Case No. S196568

IN THE SUPREME COURT OF CALIFORNIA

VICENTE SALAS,
Petitioner and Appellant,
v.
SIERRA CHEMICAL CO.,
Defendant and Respondent.

SUPREME COURT
FILED
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REPLY TO ANSWER TO PETITION FOR REVIEW

Appeal from the Court of Appeal
Third Appellate District, Case No. C064627
Superior Court of California, County of San Joaquin
Superior Court Case No. CV033425

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INTRODUCTION

The Answer filed by Respondent Sierra Chemical Co. ("Sierra") does nothing to rebut the case for review of the opinion below.[1] Indeed, Sierra nowhere denies that the decision at issue or the two cases it relied on, *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620 and *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, are fundamentally at odds with *McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352, a decision that established the unquestioned standards for the application of the after-acquired evidence and unclean hands defenses in the context of civil rights claims. Nor does Sierra explain why SB 1818's "declaratory of existing law" provision is to be construed not by reference to the description of "existing law" contained in its own legislative history, but instead in a way that would turn that "urgency" statute into a pointless act. Rather, Sierra belabors at length the factual merits of Petitioner Vicente Salas's disability discrimination claim – none of which were material to the result below – and simply regurgitates the legal arguments it made to the court below, failing to even acknowledge the numerous reasons set forth in the Petition why those arguments are deeply problematic.

Petitioner will not engage in a point-by-point response to Sierra's numerous representations of fact, many of which Petitioner takes strong issue with and does not concede, as they are irrelevant to the legal questions

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[1] *Salas v. Sierra Chemical Co.* (2011) 198 Cal.App.4th 29, 129 Cal.Rptr.3d 263.

presented on this appeal. Instead, this Reply sets forth why nothing contained in Sierra's Answer diminishes in any way the need for review.

ARGUMENT

I. In Presuming *Camp* And *Murillo* To Be Controlling, Sierra Fails To Explain How They And The Opinion Below Can Be Reconciled With *McKennon*.

In its Answer, Sierra asserts that *Camp* and *Murillo,* if applied here, deprive Petitioner of any legal recourse for its discrimination against him. Answer, 19-30. But that is not the question presented for review. Instead, Petitioner has asked this Court to grant review to decide whether the court below, in its exclusive reliance on *Camp* and *Murillo*, properly applied the after-acquired evidence and unclean hands doctrines to bar entirely his claims, particularly in light of *McKennon*. Stated otherwise, Petitioner asks this Court to find that the Court of Appeal's decision is fundamentally at odds with *McKennon* and, along with *Camp* and *Murillo,* should thus be overruled.

Sierra has failed – indeed, has not even tried -- to show that those cases can be reconciled with *McKennon*. Sierra's entire "analysis" of *McKennon* consists of the following paragraph:

> *Camp* and *Murillo* both discuss *McKennon* and each concludes that the unclean hands doctrine bars a claim based on acts not occurring during employment where the plaintiff's misrepresentation goes to the heart of the employment relationship and relates directly to the wrongful discharge claim. As noted in *Camp*, "California courts often look to decisions construing federal antidiscrimination statutes in deciding issues of state employment law," but "refer to federal decisions only 'where appropriate.'" (35 Cal.App.4th at p. 635.)

Answer at 20 [full citations omitted].

The mere fact that *Camp* and *Murillo* "discuss" *McKennon*, however, hardly demonstrates that they are consistent with *McKennon's* repudiation of the notion that the after-acquired evidence doctrine should bar any relief under a civil rights statute, *id.*, 513 U.S. at 356, or with *McKennon's* emphatic "reject[ion of] the unclean hands defense where a private suit serves important public purposes." *Id.* at 360. Indeed, as Petitioner previously noted, neither *Camp* nor *Murillo* articulated any discernible *McKennon*-based rationale in carving out a broad exception specially penalizing misrepresentations regarding employment authorization.[2]

And, specifically with respect to the case at bar, Sierra makes no attempt to explain how the court below -- which went even further than *Camp* or *Murillo*[3] by barring any claim that is somehow "tied to" a denial of employment[4] -- acted in keeping with *McKennon*. As Petitioner argued earlier,[5] the decision below would require the outright dismissal of *any* such claim brought by any worker whose employer managed to persuade a court that the worker had presented false information regarding his or her employment authorization. To observe that such a holding would enable employers to engage in all manner of workplace abuses against immigrant workers with impunity is scarcely "hyperbolic," as Sierra suggests.

In *Salas*, the gradual erosion begun by *Camp* and *Murillo* of *McKennon*'s careful balancing of equitable doctrines with important public

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[2] *See* Petition at 10.

[3] Petition at 11.

[4] *Salas,* 129 Cal.Rptr.3d at 273.

[5] Petition at 11-13.

policy goals has reached a new extreme. Review by this Court is critical to ensuring that this state's civil rights protections, if anything traditionally more expansive than their federal counterparts, are not further weakened by this line of wrongly-decided cases.

II. Sierra Fails To Justify Its Nonsensical Construction Of SB 1818.

Just as Sierra has failed to explain or justify the Court of Appeal's fundamental deviation from *McKennon*, it has also failed to explain why SB 1818's reference to "existing law" does not simply refer to the statement of "existing law" contained in its legislative history, as set forth in the Petition. Instead, entirely ignoring that far more measured construction, Sierra simply recites arguments, accepted by the court below,[6] that the Legislature intended *sub silentio* to preserve prior contrary case law even though, were it to be followed, it would essentially swallow the statute in its entirety and stand as a virtually insurmountable obstacle to its express purpose.

Sierra belabors the obvious point that a Social Security number is generally a legal prerequisite to employment in the United States.[7] In so doing, however, Sierra demonstrates its persistent failure to grasp that SB

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[6] A review of the Answer indicates that approximately two-thirds of its discussion of SB 1818 is taken virtually verbatim, without attribution, from the Court of Appeal's opinion. Answer, 30-36; *Salas*, 129 Cal.Rptr.3d at 276-78.

[7] Narrow exceptions to this general rule exist, but they are not germane to the case at bar. For example, a work-authorized individual who has applied for a Social Security number could legally begin working, but would be required to note on the Form I-9 that she had applied for a number, and would be required to supplement her Form I-9 once she had been issued a number.

1818 was intended precisely to provide equal rights and remedies for persons who are *not* legally authorized to work and thus do not possess valid Social Security numbers. SB 1818's legislative history, which the Answer largely ignores, makes clear that this was a conscious policy choice of the Legislature. As noted in the committee bill analysis:

> [I]t is consistent with the police powers of the state to ensure that employers who violate labor and civil rights laws do not gain competitive advantage over law-abiding businesses [by hiring undocumented workers], and that remedies be provided workers who have suffered financial harm in the exercise of their rights.

SB 1818 Bill Analysis, Senate Committee on Labor and Industrial Relations, at 2[8]; *see also id.* at 3 (noting that although the majority in *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137 found that undocumented workers should not recover wages "earned in a job that was obtained by criminal fraud", the "[d]issenting justices argued that the ruling may encourage employers to hire illegal immigrants and disregard labor laws without fear of penalty.").

The third reading analysis of SB 1818 makes the same point:

> Proponents, [sic] contend that the Supreme Court's recent decision in Hoffman promotes and rewards the unscrupulous practice of hiring and then retaliating against undocumented workers. . . . Additionally, employers who fear unionized workers who are fighting for better wages and working conditions now have an added incentive to hire undocumented workers, knowing that they will not have to compensate the workers they fire for otherwise unlawful union activities.

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[8] The committee bill analysis of SB 1818 is appended to the Motion for Judicial Notice, filed herewith, as Attachment A.

SB 1818 Senate Third Reading Analysis at 2.[9] Plainly, the Legislature sought to create a level playing field so that unscrupulous employers would not enjoy a competitive advantage that would, in fact, incentivize their hiring of undocumented workers over those who were work-authorized.

Nevertheless, Sierra asserts that Petitioner is not protected by SB 1818, claiming that it is not challenging his claims on the basis of his alleged lack of immigration status. Instead Sierra suggests, without the benefit of any authority, that SB 1818 does not confer rights upon undocumented persons who may have provided false employment authorization information.[10] But aside from the fact that such a interpretation would defeat the Legislature's aim of eliminating incentives to employ undocumented workers, the distinction Sierra would draw here is nothing other than sophistic. It is generally understood that in order to obtain a job, undocumented workers must typically proffer documents that are not genuine.[11] To argue that the Legislature was somehow oblivious to that fact when it enacted SB 1818 is, at best, far-fetched.

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[9] The third reading analysis of SB 1818 is appended to the Motion for Judicial Notice, filed herewith, as Attachment B.

[10] *See, e.g.*, Answer at 39 ("Sierra Chemical's motion was not based on Salas' immigration status and there is nothing in California or federal law which precludes the company from asserting the defenses of unclean hands and after-acquired evidence.").

[11] *See, e.g.*, Eduardo Porter, "Illegal Immigrants are Bolstering Social Security With Billions," New York Times, Apr. 5, 2005, *available online at* http://www.nytimes.com/2005/04/05/business/05immigration.html?pagewanted=print&position=n= ("Since 1986, when the Immigration Reform and Control Act set penalties for employers who knowingly hire illegal immigrants, most such workers have been forced to buy fake ID's to get a job."). A true and correct copy of this article is appended as Attachment C to the Motion for Judicial Notice, filed herewith.

Because Sierra has failed to provide any reason to doubt that the Legislature's reference to "existing law" did not include contrary cases such as *Camp* and *Murillo*, and cannot reasonably be read so as to defeat SB 1818's stated purpose, the Court should grant review.

III. The Court Of Appeal's Treatment Of Petitioner's Social Security Number Was Misguided.

Finally, Sierra offers nothing new in its Answer to support its contention that Petitioner provided Sierra with an invalid Social Security number. As already addressed in the Petition, the fact that the number provided to Sierra by Petitioner is also claimed by Kelley R. Tenney, a declarant from North Carolina produced by Sierra under unexplained circumstances, establishes at most that two persons claim the same number.[12] Petition at 20-22.[13] Moreover, as to whether Sierra would have

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[12] Sierra takes Petitioner to task for pointing out that it is for the trier of fact to determine whether – even assuming *arguendo* that the Social Security number he provided Sierra was incorrect, which Petitioner does not concede -- that his provision of incorrect information was intentional. Answer at 38. This disregards the fact that intent is a necessary element of fraud and a prerequisite to the application of the unclean hands and after-acquired evidence doctrines. *See* Petition at 24; *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.* (1945) 324 U.S. 806, 815 (holding that "willful act" required for finding of unclean hands). In any event, a violation of IRCA's "document fraud" provisions requires an intent to use false information; they are not "strict liability" offenses, as Sierra apparently contends. 8 U.S.C. § 1324c(a)(2); *Villegas-Valenzuela v. INS* (9th Cir. 1996) 103 F.3d 805, 809.

[13] On this s*ee Zamora v. Elite Logistics, Inc.* (10th Cir. 2007) 478 F.3d 1160, 1194 (Lucero, J., dissenting) ("[A]lthough a neutral decisionmaker would realize the fact that someone else had used Zamora's SSN did not resolve whether Zamora was the perpetrator or the victim of identity theft, Zamora testified that Tucker accused him of stealing someone else's SSN despite Zamora's protestations to the contrary. Tucker's immediate

continued to employ Salas had it *arguendo* learned that his Social Security number was invalid, the trial court admitted Salas's testimony in support of that proposition over Sierra's objection, recognizing the existence of a triable issue of fact and defeating summary judgment. Petition at 23. In any event, the mere declaration of Sierra's president asserting that it would undoubtedly have terminated Salas in such a situation is scarcely sufficient to establish that fact as undisputed. *See, e.g., O'Day v. McDonnell Douglas Helicopter Co.* (9th Cir. 1996) 79 F.3d 756, 759 (noting that "[t]he inquiry focuses on the employer's actual employment practices, not just the standards established in its employee manuals, and reflects a recognition *that employers often say they will discharge employees for certain misconduct while in practice they do not.*") (emphasis added).

In any event, whether Petitioner provided Sierra with a Social Security number that was not valid is of no relevance to his ability to seek legal recourse for the disability discrimination by Sierra that he alleges. As already discussed, SB 1818 establishes in no uncertain terms that Petitioner's immigration status is irrelevant to his coverage by state civil rights law, and neither the after-acquired evidence nor unclean hands doctrines can properly be invoked to dismiss his claims or to trump the clearly expressed intent of the Legislature.

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conclusion that Zamora stole his SSN could reasonably support an inference of discriminatory intent on the part of Tucker.").

CONCLUSION

For the foregoing reasons, Petitioner Vicente Salas respectfully requests that the Court order review of the decision below.

Dated: October 21, 2011

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that this Reply To Answer To Petition for Review contains 2,232 words, exclusive of the caption page, tables of contents and authorities, signature blocks, and this Certificate and that appearing on the page following.

Dated: October 21, 2011

Respectfully submitted,

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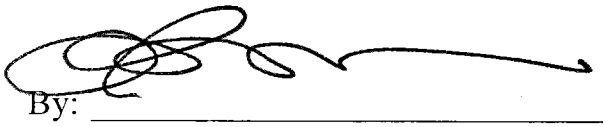

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CERTIFICATE OF SERVICE

I, DJUNA GRAY, declare:

I am a citizen of the United States, over 18 years of age, employed in the County of San Francisco, and not a party to or interested in the within entitled action. I am an employee of THE LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER, and my business address is 180 Montgomery Street, Suite 600, San Francisco, CA 94104.

On October 21, 2011, I served the within:

REPLY TO ANSWER TO PETITION FOR REVIEW

MOTION FOR JUDICIAL NOTICE

__X__ by U.S. mail to the persons and at the address set forth below:

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I declare under penalty of perjury under the laws of the State of California and of the United States of America that the foregoing is true and correct. Executed on October 21, 2011.

DJUNA GRAY