No. S222314

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SOLUS INDUSTRIAL INNOVATIONS, LLC; EMERSON POWER TRANSMISSION CORPORATION; and EMERSON ELECTRIC CO.,

Petitioners,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF ORANGE,

Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Parties in Interest.

Appeal from a Published Opinion of the Court of Appeal, Fourth Appellate District, Division 3, No. G047661

From the Superior Court, County of Orange
Civil Case No. 30-2012-00581868-CU-MC-CXC
The Honorable Kim G. Dunning, Department CX104

OPPOSITION TO REQUEST FOR JUDICIAL NOTICE OF *AMICI CURIAE* CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS AND DIVISION OF OCCUPATIONAL SAFETY AND HEALTH

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I. INTRODUCTION

The California Department of Industrial Relations and the California Division of Occupational Safety and Health Act (collectively, "Cal/OSHA") ask the Court to take judicial notice of three documents—principally, three reports from the 1980s by Cal/OSHA's Bureau of Investigations ("BOI") about BOI's enforcement activities—that were not presented to the superior court or the Court of Appeal. Respondents Solus Industrial Innovations, LLC, Emerson Power Transmission Corporation, and Emerson Electric Co. (collectively, "Solus") oppose the request.

The California appellate courts typically do not take judicial notice of matters not presented to the trial court. No reason exists here to depart from that rule.

The documents are also irrelevant to the issue before the Court. The Court must determine whether the federal Occupational Safety and Health Act (the "OSH Act") preempts a civil penalties action under California's Business and Professions Code section 17200 (the "UCL") when that statute is used to enforce workplace safety standards. The BOI reports proffered by Cal/OSHA cannot affect the Court's determination of this issue. In the reports, BOI makes self-serving statements to bureaucrats connected with the federal Occupational Safety and Health Administration ("OSHA") about BOI's enforcement activities. Apparently, Cal/OSHA is attempting to make the point that, since BOI informed OSHA bureaucrats

in the 1980s that California prosecutors on occasion used the UCL as an additional enforcement mechanism in workplace safety cases, the Secretary of Labor must have implicitly approved that practice and therefore such practices should be regarded as part of the California State Plan.

Nothing in the proffered materials suggests that the Secretary of Labor (as opposed to regional bureaucrats at OSHA) was ever informed that local prosecutors were using the UCL to enforce workplace safety standards, let alone anything that establishes this as a fact not reasonably subject to dispute. Moreover, there is no law holding or suggesting that a state plan can be amended by implication and *sub silentio*, and without the taking of any formal action, even if the Secretary is informed of enforcement practices that the plan does not contain and does not object to such practices. In other words, there is no doctrine of amendment by acquiescence. So even if the proffered materials were sufficient to show beyond reasonable dispute acquiescence by the Secretary in the practice of local prosecutors filing UCL actions in workplace safety cases (and the materials do not so demonstrate), the proffered materials are irrelevant.

For that matter, the notion that three cherry-picked (and redacted)[1] BOI reports, from 1982 (Exhibit A), 1986 (Exhibit B) and 1987 (Exhibit C), provide anything approaching a complete or balanced picture of BOI's

[1] The reports comprising Exhibits B and C contain redactions. Cal/OSHA has not indicated the purpose of the redactions.

enforcement activities or the use by local prosecutors of the UCL is a non-starter. These materials chosen based on some unarticulated principle could not possibly shed any real light on the issue for which they are being proffered even if that issue had some relevance to this appeal.

Cal/OSHA's request for judicial notice should therefore be denied.

II. ARGUMENT

Cal/OSHA asks the Court to take judicial notice of the three documents at issue (BOI reports from the 1980s) under Evidence Code section 452, subdivisions (c) (official acts of the executive), (g) ("common knowledge"), and (h) (facts "not reasonably subject to dispute"). Judicial notice under section 452 is permissive, not mandatory. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2 (*Shamrock Foods*).)

The Court should deny the request. None of the reports was presented to either the superior or intermediate appellate court. None of them sets forth "common knowledge" or facts "not reasonably subject to dispute and . . . capable of immediate and accurate determination." (See Evid. Code § 452, subds. (g), (h).) The reports largely consist of self-serving narratives of BOI's enforcement activities in the subject years. They are replete with hearsay. These narratives do not qualify as "official acts" of the agency under Evidence Code section 452, subdivision (c). In any case, they are irrelevant to the matters before the Court.

A. JUDICIAL NOTICE OF MATTERS NOT PRESENTED TO THE TRIAL COURT IS INAPPROPRIATE ABSENT EXCEPTIONAL CIRCUMSTANCES NOT PRESENT HERE

The Court should deny Cal/OSHA's request for judicial notice because none of the proffered documents was submitted to either the superior court or the Court of Appeal.

"It is an elementary rule of appellate procedure that, when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered. [Citation.] This rule preserves an orderly system of appellate procedure by preventing litigants from circumventing the normal sequence of litigation." (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813; *see also People v. Peevy* (1998) 17 Cal.4th 1184, 1207 ["[A]n appellate court generally is not the forum in which to develop an additional factual record."].)

For this reason, unless the proponent can demonstrate the existence of exceptional circumstances, appellate courts will not judicially notice matters that were not presented to the trial court. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 (*Vons*); see also, e.g., *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 194; *Safeco Insurance Co. of America v. Superior Court* (2009) 173 Cal.App.4th 814, 834, fn. 14.) "Rather, normally 'when reviewing the correctness of a

trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered.' [Citation.]" (*Vons*, *supra*, at p. 444, fn. 3.)

The BOI reports at issue were not part of the record in the superior court. Nor did anyone ask the Court of Appeal to take notice of these documents. Instead, Cal/OSHA (which was an amicus before the Court of Appeal) requested that that court take judicial notice of five *different* documents. Solus objected to four of those documents.[2] The Court of Appeal agreed with Solus, taking judicial notice of only the document to which Solus did not object.

Now Cal/OSHA requests that this Court take judicial notice of three entirely different documents—BOI reports from 1982, 1986 and 1987. Cal/OSHA has not identified any "exceptional circumstances" supporting its request for judicial notice. Indeed, Cal/OSHA's request does not even acknowledge that it did not seek judicial notice of these reports before the Court of Appeal, let alone explain why it did not do so. Nor does Cal/OSHA inform the Court that the reports were not part of the record at the trial court level. Given the fact that these materials were not presented to the courts below, the Court should deny the request. But even if the

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[2] Solus did not object to a document that consisted merely of an earlier version of the Labor Code.

Court decides not to adhere to the general rule, it should reject the request for the reasons set out below.

B. THE REPORTS FOR WHICH JUDICIAL NOTICE IS SOUGHT ARE REPLETE WITH HEARSAY AND ARE IRRELEVANT TO ANY ISSUE IN THE CASE

The Court should also reject the request for judicial notice because the reports in question are replete with hearsay and are not relevant to the issues in this case.

All three documents appear to be BOI reports to the OSHA Regional Administrator describing BOI's enforcement activities for calendar years 1982 (Exhibit A), 1985 (Exhibit B), and 1986 (Exhibit C).

The core of Exhibit A is a BOI report dated September 2, 1982 about BOI's activities in the previous year.[3] The report discusses cases investigated, cases filed, and cases referred. It also contains a fairly lengthy discussion of the use by local prosecutors of the UCL as an adjunct to Cal/OSHA's civil enforcement program. This is followed by a summary of 11 different cases, accompanied by quotations from union officials and others offering praise of BOI's work. Exhibits B and C, which are also

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[3] The BOI report that is Exhibit A does not start until the fifth page of Exhibit A. The first four pages of Exhibit A consist of an internal Department of Labor memorandum and an attachment. This, of course, is not a record of Cal/OSHA and is not subject to judicial notice.

BOI reports (covering the years 1985 and 1986 respectively),[4] principally describe BOI's investigation and resolution of various matters, including referrals to district attorneys for prosecution. Some of the information is set forth in tabular form. Both reports contain redactions, unaccompanied by any explanation of their basis.

1. The Reports Are Largely Hearsay

"'Taking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning' [Citation.] While courts take judicial notice of public records, they do not take notice of the truth of matters stated therein. [Citation.]" (*Herrera v. Deutsche Bank Nat. Trust Co.* (2011) 196 Cal.App.4th 1366, 1375, as modified June 28, 2011.) If the excision of inadmissible materials renders the document confusing, the courts should not take judicial notice of it. (*Love v. Wolf* (1964) 226 Cal.App.2d 378, 403–04 [holding that trial court erred in admitting transcript of U.S. Senate Committee hearing].) Accordingly, courts decline to take judicial notice of documents that consist largely of hearsay. (See, e.g., *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693 (rejecting request to take judicial notice of Cal/OSHA

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[4] The report that is Exhibit B is undated but is attached to a transmittal letter dated April 8, 1996. The report relates to the previous calendar year (1985). The report that is Exhibit C is also undated and is attached to a transmittal letter dated March 27, 1987. This report relates to the 1986 calendar year.

document that consisted of "[m]ere secondhand reports of conversations with employees of the Division of Labor Standards and unauthenticated internal documents of the division. [Citation.]".)

As the earlier description of the subject reports shows, the reports are largely hearsay. Indeed, although the reports discuss or report data relating to investigations, referrals and prosecutions in workplace safety cases, Cal/OSHA has not offered the underlying documents supporting the alleged investigations, referrals, or prosecutions, or reflecting the resolutions of these matters. Accordingly, each report consists largely of inadmissible hearsay. Once that hearsay is excised, the documents are meaningless. They are therefore not fit subjects of judicial notice.

2. The Reports Are Irrelevant

"The burden is on the party seeking judicial notice to provide sufficient information to allow the court to take judicial notice." (*Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 744; see also Cal. Rules of Court, rules 8.252(a), 8.520(g).) That party must demonstrate that "the material is 'relevant to and helpful toward resolving the matters before this court,' . . . [Citation.]" (*Duronslet v. Kamps* (2012) 203 Cal.App.4th 717, 737.) In other words, "any matter to be judicially noticed must be relevant to a material issue." (*Shamrock Foods*, *supra*, 24 Cal.4th at p. 422, fn.2.)

It appears that Cal/OSHA is proffering these materials in service of an argument that the Secretary of Labor was on notice that local prosecutors in California were using the UCL to assist Cal/OSHA in the agency's workplace safety enforcement efforts. Specifically, Cal/OSHA wants the Court to conclude that the Secretary of Labor acquiesced in the use by local prosecutors of the UCL as an enforcement tool so that such use became, in effect, part of the approved California worker safety plan. [*See* Cal/OSHA Amicus Br. at 27–28.] And from that, Cal/OSHA in turn wants the Court to conclude that the federal OSH Act does not preempt the UCL when that statute is used as an enforcement tool.

But the proffered materials show only that, on three occasions in the 1980s, BOI may have sent reports of its enforcement activities to an OSHA bureaucrat in San Francisco. Nothing shows that any of these reports ever came to the attention of the Secretary of Labor. The proffered materials do not show that anyone in the U.S. Department of Labor even read any of these BOI reports—much less that the Secretary of Labor did so. Nor do the materials shed any light on the question of what, if anything, the Secretary of Labor thought about the fact that local prosecutors in California sometimes used the UCL as an enforcement tool in workplace safety cases. The documents hardly establish beyond reasonable dispute (as required by Evidence Code section 452, subdivision (h)) that the Department of Labor knew of local prosecutors' use of the UCL in

workplace safety enforcement matters, let alone that the Secretary ever approved such a practice.

Indeed, the notion that three BOI reports from the 1980s—two of which contain redactions—can shed any light about what the Secretary of Labor knew in that decade or at any time about the use of the UCL in worker safety cases in California is baseless. Three reports out of what are no doubt many hundreds during the decades in question, unaccompanied by any communications from the Department of Labor or any other portions of the files of either Cal/OSHA or the Department, hardly give a complete picture of the relationship between the two agencies or what the federal authorities knew of activities at the state level.

Beyond this, and even indulging the assumption that the proffered materials show that the Secretary of Labor knew that local prosecutors in California were on occasion invoking the UCL in workplace safety cases, this would be completely irrelevant to the issues in this case. The California State Plan contains nothing about the use of the UCL as a supplemental enforcement method in workplace safety cases. Nor can it be argued—and Cal/OSHA does not so argue in its amicus brief—that the Secretary's knowledge of the use of the UCL and his/her failure to object somehow amended the plan such that UCL actions may be deemed to be part of the plan (and therefore not preempted). Indeed, there is no doctrine

of plan amendment by acquiescence, and Cal/OSHA does not even try to advance such an argument.

Accordingly, whether or not the Secretary of Labor knew that local prosecutors in California brought UCL actions in workplace safety cases and whether he/she ever objected or instead acquiesced in this practice is entirely irrelevant. Since the issue to which the proffered materials relate is irrelevant, the request for judicial notice should be denied.

III. CONCLUSION

The Court should deny Cal/OSHA's Request for Judicial Notice. The proffered documents were not offered to the trial court or the Court of Appeal. They are not relevant to the issues in this matter. And they are replete with inadmissible material.

Dated: August 6, 2015

Respectfully submitted,

JONES DAY

By: _____
Frederick D. Friedman

Counsel for Petitioners
SOLUS INDUSTRIAL
INNOVATIONS, LLC, et al.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071.2300. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On August 6, 2015, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s): **OPPOSITION TO REQUEST FOR JUDICIAL NOTICE OF *AMICI CURIAE* CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS AND DIVISION OF OCCUPATIONAL SAFETY AND HEALTH**, addressed as follows:

SEE ATTACHED SERVICE LIST

Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

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

Executed on August 6, 2015, at Los Angeles, California.

Susan C. Ballard

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