Case No. S196568

IN THE SUPREME COURT OF CALIFORNIA

VICENTE SALAS,
Petitioner and Appellant

vs.

SIERRA CHEMICAL COMPANY,
Defendant and Respondent

RESPONDENT'S ANSWER BRIEF

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

California Cases

Federal Cases

Statutes

Miscellaneous

I. INTRODUCTION.

A. Overview of the Issues.

The principal issue which this appeal presents is whether the after-acquired evidence and unclean hands doctrines are complete defenses to the wrongful refusal to hire claim of a person who, not having a valid Social Security number of his own, applies for a job using a Social Security number that belongs to someone else.

Plaintiff/Appellant Vincente Salas ("Salas") argues that the protection of "workers' rights" compels a decision that would allow him to seek a damage award in his disability discrimination lawsuit. Respondent Sierra Chemical Co. ("Sierra Chemical") submits that worker's rights is a manufactured policy issue and that the dire scenarios upon which Salas grounds his argument that the Court of Appeals' decision "derogates workers' civil rights" are nothing short of fantastic. That there are good reasons to apply overtime, workplace safety, non-discrimination, and other rules and regulations for the benefit of even those whose employment constitutes a violation of law does not mean that a person not legally qualified to work at a job can avoid equitable defenses in a wrongful

refusal to hire case.

On one side of the policy continuum are the lawful prerogatives of a potential employer in conducting its business, the obligation of a potential employer to hire only those legally qualified for employment, the legal jeopardy attendant to the employment of persons not legally qualified for employment, the wrongdoing of the employee, and the fundamental unfairness of allowing a damage claim based on a person's not getting a job which he or she was not even legally able to hold. On the other side is the important public interest in the antidiscrimination laws. The United States Supreme Court has observed that cases involving evidence of employee wrongdoing discovered after the challenged employment decision "must be addressed by the judicial system in the ordinary course of further decisions, for the factual permutations and the equitable considerations they raise will vary from case to case." (*McKennon v. Nashville Banner Pub. Co.* (1995) 513 U.S. 352, 361.) Here Sierra Chemical seeks a ruling which affirms the principle that the after-acquired evidence and unclean hands defenses apply to the wrongful refusal to hire claim of a person who, not

having a valid Social Security number of his own, applies for a job using a Social Security number that belongs to someone else.

Salas mischaracterizes Sierra Chemical's argument as an attack on the substance of his case arising from his immigration status. That was not the basis of Sierra Chemical's arguments to the courts below, nor was it the basis of the Court of Appeal's ruling. Sierra Chemical argued, and the Court held, that Salas' claim was barred by the after-acquired evidence and unclean hands doctrines because of his misrepresentation of a government-imposed requirement for employment. Salas' erroneous characterization is part and parcel of an effort to transform the application of basic equitable principles to his damage claim into a major assault on workers' rights.

Interestingly this case started out as a wrongful discharge case as Salas' original Complaint alleged that Sierra Chemical had wrongfully terminated him because he was making a workers' compensation claim. In fact, Sierra Chemical had not terminated Salas and, on the termination date alleged in the Complaint, he was actually working for the company on duty modified to accommodate

a back injury which he'd reported suffering on the job.[1]

Salas' characterization of the central issue of his appeal is revealing. According to his Opening Brief, that issue is whether an employee is barred as a matter of law from any remedies for an employer's unlawful discrimination "solely because the employer *allegedly believes* that the employee had used someone else's Social Security number when earlier applying for the job." (Appellant's Opening Brief ("AOB"), p. 1 [emphasis added].) Neither Sierra Chemical's argument nor the decisions of the lower courts were based on what the company "allegedly believed."

There is no merit to Salas' contention that the Court of Appeal improperly applied the principles which govern the adjudication of summary judgment motions. Its decision was based on the only evidence submitted by the parties regarding the Social Security number which Salas represented as his, namely, the Declaration which Sierra Chemical submitted from the number's owner.

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[1] Sixteen months after filing his Complaint, Salas filed his Amended Complaint which alleged that Sierra Chemical had wrongfully denied him employment because of his disability.

Although Salas argues here that there was an issue of fact as to whether the Social Security number he presented to Sierra Chemical had been issued to him, all he had to do was include in his own Declaration a statement that the number had been assigned to him in order to defeat the motion. In any event, because the appeal is subject to *de novo* review, this Court will make its own determination whether the record presents any triable issue of material fact. (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 717.)

B. Overview of the Case.

Sierra Chemical hired Salas in May 2003 to work on its production line, and accommodated two back injuries which he had reported in 2006 by placing him on restricted duty.[2] In mid-December 2006 the company laid off Salas as part of its seasonal reduction of production line staff required by the falloff in demand

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[2] In each instance Salas was given restricted duties consistent with physician instructions until the physician released him to full duty.

for swimming pool chemicals.[3] In late January 2007, Salas went to work for a company known as RO-Lab American Rubber Co., Inc. In May 2007, Sierra Chemical, unaware that Salas was working for another company, recalled him as part of its seasonal increase in its production line staff. The theory underlying the claim in Salas' amended Complaint is that when Sierra Chemical recalled him to work, its employees told him that he had to be able to work without any restrictions in order to be rehired.

At the time of the recall, Salas was being represented in a worker's compensation by the Rancaño law firm ("Rancaño"). For reasons that do not appear in the record, Rancaño did not contact Sierra Chemical to request an accommodation for Salas' purported disability. Instead, it filed the original Complaint which falsely alleged that Salas had been terminated because of a disability and to retaliate against him because of his worker's compensation claim.

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[3] Prior to the layoff, Salas had been declared fit for full duty. Shortly after the layoff, Salas was declared fit for full duty by another physician who had been designated as Salas' primary care provider at the request of the Rancaño law firm, which Salas had hired two days after the second reported back injury.

Prior to trial, Sierra Chemical learned that the Social Security number which Salas had represented as his own belonged to another person, who lived in North Carolina. Sierra Chemical filed a motion for summary judgment based, among other things, on the unclean hands and after acquired evidence doctrines. Ultimately the trial court granted the motion and this appeal followed.

The issue before the Court of Appeal was whether there was any triable issue of material fact regarding the defenses of unclean hands and after-acquired evidence arising from Salas' use of a Social Security number which had been issued to someone else in order to obtain a job with Sierra Chemical.[4] The Court of Appeal held that Salas' claim was barred by the after-acquired evidence and unclean hands doctrines because of Salas' misrepresentation that the Social Security number he submitted to Sierra Chemical belonged to him. The Court found that Senate Bill No. 1818 ("SB 1818") did not disallow these defenses because law existing at the time of the bill's

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[4] Sierra Chemical did not argue to the Court of Appeal that Salas' failure to disclose his prior medical release to full duty barred his action because of the unclean hands, after-acquired, and estoppel defenses.

passage precluded an employee who misrepresented a job qualification imposed by the federal government such that he or she was not lawfully qualified for the job, from maintaining a claim for wrongful termination or failure to hire, citing *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 636, and *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 847.

C. Overview of Sierra Chemical's Argument.

There are three fundamental problems with Salas' substantive attack on the Court of Appeal's decision.

First, the argument mistates the scope of SB 1818 and its application to a disability discrimination claim based on an employer's failure to hire a person not legally qualified to work in the United States. SB 1818 was enacted in response to *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137, in which the Court held that the policies underlying the Immigration Reform and Control Act of 1986 ("IRCA") prohibited the National Labor Relations Board ("NLRB") from awarding backpay to illegal immigrants who, in violation of the National Labor Relations Act, were terminated because of their participation in the organization of

a union. (*Id.* at pp. 140-141;148-152.) Salas argues that because *Hoffman* precluded the NLRB from awarding backpay to illegal immigrants, the enactment must allow him to recover "backpay" for Sierra Chemical's allegedly discriminatory failure to hire him regardless whether the after-acquired-evidence or unclean hands doctrines would otherwise preclude him from bringing such claims. The analysis in *Farmer Brothers Coffee v. Workers' Compensation Appeals Board* (2005) 133 Cal.App.4th 533, shows this argument to be wrong:

> [W]here reinstatement is prohibited by federal law, section 1171.5 would also prohibit backpay, which was the intent of the Legislature in passing section 1171.5 and related statutes. (See Sen. Com. on Labor and Industrial Relations, Rep. on Sen. Bill No. 1818, *supra*, as amended May 14, 2002; Civ. Code, § 3339; Gov. Code, § 7285.)

(*Id.* at p.541.)

Although SB 1818 provides that undocumented workers are entitled to "[a]ll protections, rights, and remedies available under state law," there is nothing in the statute which expands the rights of undocumented workers. On the contrary, SB 1818 instead states that its provisions are "declaratory of existing law." Law existing as

of the time of SB 1818's enactment precluded an employee who misrepresented a job qualification imposed by the federal government such that he or she was not lawfully qualified for the job, from maintaining a claim for wrongful termination or failure to hire. (*Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 636; *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 847.)

The preclusive effect of such a misrepresentation applies regardless of immigration status. As the Court of Appeal recognized, the rule does not frustrate the purposes of SB 1818 because it allows undocumented immigrants to bring a wide variety of claims against their employers as long as these claims are not tied to the wrongful discharge or failure to hire. Accordingly, at the time SB 1818 was enacted, an undocumented immigrant possessed no right under state law to maintain a claim for an allegedly discriminatory termination or failure to hire when the claim would otherwise be barred by the after-acquired evidence or unclean hands doctrines.

Second, Salas' policy arguments posit an armaggedon for

workers' rights that is a fiction. Salas' argument that the Court of Appeal's decision "derogates" California's civil rights protections" is one of the exaggerations in his brief.

Third, *McKennon v. Nashville Banner Pub. Co.* (1995) 513 U.S. 352, was a wrongful discharge case and does not support an award of any pay to Salas. The other appellate decisions which Salas attacks as being wrongly decided, *Camp, supra* and *Murillo, supra*, discuss *McKennon* and conclude 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 the Court of Appeal here correctly concluded, an award of what Salas argues is "backpay" is prohibited by SB 1818, which intended to prohibit an award of backpay to an employee whose reinstatement is prohibited by federal law. (See *Farmer Brothers Coffee, supra,* 133 Cal.App.4th at p. 541.)

There is no merit to Salas' procedural argument against the Court's decision, which was based on the only evidence submitted by the parties regarding the Social Security number which Salas

represented as belonging to him. Salas' reference to the possibility that the Social Security Administration mistakenly gave the same number to more than one person is simply speculation, which does not create a triable issue of fact. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.) The argument that the Court's finding usurped the role of immigration authorities and misapplied immigration law is not one which Salas made to the lower courts nor is it supported by the authorities cited. There was no triable issue of fact regarding Sierra Chemical's policy regarding a potential employee who submits a false Social Security number.

II. STATEMENT OF THE CASE.

A. Statement of the Facts.

1. Sierra Chemical's Business.

Sierra Chemical is in the business of manufacturing, repackaging, and distributing chemicals primarily used in the water treatment business, including both commercial and residential swimming pools, as well as potable and waste water treatment plants. Consumer demand for Sierra Chemical's products increases significantly in Spring when the weather gets warmer and then

decreases significantly in the late Fall or early Winter when the weather cools, so that the company decreases its operations as consumer demand decreases. This results in a seasonal reduction in its production line staff through layoffs and, when consumer demand increases, a recall of those who were laid off. (Appellant's Appendix II ("AA"), Tab 24, p. 389 [Cummings Declaration, ¶¶ 4-5].)

2. Salas' Employment with Sierra Chemical: 2003-2006.

Salas submitted a job application to Sierra Chemical on April 27, 2003. Included in the application was Salas' purported Social Security number. On May 13, he signed INS Form I-9 verifying under penalty of perjury that the information he provided on the form was correct. Included in that information was the same Social Security number he claimed was his and he attached a copy of a Social Security card that contained the same number. Salas began working for Sierra Chemical on approximately May 14, 2003. (AA I, Tab 16, pp. 119-122; Tab 24, p. 388 [Cummings Declaration, ¶ 9].)

Salas worked on the production line filling containers with Sierra Chemical's products. The production line employees fill different size containers with specific products. There are two bottling lines to fill one gallon bottles, and a third line to fill larger containers ranging from 5 gallons to 53 gallons. Normally only one bottling line is operated at a time and all production workers are required for its operation. The line operates in an "assembly line" fashion. One to two employees remove empty bottles from returned crates, remove the caps, and place the bottles on one conveyer and the crates on another. The empty bottles travel through a bottle washer and the crates travel through a crate washer. An employee inspects the bottles and crates to verify they are clean and ready to be filled. The empty clean bottles go through a rotary bottle filling machine where the product is placed in the bottle. The lead operator operates the fill machine and places the caps on the bottles. The filled capped bottles go through a cap tightening machine where the caps are tightened. They then pass through a rinsing area where any spilled product is rinsed off the bottle. An employee wipes the bottle following the rinse to remove most of the rinse water. An

employee puts the filled bottles into a clean crate and another employee stacks the filled crates on a pallet. Stacking the crates on a pallet is the only step that requires lifting more than 15 lbs. Therefore, with the exception of the lead operator who operates the filling machine, Sierra Chemical requires the employees to constantly rotate through the different positions during each shift so that no one person is doing all of the heavier lifting all of the time. (AA II, Tab 24, pp. 387-388 [Cummings Declaration, ¶¶ 6-7].)

Sierra Chemical laid off Salas as part of its annual reduction of the production line staff in October 2003 and then recalled him in March 2004. He was again laid off in December 2004 and recalled the following March. By December 2005, Salas had accrued enough seniority that three of his co-workers were laid off instead of him. (AA II, Tab 24, pp. 388-389 [Cummings Declaration, ¶¶ 10-12].)

3. Salas' Employment with Sierra Chemical: 2006-2007.

On March 1, 2006, Salas reported a back injury while stacking crates and was taken to Dameron Hospital Occupational

Health for treatment. He returned to work the next day with the restrictions of no lifting over 10-15 pounds, no prolonged sitting, no prolonged standing or walking, and limited bending, twisting or stooping at the waist. Sierra Chemical placed him on modified duty which included sweeping the work area, rinsing empty containers, and performing duties on the production line other than taking the filled containers and putting them in crates and stacking the crates on pallets. He remained on modified duty until he was given a release to full duty on June 9, 2006. (AA II, Tab 24, p.395 [Huizar Declaration, ¶¶ 12-15].)

Salas informed his supervisor that he re-injured his back on August 16, 2006. He was again treated at Dameron Hospital Occupational Health. He returned to work that day and completed his shift under the same restrictions as before. He failed to show for his next four scheduled shifts. When he did return, he was placed on modified duty which continued until he was laid off on December 15, 2006.[5] (AA II, Tab 24, p.395 [Huizar Declaration, ¶¶ 16-18].)

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[5] Dameron Occupational Health had returned Salas to full duty on December 7 because he failed to keep his scheduled appointment.

4. Salas' Medical Treatment and Work in 2007.

Salas had retained Rancaño two days after the injury he reported in August 2006 to represent him in a worker's compensation claim against Sierra Chemical and the State Insurance Fund, its carrier. In November 2006, Rancaño notified the State Fund that Salas had selected the Patel medical group as his new primary care physician. The State Fund approved Salas' choice of Patel in December 2006. (AA II, Tab 22, pp. 358-359 [Taylor Declaration, ¶¶ 1-3].)

On January 4, 2007, Salas went to an appointment with a physician in the Patel group, Dr. Adapa, who found "excessive subjective complaints" and declared him fit for regular duty with no work restrictions. (AA I, Tab 16, pp. 217-218.) According to Salas, Dr. Adapa "didn't say that I could work with restrictions. He only said 'You're released,' without any explanation." (AA I, Tab 16, p.157 [Salas Deposition 139:14-18].)

Following Dr. Adapa's report, Rancaño requested that the State Insurance Fund assign another physician as his primary care provider. When the Fund denied the request, Rancaño sought an

expedited hearing before the worker's compensation appeals board to authorize a new primary care provider. The appeals board granted Salas' request to see a Stockton physician, Dr. Alan Jakubowski, as his new primary care provider.[6] (AA II, Tab 22, p. 359 [Taylor Declaration, ¶ 4].)

5. Salas Gets a Job with Another Employer.

On January 31, 2007, Salas started working at RO-Lab American Rubber Co., Inc. (Respondent's Appendix ("RA"), Tab 3, pp. 13-15 [Salas Deposition 13:23-14:12; 19:11-22].)

6. Sierra Chemical's 2007 Recall.

According to Salas' Declaration, Sierra Chemical foreman Leo Huizar called him on March 1, 2007 and asked if he wanted to go to work. Salas responded that he did and Huizar told him to show up the next day. Huizar then asked Salas if he was fully recovered from his back injury and if he was still seeing a doctor. Salas answered that he was not completely healed and Huizar told

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[6] According to Salas, he had sought a change from Dameron Occupation Health to Dr. Patel's medical group because he lived in Tracy and it was difficult for him to go to Stockton for treatment for his injuries. (AA II, Tab 20, p. 345 [Salas Declaration ¶ 5].)

him that he could not return to work like that and that it would violate the company's policies to allow him to return to work. (AA II, Tab 20, p.346 [Salas Declaration, ¶ 7].)[7]

Sierra Chemical sent Salas a recall notice on May 1, 2007, instructing him to contact Huizar to make arrangements to return to work. According to Salas' deposition testimony, he contacted Huizar after receiving the letter and told him that he had received it. Huizar said that he wanted Salas to work but only if his back was 100% well, and if it wasn't, he shouldn't show up for work. Salas then said that he wasn't going to be able to work and Huizar answered that he wouldn't be able to work until he was 100% well. (AA I, Tab 16, p. 142 [Salas Deposition 142:1-21].) According to Salas' Declaration, he told Huizar that "I could work within my restrictions" and Huizar said that "I could not go to work unless I was 100% recovered." (AA II, Tab 24, pp. 367-368 [Salas Declaration, ¶ 11].) Also, according to Salas, he did not tell

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[7] Sierra Chemical objected to the statements of Huizar as an unauthorized admission. (AA II, Tab 29, pp. 486-487, objection number 17.) The trial court overruled the objection. (AA II, Tab 34, p.522.)

Huizar that Dr. Adapa had told him that he was released to full duty "[b]ecause he did not ask me. He only asked if my back was well." (AA I, Tab 16, p. 157 [Salas Deposition 139:11-24].)

There is no evidence that Salas requested a work accommodation other than his purported statement to Huizar that "I could work within my restrictions," which appears in his Declaration but not in his deposition. There is no evidence that a request for a work accommodation came from Rancaño, which had been representing him since August 2006 and which filed this action.[8] Huizar subsequently learned from Salas' production line co-workers that he was employed somewhere. (AA I, Tab 16, p. 203 [Huizar Deposition, 144:18-145:6].)

Sierra Chemical did not hear from Salas again until it was served some months later with the Complaint.

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[8] Rancaño, which had been representing Salas since August 2006, sent a letter to the State Fund in December 2006, notifying the Fund of Salas' layoff and requesting benefits. (RA, Tab 3, p.77)

B. Statement of the Proceedings Below.

1. Salas' Complaint & Discovery Responses.

Salas' first Complaint, filed on August 28, 2007 alleged that on or about November 1, 2006, Sierra Chemical had "terminated plaintiff's employment . . . to punish plaintiff for exercising a legal right, and to intimidate and deter plaintiff, and other persons similarly situated, from bringing a claim for workers' compensation benefits." (AA Tab 1, p.3 [Complaint, ¶ 12].) The Complaint also alleged that Sierra Chemical failed to provide a reasonable accommodation for Salas' disability and failed to engage in the informal interactive process to determine a reasonable accommodation. (AA I, Tab 1, p.3 [Complaint, ¶ 7].)

Salas' contention that he had been terminated and not laid off persisted through his discovery responses. (See, *e.g.* Salas' April 21, 2008 Response to Request for Admission number 3, Respondent's Appendix ("RA") Tab 3, pp. 71, 74.)

2. Sierra Chemical's First Summary Judgment Motion & Salas' Amended Complaint.

On December 16, 2008, Salas filed a motion for leave to

amend his Complaint. (AA I, Tab 4, p. 12.) Sierra Chemical opposed the motion on a number of grounds, including the timing of the motion in light of the April 6, 2009 trial date, which required a motion for summary judgment to be heard no later than March 6, 2009. On March 11, 2009, the lower court granted Salas' motion, but allowed Sierra Chemical the right to take additional discovery. (AA I, Tab 5, p. 29.) Salas filed the Amended Complaint on March 24. (AA I, Tab 6, p. 31.)

The Amended Complaint alleged that "[o]n or about November 1, 2006" Sierra Chemical "denied plaintiff employment to punish plaintiff for exercising a legal right, and to intimidate and deter plaintiff, and other persons similarly situated, from bringing a claim for workers' compensation benefits." (AA I, Tab 6, p.33 [Amended Complaint, ¶ 12].)

3. Salas' First Summary Judgment Motion.

On December 18, 2008, Sierra Chemical filed a motion for summary judgment to be heard on March 6, 2009, which was 30 days before the scheduled April 6, 2009 trial date. (RA, Tab 1, p.1) On March 11, 2009, the court denied the motion. (RA, Tab 8, pp.

179-181.)

4. Salas' In Limine Motion & Sierra Chemical's Second Summary Judgment Motion.

Trial was scheduled to begin on April 6, 2009. The parties filed their in limine motions prior to trial as required by the local rules. Salas' in limine motion number 7 advised the court that he would assert his Fifth Amendment rights in response to any question as to his immigration status and sought an order that any such questions be put to him outside of the presence of the jury. (RA, Tab 8, p.43.)

Up to this point Sierra Chemical had no reason to doubt the authenticity of any of the documents which Salas had provided with his employment application. The allegation in Salas' in limine motion led to an investigation which resulted in Sierra Chemical discovering that the Social Security number which Salas had represented as his own belonged to a person in North Carolina named Tenney. Sierra Chemical's second summary judgment followed.

Sierra Chemical sought summary judgment on the grounds that: (1) after acquired evidence of Salas' use of another person's

Social Security number to obtain employment with Sierra Chemical barred his claims; (2) Salas' use of another person's Social Security number and his failure to disclose that he had been released to full duty barred his action because of the doctrine of unclean hands; and (3) Salas' failure to disclose that he had been released to full duty estopped him from pursuing his claims. (AA I, Tab 9, pp. 46-69.) The trial court denied the motion. (AA I Tab 34, p. 516.)

On January 7, 2010, the Court of Appeal issued an alternative writ of mandate and prohibition. (AA II, Tab 37, p. 540.) On January 22, 2010, the trial court vacated its order denying Sierra Chemical's motion for summary judgment and granted the motion and entered judgment in favor of Sierra Chemical. (AA II, Tab 35, p. 526; Tab 38, p. 560.) Salas' appeal followed. (AA II, Tab 40, p. 564.)

The Court of Appeal held that Salas' disability discrimination claim was barred by the after-acquired evidence doctrine because there was no evidence that Salas had his own Social Security number or that Sierra Chemical would have rehired him had it known that he did not possess his own Social Security number. The Court also held

that Salas' claim was barred by the unclean hands doctrine because his misrepresentation that the Social Security number submitted to Sierra Chemical went directly to the heart of the employment relationship and related directly to his claims that Sierra Chemical wrongfully failed to hire him after his seasonal layoff and discriminated against him by failing to provide a reasonable accommodation for his back injury. The Court found that SB 1818 did not prohibit application of the after-acquired evidence and unclean hands defenses because law existing at the time of the bill's passage precluded an employee who misrepresented a job qualification imposed by the federal government, such that he or she was not lawfully qualified for the job, from maintaining a claim for wrongful termination or failure to hire.

III. ARGUMENT.

A. SB 1818 did not Abrogate the Defenses of After-Acquired Evidence & Unclean Hands to a Disability Discrimination Claim Based on an Employer's Refusal to Hire.

Salas' lengthy discussion of SB 1818, which makes immigration status irrelevant to the determination of liability under

the state's employment laws, has no bearing on Sierra Chemical's argument that Salas' misrepresentation that he possessed a Social Security number precludes him from maintaining this action.[9] Salas' argument mistates the scope of SB 1818 and its application to a disability discrimination claim based on an employer's failure to hire a person not legally qualified to work in the United States.

The summary judgment motion was based on Salas' use of a Social Security number that belonged to another person and his ineligibility to work in the United States because he did not have a Social Security number of his own. Cases such as *Cassano v. Carb* (2nd Cir. 2006) 436 F.3d 74, 75, explain the rationale for requiring employers to gather and report Social Security numbers as being an aid to the enforcement of tax and immigration laws. But that doesn't

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[9] Sierra Chemical could have based unclean hands and after-acquired defenses on Salas' immigration status, had the evidence so warranted. Salas' claim for backpay is the equivalent of a "reinstatement remedy prohibited by federal law" because "[u]nder existing law, backpay is not recoverable by an employee who would not be rehired regardless of any employer misconduct." (*Farmer Brothers Coffee v. Workers' Compensation Appeals Board* (2005) 133 Cal.App.4th 533, 541.)

transform an argument based on Salas' ineligibility for employment because he didn't have a Social Security number in his own name into an argument based on his immigration status. A valid Social Security number is a necessary condition of employability under federal law. (*Sutton v. Providence St. Joseph Medical Center* (9th Cir. 1999) 192 F.3d 826, 830-831; *Seaworth v. Pearson* (8th Cir. 2000) 203 F.3d 1056, 1057.)

In *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137, the Court held that the policies underlying the Immigration Reform and Control Act of 1986 ("IRCA") prohibited the National Labor Relations Board ("NLRB") from awarding backpay to illegal immigrants who, in violation of the National Labor Relations Act, were terminated because of their participation in the organization of a union. (*Id.* at pp. 140-141;148-152.):

> Congress has expressly made it criminally punishable for an alien to obtain employment with false documents. There is no reason to think that Congress nonetheless intended to permit backpay where but for an employer's unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities.

(*Id.* at p. 149.)

Following the *Hoffman* decision, the Legislature enacted SB 1818, which added four identical provisions to California's statutes:

> The Legislature finds and declares the following: [¶] (a) All protections, rights, and remedies available under state law, **except any reinstatement remedy prohibited by federal law**, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state. [¶] (b) For purposes of enforcing state labor, employment, civil rights and employee housing laws, a person"s immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law. [¶] (c) The provisions of this section are declaratory of existing law. [¶] (d) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(Stats. 2002, ch. 1071, § 1, pp. 6913-6915; Lab. Code, § 1171.5; Civ. Code, § 3339; Gov. Code, § 7285; Health & Saf. Code, § 24000 [Emphasis added].)

Salas argues that because *Hoffman* precluded the NLRB from awarding backpay to illegal immigrants, and because SB 1818 was

enacted to "limit the potential effects of [this decision] on the state's labor and civil rights laws . . . ." (Sen. Com. on Labor and Industrial Relations, Analysis of SB 1818 (2001-2002 Reg. Sess.) as amended May 9, 2002, p. 1), the enactment must allow him to recover backpay for the allegedly discriminatory failure to hire, regardless of whether the after-acquired-evidence or unclean hands doctrines would otherwise preclude him from bringing claims tied to the failure to hire.

The analysis in *Farmer Brothers Coffee v. Workers' Compensation Appeals Board* (2005) 133 Cal.App.4th 533, which held that an undocumented worker was entitled to worker's compensation benefits, shows this argument to be wrong:

> Section 1171.5 was enacted by the California Legislature in response to *Hoffman.* (See *Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F.3d 1057, 1073.) The Legislature sought to avoid any conflict with the IRCA by providing that an employee's immigration status was irrelevant to his or her workers' compensation claim, as provided under existing law, except with regard to the issue of reinstatement, since the employer would be committing a federal crime by reinstating the undocumented employee. (See Sen. Com. on Labor and Industrial Relations, Rep. on Sen. Bill No. 1818 (2001-2002 Reg. Sess.) as amended May 14, 2002.)

> Section 1171.5, subdivision (b), avoids conflict with *Hoffman*'s backpay prohibition by making an exception to the exclusion of evidence of the employee's immigration status "where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law," and by excluding any reinstatement remedy prohibited by federal law. **Under existing law, backpay is not recoverable by an employee who would not be rehired regardless of any employer misconduct.** (*Rivcom Corp. v. Agricultural Labor Relations Bd.* (1983) 34 Cal.3d 743, 773-774 [195 Cal. Rptr. 651, 670 P.2d 305].) **Thus, where reinstatement is prohibited by federal law, section 1171.5 would also prohibit backpay, which was the intent of the Legislature in passing section 1171.5 and related statutes.** (See Sen. Com. on Labor and Industrial Relations, Rep. on Sen. Bill No. 1818, *supra*, as amended May 14, 2002; Civ. Code, § 3339; Gov. Code, § 7285.)

(*Id.* at p.541 [Emphasis added].)

Although SB 1818 provides that undocumented workers are entitled to "[a]ll protections, rights, and remedies available under state law," there is nothing in the statute which expands the rights of undocumented workers. On the contrary, SB 1818 states that its provisions are "declaratory of existing law."

As discussed below, law existing as of the time of SB 1818's enactment precluded an employee who misrepresented a job

qualification imposed by the federal government such that he or she was not lawfully qualified for the job, from maintaining a claim for wrongful termination or failure to hire. (*Camp, supra,* 35 Cal.App.4th at p. 636; *Murillo, supra,* 65 Cal.App.4th at p. 847.)

The preclusive effect of such a misrepresentation applies regardless of immigration status. As the Court of Appeal recognized, the rule does not frustrate the purposes of SB 1818 because it allows undocumented immigrants to bring a wide variety of claims against their employers as long as these claims are not tied to the wrongful discharge or failure to hire. Accordingly, at the time SB 1818 was enacted, an undocumented immigrant possessed no right under state law to maintain a claim for an allegedly discriminatory termination or failure to hire when the claim would otherwise be barred by the after-acquired evidence or unclean hands doctrines.

Sullivan v. Oracle Corp. (2011) 51 Cal. 4th 1191 does not support Salas' argument that the effect of the Court of Appeal's decision is to create a "subclass of undocumented workers who did not possess the rights and remedies available to all." (AOB, p. 13.)

In *Sullivan*, this Court held that the Labor Code's overtime provisions apply to claims for compensation for work performed by non-residents in California. The Court observed that "[t]o exclude nonresidents from the overtime laws' protection would tend to defeat their purpose by encouraging employers to import unprotected workers from other states." (*Id.* at p. 1198.) There is no comparable governmental interest in prohibiting the assertion of equitable defenses to the wrongful refusal to hire action of a person not legally qualified to work at the job for which he was not hired.

B. The Court Of Appeal's Proper Application of the After-Acquired Evidence & Unclean Hands Doctrines Is not a Threat to California Civil Rights Protections.

Salas argues that the Court of Appeal's use of the after-acquired evidence and unclean hands defenses to bar all of Salas' claims as a matter of law "derogates" California's civil rights protections and cites *McKennon v. Nashville Banner Pub. Co.* (1995) 513 U.S. 352 in support of this hyperbolic assertion. In *McKennon*, the Court held that impact of after acquired evidence of wrongdoing by a plaintiff-employee under the Age Discrimination Act of 1967, 29 U.S.C. sections 621 *et seq.*, had to be determined on a case by

case basis:

> The proper boundaries of remedial relief in the general class of cases where, after termination, it is discovered that the employee has engaged in wrongdoing must be addressed by the judicial system in the ordinary course of further decisions, for the factual permutations and the equitable considerations they raise will vary from case to case. We do conclude that here, and as a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.

(*Id.* at p. 361.)

Camp, supra, and *Murillo, supra*, discuss *McKennon* and conclude 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.)

There is nothing in the FEHA which calls for allowing a claim

by a plaintiff alleging disability discrimination resulting from a refusal to hire where the employee is disqualified from employment under federal law because he does not have a valid Social Security number.

1. An Employee Who Misrepresents a Government-Imposed Job Qualification Cannot Maintain a Discrimination Action.

Murillo, supra, 65 Cal.App.4th 833, 845-846, and *Camp, supra*, 35 Cal.App.4th 620, 638-639, hold that an employer's discovery that an employee has misrepresented a job qualification required by the federal government such that the employee is not lawfully qualified for the job is a complete defense to a discrimination action under both the after-acquired evidence doctrine and the doctrine of unclean hands.

Where an employee's misrepresentation goes directly to the heart of the employment relationship and relates directly to the wrongful discharge claim, those claims are barred by the doctrine of unclean hands. (*Murillo, supra*, 65 Cal.App.4th at p. 845.) The defense of after-acquired evidence involves a different analysis: in order to invoke this doctrine, the employer must show that had the

employer known of the misrepresentation, it would have terminated the employee.[10] (*Murillo, supra*, 65 Cal.App.4th at pp. 845-846.)

Having a valid Social Security number is a job qualification that federal law imposes for all jobs because employers are required by law to obtain and report the Social Security numbers of their employees:

> Plaintiff's reliance on anti-discrimination statutes is misplaced because defendants' policy of requiring SSNs applied equally to all employees and was also a necessary consequence of defendants' obligations under federal law. As the District Court noted, federal law requires that employers gather and report the SSNs of their employees to aid enforcement of tax and immigration laws.

(*Cassano v. Carb* (2nd Cir. 2006) 436 F.3d 74, 75.)

Federal law required Salas to have a valid Social Security number before he could work for Sierra Chemical. In *Sutton v. Providence St. Joseph Medical Center* (9th Cir. 1999) 192 F.3d 826, 830-831, the court affirmed the dismissal of a job applicant's

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[10] As applied to Salas' claim, the after-acquired evidence defense requires that Sierra Chemical show that it would not have rehired Salas had it known that the Social Security number which he was representing as his own actually belonged to someone else.

religious discrimination lawsuit because his refusal to provide Social Security number barred his hiring as a matter of federal law. (See also *Seaworth v. Pearson* (8th Cir. 2000) 203 F.3d 1056, 1057.)

2. Salas' Claim Is Barred by the Doctrine of Unclean Hands.

In *Murillo, supra*, an employee brought an action against her former employer for wrongful discharge, sexual harassment, and other contractual and tort claims. The employer asserted the defense of unclean hands based on the employee's use of false alien registration and Social Security card to obtain employment. The court held:

> Plaintiff's misrepresentation went to the heart of the employment relationship and related directly to her wrongful discharge and contractual claims. The unclean hands doctrine therefore would bar those claims.

(65 Cal.App.4th at p. 845.)

Murillo distinguished the plaintiff's sexual harassment claim, which was based on what occured during her employment, from her wrongful discharge claim. Salas' claims, like the *Murillo* plaintiff's wrongful discharge claim, did not arise from anything that happened during his employment. According to Salas' Amended Complaint,

Sierra Chemical is liable for *denying him employment* on a modified basis to accommodate his disability. Denying a person employment is by definition not an act that occurs during employment. Under *Murillo's* distinction between acts occurring during employment and those not occurring during employment, the unclean hands defense is available to Sierra Chemical.

Salas attacks the Court of Appeals' conclusion that his claims were tied to the company's failure to hire him through a non-discriminatory recall and that, unlike the on the job harassment underlying *Murillo*, this action is based on what occurred before Sierra Chemical hired him. He argues that his claims were based on what occurred during his employment, and references the portion of his Declaration in which he avers that when he returned to work under restricted duty, his supervisor forced him to return to regular duty despite the fact that he was still in pain and that as a result he reinjured his back. (AOB, p. 6.) Salas did not argue to the courts below that his claims were based on what occurred during his employment. Neither his original Complaint nor his amended version references any physical injury. The damages alleged in the

Complaint's "failure to accomodate" and "wrongful termination" causes of action and in the Amended Complaint's "failure to accomodate" and "denial of employment" causes of action are "loss of wages and other compensation" and "extreme and severe mental anguish, humiliation, severe emotional distress, nervousness, tension, anxiety and depression." (AA I, Tab 1, pp.4-5 [Complaint, ¶¶ 8, 15]; (AA I, Tab 6, pp.33-34 [Amended Complaint, ¶¶ 8, 15].) Salas' Amended Complaint sought damages for Sierra Chemical's purportedly wrongful conduct in failing to hire him for work that would accomodate his alleged disability.

3. Salas' Claim Is Barred by the After-Acquired Evidence Doctrine.

In *Camp*, *supra*, the plaintiffs, husband and wife, were hired by the defendant law firm, a contractor for the Resolution Trust Corporation (RTC). Because the RTC was a federal agency responsible for the sale and liquidation of savings and loan associations placed in receivership or conservatorship, a condition of the defendant representing the RTC was that none of its employees could have a prior felony conviction. The wife plaintiff was

terminated shortly after she reported to human resources and a member of the defendant's management committee her supervisor's confession that he was engaging in insider trading. The reason given for her termination was excessive spelling errors in a letter she had typed. Around the same time, the husband plaintiff was also terminated for using company time and resources for a personal matter. Both sued, claiming, among other things, that their terminations violated public policy.

During discovery, the defendant learned that the plaintiffs had lied on their job applications when they each stated that neither had been convicted of a felony. The defendant's motion for summary judgment was granted based on this after acquired evidence.

Affirming, the appellate court concluded that the after acquired evidence of the plaintiffs' misrepresentations barred them from *any* recovery.

> The [plaintiff] Camps' misrepresentations about their felony convictions went to the heart of their employment relationship with [defendant law firm] Jeffer Mangels. Under its contract with the RTC, Jeffer Mangels was obligated to ensure that none of its employees had ever been convicted of a felony. In moving for summary judgment, Jeffer Mangels established that the Camps had

> in fact been convicted of a felony. Further, the Camps' misrepresentations placed Jeffer Mangels in the risky position of certifying to the federal government - - inaccurately - - that all of the firm's employees met the RTC's qualifications. The Camps thus put Jeffer Mangels not only in jeopardy of losing its contract with the RTC but also of being accused of making false statements itself. Moreover, given the function of the RTC, the nature of the Camps' past criminal conduct - - conspiring to defraud a federally insured bank - - magnified the potential adverse consequences to Jeffer Mangels of certifying that none of its employees were convicted felons.

(*Camp*, *supra*, 35 Cal.App.4th at p. 637.)

As discussed above, having a valid Social Security number is a job qualification that federal law imposes for all jobs because employers are required by law to obtain and report the Social Security numbers of its employees. And in *Murillo*, *supra*, the court analyzed the after-acquired evidence doctrine in the context of a former employee's use of a false Social Security number to obtain employment.

The employee's complaint sought damages for wrongful termination, sexual harassment, and other tort and contractual claims. Conceding that the use of a false alien registration and Social Security card would bar her wrongful discharge cause of action under

the unclean hands doctrine, the employee dismissed that claim. *Murillo* then analyzed the after-acquired evidence defense as applied to the employee's remaining claims. The court concluded that the employer failed to establish that the after-acquired-evidence doctrine barred the employee's remaining claims as a matter of law because the employee produced admissible evidence that raised a factual issue as to whether the employer actually would have refused to hire her or would have fired her immediately upon learning of her undocumented status.

In *Shattuck v. Kinetic Concepts, Inc.* (5th Cir. 1995) 49 F.3d 1106, the plaintiff brought an age discrimination action against the employer who discharged him purportedly as part of a reduction in force. The employer offered an acquired evidence defense, arguing that had it known that plaintiff had misrepresented himself as having a college degree in his job application, it would not have hired him. In holding that was not a defense in a wrongful termination case, the court stated:

> We are persuaded that the pertinent inquiry, except in refusal-to-hire cases, is whether the employee would have been fired upon discovery of the wrongdoing, not

> whether he would have been hired in the first instance. The rationale underlying consideration of after-acquired evidence is that the employer should not be impeded in the exercise of legitimate prerogatives and **the employee should not be placed in a better position than he would have occupied absent the discrimination.**

(*Id.* at pp. 1108-1109 [Footnotes omitted.] [Emphasis added].)

Applying the rationale that a person should not be placed in a better position than he would have occupied absent the discrimination to a failure to hire case means an award of pay to a non-hired plaintiff who was not legally qualified to work for an employer places him in "in a better position than he would have occupied absent the discrimination."

Here, Sierra Chemical submitted the Declaration of Stan Kinder, its president and chief executive officer that: (1) Sierra Chemical has a long-standing policy precluding the hiring of any applicant who submits false information; (2) if he had learned that an employee had submitted false information, that employee would be immediately terminated; and (3) he learned that the Social Security number which Salas was using had not been assigned to him only within the last 60 days. (AA I, Tab 11, pp. 99-100.)

Salas' evidence consisted of his Declaration that: (1) in late 2004 or early 2005, he received a letter from the Social Security Administration stating that his name and Social Security number did not match their records; (2) during the same period several of his co-workers at Sierra Chemical also received identical form letters from Social Security; (3) Huizar, his foreman, told him and the employees who received the letters that Sierra Chemical's president was happy with their work and that as long as he remained happy he would not fire them over a discrepancy with a Social Security number; (4) during the years he worked at Sierra Chemical some workers admitted to being undocumented; (5) he never heard of Sierra Chemical discharging any person due to a discrepancy with a Social Security number. (AA II, Tab 20, p. 346 [Salas Declaration ¶¶ 8, 9].)

Sierra Chemical objected to these statements in Salas' Declaration on a number of grounds, including lack of foundation and hearsay. (AA II, Tab 29, p. 487, objections 18, 19.) Although the trial court overruled the objections (AA II, Tab 34, p. 522), the statement attributed to Huizar about the response of Sierra

Chemical's president to a Social Security number "discrepancy" is undoubtedly hearsay.

Salas argued before the Court of Appeal an exception to the hearsay rule, namely, that Huizar's statements were admissible under Evidence Code sections 1220 (admission of a party opponent) and 1222 (authorized admission). But Salas did not lay a proper foundation for the applicability of the party admission (Evid. Code, § 1220) or authorized admission (Evid. Code, § 1222) exceptions to the hearsay rule. (See *Morgan v. Regents of the University of California* (2000) 88 Cal.App.4th 52, 70 [proponent of hearsay evidence has burden of laying foundation showing authority to speak].) Salas argued that Huizar's position as Production Manager of Sierra Chemical's Stockton facility gave him authority to speak for the company on its personnel policy, but there was no evidence that Sierra Chemical ever gave him any such authority.

Salas also did not produce any evidence that Sierra Chemical ever knowingly hired or retained an "undocumented" worker, a worker who had submitted a Social Security number belonging to another person, or a worker who did not have his own Social

Security number. As a result, there was no admissible evidence rebutting Kinder's Declaration that had Sierra Chemical known Salas was submitting false information, *i.e.*, the Social Security number of another person, to obtain employment, he would not have been hired, and that had the company learned after hiring that false information had been provided, he would have been fired.

The Court of Appeal found that the evidence Salas submitted to rebut Kinder's Declaration was mere speculation and did not create a triable issue of fact whether Sierra Chemical had a settled policy of refusing to hire a person who submitted a Social Security number which belonged to someone else.[11]

C. The Court of Appeal Properly Applied the Principles That Govern the Adjudication of Summary Judgment Motions.

In support of its motion for summary judgment/adjudication, Sierra Chemical produced the sworn declaration of Kelly Tenney, who stated that his Social Security number was xxx-xx-4253. (AA I,

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[11] As a result of its finding, the Court did not address Sierra Chemical's arguments regarding its hearsay and foundation objections.

Tab 12, p. 103.)

Salas admitted that he represented his Social Security number as being xxx-xx-4253 in both his job application to Sierra Chemical and RO-Lab American Rubber Co., Inc.:

(1) He submitted a job application to Sierra Chemical on April 27, 2003, on which he wrote his purported Social Security number, xxx-xx-4253. (AA II, Tab 19, p. 297, undisputed fact no. 1.)

(2) He also completed IRS Form W-4 informing Sierra Chemical of the number of "allowances" he was claiming for purposes of payroll taxes and wrote the same Social Security number, xxx-xx-4253, on that form as he did on the other. (AA II, Tab 19, p. 298, undisputed fact no. 3.)

(3) He was again laid off and then recalled, and on March 24, 2005, he submitted a third IRS Form W-4 on which he again wrote the same Social Security Number, xxx-xx-4253. (AA II, Tab 19, p. 299, undisputed fact no. 8.)

(4) He used the same Social Security number, xxx-xx-4253, and Social Security card to misrepresent his eligibility to work in the United States to his current employer RO-Lab American Rubber Co.,

Inc. (AA II, Tab 19, p. 300, undisputed fact no. 10.)

Salas failed to produce any evidence that Social Security number xxx-xx-4253 was his nor did he produce any evidence that he has a valid Social Security number. His failure to produce any such evidence established there was no triable issue of fact regarding his misrepresentation of Tenney's Social Security number as being the one which he had been issued or his possession of a valid Social Security number. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 [opposing party has burden of producing evidence to rebut moving party's prima facie showing of entitlement to judgment as a matter of law]; Code Civ. Proc., § 437c, subd. (c) [only admissible evidence can establish existence of triable issue of material fact].) Salas' argument that it was possible that the Social Security Administration mistakenly gave the same number to more than one person is speculation, which does not create a triable issue of fact. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.)

Salas argues that there was a triable issue of fact whether he would have been rehired had Sierra Chemical known that he didn't have his own Social Security number. As discussed above, the

evidence which Salas submitted through his own Declaration was inadmissible and therefore legally insufficient to rebut the Kinder Declaration. Moreover, the issue is irrelevant to the defense of unclean hands. (*Murillo, supra*, 65 Cal.App.4th 845-846.)

Salas argues that the Court of Appeal erred in inferring his "lack of employment authorization from the purported discrepancy" with the Social Security number he submitted to Sierra Chemical. According to Salas, this is an inquiry which should be conducted by immigration authorities and not the judiciary. Again, the issue is not Salas' immigration status. It is whether he had his own Social Security number entitling him to work.

IV. CONCLUSION.

Sierra Chemical's motion was not based on Salas' immigration status, and there is nothing in California or federal law that precludes the company from asserting the defenses of unclean hands and after-acquired evidence. Salas produced no evidence that the Social Security number he submitted to Sierra Chemical was his or that he has ever been assigned a number of his own. Sierra Chemical's motion established that as matter of law Salas' claims are barred by

the doctrines of unclean hands and after-acquired evidence because of Salas' use of another person's Social Security number to obtain employment.

Dated: June 14, 2012

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Calif. Rule of Court 8.204(s)(1))

The test of this brief consists of 9915 words as counted by the word processing program (Word Perfect) that was used to generate this brief.

Dated: June 14, 2012

Freeman, D'Aiuto, Pierce, Gurev, Keeling & Wolf

By 

ARNOLD J. WOLF

Attorneys for defendant/respondent Sierra Chemical Co.

PROOF OF SERVICE

I hereby certify that I am a citizen of the United States, over the age of eighteen years, and not a party to this action. My business address is 1818 Grand Canal Boulevard, Suite 4, Stockton, California 95207. I served the foregoing document entitled:

RESPONDENT'S ANSWER BRIEF

Service by United States Mail:

✓ by placing a true copy thereof enclosed in a sealed envelope or package with postage thereon fully prepaid in a box or receptacle designated by my employer for collection and processing of correspondence for mailing with the United States Postal Service, addressed as set forth below. I am readily familiar with the business practices of my employer, FREEMAN, D'AIUTO, PIERCE, GUREV, KEELING & WOLF, for the collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence placed in the designated box or receptacle is deposited with the United States Postal Service

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The acts described above were undertaken and completed in San Joaquin County on June 14, 2012.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on June 14, 2012, at Stockton, California.

Angela N. Yess