjury under the laws of the State of California that the above is true
and correct.


Nicolai Cocis