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BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **CALVARY CHAPEL OF SAN JOSE dba CALVARY CHRISTIAN ACADEMY,** **Employer.**	Inspection No. **1564732** **EMPLOYER'S BRIEF IN RESPONSE TO ORDER AFTER REMAND RE GOOD FAITH EXCEPTION**

This Court has already concluded that "[t]he declaration submitted in support of the warrant in the instant matter not only contains no detail, but it is precisely what is proscribed as merely 'a conclusory statement in the application that employee complaints have been received' and provided nothing more for the magistrate to review." Ord. Mot. Suppress Evid. at 6 (quoting *Salwasser Mfg. Co. v. Occupational Safety & Health Appeals Bd.*, 214 Cal. App. 3d 625, 631 (1989) (*Salwasser II*)). The Division should have known better than to submit such a declaration, having litigated the issue of probable cause before the Board and California courts numerous times. Therefore, the Division cannot reasonably claim ignorance of the basic requirements for an affidavit. If this

warrant qualifies for the good faith exception, it's hard to imagine a warrant that wouldn't. The Court should maintain its previous position: there is no excuse for the Haskell Declaration. To deter the Division from taking the Fourth Amendment lightly in the future, suppression is the appropriate remedy.

ARGUMENT

The good faith exception to the Fourth Amendment exclusionary rule applies to law enforcement officers rather than judges. *United States v. Leon*, 468 U.S. 897, 921 (1984). When there is a "close or debatable question on the issue of probable cause," law enforcement officers are allowed to rely, within reason, on the judge's assessment. *People v. Pressey*, 102 Cal. App. 4th 1178, 1191 (2002) (quoting *People v. Camarella*, 54 Cal. 3d 592, 606 (1991)). This is in part because judges are presumed to have no motive to disregard the Fourth Amendment's protections. *Id.* at 916–17. The same, of course, cannot be said of law enforcement officers. That is why the exception does not apply when officers place unreasonable reliance on a warrant. The burden is on the Division to show its reliance was objectively reasonable. *Camarella*, 54 Cal. 3d. at 596.

There are three pertinent ways officers can place unreasonable reliance in a warrant: (a) if the judge was misled by the affidavit; (b) if the judge "wholly abandoned his judicial role" in issuing the warrant; or (c) if the affidavit was so deficient that the officer presenting it could not have reasonably believed probable cause was shown. *See Leon*, 468 U.S. at 923.

The Haskell Declaration does not present a case that is "close or debatable". Both this Court and the Board have previously detailed the reasons for this in their original ruling and subsequent Decision on Reconsideration. Therefore, the Employer is requesting this Court to suppress all evidence obtained by the Division through its unconstitutional search.

I. The Division cannot meet the standard for the good faith defense because the Haskell Declaration misled the issuing judge.

The Division cannot claim the good faith exception because its affidavit had factual omissions and legal misstatements that were misleading. *Cf. Leon*, 468 U.S. 919–20. While the Division erroneously asserted the Employer must show an "intent to mislead or actual misconduct," Pet. Recons. at 29, that is not what the courts have held. Recklessness or even negligence in

preparing the affidavit is sufficient culpability to defeat the good faith exception. *People v. Ivey*, 228 Cal. App. 3d 1423, 1426–27 (1991). An affidavit does not even have to make affirmative misrepresentations to be misleading; omissions can also be misleading. *United States v. Jacobs*, 986 F.2d 1231, 1234 (8th Cir. 1993). Three issues with the Haskell Declaration gave it a cumulatively misleading effect. First, it omitted key circumstances about the Division's interactions with Ms. Wood. Second, it omitted portions of the legal standard the judge was to apply. And third, it caused the Superior Court judge to believe a legal proposition the Division itself openly flouts. Each of these reasons is independently sufficient to deprive the Division of the good faith exception.

First, the Haskell Declaration's description of the Division's interaction with Ms. Wood was misleading because it wrongly implied Ms. Wood violated face covering regulations. The description is terse. It describes only how the Division received a complaint that the Employer was "not complying with" face mask requirements, and then it mentioned that agents observed Ms. Wood outside "not wearing a face covering." Haskell Decl. ¶¶ 3–4. These statements were placed in adjacent paragraphs. Since Ms. Wood's lack of a mask would only be relevant to establishing probable cause if it was illegal, an ordinary reader would assume illegal conduct. Even this Court read the interaction with Ms. Wood as an attempt to establish probable cause: "The declaration contains one statement that the Division's Opposition asserts should support a finding of a reasonable belief of a violation: 'Ms. Wood came from inside of the office and was not wearing a face covering.'" Order Mot. Suppress Evid. at 6; *see also* Decision Recons. at 11; Opp. Mot. Suppress at 6–7 (presenting Ms. Wood as a reason for establishing probable cause). Either intentionally or recklessly, the Division omitted how regulations at the time did not require a mask to be worn outdoors. In fact, regulations did not even always require masks indoors. *See* Decision Recons. at 14 ("[T]he problem is that the Division did not demonstrate that mask usage was required indoors.").

This Court has twice concluded that the affidavit's statements about Ms. Wood could not have been relevant to finding probable cause. Order Mot. Suppress Evid. at 6; Decision Recons. at 14. The only way they could have been relevant was if the inspectors observed Ms. Wood do something illegal; they did not. But by holding out the interaction with Ms. Wood as being relevant,

the Division created the illusion that they observed illegal behavior. That was misleading. The Division is therefore not entitled to the good faith exception.

Second, the Haskell Declaration was misleading because it stripped the standard for issuing a warrant down to one sentence: "Cause for issuance of a warrant shall be deemed to exist '. . . if any complaint that violations of occupational safety and health standards exist at the place of employment has been received by the division.'" Haskell Decl. ¶ 10 (quoting Cal. Lab. Code § 6314(b) (alteration in original)). As the Board noted on reconsideration, the Division neglected a whole body of law outside the statute it cited. Decision Recons. at 12. Presenting this one statute as the only standard for a warrant was an omission that made the declaration misleading.

Third, the Haskell Declaration was misleading because it claimed the judge was legally obligated to waive the twenty-four-hour notice required by the Civil Procedure Code. Haskell Decl. ¶ 12. That was not true. The Civil Procedure Code requires a day's notice before an administrative search warrant is executed if that person previously refused consent to a search. Cal. Civ. Proc. Code § 1822.56. The only exception is for when "immediate execution is reasonably necessary in the circumstances shown." *Id.*

There were no such circumstances (the Division waited eleven days to seek the warrant). To justify a no-notice inspection, the Division instead pointed to the Labor Code, which does not allow "advance warning of an inspection or investigation by any authorized representative of the division unless authorized under provisions of this part." Cal. Lab. Code § 6321. Apparently, the Division believed this statute conflicted with—and took priority over—the twenty-four-hour notice requirement. Perhaps that would have been convincing if this Board had not already told the Division this position is wrong. *See In re Forty-Niner Sierra Res., Inc.*, No. 90-R2D4-165, 1991 WL 528425, at *7 (Cal. Occ. Safety & Health Appeals Bd. July 15, 1991) (decision after reconsideration) (finding that Section 6321 is a direction to the Chief of the Division, not to the courts issuing inspection warrants, and that the facts ultimately must provide the basis for a waiver). The Division defended its forgetfulness, stating that "it is not 'objectively reasonable' to expect an inspector to be a legal scholar." Yet, it acknowledges that "an inspector applying for a warrant must have a reasonable understanding of what the law prohibits" Pet. Recons. at 28. The true issue of

unreasonableness lies in the fact that Division inspectors continue to present judges with legal conclusions that were debunked three decades ago. Compounding that mistake, the Division does not actually follow in practice the interpretation it gave the judge. It did not do so in this case; counsel for the Division, Lisa Brokaw, notified the Employer multiple times it was planning an inspection. Brokaw Decl. ¶ 5, 8. The Division should not be allowed to play both sides of a legal question to game inspection process.

This Board has already determined the Division presented a judge with an affidavit that was missing critical facts. And the evidence shows the Division made legal assertions to the judge that it did not practice itself—and that it has known to be wrong for thirty years. That made the Haskell Declaration misleading. Therefore, this Court should deny the Division's request for the good faith defense. The Division could not reasonably have relied on the warrant it obtained because the issuing judge "wholly abandoned his judicial role" in issuing the warrant.

While the fault for the issuance of the warrant lies foremost with the Division, the Board has also already determined on reconsideration that even when the issuing judge is afforded deference, the issuance of the warrant is unsupportable. Decision Recons. at 14. It also noted that there is no reason to believe the judge ever examined the inspector on oath to satisfy himself with the grounds for probable cause. Decision Recons. at 14 n.10. This is unsurprising; the Division's long list of questions it was unwilling to answer suggests any attempted examination would have been futile:

> Was it a current employee? A former employee? A parent of a student at the school? A member of the public? Someone making a delivery to the school? . . . Was the complaint made by phone, in person, or some other means? Was there a written complaint? Who, if anyone, from the Division spoke to the complainant? Were any steps taken to verify the information in the complaint? . . . Who was not wearing face coverings and where? Had there been COVID-19 outbreaks that had not been reported? When? How many? How did the complainant know that the outbreaks had not been reported? Did the complainant have personal knowledge of the alleged violations, or was the information obtained second-hand from someone else?

Pet. Recons. at 19 (quoting Ord. Mot. Suppress Evid. at 7).

The Division quoted these questions in its Petition as examples of information it believed it could not provide. That means the issuing judge had none of the answers to any of those questions.

Without any of this knowledge, the issuing judge could not possibly have "exercise[d] independent judgment as to whether an inspection [was] justified," which was his judicial role. *Salwasser II*, 214 Cal. App. 3d at 631. And since the issuing judge did not fulfill his judicial role, the good faith exception to the Fourth Amendment exclusionary rule does not apply.

II. The Division cannot meet the standard for the good faith defense because it could not have reasonably believed the Haskell Declaration showed probable cause.

The most obvious reason the Haskell Declaration is not entitled to the good faith defense is because the Division could not have reasonably believed it showed probable cause. The standard is whether "a well-trained officer should have reasonably known that the affidavit failed to establish probable cause." *Camarella*, 54 Cal. 3d at 596. It is not necessary to rehash the entire probable cause discussion here—this Court has already twice held definitively that it did not exist. Order Mot. Suppress Evid. at 6; Decision Recons. at 14. A few highlights are sufficient to show that the Division never should have believed the Haskell Declaration showed probable cause.

The Haskell Declaration was only twelve numbered paragraphs long. Most of those were not related to probable cause; instead, they recited boilerplate legal authorities, gave Mr. Haskell's background, or recounted how the Employer turned away the inspectors. Only two paragraphs attempted to provide probable cause: paragraphs 3 and 4.

Paragraph 3 stated that a complaint was made but was "otherwise devoid of detail." Ord. Mot. Suppress Evid. at 5; *see also* Haskell Decl. ¶ 3. Paragraph 4 states that the inspectors interacted with Ms. Wood outdoors, where she did not wear a mask. But that was lawful. There was "no statement in the declaration that the Division inspectors observed any behaviors that would give rise to a violation of any safety orders." Ord. Mot. Suppress Evid. at 6; Haskell Decl. ¶ 4. On reconsideration, the Board found the Declaration was "conclusory" and "did not otherwise demonstrate a basis for believing that a complaint was actually made, that the complainant was sincere in the assertion that a violation exists, and that a plausible basis exists for entering a complaint." Decision Recons. at 13–14. The Haskell Declaration never even contained a statement that the Division believed violations were ongoing.

The Division was not (or should not have been) ignorant of what a proper affidavit required.

It has litigated the issue in front of the Board and the California courts multiple times. *See, e.g.*, Decision Recons. at 14 n.9 (citing cases where this Board's prior decisions have relied on "more robust declaratory showing[s] than exists here"); *Salwasser II*, 214 Cal. App. 3d 625. This case presented no difficult or unusual facts. It is telling that the Division's primary argument against suppression was that this Court ought not peek behind the curtain at the probable cause issue at all.

The fact that the Division is bringing search warrant applications to judges with affidavits like the Haskell Declaration is a sign of a significant culture problem at the Division. The Division is treating the Fourth Amendment lightly, viewing it as a pro forma, meaningless and routine requirement. The exclusionary rule is precisely designed to address this type of problem: it is meant to "compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Michigan v. Tucker*, 417 U.S. 433, 446 (1974) (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)). This Court should take this opportunity to, "[b]y refusing to admit evidence gained as a result of such conduct . . . instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused." *Leon*, 468 U.S. at 919 (quoting *Tucker*, 417 U.S. at 447). Accordingly, the good faith defense should be rejected.

III. The Division waived its right to argue the good faith defense by failing to present it to this Court in its Opposition to the Motion to Suppress.

The Board on Reconsideration decided it would not hold the good faith defense to be waived by the Division. Decision Recons. at 18 n.13. But it did not give the parties the chance to brief or argue the grounds upon which it made this determination. The Employer continues to maintain, for purposes of preserving the issue for appeal, that the Division waived the good faith defense. Despite the fact that the Employer proactively addressed it in its Motion to Suppress, the Division decided to ignore it in its Opposition. It never argued the Good Faith Defense until it moved for reconsideration. Thus, the argument should be deemed waived.

CONCLUSION

The Haskell Declaration never asserted that investigators suspected illegal activity at the Employer's workplace. It failed to provide any specific behaviors that could lead to a reasonable

suspicion of such conduct. Furthermore, it did not offer any substantiating details about the initial complaint that allegedly triggered the investigation. Instead, it dismissed the Fourth Amendment and the warrant requirement as a mere formality, neglecting the fundamental principles of establishing probable cause. The Division then exploited the Haskell Declaration to deceive a judge into granting a warrant that it knew was not reasonably justified.

Most troubling, despite this Court and the Board determining that the Division's warrant failed to meet Constitutional standards, the Division has yet to acknowledge its mistake. It continues to insist that it was correct. Without the deterrent of suppression, the Division will persist in violating the constitutional rights of other employers. The good faith exception should not be a carte blanche for continuous errors. Therefore, the Employer respectfully requests this Court to affirm that the good faith exception does not apply and uphold its previous order to suppress all evidence obtained from the Division's unlawful search.

Respectfully submitted,

/s/Nicolai Cocis
Nicolai Cocis
LAW OFFICE OF NICOLAI COCIS

Mariah Gondeiro
ADVOCATES FOR FAITH & FREEDOM

PROOF OF SERVICE

In the Matter of the Appeal of
Calvary Chapel of San Jose dba Calvary Christian Academy
Inspection Number 1564732

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

On January 29, 2024, I caused to be served the foregoing documents described as **EMPLOYER'S BRIEF IN RESPONSE TO ORDER AFTER REMAND RE GOOD FAITH EXCEPTION** on the interested parties in this action

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

☐ **BY MAIL**

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

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

☐ **BY PERSONAL SERVICE**

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

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

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

Kathryn Tanner, Staff Counsel, Division of Occupational Safety & Health
1515 Clay Street, Suite 1901
Oakland, CA 94612
Email: ktanner@dir.ca.gov

☐ **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