APPENDIX

APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA

SOLUS INDUSTRIAL INNOVATIONS, LLC, et al.,

Petitioners,

v.

THE SUPERIOR COURT OF ORANGE COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

S222314

Filed 2/8/2018

The Orange County District Attorney brought an action for civil penalties under this state's unfair competition law (UCL; Bus. & Prof. Code, § 17200) and fair advertising law (FAL; *id.*, § 17500) against an employer. The action alleged the employer violated workplace safety standards established by the state occupational safety and health law (Cal/OSHA; Lab.

Code, § 6300 et seq.) and attendant regulations. The employer contended, and the Court of Appeal concluded, that the district attorney's action was preempted by the federal Occupational Safety and Health Act of 1970 (federal OSH Act; 29 U.S.C. § 651 et seq.).

For the reasons set forth below, we conclude that the federal act does not preempt unfair competition and consumer protection claims based on workplace safety and health violations when, as in California, there is a state plan approved by the federal Secretary of Labor. The district attorney's use of UCL and FAL causes of action does not encroach on a field fully occupied by federal law, nor does it stand as an obstacle to the accomplishment of the federal objective of ensuring a nationwide minimum standard of workplace protection. In addition, the federal act's structure and language do not reflect a clear purpose of Congress to preempt such claims. Therefore, we reverse the judgment of the Court of Appeal.

I. Background

A. Factual and procedural history

Our statement of facts and procedure is based largely on the opinion of the Court of Appeal.

Solus Industrial Innovations, LLC (Solus) manufactures plastics at its Orange County facility. In 2007, it installed at the facility an electric water heater that was designed for residential use. In March 2009, the water heater exploded, killing two employees.

The Division of Occupational Safety and Health[1] investigated and "determined the explosion had been caused by a failed safety valve and the lack of 'any other suitable safety features on the heater' due to 'manipulation and misuse.'" In an administrative proceeding, the agency charged Solus with five violations of state occupational safety and health regulations. (Cal. Code Regs., tit. 8, § 467, subd. (a) [failure to provide a proper safety valve]; *id.*, § 3328, subds. (a) [permitting unsafe operation of machinery and equipment], (b) [improper maintenance of machinery and equipment], (f) [failing to use good engineering practices], (h) [permitting unqualified and untrained personnel to operate and maintain machinery and equipment].) The Division also cited Solus with a willful violation for failing to maintain the water heater in a safe condition.

In addition, because two employees had died and there was evidence of violations of law, the Division forwarded the investigation results to the District Attorney of Orange County. (See Lab. Code, § 6315, subd. (g).) In March 2012, the district attorney filed criminal charges against Solus's plant manager and its maintenance supervisor for felony violations of Labor Code section 6425, subdivision (a).

The district attorney also filed the present civil action against Solus. The complaint alleged four causes of action, "all based on the same worker health

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[1] The Division of Occupational Safety and Health (sometimes hereafter Division) functions within the state Department of Industrial Relations. Sometimes referred to as Cal/OSHA, the Division holds general authority to enforce the state occupational safety and health law. (See p. 9, *post*.)

and safety standards placed at issue in the administrative proceedings." Only two of the causes of action are at issue here. One "allege[d] that Solus's failure to comply with workplace safety standards amount[ed] to an unlawful, unfair and fraudulent business practice under Business and Professions Code section 17200, and the district attorney request[ed] imposition of civil penalties as a consequence of that practice, in the amount of up to $2,500 per day, per employee, for the period from November 29, 2007, through March 19, 2009." The second was a claim that Solus "made numerous false and misleading representations concerning its commitment to workplace safety and its compliance with all applicable workplace safety standards, and as a result of those false and misleading statements, Solus was allegedly able to retain employees and customers in violation of Business and Professions Code section 17500." The district attorney requested imposition of civil penalties in the same amount for the same period.[2]

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[2] The other two causes of action were for: (1) recovery of civil penalties under Labor Code section 6428 for "serious violations" of workplace safety standards and (2) recovery of civil penalties under Labor Code section 6429 for "willful violation" of workplace safety standards. The trial court sustained Solus's demurrer without leave to amend with respect to these claims. The Court of Appeal summarily denied the district attorney's petition for writ of mandate challenging this order. This court granted review and transferred the matter back to the Court of Appeal. In a separate opinion the Court of Appeal affirmed, agreeing with the trial court that the district attorney lacked standing to bring those two claims. (*People v. Superior Court* (*Solus Industrial Innovations, LLC*) (2014) 224 Cal.App.4th 33.)

Solus demurred on the ground that the two causes of action were preempted by the federal OSH Act. (29 U.S.C. § 651 et seq.) The trial court overruled the demurrer. Solus challenged the order and the Court of Appeal summarily denied Solus's petition for writ of mandate. This court granted the petition for review filed by the district attorney and transferred the matter back to the Court of Appeal with directions to issue an order to show cause.

The Court of Appeal issued its order to show cause and concluded that the federal OSH Act preempted the district attorney's UCL and FAL claims. Its conclusion was based in part on a misapprehension concerning the date that unfair competition penalty provisions were enacted compared with the date the federal Secretary of Labor approved California's occupational safety and health plan. This court granted review and transferred the matter back to the Court of Appeal for reconsideration in light of former section 3370.1 of the Civil Code, a provision enacted in 1972. As the Court of Appeal acknowledged in its second opinion, this statute, which provided penalties for unfair competition, "was in effect when California's plan was approved" by the federal Secretary of Labor. The Court of Appeal nonetheless concluded that the UCL and FAL claims were preempted by the federal statute. In its view, federal law preempted any state occupational safety and health standard or method of enforcing such a standard that did not appear in the California occupational safety and health plan submitted to and approved by the federal Secretary of Labor.

This court granted the district attorney's petition for review.

B. Relevant federal and state laws

1. Federal law

As explained below, the federal OSH Act (29 U.S.C. § 651 et seq.) provides that the federal Secretary of Labor shall adopt standards for occupational safety and health, but federal law does not preempt state authority when (1) there is no federal standard or (2) there is a state plan for occupational safety and health that has been approved at the federal level.

It is settled that the purpose of the 1970 federal enactment was to supply a nationwide *floor* of protection for workers. (29 U.S.C. § 651(b) [Congress's intent was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions"]; *United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd.* (1982) 32 Cal.3d 762, 772 (*United Air Lines*) [the federal act intended "to address the problem of uneven and inadequate state protection of employee health and safety" and "establish a nationwide 'floor' of minimally necessary safeguards"].)

The federal OSH Act grants the federal Department of Labor the authority to provide and enforce mandatory national standards. (29 U.S.C. § 651(b)(3); see also *id.*, § 655 [calling for promulgation of standards].) The federal Secretary of Labor has delegated certain authority to the federal Occupational Safety and Health Administration (hereafter sometimes federal OSHA) to adopt

standards. (*Gade v. National Solid Wastes Management Ass'n* (1992) 505 U.S. 88, 92 (*Gade*) (plur. opn. of O'Connor, J.).) If the Secretary of Labor has not promulgated a federal standard with respect to an occupational safety or health issue, states may supply their own standards. (29 U.S.C. § 667(a) ["Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title"].)[3]

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[3] Solus has identified several standards that it contends apply to the facts of this case. (29 C.F.R. § 1910, subpts. H, M (2017); *id.*, § 1910.147 (2017).) Section 1910, subpart H, entitled "Hazardous Materials," concerns, in part, the handling, storage, and use of compressed gas cylinders and tanks (29 C.F.R. §§ 1910.101-1910.121 (2017)), but these provisions do not appear to have any application to the allegations of the complaint, which assert that Solus removed a water heater's safety features to force it to operate beyond its capacity. Nor does section 1910, subpart M, entitled "Compressed Gas and Compressed Air Equipment," which applies to "compressed air receivers, and other equipment used in providing and utilizing compressed air for performing operations such as cleaning, drilling, hoisting, and chipping" (29 C.F.R. § 1910.169(a) (2017)), appear to apply to these allegations. Finally, the provisions of 29 Code of Federal Regulations section 1910.147 (2017) set forth steps that must be taken to control hazardous energy during maintenance of a machine, but it appears from the complaint that the explosion occurred as workers arrived to address a problem, before any maintenance procedures were undertaken.

Solus also cites federal OSHA's general duty clause, which states that an employer "(1) shall furnish . . . employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." (29 U.S.C. § 654(a).) However, the

Moreover, even when there are federal standards on an issue relating to occupational safety and health, a state may assume responsibility for developing and enforcing state standards on such issues by developing and submitting to the Secretary of Labor a plan to "preempt" federal standards. In a provision entitled "Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards," the federal OSH Act states: "Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement." (29 U.S.C. § 667(b).)

The Secretary of Labor is required to approve a state's plan or any modification of its plan if, in the Secretary's judgment, a number of conditions are met. (29 U.S.C. § 667(c).) First, approval is conditioned on the plan designating a state agency or agencies to administer the plan throughout the state. *(Id.*, § 667(c)(1).) Second, approval is conditioned on the

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standards to which 29 United States Code section 667, subdivision (a) refers are those promulgated by the federal Secretary of Labor under 29 United States Code section 655; the general duty clause is not such a "standard."

Although we are skeptical that the cited standards apply here, we note that the case has been litigated based on the view that a federal standard applies to the allegations, and we will assume without deciding that there is a federal standard relevant to the claims.

plan providing standards and enforcement at least as effective as parallel federal standards. (*Id.*, § 667(c)(2) [the state plan "provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 655 which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce"].) Other conditions include that the state plan contain satisfactory assurances that the designated administrative agency or agencies "have or will have the legal authority and qualified personnel necessary for . . . enforcement," and that the state will devote adequate funds to administration and enforcement. (*Id.*, § 667(c)(4) & (5).) The Secretary must give adequate notice and an opportunity for a hearing before rejecting a state plan. (*Id.*, § 667(d).)

The Secretary of Labor retains some ongoing authority over state plans. For example, the Secretary must "make a continuing evaluation of the manner in which each State having a plan . . . is carrying out such plan." (29 U.S.C. § 667(f).) If the Secretary finds, after "due notice and opportunity for a hearing," that the state has failed to "comply substantially" with its plan, the Secretary "shall notify the State agency of [the] withdrawal of approval of such plan . . . ." (*Ibid.*; see also *id.*, subd. (g) [judicial review of withdrawal of approval].) A

federal regulation adds that states must submit changes to their plans to the Secretary of Labor for approval. (29 C.F.R. § 1953.4(d) (2017).)

Finally, the federal OSH Act contains a broad savings clause: "Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment" (29 U.S.C. § 653(b)(4).)

2. Cal/OSHA

Long before the federal enactment, California regulated occupational safety and health. (*United Air Lines*, *supra*, 32 Cal.3d at p. 766.) As we have recounted: "'In 1913 . . . the Legislature enacted a . . . bill creating the Industrial Accident Commission, and vested that body, inter alia, with broad authority to adopt regulations relating to the safety and welfare of employees.'" (*Ibid.*) That "'broad authority to regulate safety in places of employment'" was transferred to another body in 1945 and then, "[i]n 1973, as part of a comprehensive revision of California's occupational health and safety statutes in response to the Federal Occupational Safety and Health Act of 1970, the [regulatory board] was reconstituted . . . and the division of Occupational Safety and Health was designated as the administrative entity." (*Ibid.*)

The 1973 legislation largely mirrored earlier state enactments. (Lab. Code, § 6300 et seq.; *United Air Lines*, *supra*, 32 Cal.3d at p. 767.) The declared purpose was to permit California to "assume responsibility for development and enforcement of occupational safety and health standards under a state plan pursuant to [the federal enactment]." (Stats. 1973, ch. 993, § 107, pp. 1954-1955; see *United Air Lines*, *supra*, 32 Cal.3d at p. 766; *California Lab. Federation v. Occupational Safety & Health Stds. Bd.* (1990) 221 Cal.App.3d 1547, 1552 (*Cal. Labor Fed.*).)

The Department of Industrial Relations (Department) was assigned the overall task of administering the state plan for "development and enforcement of occupational safety and health standards" relating to issues covered by the federal OSH Act standards (Lab. Code, § 50.7, subd. (a); see *id.*, § 6302), and the state plan was to be "consistent with the provisions of state law governing occupational safety and health, including, but not limited to [Cal/OSHA legislation]." (*Id.*, § 50.7, subd. (a).) Within the Department, the Occupational Safety and Health Standards Board (Board) has authority to adopt, amend, or repeal standards (*id.*, § 142.3), and the Board's authority to adopt occupational safety and health standards is exclusive. (*Id.*, § 142.3, subd. (a)(1).) Also within the Department is the Division of Occupational Safety and Health. The Division is required to study federal standards, propose modifications of California standards to the Board, evaluate proposed standards for the Board, and, on issues not covered by federal standards, "maintain surveillance, determine the necessity for standards,

[and] develop and present proposed standards to the board." (*Id.*, § 147.1, subd. (c); see *id.*, subds. (a), (b), (d).) The Division also holds general enforcement powers over any "place of employment." (*Id.,* § 6307, see also *id.*, §§ 142, 6308.)

The state law includes various enforcement and civil and criminal penalty provisions. (See Lab. Code, §§ 6317 [citations, abatement, civil penalties], 6425 [criminal penalties for violations causing death or serious impairment], 6428 [civil penalties for serious violations], 6429 [civil penalties for willful or repeated violations]; 6430 [civil penalties for failure to correction violations].) State regulations include those governing water heaters.

The Division's authority over "places of employment" is not exclusive, and does not include places "where the health and safety jurisdiction is vested by law in, and actively exercised by, any state or federal agency other than the division." (Lab. Code, § 6303, subd. (a); see also *United Air Lines*, *supra*, 32 Cal.3d at pp. 767, 770-771 [Lab. Code, § 6303, subd. (a) divests the division of jurisdiction solely when another agency is under a *mandate* to provide for worker protection].) Cal/OSHA provisions also recognize some concurrent local entity jurisdiction. (See Lab. Code, § 6316 [except as otherwise provided in Cal/OSHA, the governing bodies of local government entities generally are not deprived of "any power or jurisdiction over or relative to any place of employment"]; see *id.*, § 144, subds. (a) [authority of agencies other than the Division to "assist in the administration or enforcement" of standards "shall be contained in a written agreement with the

Department . . . ."], (e) [no limitation on local agency authority "as to any matter other than the enforcement of occupational safety and health standards"]; *Coyle v. Alland & Company, Inc.* (1958) 158 Cal.App.2d 664, 669-670.) Consistent with this concurrent jurisdiction, the Division's Bureau of Investigations ordinarily must forward its investigative results to local prosecutors in cases of serious injury or death. (Lab. Code, § 6315, subds. (g), (i).)

The Department submitted a Cal/OSHA plan to the federal Secretary of Labor, and it was approved in May 1973. (29 C.F.R. § 1952.7(a) (2017).)[4] Descriptions of the California plan and amendments that

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[4] The federal regulation provides: "(a) The California State plan received initial approval on May 1, 1973. [¶] (b) [federal] OSHA entered into an operational status agreement with California. [¶] (c) The plan covers all private-sector employers and employees, with several notable exceptions, as well as State and Local government employers and employees, within the State. For current information on these exceptions and for additional details about the plan, please visit [a federal Department of Labor website]." (29 C.F.R. § 1952.7 (2017).)

The referenced website contains a very brief summary of the plan, noting that the Division "implements the California State Plan's enforcement . . . ." (U.S. Dept. of Labor, OSHA Plans <http://www.osha.gov/dcsp/osp/stateprogs/california.html> [as of February 8, 2018].)

The referenced "operational status agreement" notes that the Division "is designated as the state agency responsible for administering the State Plan," that, with certain limited exceptions, "concurrent federal enforcement authority was suspended with regard to federal occupational safety and health standards in issues covered by the State Plan," and that "concurrent federal enforcement authority would not be initiated with regard to any federal occupational safety and health

formerly appeared in federal regulations (see 29 C.F.R. former § 1952.170 (1999)[5] have been removed by federal OSHA in an effort at streamlining. (Text removed by 80 Fed.Reg. 78977 (Dec. 18, 2015) (approving proposal of federal OSHA Aug. 18, 2015); 80 Fed.Reg. 49897 (Aug. 18, 2015) ["This document . . . amends OSHA regulations to remove the detailed descriptions of State plan coverage, purely historical data, and other unnecessarily codified information . . . . The purpose of these revisions is to eliminate the unnecessary codification of material in the Code of Federal Regulations . . . ."].) There appears to be no dispute, however, that the Cal/OSHA standards, the violation of which was the basis for the district attorney's UCL and FAL claims, were part of the approved California plan, nor does there appear to be any dispute that use of UCL and FAL claims by local prosecutors pursuing civil actions was not mentioned in the plan's enforcement provisions. (See, e.g., Cal. Code Regs., tit. 8, § 344.50 [Division of Occupational Safety and Health compliance personnel conduct civil inspections and enforcement actions but lack authority to initiate criminal proceedings].)

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standards in issues covered by the State Plan." (82 Fed.Reg. 25631 (June 2, 2017).)

[5] The former provision referred to enforcement by the Division, and noted that then-existing state safety and health standards would be "continued unless amended by a State occupational safety and health standards board to be created." (29 C.F.R. former § 1952.170(a) (1999).) It observed that the state plan "set out goals" and acknowledged that certain enabling legislation was still to be enacted by the state Legislature. (*Id.*, former § 1952.170(e) (1999).)

Cal/OSHA standards have undergone revisions that were submitted for and secured federal approval. For example, in response to a state court action by labor representatives, the state Board amended the state standards to reflect the requirements of the state's then-newly adopted Safe Drinking Water and Toxic Enforcement Act of 1986. (Health & Saf. Code § 25249.5 et seq.; see *Cal. Labor Federation*, *supra*, 221 Cal.App.3d at pp. 1554, 1557-1559; see Dept. of Labor, Supplement to California State Plan; Approval, 62 Fed.Reg. 31159 (June 6, 1997).)

In 1987, the Governor of California attempted to reassign exclusive control over occupational safety and health matters to the federal government. He notified the federal Secretary of Labor of his intent and reduced the Department's budget. (See *Cal. Labor Federation*, *supra*, 221 Cal.App.3d at p. 1552.) The voters, however, in 1988 approved a proposition that defeated the Governor's plan and affirmed the central role of state law in these matters. (Lab. Code, § 50.7, subd. (a), enacted by Prop. 97, as approved by voters, Gen. Elec. (Nov. 8, 1988).) The proposition's preamble stated the enactment's goal: "It is the purpose of this Act to restore California control over private sector safety and health, which the state has provided for since 1913, and has administered since 1973 through Cal/OSHA. Pursuant to Article XIV, Section 4, of the California Constitution, state jurisdiction over worker safety and health should not be limited, eliminated or otherwise restricted, unless absolutely required by the federal Constitution." (Ballot Pamp. Gen. Elec. (Nov. 8, 1988) text of Prop. 97, p. 75.)

C. General preemption principles

"'The supremacy clause of the United States Constitution establishes a constitutional choice-of-law rule, makes federal law paramount, and vests Congress with the power to preempt state law.' [Citations.] Similarly, federal agencies, acting pursuant to authorization from Congress, can issue regulations that override state requirements. [Citations.] Preemption is foremost a question of congressional intent: did Congress, expressly or implicitly, seek to displace state law?" (*Quesada v. Herb Thyme Farms, Inc.* (2015) 62 Cal.4th 298, 307-308 (*Quesada*).)

We "conduct[] the search for congressional intent through the lens of a presumption against preemption. [Citations.] The presumption is founded on 'respect for the States as "independent sovereigns in our federal system'"; that respect requires courts 'to assume that "Congress does not cavalierly pre-empt state-law causes of action.'" [Citation.] The strength of the presumption is heightened in areas where the subject matter has been the long-standing subject of state regulation in the first instance; where federal law touches 'a field that "'has been traditionally occupied by the States,"'" the party seeking to show preemption 'bear[s] the considerable burden of overcoming "the starting presumption that Congress does not intend to supplant state law."'" (*Quesada*, *supra*, 62 Cal.4th at pp. 312-313, see also *id.* at p. 315 [*Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230, which first recognized the assumption that the historic police powers of the state are not superseded, remains good law].) The

presumption applies to the scope as well as the existence of preemption. (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 815 (*Olszewski*); see also *Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1064.)

"We have identified several species of preemption. Congress may expressly preempt state law through an explicit preemption clause, or courts may imply preemption under the field, conflict, or obstacle preemption doctrines." (*Quesada*, *supra*, 62 Cal.4th at p. 308.) Implied preemption, for its part, may be found "(i) when it is clear that Congress intended, by comprehensive legislation, to *occupy the entire field* of regulation, leaving no room for the states to supplement federal law [citation]; (ii) when compliance with both federal and state regulations is an *impossibility* [citation]; or (iii) when state law 'stands as an *obstacle* to the accomplishment and execution of the full purposes and objectives of Congress.'" (*Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 955, italics added; see also *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1087.) Because preemption questions turn on Congressional intent, a reviewing court begins with the text of the federal statute, "the source of the best evidence concerning the breadth of Congress's preemptive intent." (*Quesada*, *supra*, 62 Cal.4th at p. 308.)

D. Federal OSH Act preemption principles announced by the high court

The United States Supreme Court examined the preemptive effect of the federal OSH Act in *Gade, supra,* 505 U.S. 88. The high court's plurality and concurring opinions offer helpful interpretive

guidance, but as explained below, in *Gade*, there was no approved state plan, so the extent to which an approved state plan displaces federal authority was not at issue.

In *Gade*, Illinois state laws imposed special requirements for persons working with hazardous waste, including training and licensing requirements. There was a federal occupational safety and health standard in effect concerning training and certification of persons working with hazardous wastes. The stated purpose of the Illinois laws was to "'promote job safety'" and "'protect life, limb and property.'" (*Gade*, *supra*, 505 U.S. at p. 91 (plur. opn. of O'Connor, J.).) Two issues were raised by those laws. The first was whether, in the absence of an approved state plan, the federal OSH Act preempted efforts by the state to supplement the existing and applicable federal occupational safety and health standards. The second issue was whether state statutes having an asserted dual purpose of protecting public as well as worker safety would be preempted. A majority of the court concluded that the state law was preempted, but there was disagreement whether implied or express preemption was involved. (*Id.*, at pp. 91-109 (plur. opn. of O'Connor, J.); *id.*, at pp. 109-114 (conc. opn. of Kennedy, J.).)

The high court's plurality opinion used an implied preemption analysis. The plurality found that when a federal occupational safety and health standard exists and the state has *not* presented a plan to the Secretary of Labor and obtained approval, the application of a state occupational safety and health

standard would be an *obstacle* to achieving Congress's goal that only a single regime of occupational safety and health regulation should apply. The plurality held that "nonapproved state regulation of occupational safety and health issues for which a federal standard is in effect is impliedly pre-empted as in conflict with the full purposes and objectives of the OSH Act. [Citation.] The design of the statute persuades us that Congress intended to subject employers and employees to only one set of regulations, be it federal or state, and that the only way a State may regulate a [federally]-regulated occupational safety and health issue is pursuant to an approved state plan that displaces the federal standards." (*Gade*, *supra*, 505 U.S. at pp. 98-99.)

The plurality opinion relied on 29 United States Code section 667(b), specifically the subdivision's language directing that a state "shall" submit a plan for federal approval if a state wishes to "assume responsibility" for development and enforcement of occupational safety and health standards when a federal standard already exists. (*Gade*, *supra*, 505 U.S. at p. 99.) "The unavoidable implication of this provision is that a State may not enforce its own occupational safety and health standards without obtaining the Secretary's approval . . . ." (*Ibid.*) In the plurality's view, the federal OSH Act as a whole indicated that "a State may develop an occupational safety and health program tailored to its own needs, but only if it is willing *completely to displace* the applicable federal regulations." (*Id.*, at p. 100, italics added.)

The plurality opinion also pointed to 29 United States Code section 667(a)—which acknowledges the authority of states to exercise jurisdiction where there is *no* federal standard—reasoning that the subdivision's "preservation of state authority in the *absence* of a federal standard presupposes a background preemption of all state occupational safety and health standards whenever a federal standard governing the same issue is in effect." (*Gade*, *supra*, 505 U.S. at p. 100, italics added.) And pointing to 29 United States Code section 667(c), which establishes conditions for plan approval, the *Gade* decision observed that the conditions would be nullified if states could simply adopt their own standards without going through the approval process. (*Id.*, at p. 100.)

Subdivisions (f) and (h) of 29 United States Code section 667 also confirmed the plurality's view that states cannot act when there is no approved state plan but a federal standard does exist. Because subdivision (f) of section 667 gave the federal Secretary of Labor the power to withdraw approval of a state plan, the decision reasoned that "[o]nce approval is withdrawn, the plan 'cease[s] to be in effect' and the State is permitted to assert jurisdiction under its occupational health and safety law only for those cases 'commenced before the withdrawal of the plan.'" (*Gade*, *supra*, 505 U.S. at p. 101.) This language "assumes that the State loses the power to enforce all of its occupational safety and health standards once approval is withdrawn." (*Ibid.*) And the plurality saw the "same assumption of exclusive federal jurisdiction in the absence of an approved

state plan" in subdivision (h), which permits states to enter temporary agreements to enforce their own laws in the two years following the passage of the federal OSH Act. (*Id.*, at pp. 101-102.)

From these provisions, the plurality "conclude[d] that the OSH Act precludes any state regulation of an occupational safety or health issue with respect to which a federal standard has been established, unless a state plan has been submitted and approved pursuant to [29 United States Code section 667](b). Our review of the Act persuades us that Congress sought to promote occupational safety and health while at the same time avoiding duplicative, and possibly counterproductive, regulation. It thus established a system of uniform federal occupational health and safety standards, but *gave States the option of pre-empting federal regulations* by developing their own occupational safety and health programs." (*Gade*, *supra*, 505 US. at p. 102, italics added.)

Addressing the separate question whether preemption—still in the absence of an approved state plan—reached state laws that directly regulated occupational safety and health but also were intended to protect public safety, the plurality concluded that the preemptive effect of the federal law extended to such "dual impact" state laws. (*Gade*, *supra*, 505 U.S. at pp. 104-105.) The state argued that its laws, which imposed requirements regarding training, testing, and licensing of crane and hazardous waste site workers, were intended to promote both public and worker safety, and therefore should not be preempted. The plurality disagreed, declaring that "dual impact

state regulation cannot avoid OSH Act pre-emption simply because the regulation serves several objectives rather than one." (*Id.* at p. 106.) Rather, "[w]hatever the purpose or purposes of the state law, pre-emption analysis cannot ignore the effect of the challenged state action on the pre-empted field. The key question is thus at what point the state regulation *sufficiently interferes with federal regulation that it should be deemed pre-empted* . . . ." (*Id.* at p. 107, italics added.) The decision concluded that state law that "'constitutes, in a *direct, clear and substantial way, regulation of worker health and safety*'" would be preempted, whereas "state laws of general applicability (such as laws regarding traffic safety or fire safety) that do not conflict with [federal] standards and that regulate the conduct of workers and nonworkers alike would generally not be pre-empted. Although some laws of general applicability may have a 'direct and substantial' effect on worker safety, they cannot fairly be characterized as 'occupational' standards, because they regulate workers simply as members of the general public." (*Ibid.*, italics added.)

"In sum, a state law requirement that *directly, substantially, and specifically regulates occupational safety and health* is an occupational safety and health standard within the meaning of the [federal OSH] Act. . . . If the State wishes to enact a dual impact law that regulates an occupational safety or health issue for which a federal standard is in effect, . . . the Act requires that the State submit a plan for the approval of the Secretary." (*Gade, supra,* 505 U.S. at pp. 107-108, italics added.)

The concurring opinion by Justice Kennedy concluded that the federal law *expressly* preempts state occupational safety and health standards when a federal standard is in effect and the state has not submitted a plan for approval, but vigorously opposed the plurality's finding of implied preemption. (*Gade*, *supra*, 505 U.S. at pp. 109-114 (conc. opn. of Kennedy, J.).) In his view, the plurality's analysis failed to surmount the "high threshold" required for a finding that a law is preempted because it conflicts with the purpose of a federal law. (*Id.* at p. 110.) He added that such preemption "should be limited to state laws which impose prohibitions or obligations which are in direct contradiction to Congress' primary objectives, as conveyed with clarity in the federal legislation." (*Ibid.*) The concurrence observed no such direct contradiction between federal standards and a "concurrent, supplementary state scheme." (*Ibid.*) Rather, all the inferences from 29 United States Code section 667(b)'s *express* terms direct the preemption of state occupational safety standards in the absence of a state plan approved by the Secretary of Labor. Absent those express terms, Justice Kennedy "would not say that state supplementary regulation conflicts with the purposes of the federal OSH Act[] or that it "'interferes with the methods by which the federal statute was designed to reach [its] goal.'" [Citation.]" (*Id.* at p. 111.)

According to the concurrence, the plurality opinion failed to comply with a presumption that "'historic police powers of the States'" are not preempted "'unless that was the clear and manifest purpose of Congress.'" (*Gade*, *supra*, 505 U.S. at p 111.) In

addition, Justice Kennedy criticized the plurality's method of inferring the congressional purpose, saying that a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law." (*Ibid.*)

Although Justice Kennedy disagreed with the plurality's conclusion that preemption was implied, he concluded that the plurality's analysis "amply demonstrates" express preemption. (*Gade*, *supra*, 505 U.S. at p. 112.) In his view, although 29 United States Code section 667(b), which authorizes a state to assume responsibility for occupational safety and health issues, lacked the "magic words" of preemption (*Gade*, *supra*, 505 U.S. at p. 112), "[t]he statute is clear: When a State desires to assume responsibility for an occupational safety and health issue already addressed by the Federal Government, it must submit a state plan. The most reasonable inference from this language is that when a State does not submit and secure approval of a state plan, it may not enforce occupational safety and health standards in that area." (*Id.* at pp. 112-113 [also reading the language of 29 U.S.C. 667(b) in conjunction with section 667(a), (c), and (f)].)

Justice Kennedy found it unnecessary to "reiterate the plurality's persuasive discussion on this point." (*Gade*, *supra*, 505 U.S. at p. 113.) The plurality similarly observed that although the two opinions disagreed concerning the category of preemption, they agreed on federal OSHA's preemptive scope, based on

the language of 29 United States Code section 667. (*Id.* at p. 104, fn. 2.)

II. Discussion

The Court of Appeal held that the UCL and FAL claims are preempted by the federal OSH Act both expressly and through application of the principles of implied preemption. It concluded that Congress has essentially occupied the entire field of workplace safety regulation and enforcement other than workers' compensation and the precise provisions of an approved state plan. It reasoned that "[b]ecause the [federal] OSH Act allows a state to avoid federal preemption only if it obtains federal approval of its own plan, it necessarily follows that a state has no authority to enact and enforce laws governing workplace safety which fall outside of that approved plan." In its view, the district attorney's use of UCL and FAL actions based upon violations of approved Cal/OSHA standards was an attempt to govern workplace safety without securing approval by the federal Secretary of Labor.

As the Court of Appeal observed, the federal OSH Act expressly states what is *not* preempted—state laws governing workers' compensation, a broad category of statutory and common law actions touching on worker safety, and any occupational safety or health issue as to which there is no federal standard. (29 U.S.C. §§ 653(b)(4) [workers' compensation and other laws related to worker safety], 667(a) [no federal standard].) As the Court of Appeal's analysis further reflects, the federal OSH Act does not expressly describe what state regulation

is preempted. This omission does not preclude a finding of explicit preemption; as Justice Kennedy noted in *Gade,* the high court has "never required any particular magic words" to establish express preemption. (*Gade*, *supra*, 505 U.S. at p. 112.) But as illustrated by Justice Kennedy's concurring opinion, when a court attempts to discern from a statutory scheme the expression of an intent to displace state law, the analysis may be substantially similar to an implied preemption analysis. Therefore, we will first address whether preemption of the UCL and FAL claims is implied. As will be seen, this analysis also resolves the issue of whether the federal scheme explicitly preempts these claims.

A. No implied preemption of UCL and FAL claims

1. Field preemption

a. The field preempted is narrow

In enacting the federal OSH Act, Congress entered "a field that traditionally had been occupied by the States. Federal regulation of the workplace was not intended to be all encompassing, however." (*Gade*, *supra*, 505 U.S. at p. 96 (plur. opn. of O'Connor, J.); see *United Air Lines*, *supra*, 32 Cal.3d at p. 772 ["Despite a broad authorization to [the federal OSH Act] . . . , the act did not foreclose other federal agencies or states from exercising . . . jurisdiction" over occupational safety and health].) Unlike some federal statutes, 29 United States Code section 667 does not employ broad language preempting all state regulation, laws, or remedies relating to, concerning, or merely touching on the issue at hand, namely

occupational safety and health. (See, e.g., 21 U.S.C. § 360k(a) [except as specifically provided, "no State . . . may establish or continue in effect with respect to [medical devices] any requirement . . . different from, or in addition to, any requirement [under the specific federal law]"; 29 U.S.C. § 1144(a) [ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"]; 49 U.S.C. § 14501(c)(1) ["[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property"]; *id.*, § 41713(a)(4)(A) ["[A] State . . . may not enact or enforce a law . . . related to a rate, route, or service of an air carrier"].)

Moreover, various elements of the federal OSH Act convince us that the preempted field is narrow. First, we have seen that when there is no federal standard, there is no preemption. (29 U.S.C. § 667(a).) This provision acknowledges that federal authority does not occupy the entire field. Rather, states retain authority freely to apply their own law in the field of occupational safety or health when the Secretary has not promulgated an applicable federal standard.

Second, even when there are federal standards, states may "assume responsibility for development and enforcement" of state occupational safety and health standards, provided the state submits and gains approval for a state plan. (29 U.S.C. § 667(b).) Under the terms of the statute, an approved state plan "preempts" federal standards. (29 U.S.C. § 667(b) [entitled "Submission of State plan for development and enforcement of State standards to

preempt applicable Federal standards"]; see also *Gade*, *supra*, 505 U.S. at p. 119 (dis. opn. of Souter, J.) [this heading was "enacted as part of the statute and properly [may be] considered under our canons of construction"].) In other words, once the state plan is adopted and approved, state law has the effect of *broadly preempting parallel federal law*. (See *Gade*, *supra*, 505 U.S. at pp. 96-97 (plur. opn. of O'Connor, J.) [observing that 29 U.S.C. § 667(b) "gave the States the option of pre-empting federal regulation entirely"]; *United Air Lines*, *supra*, 32 Cal.3d at p. 772 [adoption of an approved plan "removes federal preemption so that the state may exercise its own sovereign powers over occupational safety and health"].) In addition, states can provide greater protection if they adopt their own plans with standards and enforcement that are at least as protective as federal law. (29 U.S.C. § 667(c)(2).)

We acknowledge that the Secretary of Labor has authority to approve modifications to a state's plan (29 U.S.C. § 667(c)) and "shall . . . make a continuing evaluation of the manner in which each State having a plan . . . is carrying out such plan." (*Id.*, § 667(f).) Notwithstanding these provisions, the federal OSH Act as a whole does not suggest that the preempted field encompasses all means of enforcement not specifically included in the state's approved plan. On the contrary, the federal OSH Act encourages states to "assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws." (29 U.S.C. § 651(b)(11).) In addition, it directs that the Secretary "shall" approve a conforming state plan or modification, and places

administrative limits on the Secretary of Labor's discretion to reject state plans. (*Id.*, § 667(d).) And as we have observed, once a state plan is approved, it is *federal*, not state, law that must give way. (29 C.F.R. § 1953.3(a) (2017) [federal approval of a state plan "in effect removes the barrier of Federal preemption, and permits the State to adopt and enforce State standards," including adopting and implementing modifications].) Finally, even if any new enforcement method that is related to an existing approved standard should be submitted to the Secretary—a question we need not answer—it does not follow that the new method is preempted until approved. State modifications to an approved plan go into effect immediately, subject to a review by the Secretary. (67 Fed.Reg. 60122 (Sept. 25, 2002); see also 62 Fed.Reg., *supra*, at p. 31165 [a modification "takes effect prior to and pending OSHA review of the modification"].)

Third, the federal OSH Act's savings clause (29 U.S.C. § 653(b)(4)) leads us to infer a narrow field of implied preemption. That provision disclaims any intent to interfere with state law in a broad domain affecting occupational safety and health, whether or not there is an approved state plan. Specifically, notwithstanding the existence of federal standards, not only are state workers' compensation actions not preempted, but state tort claims and criminal prosecutions also survive, although they may be based on duties established by state occupational safety and health standards. (See *Pedraza v. Shell Oil Co.* (1st Cir. 1991) 942 F.2d 48, 53-54, and cases cited [tort claims not preempted: "[W]e find no warrant whatever for an interpretation which would

preempt enforcement in the workplace of private rights and remedies traditionally afforded by state laws of general application"]; *State v. Far West Water & Sewer* (Ariz. 2010) 228 P.3d 909, 919, and cases cited [no preemption of prosecution under state criminal law punishing conduct that is also governed by federal occupational safety and health standards, the existence of some criminal penalties within the federal act itself notwithstanding]; *People v. Pymm* (N.Y. 1990) 563 N.E.2d 1, 4 [referring to "continued viability of State statutory and common-law duties"].) Indeed, section 653(b)(4) has been interpreted as a uniquely broad savings clause (*In re Welding Fume Products Liability Litigation* (N.D.Ohio 2005) 364 F.Supp.2d 669, 687, & fn. 21), and broad savings clauses may be seen as an indication that the field preempted is narrow. (See *Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 944.)

Finally, the provisions we have discussed indicate that the federal OSH Act contemplates a cooperative system of workplace safety regulation, not an exclusively federal one. When federal schemes involve cooperation and concurrent jurisdiction, this circumstance also suggests that the scope of preemption was not intended to be broad. *(Olszewski*, *supra*, 30 Cal.4th at p. 816 ["'Where . . . coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one'"].)

b. The UCL and FAL claims do not fall within this narrow field of preemption

Laws of general application are not ordinarily preempted by the federal act. (*Gade*, *supra*, 505 U.S. at p. 107 (plur. opn. of O'Connor, J.); *id.* at p. 114 (conc. opn. of Kennedy, J.).) As explained below, under state law, actions under the UCL or FAL are not considered to be a means of enforcing the law claimed to have been violated; rather, they provide a remedy for economic damage suffered as a result of violations of a wide array of other laws. Furthermore, to the extent these claims may be a considered an enforcement mechanism with respect to the state plan's substantive standards, these claims merely supplement enforcement of state standards. Federal OSHA's provisions related to the enforcement of state plans are concerned with ensuring enforcement that is at least as effective as the federal standards; nothing in the federal act suggests a concern with enforcement that exceeds federal requirements.

The UCL concerns unfair competition, a term that "mean[s] and include[s] any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law]." (Bus. & Prof. Code, § 17200.) The purpose of the UCL "is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949.) As we have said, "the act provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent *unfair business practices* and restore money or property to

victims of these practices." (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 371, italics added.) The FAL, for its part, makes actionable "untrue or misleading" statements made to "induce the public to enter into any obligation" to purchase goods and services. (Bus. & Prof. Code, § 17500.) Actions to enforce the UCL or FAL, which may be brought by government officials and by individuals who have suffered injury in fact (Bus. & Prof. Code, § 17203), address the "'"overarching legislative concern . . . to provide a streamlined procedure for the prevention of *ongoing or threatened acts of unfair competition.*" [Citation.]'" (*Zhang*, *supra*, 57 Cal.4th at p. 371, italics added.) And the remedies are "cumulative . . . to the remedies or penalties available under all other laws of this state." (Bus. & Prof. Code, § 17205.)

As noted above, under state law, these actions are not considered on their face to be a means of enforcing the underlying law. "'By proscribing "any unlawful" business practice, "[the UCL] 'borrows' violations of other laws and treats them as unlawful practices" that the [UCL] makes *independently* actionable. [Citations.]'" (*Rose v. Bank of America, N.A.* (2013) 57 Cal.4th 390, 396.) We have explained that "by borrowing requirements from other statutes, the UCL does not serve as a mere enforcement mechanism. It provides its own distinct and limited equitable remedies for unlawful business practices, using other laws only to define what is 'unlawful.' [Citation.] The UCL reflects the Legislature's intent to discourage business practices that confer unfair advantages in the marketplace to the detriment of both consumers and law-abiding competitors." (*Id.* at p. 397; see

People ex rel. Harris v. Pac Anchor Transportation, Inc. (2014) 59 Cal.4th 772, 783 [Federal Aviation Administration Act does not on its face preempt UCL claims against motor carriers for misclassification of drivers]; *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1272 [a federal law governing cigarette sales to minors on its face did not expressly preempt the UCL, which "is a law of general application, and it is not based on concerns about smoking and health"]; *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1150; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180; *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 560, 566 576.) Thus, the UCL and FAL are laws of general application.

We acknowledge that in some instances, a UCL claim may fall within a field of preemption. For example, in *In re Tobacco Cases II*, *supra*, 41 Cal.4th 1257, a UCL claim based on advertising activities alleged to violate Penal Code section 308 (prohibiting sale of tobacco products to minors and possession of such products by minors) was preempted as applied under the particular terms of a federal law governing cigarette labeling and advertising. (*Id.* at pp. 1272-1273.) Under the federal law involved, preemption turned on whether the particular UCL claim would impose a duty necessarily and inherently based on concerns about smoking and health. (*Id.* at p. 1273.) But here, the UCL and FAL claims are based on standards set forth in an approved state plan, and which therefore *preempt any federal standards.* Because these claims do not impose any duty on employers that is subject to federal preemption, they

do not come within the principles articulated in *Tobacco Cases II*.

We also recognize that the federal OSH Act is concerned not only with a state's substantive standards, but also with its enforcement. (29 U.S.C. § 667(b) [a state that wants to assume responsibility for "development and enforcement" of standards must submit a state plan for "development of such standards and their enforcement"].) Therefore, when UCL and FAL claims are premised on violations of a state's plan, the UCL and FAL arguably come within the high court's description of an occupational safety and health standard in the context of the federal OSH Act: "a state law requirement that directly, substantially, and specifically regulates occupational safety and health." (*Gade*, *supra*, 505 U.S. at pp. 107 (plur. opn. of O'Connor, J.); *id.* at p. 114 (conc. opn. of Kennedy, J.).)

Notably, however, the federal OSH Act's concern regarding enforcement is only that states provide enforcement "at least as effective" as required under the federal OSH Act. (29 U.S.C. § 667(c)(2); see 29 C.F.R. § 1902.3(d) (2017).) Its focus on *adequate* enforcement, and its silence with respect to enforcement that is more than adequate or is pursued through mechanisms other than those set forth in a state's plan, lead us to conclude that the federal OSH Act's scheme is not "'"so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."'" (*Gade*, *supra*, 505 U.S. at p. 98 (plur. opn. of O'Connor, J.).) California has provided adequate enforcement provisions through its plan, and there is no "unavoidable

implication" to be derived from the federal OSH Act that where a state has met this federal requirement, Congress intended to preclude supplemental enforcement of approved standards. (*Id.* at p. 99.)

Our conclusion is consistent with the decision of the federal Department of Labor approving California's Hazard Communication Standard (Standard), which incorporated provisions from Proposition 65, the Safe Drinking Water and Toxic Enforcement Act. (Health & Saf. Code, §§ 25249.5 et seq.; 62 F.R. § 31159-01.) In addition to adopting the substantive standards of Proposition 65, "the Cal/OSHA standard incorporate[d] the enforcement mechanism of Proposition 65, which provides for supplemental judicial enforcement by allowing the State Attorney General, district attorneys, city attorneys, city prosecutors, or 'any person in the public interest' to file civil lawsuits against alleged violators." (62 Fed.Reg., *supra*, at p. 31161.) Some comments regarding the proposed Standard contended that Proposition 65's private right of action violated the federal requirement that an agency be designated to enforce the state plan. The Board's decision noted that "[i]f a State standard is not identical to Federal standards, the State standard (and its enforcement) must be at least as effective as the comparable Federal standard." (62 Fed.Reg, *supra*,. at p. 31160.) It also observed, "Although [the federal OSH Act] does not authorize private enforcement, OSHA State plans do not operate under a delegation of Federal authority but under a system which allows them to enact and enforce their own laws and standards under State authority. Therefore,

nothing in the Act prevents States with approved plans from legislating such a supplemental private right of action in their own programs. . . . [¶] In the case of Proposition 65, private enforcement is supplemental to, not a substitute for, enforcement by Cal/OSHA. Private enforcement, therefore, should not detract from Cal/OSHA's responsibilities to enforce State standards." (*Id.*, p. 31167.)

The federal Department's consideration of Proposition 65 occurred in the context of an approval of a plan amendment, but Congress has not specified (as it has elsewhere) that any amendments to the state plan—even as to substantive standards—must be submitted to the Secretary of Labor for approval *before they are implemented.* (See, e.g., 7 U.S.C. § 6507(c)(2) [in context of changes to federally-approved supplemental state requirements for organic food certification, governing state official, "prior to implementing any substantive change to programs approved under this subsection, shall submit such change to the Secretary for approval"].) In addition, as explained above, the federal OSH Act's provisions related to the authority of the Secretary of Labor to approve modifications to a state plan and to evaluate a state's execution of its plan (29 U.S.C. § 667(c), (f)) raise the *potential* that a modification may be rejected or that approval of a plan may be withdrawn, but these provisions leave the state plan intact and do not preempt state law before a modification is rejected or approval is withdrawn. There is no indication in these provisions that any state deviation from the formally approved plan is, by some self-executing feature, without effect until it is

brought to the Secretary's notice and formally approved as an amendment.

Federal regulations and commentary are in accord that changes to state plans may be implemented immediately, *prior* to any action by the Secretary of Labor or that officer's designee, federal OSHA: "Federal OSHA approval of a State plan . . . in effect removes the barrier of Federal preemption, and permits the State to adopt and enforce State standards and other requirements regarding occupational safety or health issues regulated by OSHA. A State with an approved plan may modify or supplement the requirements contained in its plan, and may implement such requirements under State law, without prior approval of the plan change by Federal OSHA. Changes to approved State plans are subject to subsequent OSHA review. If OSHA finds reason to reject a State plan change, and this determination is upheld after an adjudicatory proceeding, the plan change would then be excluded from the State's Federally-approved plan." (29 C.F.R. § 1953.3(a) (2017).) Federal OSHA explained that this regulation reflects the agency's "longstanding interpretation of the Act to the effect that States which have submitted and obtained Federal approval of a State plan under [the federal OSH Act] may adopt modifications to their State plan (such as new standards, regulations, amendments to State OSHA legislation, *or revised enforcement procedures*) and may implement these modifications upon adoption, without prior approval of each particular modification. . . . OSHA has always viewed its enabling statute as not requiring pre-

enforcement/pre-implementation Federal approval . . . ." (67 Fed.Reg., *supra*, at p. 60123, italics added; see also 62 Fed.Reg., *supra*, at p. 31165 ["A modification to an approved State plan takes effect prior to and pending OSHA review of the modification" and the burden of proof rests on the party opposing the modification]; see *Florida Citrus Packers v. California* (N.D.Cal. 1982) 545 F.Supp. 216, 219 [upholding federal OSHA's pre-approval enforcement policy]; see also *Shell Oil Co. v. U.S. Dept. of Labor* (D.D.C. 2000) 106 F.Supp.2d 15, 18 [noting in passing that federal OSHA routinely applies this pre-approval enforcement policy].)[6]

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[6] We are aware of *Industrial Truck Ass'n v. Henry* (9th Cir. 1997) 125 F.3d 1305, in which the court read the *Gade* plurality's implied preemption analysis relatively broadly, and concluded that the state regulations promulgated to implement California's Safe Drinking Water and Toxic Enforcement Act were preempted by the federal OSH Act in the workplace context until the regulations were included in the existing state OSHA standards and approved by the Secretary of Labor. In the *Industrial Truck Ass'n* case, unlike here, it was undisputed that the challenged regulations themselves constituted occupational safety and health standards, and that there were inconsistent federal standards on the same issue; that case did not present a situation implicating mere additional enforcement measures for existing, approved standards. Moreover, as the Ninth Circuit recognized, "[a]n agency's interpretation of the preemptive effect of its regulations is entitled to deference where Congress has delegated authority to the agency, the agency's interpretation is not contrary to a statute, and agency expertise is important to determining preemption." (*Id.* at p. 1311.) In light of this principle, the Ninth Circuit should have given deference to the federal Department of Labor's decision approving California's incorporation of provisions from Proposition 65 into a standard under the state plan. (62 Fed.Reg, *supra.*) As noted above, that

Finally, we reiterate the strong presumption against preemption, arising both from the fact that the federal legislation addresses an area that has been the long-standing subject of state regulation and from the fact that California has assumed responsibility under the federal OSH Act to regulate worker safety and health, thereby preempting federal law. In light of the cooperative character of the federal OSH Act, the authority the federal OSH Act grants states that have assumed responsibility for worker safety and health, the nature of UCL and FAL claims, and the strong presumption against preemption, we find no implied preemption of the claims in this case.

2. Obstacle preemption

To recall, "Obstacle preemption permits courts to strike state law that stands as 'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citations.] It requires proof Congress had particular purposes and objectives in mind, a demonstration that leaving state law in place would compromise those objectives, and

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decision reflects the federal agency's view that a state may modify its enforcement mechanisms without prior federal approval. (62 Fed.Reg., supra, at p. 31165.) Proper consideration of the federal Department's decision would have led to a narrower reading of the federal OSH Act's preemptive effect. (See also *National Cable & Telecommunications Ass'n v. Brand X Internet Services* (2005) 545 U.S. 967, 982 [a subsequent agency construction is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837 unless the court's prior construction was based on a conclusion that the terms of the statute were unambiguous, leaving no room for the agency's construction].)

reason to discount the possibility the Congress that enacted the legislation was aware of the background tapestry of state law and content to let that law remain as it was." (*Quesada, supra,* 62 Cal.4th at p. 312.) We "conduct our analysis from the starting point of a presumption that displacement of state regulation in areas of traditional state concern was not intended absent clear and manifest evidence of a contrary congressional intent." (*Id.* at p. 315; see also *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 388 [a high threshold must be surmounted before obstacle preemption will be found].)

The principal goal of the federal OSH Act's enactment was to "address the problem of uneven and inadequate state protection of employee health and safety" by supplying a minimum level of protection throughout the country—a federal "nationwide 'floor' of minimally necessary safeguards." (*United Air Lines*, *supra*, 32 Cal.3d at p. 772.) Federal approval of the California plan indicates that this goal has been met in this state. Even if we view UCL and FAL actions based on Cal/OSHA violations as having a substantial impact on occupational safety and health issues, that impact is not an obstacle to achieving the congressional purpose, nor are additional enforcement mechanisms an obstacle to establishing at least a minimum level of worker protection.[7]

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[7] The congressional purpose recognized by the plurality opinion in *Gade*, *supra*, 505 U.S. 88, that there be but a single standard of conduct to which employers must adhere (*id.* at p. 99) was at issue in *Gade* because there was no approved state plan that *displaced* the federal law. In contrast, the sole applicable

Similarly, UCL and FAL claims that are premised on Cal/OSHA violations do not conflict with the federal OSH Act's provision that when state standards are applicable to products in interstate commerce, the Secretary of Labor must determine that the standards "are required by compelling local conditions and do not unduly burden interstate commerce." (29 U.S.C. § 667(c)(2).) Such claims involve the same substantive standards that have been approved by the Secretary, and therefore do not impose any greater substantive burdens on interstate commerce. Even if the availability of greater penalties should be incorporated into the state plan and submitted to the Secretary of Labor for review of any impact on interstate commerce, it does not follow that any change that has not yet been incorporated and approved is preempted in the meantime.

Neither do the UCL or FAL claims obstruct another of the federal OSH Act's purposes, namely to encourage the States "to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws." (29 U.S.C. § 651(b)(11); see also 29 C.F.R. § 1902.1(a) (2017), see *id.* § 1902.1(c)(1) (2017) [after an approved plan gains successful review the year following its initial approval, the federal "enforcement authority shall not apply with respect to any occupational safety or health issue covered by the plan"].) "OSHA has

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relevant standards in this state are the California standards. The Secretary of Labor retains the authority to audit the state's enforcement of its standards and to withdraw federal approval, but until that happens, only the California standards govern employer conduct.

interpreted the OSH Act to recognize that States with approved State plans *retain* broad power to fashion State standards" and to experiment. (62 Fed.Reg., *supra*, p. 31160, italics added.) The federal OSH Act "reflects [a] 'search for enlightened public policy' . . . by removing the bar of preemption through plan approval and, thus, allowing States to administer their own workers' protection laws so long as they meet the floor established by the Federal OSHA program." (*Ibid.*) We can identify no evidence that Congress had a "particular purpose[] and objective[]" to restrict state authority to the exact terms of the state's approved state plan. (See *Quesada*, *supra*, 62 Ca1.4th at p. 312.)

Finally, there is no reason to "discount" Congress's awareness and acceptance of the "background tapestry" of state law in this area. (*Quesada*, *supra*, 62 Cal.4th at p. 312) In the federal OSH Act's savings clause, Congress explicitly recognized the continuing applicability of state law in the field. (See 29 U.S.C. § 653(b)(4).) Under that clause, tort litigation could produce large civil awards and penalties despite the existence of a more modest state administrative enforcement plan, but such litigation is not preempted. Therefore, the magnitude of the potential UCL and FAL penalties compared with the lesser administrative penalties imposed under the state plan are not inconsistent with the federal scheme.

Under the circumstances, there is no "clear and manifest evidence" (*Quesada*, *supra*, 62 Cal.4th at p. 315) of a congressional intent to displace state authority over unfair competition and consumer claims that are premised on Cal/OSHA standards.

B. No express preemption of UCL and FAL claims

As noted above, the federal OSH Act does not state that claims such as UCL and FAL claims or that enforcement actions beyond those specified in a state plan are preempted until they are included in a plan and approved by the Secretary of Labor. However, despite the absence of such a statement, express preemption may be found where an act's structure and language reflect a clear purpose of Congress to preempt state law. (See *Gade*, *supra*, 505 U.S. at pp. 112-113 (conc. opn. of Kennedy, J.) [express preemption of state law established by federal OSH Act provisions that allow state regulation where there is no relevant federal standard, require a state to submit a plan in order to assume responsibility for worker safety and health, set forth conditions for approval of a plan, and require continuing evaluation of a plan by the Secretary of Labor].)

As our discussion above of implied preemption reflects, when a state has obtained approval of a state plan for the regulation of worker safety and health, state law preempts federal law. Moreover, with respect to the enforcement of safety and health standards, the federal OSH Act requires enforcement at least as effective as under the federal act; there is no indication in the language or structure of the federal OSH Act that states with approved plans cannot supplement enforcement of federally-approved standards by means of unfair business practice claims. (See *Farm Raised Salmon Cases*, *supra*, 42 Cal.4th at p. 1090 [permitting UCL claim to proceed and finding it significant that nothing in the federal

Food, Drug and Cosmetic Act said anything restricting the range of remedies states could provide].) Finally, the federal OSH Act allows a state with an approved plan to implement modifications or additions without prior approval of the plan change by Federal OSHA.

In the absence of a clear and manifest congressional purpose to preempt claims such as the UCL and FAL claims asserted in this action, such claims are encompassed in the presumption against preemption that arises upon a state's assumption of responsibility under the federal OSH Act to regulate worker safety and health. (See *Quesada*, *supra*, 62 Cal.4th at p. 315.)

III. Disposition

The judgment of the Court of Appeal is reversed, and the matter is remanded to the Court of Appeal with directions to vacate its order granting the petition for writ of mandate and instead to deny the petition for writ of mandate, and to remand the matter to the trial court for further proceedings not inconsistent with this opinion.

CANTIL-SAKAUYE, C. J.

WE CONCUR:

CHIN, J.

CORRIGAN, J.

LIU, J.

CUÉLLAR, J.

KRUGER, J.

MIHARA, J.*

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* Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SOLUS INDUSTRIAL INNOVATIONS, LLC, et al.,

Petitioners,

v.

THE SUPERIOR COURT OF ORANGE COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

G047661

Filed September 22, 2014

As Modified on Denial of Rehearing October 16, 2014

OPINION

In this case we are called on to determine whether federal law preempts the effort by a district attorney to recover civil penalties under California's Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.) based on an employer's alleged violation of workplace safety standards. Petitioners Solus Industrial Innovations, Emerson Power Transmission Corp., and Emerson Electric Co. (collectively Solus) contend the trial court erred by overruling their demurrer to two causes of action filed against them by Respondent, the Orange County District Attorney, alleging a right to recover such penalties. Solus argues that federal workplace safety law (Fed/OSHA) preempts any state law workplace safety enforcement mechanism which has not been specifically incorporated into the state workplace safety plan approved by the U.S. Secretary of Labor (the Secretary).

The district attorney contends that once a state workplace safety plan has been approved by the Secretary, as California's was, the state retains significant discretion to determine how it will enforce the safety standards incorporated therein, and thus the state may empower prosecutors to enforce those standards through whatever legal mechanism is available when such a case is referred to them.

The trial court agreed with the district attorney and consequently overruled Solus's demurrer to the two causes of action based on the UCL. But the court also certified this issue as presenting a controlling issue of law suitable for early appellate review under Code of Civil Procedure section 166.1. Solus then filed a petition for writ of mandate with this court, asking

us to review the trial court's ruling. After we summarily denied the petition, the Supreme Court granted review and transferred the case back to us with directions to issue an order to show cause.

We issued the order to show cause and then an initial opinion concluding the trial court's ruling was incorrect on the merits. We reasoned that under controlling law, any part of a state plan not expressly approved is preempted, and that California's workplace safety plan, as approved by the Secretary, does not include any provision for civil enforcement of workplace safety standards by a prosecutor through a cause of action for penalties under the UCL. In the course of our opinion, we noted that the UCL, in its current form, was not even in effect when California's plan was approved.

The California Supreme Court then granted review, and transferred the matter back to this court with directions to reconsider the matter in light of former Civil Code section 3370.1 (former section 3370.1) repealed by stats. 1977, ch. 299, § 3, p. 1204—which was in effect when California's plan was approved—providing for the imposition of similar penalties based on acts of unfair competition. Having done so, we again conclude that the district attorney's reliance on the UCL to address workplace safety violations is preempted.

FACTS

As is typical when we review the propriety of the trial court's ruling on a demurrer, "'we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions,

deductions or conclusions of law.'" (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792.)

Solus makes plastics at an Orange County manufacturing facility. In 2007, Solus installed an electric water heater intended for *residential use* at the facility. In March 2009, that water heater exploded, killing two workers instantly in what district attorney refers to as an "untimely and horrific death."

After the incident, California's Division of Occupational Safety and Health (Cal/OSHA) opened an investigation and determined the explosion had been caused by a failed safety valve and the lack of "any other suitable safety feature on the heater" due to "manipulation and misuse." Based on Cal/OSHA's investigation, it charged Solus with five "'[s]erious'" violations of Title 8 of the California Code of Regulations in an administrative proceeding, including violations of: "(1) section 467(a) for failure to provide a proper safety valve on the heater; (2) section 3328(a) for permitting the unsafe operation of the water heater; (3) section 3328(b) for improperly maintaining the water heater; (4) section 3328(f) for failing to use good engineering practices when selecting and using the unfit residential water heater in the extrusion operations; and (5) section 3328(h) for permitting unqualified and untrained personnel to operate and maintain the water heater." Cal/OSHA also cited Solus with one "'[w]illful'" violation of the same regulation, based on its "willful failure to maintain the residential water heater in a safe operating condition."

Because the incident involved the death of two employees, and there was evidence that a violation of law had occurred, Cal/OSHA's Bureau of Investigation forwarded the results of its internal investigation to the district attorney as required by Labor Code section 6315, subdivision (g). In March 2012, the district attorney filed criminal charges against two individuals, including Solus's plant manager and its maintenance supervisor, for felony counts of violating Labor Code section 6425, subdivision (a). (See *People v. Faulkinbury* (Super. Ct. Orange County, 2012, No. 12CF0698).) No party challenges the district attorney's standing to bring these or other appropriate criminal prosecutions.

The district attorney also filed the instant civil action against Solus. The complaint contains four causes of action, all based on the same worker health and safety standards placed at issue in the administrative proceedings.

The first two causes of action are not at issue in this writ proceeding. The third cause of action alleges that Solus's failure to comply with workplace safety standards amounts to an unlawful, unfair and fraudulent business practice under Business and Professions Code section 17200, and the district attorney requests imposition of civil penalties as a consequence of that practice, in the amount of up to $2,500 per day, per employee, for the period from November 29, 2007 through March 19, 2009.

The fourth cause of action alleges Solus made numerous false and misleading representations concerning its commitment to workplace safety and its compliance with all applicable workplace safety

standards, and as a result of those false and misleading statements, Solus was allegedly able to retain employees and customers in violation of Business and Professions Code section 17500. Again, the district attorney requests imposition of civil penalties as a consequence of this alleged misconduct, in the amount of up to $2,500 per day, per employee, for the period from November 29, 2007 through March 19, 2009.

Solus demurred to these two causes of action, contending they were preempted under Fed/OSHA, because a prosecutor's pursuit of civil penalties under the UCL is not part of California's workplace safety plan approved by the Secretary. The trial court disagreed, and overruled the demurrer to the district attorney's two causes of action based on violations of the UCL.

The trial court subsequently granted a request to certify the preemption issue as appropriate for early appellate review under Code of Civil Procedure section 166.1, finding "the federal preemption issue raised in [Solus's] demurrer as to the Third and Fourth Causes of Action in the Complaint presents a controlling question of law as to which there are substantial grounds for difference of opinion and that appellate resolution of this issue may materially advance the conclusion of the litigation."

Solus filed a petition for writ of mandate with this court, which we summarily denied. After our denial, the Supreme Court granted review and transferred the case back to us with directions to issue an order to show cause. On May 10, 2013, we issued the order to show cause.

DISCUSSION

1. Standard of Review

"We apply a de novo standard of review because this case was resolved on demurrer [citation] and because federal preemption presents a pure question of law [citation]." (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10.) However, "[i]t is well established that the party who asserts that a state law is preempted bears the burden of so demonstrating." (*Id.* at p. 1088.) And further, "[t]he interpretation of the federal law at issue here is further informed by a strong presumption against preemption." (*Ibid.*)

2. The Fed/OSHA Preemption

"'The basic rules of preemption are not in dispute: Under the supremacy clause of the United States Constitution (art. VI, cl. 2), Congress has the power to preempt state law concerning matters that lie within the authority of Congress. [Citation.] In determining whether federal law preempts state law, a court's task is to discern congressional intent. [Citation.] Congress's express intent in this regard will be found when Congress explicitly states that it is preempting state authority. [Citation.] Congress's implied intent to preempt is found (i) when it is clear that Congress intended, by comprehensive legislation, to occupy the entire field of regulation, leaving no room for the states to supplement federal law [citation]; (ii) when compliance with both federal and state regulations is an impossibility [citation]; or (iii) when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

Congress." [Citations.]'" (*Farm Raised Salmon Cases*, *supra*, 42 Cal.4th at p. 1087.)

On the matter of workplace safety regulation, the federal government's intent to preempt is clear: The federal Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 et seq; (OSH Act)), and the standards promulgated thereunder by Fed/OSHA were designed "'to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.' [Citation.] To that end, Congress authorized the Secretary of Labor to set mandatory occupational safety and health standards applicable to all businesses affecting interstate commerce, 29 U.S.C. § 651(b)(3), and thereby brought the Federal Government into a field that traditionally had been occupied by the States." (*Gade v. National Solid Wastes Management Association* (1992) 505 U.S. 88, 96 [112 S.Ct. 2374, 120 L.Ed.2d 73] (*Gade*).)

However, "Congress expressly saved two areas from federal pre-emption. . . . [T]he Act does not 'supersede or in any manner affect any workmen's compensation law [and] the Act does not 'prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect.'" (*Gade*, *supra*, 505 U.S. at pp. 96-97.)

Moreover, Congress also gave states the option of side-stepping federal preemption entirely, by allowing any state which "desires to assume responsibility for *development and enforcement* therein of occupational safety and health standards relating to any occupational safety or health issue [to]

submit a State plan for the development of *such standards and their enforcement*." (29 U.S.C. § 667(b), italics added; *Gade*, *supra*, 505 U.S. at p. 97.) "The section . . . removes federal preemption so that the state may exercise its own sovereign powers over occupational safety and health." (*United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd.* (1982) 32 Cal.3d 762, 772.)

But "[t]wo prerequisites to such [state] regulation are that the state law be 'at least as effective' as the federal standard covering the same subject matter and that the state law be incorporated in a state plan submitted to and approved by the federal Secretary of Labor (the Secretary). [Citation.]" (*California Lab. Federation v. Occupational Safety & Health Stds. Bd.* (1990) 221 Cal.App.3d 1547, 1551 (*California Labor Federation*).) However, if the proposed state plan incorporates standards which are distinct from the federal ones, "[t]he Secretary is not required to approve such a plan unless in her judgment [the state] 'standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce.'" (*Id.* at pp. 1551-1552.) The state plan must designate "a [s]tate agency or agencies as the agency or agencies responsible for administering the plan throughout the [s]tate" (29 U.S.C. § 667(c)(1)) and "contain[] satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards." (29 U.S.C. § 667(c)(4).)

Further, the Secretary may rescind approval of the state plan "[w]henever the Secretary finds, after affording due notice and opportunity for a hearing, that in the administration of the State plan there is a failure to comply substantially with any provision of the State plan (or any assurance contained therein) . . . ." (29 U.S.C. § 667(f).)

Finally, if the state makes changes to its occupational safety and health laws, those changes must be formally incorporated into its approved workplace safety plan or be preempted. (*California Lab. Federation v. Occupational Safety and Health Stds. Bd.*, *supra*, 221 Cal.App.3d at p. 1559 [writ issued to compel the Department of Industrial Relations to formally incorporate the provisions of Proposition 65 into its plan, and submit it to the Secretary for approval, to avoid preemption of those provisions as applied to the workplace]; see 29 C.F.R. § 1952.175, listing federally approved changes made to California's approved plan.)

3. The Cal/OSHA Workplace Safety Plan

As explained in *California Labor Federation*, "In 1973, the Legislature enacted the California Occupational Safety and Health Act (Cal/OSHA). [Citation.] Section 107 of Cal/OSHA states in pertinent part: 'The purpose of this act is to allow the State of California to assume responsibility for development and enforcement of occupational safety and health standards under a state plan pursuant to Section 18 [29 United States Code section 667] of the Federal Occupational Safety and Health Act of 1970 (Public Law 91-596) which was enacted December 29,

1970.' (Stats. 1973, ch. 993, § 107, pp. 1954-1955.)" (*California Lab. Federation v. Occupational Safety and Health Stds. Bd.*, *supra*, 221 Cal.App.3d at p. 1552.)

The federal regulation approving California's workplace safety plan is detailed, and describes the plan as incorporating an enforcement component that includes "prompt notice to employers and employees of alleged violations of standards and abatement requirements, *effective remedies against employers*, and *the right to review alleged violations*, abatement periods, *and proposed penalties with opportunity for employee participation in the review proceedings . . . .*" (29 C.F.R. 1952.170(c), italics added.) The approval regulation also specifies "[t]he State's program will be enforced *by the Division of Industrial Safety of the Department of Industrial Relations*" and "*[a]dministrative adjudications will be the responsibility of the California Occupational Safety and Health Appeals Board.*" (29 C.F.R. 1952.170(a), italics added.) The regulation does allow other agencies to be involved in the enforcement effort, but requires that "[i]nter-agency agreements to provide technical support to the program will be fully functioning within 1 year of plan approval" (29 C.F.R. § 1952.173(d).) It then confirms, pursuant to that requirement, that "formal interagency agreements were negotiated and signed between the Department of Industrial Relations and the State Department of Health (June 28, 1973) and between the State Department of Industrial Relations and the State Fire Marshal (August 14, 1973)." (29 C.F.R. § 1952.174(b).)

That plan description is entirely consistent with Labor Code section 144, subdivision (a), which expressly requires that "[t]he authority of any agency, department, division, bureau or any other political subdivision other than the Division of Occupational Safety and Health *to assist in* the administration *or enforcement* of any occupational safety or health standard, order, or rule adopted pursuant to this chapter *shall be contained in a written agreement with the Department of Industrial Relations or an agency authorized by the department to enter into such agreement*." (*Ibid.*, italics added.)

4. The UCL

California's "UCL defines 'unfair competition' as 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.' [Citation.] By proscribing 'any unlawful' business act or practice (*ibid.*), the UCL '"borrows"' rules set out in other laws and makes violations of those rules independently actionable." (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 370.)

Actions for relief under the UCL may be initiated by a public prosecutor. (Bus. & Prof. Code, § 17204.) Available remedies for violation of the UCL include (1) restitution and injunctive relief, which can be pursued by either a public prosecutor or a private party who has suffered injury in fact, or (2) civil penalties, which can only be pursued by a public prosecutor. (Bus. & Prof. Code, §§ 17203, 17206, subd. (a).) These UCL remedies are "cumulative . . . to the remedies or penalties available under all other laws of this state." (Bus. & Prof. Code, § 17205.)

The purpose of the UCL is to "provide[] an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices. . . . [T]he 'overarching legislative concern [was] to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition.' [Citation.] Because of this objective, the remedies provided are limited." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1150.)

5. Preemption of the UCL Causes of Action in This Case

Our assessment of whether the district attorney's UCL causes of action are preempted by federal law begins with the observation that the UCL was enacted in 1977 (Stats. 1977, ch. 299, § 1, p. 1202), which is *after* the Secretary initially approved California's workplace safety plan. Hence, there is no basis to infer that reliance on the UCL, in its current form, could have been contemplated by the Secretary as part of the initial decision approving California's plan. And while the district attorney points out that former section 3370.1, which was in effect from 1972 to 1977 (added by stats. 1972, ch. 1004, § 2, p. 2021; repealed by stats. 1977, ch. 299, §§ 3, 4, p. 1204.) also provided for imposition of a similar civil penalty based on acts of unfair competition, he makes no claim that the availability of such a penalty, or its potential use in connection with violations of workplace safety laws, was ever brought to the attention of the Secretary in connection with California's plan.

Indeed, after the Supreme Court's transfer of this case back to us, with directions to reconsider our decision in light of former section 3370.1, we requested that the parties provide us with supplemental briefs addressing that specific issue, as well as whether former section 3370.1 was ever actually applied to penalize unfair competition arising out of violations of workplace safety laws (either before or after California's workplace safety plan was approved in 1973).

In his brief, the district attorney first concedes "[t]here are insufficient historical records" to demonstrate that former section 3370.1 was ever relied upon by prosecutors to penalize unfair competition arising out of violations of the workplace safety laws prior to 1973, when the Secretary approved California's workplace safety plan.

And while the district attorney does claim that prosecutors relied on former section 3370.1 to penalize unfair competition arising out of violations of the workplace safety laws *after* the Secretary's 1973 approval of California's plan, he supports that assertion solely by referencing a record of nonspecific "civil actions taken by prosecutors following referrals from the [Division of Occupational Safety and Health's Bureau of Investigations]" which even he acknowledges dates back only to 1995—i.e., 18 years *after* former section 3370.1 was superseded by the current UCL in 1977. Thus, that evidence, even if it were otherwise appropriate for us to consider, would not support the district attorney's contention.

Finally, in response to our query about whether former section 3370.1 was ever brought to the

attention of the Secretary in connection with California's proposed workplace safety plan, the district attorney argues that the Secretary is *presumed* to have known about it. That assertion, however, suffers from several analytical flaws. First, the presumption the district attorney relies upon is that "[t]he legislature is presumed to know existing law." (*Arthur Andersen v. Superior Court* (1998) 67 Cal.App.4th 1481, 1500.) But that rule refers to *our own state legislature's* presumed knowledge of existing California law when it enacts a new statute. It does not establish that members of the federal government's executive branch are also presumed to know the entirety of California law—let alone how California's laws of general application might be employed to address workplace safety issues.

Second, the district attorney suggests the Secretary would have been aware of the relevance of former section 3370.1 to our state's workplace safety plan through our Supreme Court's decision in *Barquis v. Merchants Collection Assn.* (1972) 7 Ca1.3d. 94 (*Barquis*). But that case does not address the potential use of unfair competition law in connection with regulating workplace safety. Instead, the court was concerned with the wholly unrelated issue of whether a collection agency's alleged practice of knowingly and willfully filing actions in improper counties would qualify as an unlawful business practice. In the course of deciding that issue, the court merely notes that California's unfair competition law was amended in 1963, "to add the word 'unlawful' to the types of wrongful business conduct that could be enjoined." (*Id.* at p. 112.) The

court then adds that "[a]lthough the legislative history of [the 1963] amendment is not particularly instructive, nevertheless, as one commentator has noted 'it is difficult to see any other purpose than to extend the meaning of unfair competition to anything that can properly be called a business practice and that at the same time is forbidden by law.' (Note, *Unlawful Agricultural Working Conditions as Nuisance or Unfair Competition* (1968) 19 Hastings L.J. 398, 408-409.)" (*Id.* at pp. 112-113, fn. omitted.) It is that commentator (a second year law student)—not the Supreme Court—who suggests in the cited law review article that California's unfair competition law might *also* be employed to address unlawful working conditions. The Supreme Court itself expresses no opinion on that issue. Consequently *Barquis* cannot be viewed as a basis for imputing *presumptive knowledge* to the Secretary, back in 1973, that former section 3370.1 could be relied upon as a basis for imposing additional penalties on employers that violate workplace safety laws.

And third, even if we agreed the Secretary could fairly be taxed with *presumptive* knowledge that former section 3370.1 might be relied upon by prosecutors to impose additional penalties on employers that violate California's workplace safety laws, we would still conclude that such knowledge is insufficient to support an inference that the Secretary had *approved* the imposition of those penalties as part of California's plan. As we have explained, a state seeking to exempt itself from the federal preemption over workplace safety regulation must specifically inform the Secretary of its proposed plan, detailing

both the "*standards [to be employed] and their enforcement*." (29 U.S.C. § 667(b), italics added; *Gade*, *supra*, 505 U.S. at p. 97.) That requirement cannot be fulfilled by simply asserting the Secretary is *presumed* to be familiar with the entirely of the California law and to understand how that law might be employed in connection with regulating workplace safety. If it were, the Secretary's *presumed* knowledge would effectively relieve California of any obligation to affirmatively disclose its plan.

Rather than claiming that reliance on UCL penalties as an additional remedy for wrongs associated with workplace safety violations was ever specifically included in California's approved plan, the district attorney simply relies on the "strong presumption against preemption" and argues Solus failed to establish Congress had any specific intention of "bar[ring] the People's prosecution" of these UCL causes of action. The district attorney asserts that the underlying violations of the workplace safety laws are "properly within the jurisdiction of the State of California to remedy" and "[a]s such, these violations are the proper subject matter" for him to prosecute as authorized by California law under the UCL. We find these contentions unpersuasive.

As we have already explained, Congress's intention to preempt essentially the entire field of workplace safety regulation (other than workers' compensation) was made clear when it passed the OSH Act. (*Gade*, *supra*, 505 U.S. at p. 96.) While the OSH Act does not preempt states from "'asserting jurisdiction under [s]tate law over any occupational safety or health issue *with respect to which no*

[federal] standard is in effect'" (*id.* at p. 97, italics added), the district attorney has made no claim that this case involves any such discrete issue. Consequently, we conclude federal preemption has been established.

The district attorney relies on *Farm Raised Salmon Cases*, *supra*, 42 Cal.4th 1077, to support its assertion that preemption is not established here. But that case is distinguishable. As our Supreme Court explained, the federal law at issue in *Farm Raised Salmon Cases* preempted only those state laws that "'establish . . . any requirement for the labeling of food . . . *that is not identical to the requirement* of'" federal law. (*Id.* at p. 1086.) Thus, the court concluded that to the extent California's laws established requirements which were identical to those established by federal law, its enforcement of those laws was *not preempted.* (*Id.* at p. 1083 ["plaintiffs' claims for deceptive marketing of food products are predicated on state laws establishing independent state disclosure requirements 'identical to' the disclosure requirements imposed by the FDCA, something Congress explicitly approved"].) The same cannot be said here.

By contrast to the federal law at issue *Farm Raised Salmon Cases*, the OSH Act *does not* allow states to *independently establish* workplace safety laws, even if those laws mirror federal law requirements. Instead, the states' authority to establish and enforce any laws in this area is *expressly conditioned* on submission of a proposed state plan to the Secretary—a plan which reflects not only the state's establishment of appropriate workplace safety

requirements, but also the manner in which those requirements will be enforced and the remedies provided—and *the Secretary's approval* of that specific plan. In fact, unlike the federal law at issue in *Farm Raised Salmon Cases*, the OSH Act actually contemplates that states *could deviate* from established federal standards, as long as those deviations are approved by the Secretary. The Secretary retains explicit discretion to determine whether a state plan is appropriate, and to reject any state plan that, *in the Secretary's view*, incorporates standards which are either less effective than those established by the OSH Act or unduly burdensome to interstate commerce.

It is this retained federal power to approve or disapprove the state's laws which also distinguishes the federal preemption scheme at issue here from the one recently considered by our Supreme Court in *Rose v. Bank of America* (2013) 57 Cal.4th 390. In *Rose*, the issue was whether a private party's cause of action for restitution and injunctive relief under the UCL, based upon the defendant's alleged violations of the federal Truth in Savings Act (TISA)—a law which did not itself authorize any private enforcement—was preempted. The Supreme Court held it was not, because when Congress repealed TISA's provision allowing for private enforcement, it also "explicitly approved the enforcement of state laws 'relating to the disclosure of yields payable or terms for accounts . . . except to the extent that those laws are inconsistent with the provisions of this subtitle, and then only to the extent of the inconsistency.'" (*Id.* at p. 395.) The court then concluded that a private right

of action under the UCL, based on an alleged violation of TISA, was not inconsistent with the provisions of TISA. (*Ibid.*)

In this case, however, freedom from federal preemption hinges not only on whether a state's proposed laws are "'at least as effective' as those contained in the OSH act—a standard we might be able to assess—but also on whether they are "incorporated in a state plan submitted to and approved by the federal Secretary of Labor (the Secretary)." (*California Lab. Federation v. Occupational Safety and Health Stds. Bd.*, *supra*, 221 Cal.App.3d at p. 1551.) That latter requirement is not one we are empowered to dispose of.

Because the OSH Act allows a state to avoid federal preemption only if it obtains federal approval of its own plan, it necessarily follows that a state has no authority to enact and enforce laws governing workplace safety which fall outside of that approved plan. The OSH Act expressly requires a state to comply with its approved plan, and allows the Secretary to rescind approval of the plan if the state fails to do so. (29 U.S.C., § 667(f).) Under this statutory scheme, we conclude the approved state plan operates, in effect, as a "safe harbor" within which the state may exercise its jurisdiction. It is only when the state stays within the terms of its approved plan, that its actions will not be preempted by federal law.

The district attorney's alternative argument is that even assuming preemption is established in the first instance, these UCL causes of action must be viewed as falling within the safe harbor created by

California's approved state plan. As he explains, "the California worker safety penalty statutes and regulations [underlying these UCL claims] are fully approved as part of California's State Plan and *any* action to enforce such laws is fully consistent with the goals of the federal mandate." We cannot agree.

First, while it may be true that the penalty statutes and regulations underlying these UCL claims are included in the approved state plan, the district attorney is not seeking to directly enforce those approved penalties and regulations. Instead, he is seeking to enforce *separate penalties under the UCL* which have *not been approved* for application in the otherwise preempted area of workplace safety regulation. Second, the standard for assessing whether reliance on the UCL as a tool of enforcing workplace safety laws is preempted is not whether *we believe* it appears "consistent with the goals" of the OSH Act to do so. It is the Secretary, not this court, which retains the discretion to determine whether changes in the state's already approved enforcement plan are appropriate. Stated simply, avoidance of federal preemption is dependent upon the Secretary's approval, not ours.

And finally, we reject the district attorney's implicit assertion that any opportunity for *enhanced* enforcement of workplace safety regulations would necessarily be met with the Secretary's approval. As we have already noted, one of the grounds for the Secretary's rejection of a plan is the determination that some distinct state workplace safety provision would unduly burden interstate commerce. Indeed, as Solus points out, after the court in *California Labor*

Federation issued a writ compelling the Department of Industrial Relations to formally incorporate the provisions of Proposition 65 into its workplace safety plan, so as to avoid preemption (*California Lab. Federation v. Occupational Safety and Health Stds. Bd.*, *supra*, 221 Cal.App.3d 1547), the Secretary's approval of the new law for application in the workplace actually *limited* the scope of private enforcement that would otherwise have been permitted. As reflected in the analysis underlying that decision, "[m]any [who submitted responses to the Secretary's request for comment on the proposed modification] are companies which have experienced, or fear experiencing, private enforcement lawsuits under Proposition 65." (62 Fed.Reg. 31159, 31162 (June 6, 1997).) And after consideration of the concerns expressed by those commenters, the Secretary concluded that private enforcement of the substantive provisions included in Proposition 65 would be permissible only if restricted to in-state manufacturers. (62 Fed.Reg. 31159, 31178 (June 6, 1997).)

Here, the district attorney proposes to utilize the UCL as a means of imposing truly massive penalties against Solus, based specifically upon its alleged violation of workplace safety laws. Significantly, and in contrast to *Rose*, this is not merely a private UCL cause of action, brought by a litigant who has suffered injury in fact as a result of defendant's anti-competitive conduct, and who seeks restitution for that injury and to enjoin such conduct in the future. This is instead an action, available only to a representative of the state, which is expressly

intended *to penalize* a party for past misconduct. (Bus. & Prof. Code, § 17206, subd. (a) [civil penalties "shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel . . . or . . . by a city prosecutor"].)

Under each of these two UCL causes of action, the district attorney seeks to recover penalties of up to $2,500 *per day*, *per employee*, for the period from November 29, 2007 to March 19, 2009. That represents a potential penalty in excess of $1 million per employee, for each cause of action. And of course, the penalties available under the UCL are cumulative, and thus would be assessed *in addition to* whatever penalties were directly provided for under the Labor Code (and thus directly approved by the Secretary as part of California's state plan.) By contrast, as the district attorney acknowledges, the *total penalty* actually imposed by Cal/OSHA in the stayed administrative action arising out of these same violations was under $100,000.

It is not our place to assess whether such an extraordinary jump in the potential civil penalty an employer such as Solus might incur for workplace safety violations through application of the UCL is a good idea. For our purposes, it is enough to note that *it is* an extraordinary jump. And because it is, we conclude it will have to be the Secretary, and not this court, who assesses its merits.

In light of our determination that state regulation of workplace safety standards is explicitly preempted by federal law under the OSH Act, and that

consequently California is entitled to exercise its regulatory power only in accordance with the terms of its federally approved workplace safety plan, we conclude the district attorney cannot presently rely on the UCL to provide an additional means of penalizing an employer for its violation of workplace safety standards.

DISPOSITION

The petition for writ of mandate is granted. The superior court is directed to vacate the portion of its October 3, 2012 order which overruled Solus's demurrer to the district attorney's third and fourth causes of action, and enter a new order sustaining Solus's demurrer to those two causes of action. Solus is to recover its costs in this writ proceeding.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

THOMPSON, J.

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

CIVIL COMPLEX CENTER

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

SOLUS INDUSTRIAL INNOVATIONS, LLC; EMERSON POWER TRANSMISSION CORPORATION; EMERSON ELECTRIC CO.; and DOES 1-10,

Defendant.

Case No. 30-2012-00581868-CU-MC-CXC

[Filed Nov. 14, 2012]

JOINTLY SUBMITTED ORDER GRANTING EX PARTE APPLICATION FOR ORDER UNDER CODE OF CIVIL PROCEDURE SECTION 166.1

The Court having read and considered the *Ex Parte* application (the "Application") of defendants Solus Industrial Innovations, LLC, Emerson Power Transmission Corporation and Emerson Electric Co. (collectively, "Defendants") for an Order under Code

of Civil Procedure section 166.1 with respect to the preemption issue raised in Defendants' demurrer to the Third and Fourth Causes of Action in the Complaint of plaintiff the People of the State of California ("Plaintiff"), having read and considered Plaintiff's Opposition to the Application and Plaintiff's request therein for an Order under Code of Civil Procedure section 666.1 with respect to the Court's ruling sustaining Defendants' demurrer as to the First and Second Causes of Action in the Complaint, and good cause appearing,

IT IS HEREBY ORDERED that the Application is granted.

The Court hereby indicates that in its belief the federal preemption issue raised in Defendants' demurrer as to the Third and Fourth Causes of Action in the Complaint presents a controlling question of law as to which there are substantial grounds for difference of opinion and that appellate resolution of this issue may materially advance the conclusion of the litigation.

The Court further indicates that in its belief the issue of Plaintiff's standing to bring the First and Second Causes of Action in the Complaint also presents a controlling question of law as to which there are substantial grounds for difference of opinion and that appellate resolution of this issue may materially advance the conclusion of the litigation.

Dated: November 14, 2012

/s/
Kim G. Dunning
JUDGE OF THE SUPERIOR COURT

APPENDIX D

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE

CIVIL COMPLEX CENTER

MINUTE ORDER

The People of the State of California

vs.

Solus Industrial Innovations, LLC.

DATE: 10/03/2012

JUDICIAL OFFICER PRESIDING:
Kim G. Dunning

CASE NO: 30-2012-00581868-CU-MC-CXC

APPLICATION TO ADMIT PATRICK D. MCVEY PRO HAC VICE

DEMURRER TO COMPLAINT

MOTION TO STRIKE PORTIONS OF COMPLAINT

Tentative Ruling posted on the Internet.

Application to Admit Patrick D. McVey Pro Hac Vice is **GRANTED**

Application of Patrick D. McVey for admission to the Bar of this court Pro Hac Vice and appear as counsel for defendants Emerson Electric Co., Emerson Power Transmission Corporation, and Solus Industrial Innovations, LLC is granted.

As to the Demurrer, the Court **sustains without leave to amend as to the 1st and 2nd causes of action. Overruled as to the 3rd and 4th causes of action.**

The Court **denies the Motion to Strike the paragraphs that are identified in the 3rd and 4th causes of action.**

The Court is rejecting defendant's Federal Preemption argument.

Plaintiff to amend by 10/17/12.

Status Conference is currently set for 10/24/12. If all counsel agree to a Status Conference continuance date, they can notify the courtroom.

Court orders Frederick D. Friedman, counsel for the defendant to give notice.

APPENDIX E

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

1. U.S. Const. art. VI, cl. 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. 29 U.S.C. § 653 provides in pertinent part:

Geographic applicability; judicial enforcement; applicability to existing standards; report to Congress on duplication and coordination of Federal laws; workmen's compensation law or common law or statutory rights, duties, or liabilities of employers and employees unaffected

* * *

(b)

* * *

(4) Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

3. 29 U.S.C. § 655 provides in pertinent part:

Standards

* * *

(b) Procedure for promulgation, modification, or revocation of standards

The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health and Human Services, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this chapter, the Secretary may request the recommendations of an advisory committee appointed under section 656 of this title. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health and Human Services, together with all pertinent factual information developed by the Secretary or the Secretary of Health and Human Services, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its

appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred and seventy days.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

(3) On or before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing.

(4) Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational

safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the standard.

* * *

4. 29 U.S.C. § 667 provides:

State jurisdiction and plans

(a) Assertion of State standards in absence of applicable Federal standards

Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards

Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

(c) Conditions for approval of plan

The Secretary shall approve the plan submitted by a State under subsection (b), or any modification thereof, if such plan in his judgment--

(1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,

(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 655 of this title which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce,

(3) provides for a right of entry and inspection of all workplaces subject to this chapter which is at least as effective as that provided in section 657 of this title, and includes a prohibition on advance notice of inspections,

(4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards,

(5) gives satisfactory assurances that such State will devote adequate funds to the

administration and enforcement of such standards,

(6) contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan,

(7) requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect, and

(8) provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require.

(d) Rejection of plan; notice and opportunity for hearing

If the Secretary rejects a plan submitted under subsection (b), he shall afford the State submitting the plan due notice and opportunity for a hearing before so doing.

(e) Discretion of Secretary to exercise authority over comparable standards subsequent to approval of State plan; duration; retention of jurisdiction by Secretary upon determination of enforcement of plan by State

After the Secretary approves a State plan submitted under subsection (b), he may, but shall not

be required to, exercise his authority under sections 657, 658, 659, 662, and 666 of this title with respect to comparable standards promulgated under section 655 of this title, for the period specified in the next sentence. The Secretary may exercise the authority referred to above until he determines, on the basis of actual operations under the State plan, that the criteria set forth in subsection (c) are being applied, but he shall not make such determination for at least three years after the plan's approval under subsection (c). Upon making the determination referred to in the preceding sentence, the provisions of sections 654(a)(2), 657 (except for the purpose of carrying out subsection (f) of this section), 658, 659, 662, and 666 of this title, and standards promulgated under section 655 of this title, shall not apply with respect to any occupational safety or health issues covered under the plan, but the Secretary may retain jurisdiction under the above provisions in any proceeding commenced under section 658 or 659 of this title before the date of determination.

(f) Continuing evaluation by Secretary of State enforcement of approved plan; withdrawal of approval of plan by Secretary; grounds; procedure; conditions for retention of jurisdiction by State

The Secretary shall, on the basis of reports submitted by the State agency and his own inspections make a continuing evaluation of the manner in which each State having a plan approved under this section is carrying out such plan. Whenever the Secretary finds, after affording due notice and opportunity for a hearing, that in the administration of the State plan there is a failure to

comply substantially with any provision of the State plan (or any assurance contained therein), he shall notify the State agency of his withdrawal of approval of such plan and upon receipt of such notice such plan shall cease to be in effect, but the State may retain jurisdiction in any case commenced before the withdrawal of the plan in order to enforce standards under the plan whenever the issues involved do not relate to the reasons for the withdrawal of the plan.

(g) Judicial review of Secretary's withdrawal of approval or rejection of plan; jurisdiction; venue; procedure; appropriate relief; finality of judgment

The State may obtain a review of a decision of the Secretary withdrawing approval of or rejecting its plan by the United States court of appeals for the circuit in which the State is located by filing in such court within thirty days following receipt of notice of such decision a petition to modify or set aside in whole or in part the action of the Secretary. A copy of such petition shall forthwith be served upon the Secretary, and thereupon the Secretary shall certify and file in the court the record upon which the decision complained of was issued as provided in section 2112 of title 28. Unless the court finds that the Secretary's decision in rejecting a proposed State plan or withdrawing his approval of such a plan is not supported by substantial evidence the court shall affirm the Secretary's decision. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(h) Temporary enforcement of State standards

The Secretary may enter into an agreement with a State under which the State will be permitted to continue to enforce one or more occupational health and safety standards in effect in such State until final action is taken by the Secretary with respect to a plan submitted by a State under subsection (b) of this section, or two years from December 29, 1970, whichever is earlier.

5. 29 C.F.R. § 1902.3 provides in pertinent part:

Specific criteria.

(a) *General*. A State plan must meet the specific criteria set forth in this section.

* * *

(d) *Enforcement*. (1) The State plan shall provide a program for the enforcement of the State standards which is, or will be, at least as effective as that provided in the Act, and provide assurances that the State's enforcement program will continue to be at least as effective as the Federal program. Indices of the effectiveness of a State's enforcement plan against which the Assistant Secretary will measure the State plan in determining whether it is approvable are set forth in § 1902.4(c).

(2) The State plan shall require employers to comply with all applicable State occupational safety and health standards covered by the plan and all applicable rules issued thereunder, and employees to

comply with all standards, rules, and orders applicable to their conduct.

* * *

6. 29 C.F.R. § 1902.4 provides in pertinent part:

Indices of effectiveness.

(a) *General*. In order to satisfy the requirements of effectiveness under § 1902.3 (c)(1) and (d)(1), the State plan shall:

(1) Establish the same standards, procedures, criteria and rules as have been established by the Assistant Secretary under the Act, or;

(2) Establish alternative standards, procedures, criteria, and rules which will be measured against each of the indices of effectiveness in paragraphs (b) and (c) of this section to determine whether the alternatives are at least as effective as the Federal program with respect to the subject of each index. For each index the State must demonstrate by the presentation of factual or other appropriate information that its plan is or will be at least as effective as the Federal program.

* * *

(c) *Enforcement*. (1) The indices for measurement of a State plan with regard to enforcement follow in paragraph (c)(2) of this section. The Assistant Secretary will determine whether the State plan satisfies the requirements of effectiveness with regard to each index as provided in paragraph (a) of this section.

(2) The Assistant Secretary will determine whether the State plan:

(i) Provides for inspection of covered workplaces in the State, including inspections in response to complaints, where there are reasonable grounds to believe a hazard exists, in order to assure, so far as possible, safe and healthful working conditions for covered employees, by such means as providing for inspections under conditions such as those provided in section 8 of the Act.

(ii) Provides an opportunity for employees and their representatives, before, during, and after inspections, to bring possible violations to the attention of the State agency with enforcement responsibility in order to aid inspections, by such means as affording a representative of the employer and a representative authorized by employees an opportunity to accompany the State representative during the physical inspection of the workplace, or where there is no authorized representative, by providing for consultation by the State representative with a reasonable number of employees.

(iii) Provides for the notification of employees, or their representatives, when the State decides not to take compliance action as a result of violations alleged by such employees or their representatives and further provides for informal review of such decisions, by such means as written notification of decisions not to take compliance action and the reasons therefor, and procedures for informal review of such decisions and written statements of the disposition of such review.

(iv) Provides that employees be informed of their protections and obligations under the Act, including the provisions of applicable standards, by such means as the posting of notices or other appropriate sources of information.

(v) Provides necessary and appropriate protection to an employee against discharge or discrimination in terms and conditions of employment because he has filed a complaint, testified, or otherwise acted to exercise rights under the Act for himself or others, by such means as providing for appropriate sanctions against the employer for such actions and by providing for the withholding, upon request, of the names of complainants from the employer.

(vi) Provides that employees have access to information on their exposure to toxic materials or harmful physical agents and receive prompt information when they have been or are being exposed to such materials or agents in concentrations or at levels in excess of those prescribed by the applicable safety and health standards, by such means as the observation by employees of the monitoring or measuring of such materials or agents, employee access to the records of such monitoring or measuring, prompt notification by an employer to any employee who has been or is being exposed to such agents or materials in excess of the applicable standards, and information to such employee of corrective action being taken.

(vii) Provides procedures for the prompt restraint or elimination of any conditions or practices in covered places of employment which could reasonably be expected to cause death or serious physical harm

immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided for in the plan, by such means as immediately informing employees and employers of such hazards, taking steps to obtain immediate abatement of the hazard by the employer, and where appropriate, authority to initiate necessary legal proceedings to require such abatement.

(viii) Provides adequate safeguards to protect trade secrets, by such means as limiting access to such trade secrets to authorized State officers or employees concerned with carrying out the plan and by providing for the issuance of appropriate orders to protect the confidentiality of trade secrets.

(ix) Provides that the State agency (or agencies) will have the necessary legal authority for the enforcement of standards, by such means as provisions for appropriate compulsory process to obtain necessary evidence or testimony in connection with inspection and enforcement proceedings.

(x) Provides for prompt notice to employers and employees when an alleged violation of standards has occurred, including the proposed abatement requirements, by such means as the issuance of a written citation to the employer and posting of the citation at or near the site of the violation; further provides for advising the employer of any proposed sanctions, by such means as a notice to the employer by certified mail within a reasonable time of any proposed sanctions.

(xi) Provides effective sanctions against employers who violate State standards and orders, such as those set forth in the Act, and in 29 CFR 1903.15(d).

(xii) Provides for an employer to have the right of review of violations alleged by the State, abatement periods, and proposed penalties and for employees or their representatives to have an opportunity to participate in review proceedings, by such means as providing for administrative or judicial review, with an opportunity for a full hearing on the issues.

(xiii) Provides that the State will undertake programs to encourage voluntary compliance by employers and employees by such means as conducting training and consultation with employers and employees.

* * *

7. 29 C.F.R. § 1952.7 provides:

California.

(a) The California State plan received initial approval on May 1, 1973.

(b) OSHA entered into an operational status agreement with California.

(c) The plan covers all private-sector employers and employees, with several notable exceptions, as well as State and local government employers and employees, within the State. For current information on these exceptions and for additional details about the plan, please visit *http://www.osha.gov/dcsp/osp/stateprogs/california.html*.

8. 29 C.F.R. § 1953.3 provides:

General policies and procedures.

(a) *Effectiveness of State plan changes under State law.* Federal OSHA approval of a State plan under section 18(b) of the OSH Act in effect removes the barrier of Federal preemption, and permits the State to adopt and enforce State standards and other requirements regarding occupational safety or health issues regulated by OSHA. A State with an approved plan may modify or supplement the requirements contained in its plan, and may implement such requirements under State law, without prior approval of the plan change by Federal OSHA. Changes to approved State plans are subject to subsequent OSHA review. If OSHA finds reason to reject a State plan change, and this determination is upheld after an adjudicatory proceeding, the plan change would then be excluded from the State's Federally-approved plan.

(b) *Required State plan notifications and supplements.* Whenever a State makes a change to its legislation, regulations, standards, or major changes to policies or procedures, which affect the operation of the State plan, the State shall provide written notification to OSHA. When the change differs from a corresponding Federal program component, the State shall submit a formal, written plan supplement. When the State adopts a provision which is identical to a corresponding Federal provision, written notification, but no formal plan supplement, is required. However, the State is expected to maintain the necessary underlying State document (e.g., legislation or standard) and to make it available for

review upon request. All plan change supplements or required documentation must be submitted within 60 days of adoption of the change. Submission of all notifications and supplements may be in electronic format.

(c) *Plan supplement availability*. The underlying documentation for identical plan changes shall be maintained by the State. Annually, States shall submit updated copies of the principal documents comprising the plan, or appropriate page changes, to the extent that these documents have been revised. To the extent possible, plan documents will be maintained and submitted by the State in electronic format and also made available in such manner.

(d) *Advisory opinions*. Upon State request, OSHA may issue an advisory opinion on the approvability of a proposed change which differs from the Federal program prior to promulgation or adoption by the State and submission as a formal supplement.

(e) *Alternative procedures*. Upon reasonable notice to interested persons, the Assistant Secretary may prescribe additional or alternative procedures in order to expedite the review process or for any other good cause which may be consistent with the applicable laws.

9. 29 C.F.R. § 1953.4 provides in pertinent part:

Submission of plan supplements.

* * *

(d) *State-initiated changes.* (1) A State-initiated change is any change to the State plan which is undertaken at a State's option and is not necessitated

by Federal requirements. State-initiated changes may include legislative, regulatory, administrative, policy or procedural changes which impact on the effectiveness of the State program.

(2) A State-initiated change supplement is required whenever the State takes an action not otherwise covered by this part that would impact on the effectiveness of the State program. The State shall notify OSHA as soon as it becomes aware of any change which could affect the State's ability to meet the approval criteria in parts 1902 and 1956 of this chapter, e.g., changes to the State's legislation, and submit a supplement within 60 days. Other State initiated supplements must be submitted within 60 days after the change occurred. The State supplement shall contain a copy of the relevant legislation, regulation, policy or procedure and documentation on how the change maintains the "at least as effective as" status of the plan. If the State fails to notify OSHA of the change or fails to submit the required supplement within the specified time period, OSHA shall notify the State that a supplement is required and set a time period for submission of the supplement, generally not to exceed 30 days.

10. Cal. Bus. & Prof. Code § 17200 provides:

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

11. Cal. Bus. & Prof. Code § 17205 provides:

Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.

12. Cal. Bus. & Prof. Code § 17206 provides in pertinent part:

Civil Penalty for Violation of Chapter

(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city having a population in excess of 750,000, by any city attorney of any city and county, or, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the

misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the General Fund. If the action is brought by a district attorney or county counsel, the penalty collected shall be paid to the treasurer of the county in which the judgment was entered. Except as provided in subdivision (e), if the action is brought by a city attorney or city prosecutor, one-half of the penalty collected shall be paid to the treasurer of the city in which the judgment was entered, and one-half to the treasurer of the county in which the judgment was entered. The aforementioned funds shall be for the exclusive use by the Attorney General, the district attorney, the county counsel, and the city attorney for the enforcement of consumer protection laws.

* * *

13. Cal. Bus. & Prof. Code § 17500 provides:

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any

state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both that imprisonment and fine.

14. Cal. Lab. Code § 50.7 provides in pertinent part:

(a) The Department of Industrial Relations is the state agency designated to be responsible for administering the state plan for the development and enforcement of occupational safety and health standards relating to issues covered by corresponding standards promulgated under the federal Occupational Safety and Health Act of 1970 (Public Law 91-596). The state plan shall be consistent with

the provisions of state law governing occupational safety and health, including, but not limited to, Chapter 6 (commencing with Section 140) and Chapter 6.5 (commencing with Section 148) of Division 1, and Division 5 (commencing with Section 6300), of this code.

* * *

15. Cal. Lab. Code § 142 provides:

The Division of Occupational Safety and Health shall enforce all occupational safety and health standards adopted pursuant to this chapter, and those heretofore adopted by the Industrial Accident Commission or the Industrial Safety Board. General safety orders heretofore adopted by the Industrial Accident Commission or the Industrial Safety Board shall continue to remain in effect, but they may be amended or repealed pursuant to this chapter.

16. Cal. Lab. Code § 144 provides in pertinent part:

(a) The authority of any agency, department, division, bureau or any other political subdivision other than the Division of Occupational Safety and Health to assist in the administration or enforcement of any occupational safety or health standard, order, or rule adopted pursuant to this chapter shall be contained in a written agreement with the Department of Industrial Relations or an agency

authorized by the department to enter into such agreement.

(b) No such agreement shall deprive the Division of Occupational Safety and Health or other state agency to which authority has been delegated of any power or authority of the state agency.

* * *

(e) Nothing in this section shall affect or limit the authority of any state or local agency as to any matter other than the enforcement of occupational safety and health standards adopted by the board; however, nothing herein shall limit or reduce the authority of local agencies to adopt and enforce higher standards relating to occupational safety and health for their own employees.

17. Cal. Lab. Code § 6307 provides:

The division has the power, jurisdiction, and supervision over every employment and place of employment in this state, which is necessary adequately to enforce and administer all laws and lawful standards and orders, or special orders requiring such employment and place of employment to be safe, and requiring the protection of the life, safety, and health of every employee in such employment or place of employment.

18. Cal. Lab. Code § 6315 provides:

(a) There is within the division a Bureau of Investigations. The bureau is responsible for directing accident investigations involving violations of standards, orders, special orders, or Section 25910

of the Health and Safety Code, in which there is a serious injury to five or more employees, death, or request for prosecution by a division representative. The bureau shall review inspection reports involving a serious violation where there have been serious injuries to one to four employees or a serious exposure, and may investigate those cases in which the bureau finds criminal violations may have occurred. The bureau is responsible for preparing cases for the purpose of prosecution, including evidence and findings.

(b) The division shall provide the bureau with all of the following:

(1) All initial accident reports.

(2) The division's inspection report for any inspection involving a serious violation where there is a fatality, and the reports necessary for the bureau's review required pursuant to subdivision (a).

(3) Any other documents in the possession of the division requested by the bureau for its review or investigation of any case or which the division determines will be helpful to the bureau in its investigation of the case.

(c) The supervisor of the bureau is the administrative chief of the bureau, and shall be an attorney.

(d) The bureau shall be staffed by as many attorneys and investigators as are necessary to carry out the purposes of this chapter. To the extent possible, the attorneys and investigators shall be experienced in criminal law.

(e) The supervisor of the bureau and bureau representatives designated by the supervisor have a right of access to all places of employment necessary to the investigation, may collect any evidence or samples they deem necessary to an investigation, and have all of the powers enumerated in Section 6314.

(f) The supervisor of the bureau and bureau representatives designated by the supervisor may serve all processes and notices throughout the state.

(g) In any case where the bureau is required to conduct an investigation, and in which there is a serious injury or death, the results of the investigation shall be referred in a timely manner by the bureau to the appropriate prosecuting authority having jurisdiction for appropriate action, unless the bureau determines that there is legally insufficient evidence of a violation of the law. If the bureau determines that there is legally insufficient evidence of a violation of the law, the bureau shall notify the appropriate prosecuting authority, if the prosecuting authority requests notice.

(h) The bureau may communicate with the appropriate prosecuting authority at any time the bureau deems appropriate.

(i) Upon the request of a county district attorney, the department may develop a protocol for the referral of cases that may involve criminal conduct to the appropriate prosecuting authority in lieu of or in cooperation with an investigation by the bureau. The protocol shall provide for the voluntary acceptance of referrals after a review of the case by the prosecuting authority. In cases accepted for investigation by the

prosecuting authority, the protocol shall provide for cooperation between the prosecuting authority, the division, and the bureau. Where a referral is declined by the prosecuting authority, the bureau shall comply with subdivisions (a) to (h), inclusive.

19. Cal. Lab. Code. § 6317 provides:

If, upon inspection or investigation, the division believes that an employer has violated Section 25910 of the Health and Safety Code or any standard, rule, order, or regulation established pursuant to Chapter 6 (commencing with Section 140) of Division 1 of the Labor Code, or any standard, rule, order, or regulation established pursuant to this part, it shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the code, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the alleged violation. The period specified for abatement shall not commence running until the date the citation or notice is received by certified mail and the certified mail receipt is signed, or if not signed, the date the return is made to the post office. If the division officially and directly delivers the citation or notice to the employer, the period specified for abatement shall commence running on the date of the delivery.

A "notice" in lieu of citation may be issued with respect to violations found in an inspection or investigation which meet either of the following requirements:

(1) The violations do not have a direct relationship upon the health or safety of an employee.

(2) The violations do not have an immediate relationship to the health or safety of an employee, and are of a general or regulatory nature. A notice in lieu of a citation may be issued only if the employer agrees to correct the violations within a reasonable time, as specified by the division, and agrees not to appeal the finding of the division that the violations exist. A notice issued pursuant to this paragraph shall have the same effect as a citation for purposes of establishing repeat violations or a failure to abate. Every notice shall clearly state the abatement period specified by the division, that the notice may not be appealed, and that the notice has the same effect as a citation for purposes of establishing a repeated violation or a failure to abate. The employer shall indicate agreement to the provisions and conditions of the notice by his or her signature on the notice.

Under no circumstances shall a notice be issued in lieu of a citation if the violations are serious, repeated, willful, or arise from a failure to abate.

The director shall prescribe guidelines for the issuance of these notices.

The division may impose a civil penalty against an employer as specified in Chapter 4 (commencing with Section 6423) of this part. A notice in lieu of a citation may not be issued if the number of first instance violations found in the inspection (other than serious, willful, or repeated violations) is 10 or more violations.

No citation or notice shall be issued by the division for a given violation or violations after six months have elapsed since occurrence of the violation.

The director shall prescribe procedures for the issuance of a citation or notice.

The division shall prepare and maintain records capable of supplying an inspector with previous citations and notices issued to an employer.

20. Cal. Lab. Code § 6428 provides:

Any employer who violates any occupational safety or health standard, order, or special order, or Section 25910 of the Health and Safety Code, if that violation is a serious violation, shall be assessed a civil penalty of up to twenty-five thousand dollars ($25,000) for each violation. Employers who do not have an operative injury prevention program shall receive no adjustment for good faith of the employer or history of previous violations as provided in paragraphs (3) and (4) of subdivision (c) of Section 6319.

21. Cal. Lab. Code § 6429 provides in pertinent part:

(a)(1) Any employer who willfully or repeatedly violates any occupational safety or health standard, order, or special order, or Section 25910 of the Health and Safety Code, may be assessed a civil penalty of not more than one hundred twenty-four thousand seven hundred nine dollars ($124,709) for each violation, but in no case less than eight thousand nine

hundred eight dollars ($8,908) for each willful violation.

(2) Commencing on January 1, 2018, and each January 1 thereafter, the penalty amounts specified in this section shall be increased based on the percentage increase in the Consumer Price Index for All Urban Consumers (CPI-U), not seasonally adjusted, for the month of October immediately preceding the date of the adjustment, as compared to the prior year's October CPI-U. Any regulation issued pursuant to this section increasing penalty amounts based on the annual increase in the CPI-U shall be exempt from the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code), except that the regulation shall be filed with the Office of Administrative Law for publication in the California Code of Regulations. Any penalty shall be calculated using the penalty amounts in effect during the calendar year in which the citation was issued.

* * *

APPENDIX F

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

CIVIL COMPLEX CENTER

THE PEOPLE OF THE
STATE OF CALIFORNIA,

Plaintiff,

vs.

SOLUS INDUSTRIAL INNOVATIONS, LLC;
EMERSON POWER TRANSMISSION
CORPORATION; EMERSON ELECTRIC CO.;
and DOES 1-10

Defendants

Case No. 30-2012-00581868-CU-MC-CXC

[Filed July 6, 2012]

CIVIL COMPLAINT FOR VIOLATIONS OF:
(1) LABOR CODE SECTION 6428; (2) LABOR
CODE SECTION 6429; (3) BUSINESS AND
PROFESSIONS CODE SECTION 17200; AND
(4) BUSINESS AND PROFESSIONS CODE
SECTION 17500

The People of the State of California, by and through Tony Rackauckas, District Attorney for the County of Orange, hereby allege as follows:

INTRODUCTION

1. On March 19, 2009, at a commercial plastics manufacturing facility in Rancho Santa Margarita ("RSM"), two workers suffered an untimely and tragic death when an overstressed and misused water heater exploded. Not only did both men—Jose Jimenez and Isidro Echeverria—die instantly due to the brutal force of the explosion, but the exploding water heater also shot through the ceiling of the building, causing severe structural damage. The explosion launched pieces of the surrounding machinery and parts in all directions and injured at least one other employee as well. The facility was shut down immediately following the devastation and never returned to operation.

2. This man-made disaster was orchestrated by the willful neglect and complete disregard for human life by the victims' employers—Solus and Emerson—that opted to "cut corners" to save costs rather than provide a safe working environment for their workers. Indeed, despite having possession of a commercial boiler and a detailed plan calling for the use of the commercial boiler in their operations, Solus managers intentionally decided to forego using the commercial boiler and opted instead to install a ***residential*** water heater so as to avoid the extra costs and down time associated with installing the more suitable boiler. Since the residential water heater was obviously not designed for use in the commercial extrusion operations at the RSM facility, Defendants

then proceeded, recklessly and hastily, to piece together parts and force the residential heater into a complicated manufacturing process it was not built to support.

3. Not surprisingly, shortly after the residential water heater was haphazardly installed—in December 2007—it quickly became apparent that the residential water heater could not operate at the high temperatures required to maintain production schedules. In their continued quest to make money and deliver product at all costs, however, rather than swapping out the residential heater for the commercial boiler, or calling in engineering consultants to evaluate safe alternatives (as any reasonable person would have done), Defendants next decided to manipulate the residential water heater to make it work at extreme temperatures. Specifically, Defendants decided to ***remove the residential heater's normal safety features*** so they could manually force the heater to work beyond its safe operating capacity in clear violation of the written warnings on the heater and those set forth in the operating manual.

4. For many months thereafter, Defendant Solus operated the manipulated water heater at temperatures and pressures in excess of its maximum capacity nearly every day, thereby exposing multiple shifts of employees to potential harm. Maintenance supervisors and staff routinely attended to the heater to fix problems and noted its unsafe operating condition, but were instructed to continue to operate the heater in excess of its safe operating capacity nonetheless.

5. Due to the extreme stress placed on the still relatively new machine, in October 2008, the temperature pressure relief valve ("TMP Valve") blew, warning Defendants, once more, that the heater was in an extremely dangerous condition and at risk of explosion. Although the operations were shut down temporarily to "fix" the heater, the safety features (including the blown valve) were not repaired and Defendants knowingly permitted operations to resume with the unsafe water heater in place. As a result, the unrepaired safety valve proceeded to leak and show further signs of distress continuously from that day forward.

6. Written warnings on the machine and in the operating manual confirmed that a failure to replace a "dripping or leaking" TMP valve "can result in death or explosion." Management was well aware of these warnings and indeed, were advised of the warnings on multiple occasions by at least one maintenance worker, but they willfully turned a blind eye and opted to stay the course regardless.

7. In December 2008, Defendant Emerson purchased Solus and took control of the RSM operations. In February 2009, Emerson managers performed a safety inspection of the RSM facility, red-flagged the water heater (among other things) and shut down the facility due to dangerous conditions. Without confirming that conditions were safe, however, Emerson management willfully permitted the operations to resume with the visably unsafe, leaking water heater on the verge of explosion. Sadly, only days later, the victim workers were killed when they were asked to attend to the leaking water heater

and dutifully reported to their assigned task. If Defendants had similarly attended to their obligations to provide safe working conditions, undoubtedly, these lives could have been spared.

8. This action is brought for civil penalties and relief against Defendant employers for operating an unsafe and hazardous work place in violation of CalOSHA regulations and Labor Code standards, as well as their unfair and unlawful business practices in violation of the Business and Professions Code.

JURISDICTION AND VENUE

9. At the relevant time period in this case, Defendants transacted business, employed workers and/or controlled a place of business in the County of Orange, in the state of California. The incident—involving the deaths of two employees—occurred in the County of Orange, in the state of California at the Defendants' place of business.

10. Jurisdiction and venue are proper in this Court pursuant to California Code of Civil Procedure Sections 395.5 because the conduct giving rise to liability occurred in the County of Orange at the Defendants' place of business located at 30152 Aventura, in Rancho Santa Margarita.

PARTIES

11. Tony Rackauckas, as District Attorney for the County of Orange, acting to protect the public from health and safety hazards and from unfair, unlawful or fraudulent business practices, brings this action in the public interest on behalf of the People. As such, the Plaintiff in this action includes the People of the

State of California and the County of Orange (hereinafter, the "Plaintiff" or the "People").

12. Defendant Solus Industrial Innovations, LLC ("Solus") is a Limited Liability Company incorporated under the laws of the State of Delaware and headquartered in Florence Kentucky at 7120 New Buffington Road. At the relevant time period in this action, Solus operated a plastics manufacturing facility, located at 30152 Aventura, in Rancho Santa Margarita, California in the County of Orange. This facility was subsequently closed and the company now shares office/warehouse space with Defendant Emerson Electric's Industrial Automation business at a facility located at 3551 Placentia Court, in Chino California.

13. Defendant Emerson Power Transmission Corporation ("Emerson Power") is a business within "Emerson Industrial Automation," which is a business of Defendant Emerson Electric Co. (NYSE: EMR). Emerson Power is a Delaware Corporation headquartered in Florence Kentucky at 7120 New Buffington Road—an office that is shared with both Solus, as well as Emerson Electric's "Industrial Automation" business. Emerson Power acquired Solus (along with its affiliated Italian parent company, System Plast SpA) on December 5, 2008, and took control of the Solus California RSM operations, along with Emerson Industrial Automation shortly thereafter.

14. Defendant Emerson Electric Co. is a Missouri corporation headquartered in St. Luis, Missouri. It operates and controls Solus through its Emerson Industrial Automation business, which shares offices

with Solus in Chino and Kentucky. Both Emerson Electric and Emerson Power exercised direct control over Solus's RSM Facility following the acquisition of Solus (and its affiliates) in December 2008 and are directly liable for their willful failure to correct the obviously hazardous conditions at the facility in concert with Solus in violation of California law. Emerson Power and Emerson Electric are collectively referred to herein as "Defendants" or "Emerson."

15. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1-10. inclusive, and therefore sues these Defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.

GENERAL ALLEGATIONS

16. On or about 2007, Solus was a domestic manufacturer of plastic-based parts and materials. The company had offices in Pennsylvania, North Carolina and Rancho Santa Margarita, California.

17. On April 23, 2007, Solus hired a new Plant Manager, Carl Richardson ("Richardson"), to manage its RSM facility. Among other things, Mr. Richardson was responsible for overseeing Production, Maintenance, Shipping and Receiving, and Production Control. Mr. Richardson was also charged with implementing appropriate work place safety policies and procedures.

18. Shortly after hiring Mr. Richardson, Solus decided to relocate its extrusion operations from the Aston Pennsylvania facility to the RSM facility. The extrusion operations required the installation of a

number of extrusion machines, a commercial boiler (which was used as a heating source to melt the plastic for processing), and a number of other components that were already set up and operating in the Aston Pennsylvania facility. In order to facilitate the transfer of operations to RSM, Aston personnel took pictures of the extrusion set up, drafted written plans and instructions detailing how the operation was to be set up, and tagged all items for shipment and easy identification once they arrived at the RSM facility. RSM Maintenance Supervisor, Roy Faulkinbury ("Faulkinbury") also traveled to Aston to view the extrusion operations and meet with Aston personnel to discuss the extrusion operations in detail prior to the move.

19. The extrusion equipment arrived from Aston Pennsylvania at the RSM Facility on August 30, 2007. The shipment included all of the necessary machines and parts to replicate the process that was used in Aston Pennsylvania in RSM. One of the necessary pieces of equipment for the extrusion operations included a "Buderus" commercial boiler, which was shipped to the RSM facility, and included in the written plans as the proper heating element to use.

A. Solus Decides To Use A Dangerous Residential Water Heater Instead Of An Available Commercial Boiler To "Save Costs" And Avoid Permit Requirements

20. In approximately September and October 2007, RSM facility management and controlling personnel evaluated the Aston work plans and consulted regarding how best to design the RSM

facility to incorporate the Aston extrusion equipment/operations. Mr. Richardson took charge of the attempts to layout the new operations at the RSM facility, with the help of Maintenance Supervisor, Roy Faulkinbury, and others. During meetings to discuss the layout of the extrusion operations, Solus managers discussed the possible delays and high costs that would be required to obtain the necessary permits and operate the Buderus commercial boiler. At these meetings, it was determined that the commercial boiler required natural gas, a natural gas line and appropriate permits. Based on these discussions, Solus decided to forego use of the commercial boiler to save "costs" and avoid the permitting requirements that were associated with the Buderus boiler.

21. Instead of the commercial boiler, which was left in storage and later disposed of, Solus management decided to order an electric ***residential*** water heater and attempt to make the process work using this as an alternate heating device. As a result of this plan, on November 1, 2007, Mr. Faulkinbury ordered a Whirlpool residential electric water heater from Lowes online for $541.66. The purchase order was approved by Mr. Richardson. On or about this same time, management also set a goal of running "mixers and extruders by 11/13" only a few days later. According to the purchase order, the heater was scheduled to be delivered to the attention of Roy Faulkinbury on November 6, 2007.

22. Solus was unable to meet its initial goal to get the extrusion operations up and running by November 13, 2007, in whole or in part, because the

water heater and pump system had not yet been installed as of that date. Management then gave the RSM facility personnel a firm, and final, deadline to get the extrusion operations up and running no later than November 29, 2007.

23. Because the extrusion operations were not previously engineered for use with the electric water heater, and in order to meet this pressing deadline, maintenance and other personnel were instructed to find parts within the facility to quickly piece together a make-shift stand for the heater and somehow force the residential water heater into the system. Mr. Richardson and Mr. Faulkinbury were well aware that the process was not designed for use with a residential water heater, but permitted and encouraged the piecemeal installation of the residential water heater nonetheless to continue. They also knew that there were no trained personnel that could operate the new extrusion machines, but pressed forward in haste to launch the new plastics manufacturing processes at the RSM facility without regard to the hazards they were creating.

24. Without complying with the installation instructions set forth in the operating manual (including for example, failing to use proper piping or including a thermal expansion tank in the set up), on or about November 29, 2007, the Whirlpool residential water heater installation was completed and it officially began use as part of the relocated extrusion operations.

25. Only days later, this shoddy and haphazardly installed water heater raised cause for concern when management was required to "look at the hot water

heater on the mixing machine to get hotter water." The problem was simple: "third ingredient will not melt unless it sees 160F . . . but the hottest the water got was 130+." This is because the Whirlpool residential water heater was not designed to operate at the high temperatures required to "melt the grease" as necessary to make the product. This problem was "extremely important because [Solus was] close to running out of Nolu S material" at the time and wanted to press onward to meet production schedules, and secure profits.

26. Due to problems melting the plastic, in January 2008, management "corrected some information" in the formula for mixing the lube and confirm[ed] that the new "Lube mixing procedure" requires: (1) three ingredients to be placed in the mixer; (2) "Heat to 170-180 deg. F while mixing"; and (3) "Hold @ 140 deg. F and discontinue mixing when not using Lube." According to the Whirlpool water heater manual, however, the water heater was not equipped to operate at temperatures in the required temperature ranges and in fact, had automatic shut off valves set to shut down the heater if temperatures in this range were reached for safety reasons, including, but not limited to, a risk of explosion. With full knowledge of the capacity limitations and safety features, management decided to press forward using the inadequate and unfit machine anyway to keep production moving.

B. In 2008, The Company Willfully Disabled Safety Features On The Water Heater And Mishandled Obvious Safety Hazards On A Daily Basis

27. In early 2008, in order to bypass the automatic safety shut off features, management instructed maintenance worker, Matt Luethen, to disable the residential water heater's temperature control device and install a new, "Athena" controller to measure and adjust temperatures to higher levels. Workers were then instructed to continue mixing the ingredients and using the extrusion equipment to process the "Lube" with the manipulated water heater throughout multiple shifts a day. Given the changes to the machine, Mr. Faulkinbury also started an obviously unsafe practice of manually letting water in and out of the water heater and/or safety relief valve once or twice a week to manually regulate the water levels and temperatures.

28. According to a Whirlpool representative, these unusual practices were not only inconsistent with any safe use of the heater as set forth in the operating manual, but these actions also essentially turned the water heater into a "bomb" that could explode at any time.

29. It is not surprising, therefore, that the water heater required repeated attention to resolve problems resulting from the misuse of the machine on a regular basis thereafter. In April 2008, for example, "Maintenance Work Requests" document that maintenance personnel were required to "check water heater" and "find screws to tighten down top electrical cover." On or about the same time, "characteristics

never before encountered" or experienced with the Lube product resulting in poor quality compared to the Aston facility was determined to be due to "processing issues: temperature, stroke, hydraulic pressure, etc." and "equipment problems including thermostat and hydraulic unit (leaking, etc.)." Regardless of these further notices of continued heating difficulties, use of the residential water heater continued.

30. The problems grew increasingly worse in the months to come. From May to October 2008, numerous work requests reference repairs and issues requiring maintenance checks with respect to the water heater. According to Matt Leuthen, who was instructed to attend to the water heater throughout the entirety of its existence at the RSM facility, the heater had "excessive problems," was "not being used right," and management knew it needed "special attention." But, according to plan, getting "product out" remained the number one concern.

31. Less than a year after it was first installed, on October 2, 2008, the one remaining safety feature (out of four) that management left intact on the machine—the temperature, pressure, relief valve ("TMP Valve")—blew due to the extreme temperatures and pressures it was operating under. Despite clear instructions in the operating manual and on warning labels requiring the valve to be replaced under such circumstances, the TMP valve was never replaced. Rather, a "[n]ew water heat pump motor" was installed to "get [heater] ready for future use" and operations were permitted to resume using the heater

shortly thereafter. From that point on, the heater demonstrated daily, obvious signs of distress.

32. Throughout November and December 2008, additional repairs and "troubleshooting" were required with respect to the water heater. According to Matt Leuthen, the TMP valve was constantly leaking water at this point, causing rust staining on the heater. (A true and correct copy of a photograph of the water heater demonstrating the rust staining on the machine as of January 2009 is attached hereto as **Exhibit A** and is fully incorporated herein by reference.) Mr. Leuthen was concerned about the leaking and advised management that the warnings on the machine confirmed there was a "risk of explosion" due to the leaking and he warned that the TMP valve needed to be replaced. (A true and correct copy of the written warnings from the applicable operating manual is attached hereto as **Exhibit B** and fully incorporated herein by reference.) Still, nothing was done to remedy this work place hazard, and workers were asked to continue to report for work.

C. Emerson Takes Control, Red Flags Hazardous Heater, But Permits Operations To Resume Thereby Causing An Explosion, Killing Two

33. Following many months of due diligence with respect to Solus' operations, and others, on December 9, 2008, Emerson Power (also known as "EPT") and Emerson Industrial Automation, a business of Emerson (NYSE: EMR), issued a press release announcing the acquisition of System Plast S.p.A., and its affiliated companies, including Solus.

34. The water heater continued to require special attention and repairs under Emersons' watch. On January 2, 2009, for example, less than three months after replacing the pump motor, another new pump motor had to be installed. On January 19 & 22, 2009, further "troubleshooting" and "checks" of the water heater were again required. The TMP valve continued to leak and cause rust to form on the outside of the heater as well. Regardless of these increasingly disturbing signs of distress, workers were permitted to report to work with this ticking time "bomb" in their vicinity.

35. In February 2009, Emerson arranged for a safety inspection of the RSM facility. In preparation for the safety inspection by EPT, RSM plant manager Richardson confirmed his knowledge of the dangerous conditions by directing Mr. Faulkinbury to "look for ***obvious issues*** such as open electrical panels, exposed wires (. . . at the top of the water heater on the lub[e] tank) and other things like that" before the inspection.

36. On February 11-12, 2009, environmental and safety managers from EPT inspected the RSM Facility and flagged the water heater, in addition to the entire extrusion department, as a fire hazard and shut down operations. Prior to permitting operations to resume, blue tarps were installed in the facility to control hazardous dust. According to Matt Leuthen, he complained that the blue tarps would interfere with his ability to manage the controls on the water heater, but was instructed to return to operating nonetheless. Mr. Leuthen further expressed his concern to managers that individuals were not

properly trained regarding the irregular use of the water heater, particularly those on the night shift, but these concerns did not stop the resumption of activities either. Even when Mr. Leuthen said "someone is going to die" to emphasize the seriousness of the situation, not a single step to fully investigate, let alone remedy the problem was taken.

37. On February 24, 2009, Emerson announced to Solus workers that the RSM facility operations were going to relocate to "EPT Corporate Facilities located in Florence Kentucky." 'Employees were asked to remain patient for further information about their "employee options" as a result of the "corporate restructuring" and continue to report for work as usual.

38. Although still the acting plant manager, by early March 2009, Mr. Richardson started to receive some direction from Emerson manager due to the corporate restructuring, including Jim Volman and Doug Heimerdinger. Through the collective management of Mr. Richardson, Mr, Faulkinbury, and Emerson managers, the extrusion operations were authorized to resume, once again, despite the safety inspection and worker concerns.

39. Approximately three weeks later, on March 19, 2009, a worker reported a puddle of water under the water heater to supervisors. Workers Isidro Echeverria (age 34) and Jose Jiminez (age 51) responded to the water heater to address the reported water leak and were instantly killed when the exacerbated heater exploded at approximately 11:30 p.m. The force of the explosion launched the water heater through the roof of the building, sending

equipment and materials flying, injuring at least one other worker and completely destroying a large part of the RSM facility.

40. The damage was so extreme that it was not "economically feasible" to repair the facility. The facility was thus permanently closed effective April 1, 2009 and never re-opened.

D. CalOSHA Investigation Leads To Administrative Action Against Solus Charging Several Serious And Willful Worker Safety Violations

41. In addition to local fire fighters and other first responders, the California Division of Occupational Safety and Health ("CalOSHA") immediately opened an investigation into the deaths at the RSM Facility and quickly determined that the cause of death was directly attributed to the exploding water heater.

42. During an interview with Roy Faulkinbury during the morning of March 20, 2009, Mr. Faulkinbury admitted the cause of explosion: "Looks like pressure relief valve on side did not work." The CalOSHA investigation similarly concluded that the cause of the explosion was driven by a failed safety valve or any other suitable safety feature on the heater due to the intentional and willful manipulation and misuse of the heater for many months; there is "no other possible explanation" for the explosion according to CalOSHA's investigation.

43. Based on the CalOSHA investigation, Solus was charged with five "Serious" OSHA violations, including the violation of Title 8 of the California Code of Regulations ("CCR"): (1) section 467(a) for the

failure to provide a proper safety valve on the heater; (2) section 3328(a) for permitting the unsafe operation of the water heater; (3) section 3328(b) for improperly maintaining the water heater; (4) section 3328(f) for failing to use good engineering practices when selecting and using the unfit residential water heater in the extrusion operations; and (5) section 3328(h) for permitting unqualified and untrained personnel to operate and maintain the water heater. CalOSHA further cited Solus with one "Willful" violation of 8 CCR § 3328(g) for the willful failure to maintain the residential water heater in a safe operating condition.

44. In addition to bringing appropriate administrative action, the CalOSHA Bureau of Investigation also referred the matter to the Orange County District Attorney's office for any further appropriate action pursuant to Labor Code Section 6315(g).

45. On March 8, 2012, criminal charges were filed against Mr. Richardson and Mr. Faulkinbury in the action entitled *People v Faulkinbury & Richardson,* Orange County Superior Court, Case No. 12CF0698. Both defendants were charged with two felony counts of violating Labor Code section 6425(a). The criminal defendants pled not guilty to the charges on March 14, 2012 and are scheduled to appear for preliminary hearing on August 2, 2012.

46. The CalOSHA administrative action against Solus is currently stayed pending resolution of this, and the related criminal action.

E. Statute Of Limitations Tolled

47. On December 30, 2011, the People entered a Statute of Limitations Tolling Agreement with Solus Industrial Innovations, Inc., and "each of its parents, branches, departments, divisions, affiliate, fictitious business names, subsidiaries, successors, or predecessors . . . " to toll any applicable statute of limitations with respect to any potential causes of action against Solus, or its affiliated companies, in relation to the workplace injuries on March 19, 2012 to June 1, 2012 The tolling agreement was extended until July 9, 2012 via an amended Statute of Limitations Tolling Agreement dated June 7, 2012.

F. To The Extent Solus Remains A Viable Entity Today, It Is Controlled By Emerson

48. As alleged above, Emerson began taking control of the Solus RSM Facility shortly after announcing its acquisition of the assets of Solus in December 2008. Emerson sent a team of inspectors to the RSM facility to perform a safety inspection and took direct control and responsibility for these matters no later than February 2009 when its safety level managers conducted their on-site inspection of the RSM facility. On or about the same time, Emerson managers started assisting with management and asserting direction over the management at the RSM facility with respect to safety matters. Prior to the explosion, Emerson announced plans to close the RSM facility and move all operations to EPT corporate headquarters. Following the explosion, a team of Emerson managers were present at the RSM facility to address CalOSHA and other first responders' investigations and to

facilitate the layoff of employees and the closure of the RSM facility.

49. On or about January 2011, Emerson Industrial Automation announced that it will no longer use the "Solus® brand name used historically in North America for conveying components [and] is transitioning to the System Plast brand."

50. Although Solus still exists as a separate entity, other than on paper, Solus largely dissolved operations following the March 19, 2009 explosion and any remaining operations are controlled by, or housed within, the Emerson Industrial Automation business of Emerson Electric. Solus does not have a website or office space that is separate or apart from Emerson and all such operations and public descriptions of the purportedly separate operations are intertwined.

51. Even if the two businesses are separate legal entities on paper today, they share such a unity of interest that for all intents and purposes Emerson and Solus appear to be one entity controlled entirely by Emerson. Although Emerson is directly liable for its own participation in the wrongdoing as set forth herein upon information and belief, as a matter of law, Emerson may also be liable for the obligations of Solus as the successor in interest to the liabilities and as an alter ego of Solus (and any of its other affiliated entities).

CAUSES OF ACTION

FIRST CAUSE OF ACTION

(Violation Of Labor Code Section 6428 Against All Defendants)

52. Plaintiff realleges the allegations of paragraphs 1 through 51 above as though fully set forth herein.

53. During the relevant time period from 2007 through 2009, one or more of the Defendants operated and controlled a place of business located at 30152 Aventura, Rancho Santa Margarita, California that employed numerous workers. As a California employer, Defendants had an obligation to provide a place of employment that is "safe and healthful for employees" and to do everything "reasonably necessary to protect the life, safety and health of employees" at all times. Labor Code §§ 6400, 6401, et seq.. .

54. By improperly installing, operating and maintaining the unsafe residential water heater at the RSM facility, Defendants failed to provide a safe work environment in "serious" violation of occupational safety or health standards set forth in Title 8 CCR Sections 467(a), 3328(a), 3328(b), 3328(f) and 3328(h) on a daily basis during multiple work shifts per business day from November 29, 2007 to March 19, 2009.

55. Every day the residential water heater was in operation, and for each employee that was subjected to hazardous work place conditions as a result, constitutes a "serious violation" of each of these

worker safety laws by Defendants that resulted in the death of two workers and injury to at least one other.

56. Defendants did not have an operative injury prevention program during the relevant time period.

57. The People hereby seek civil penalties of "up to twenty-five thousand dollars ($25,000) for each violation" from November 29, 2007 to March 19, 2009.

SECOND CAUSE OF ACTION

(Violation Of Labor Code Section 6429 Against All Defendants)

58. Plaintiff realleges the allegations of paragraphs 1 through 57 above as though fully set forth herein

59. During the relevant time period from 2007 through 2009, one or more of the Defendants operated and controlled a place of business located at 30152 Aventura, Rancho Santa Margarita, California that employed numerous workers. As a California employer, Defendants had an obligation to provide a place of employment that is "safe and healthful for employees" and to do everything "reasonably necessary to protect the life, safety and health of employees" at all times. Labor Code §§ 6400, 6401, et seq.

60. By improperly installing, operating and maintaining the unsafe residential water heater at the RSM facility, Defendants failed to provide a safe work environment in "willful" violation of occupational safety or health standards set forth in Title 8 CCR Section 3328(g) on a daily basis during

multiple work shifts per business day from November 29, 2007 to March 19, 2009.

61. Every day the residential water heater was in operation, and for every employee that was subjected to hazardous work place conditions as a result, constitutes a "willful violation" of Section 3328(g) by Defendants that resulted in the death of two workers and injury to at least one other

62. The People hereby seek civil penalties of "not more than seventy thousand dollars ($70,000) for each violation, but in no case less than five thousand dollars ($5,000)" for each willful violation from November 29, 2007 to March 19, 2009.

THIRD CAUSE OF ACTION

(Violation Of Business And Professions Code Section 17200 Against All Defendants)

63. Plaintiff realleges the allegations of paragraphs 1 through 62 above as though fully set forth herein.

64. Defendant employers operated an unsafe work place in violation of Labor Code Sections 6400, 6401, 6401.7, 6402, 6403, 6404, 6406, and 6407, and Title 8 CCR Sections 467(a), 3328(a), 3328(b), 3328(f), 3328(h), and 3328(g), on a daily basis during multiple work shifts per business day from November 29, 2007 through March 19, 2009.

65. Defendants' illegal conduct was willful and serious and directly caused the untimely death of two workers, and harm to at least one other.

66. Defendants' failure to follow worker safety laws amounts to an unlawful, unfair and fraudulent

business practice under California Business and Professions Code Section 17200.

67. The People hereby seek civil penalties of up to $2,500 per violation for each day and for each employee that was subjected to harm due to the illegally operated residential water heater from November 29, 2007 through March 19, 2009.

68. The People further hereby seek all appropriate injunctive relief pursuant to Business and Professions Code Section 17203 and any applicable restitution in an amount to be determined at trial.

FOURTH CAUSE OF ACTION

(Violation Of Business And Professions Code Section 17500 Against All Defendants)

69. Plaintiff realleges the allegations of paragraphs 1 through 68 above as though fully set forth herein.

70. Defendants encouraged workers to accept and maintain employment at the RSM facility, in part, by representing that the facilities were safe for employment and that the companies were committed to following the safety laws and practices of the State of California. In October 2008, Mr. Richardson performed safety training for workers and provided assurances of ongoing workplace safety efforts. Workers were required to sign acknowledgment of these assurances as part of the training.

71. Although the practices and procedures were not followed, the company also distributed, or made available, a "Safety Crisis Response and Emergency Action Plan," dated year 2008 that falsely stated

Solus' supposed commitment to its customers and employees to provide a safe work environment. Specifically, among other things, Solus represented that: (1) "[p]rotecting the lives and safety of our employees and our customers is every employer's moral and legal responsibility"; (2) "The health and safety of all Company personnel is our primary concern and takes precedence over all operating considerations"; (3) as a "commitment to employees" the company promised to ensure every employee was "properly trained . . . and retrained as new responsibilities, tools, substances, and/or as new laws arise"; (4) as a further "commitment to employees" Solus promised employees will "never be expected to work without adequate safeguards"; and (5) Solus assured employees and customers that it retained a policy to have "A safe work environment," "Quality materials and tools," "Safe work methods and procedures," and "Safety training/Safety Clothing/Equipment."

72. Emerson similarly publicly reported in its annual reports throughout the relevant period that "[t]he Company considers its facilities suitable and adequate for the purposes for which they are used."

73. Any and all such representations were false and misleading and resulted in the illegal retention of employees and customers in violation of the unfair competition laws.

74. The People hereby seek civil penalties of up to $2,500 per violation for each day, and for every worker that was enticed to remain employed with Defendants (as opposed to other competitors) by these

false representations from November 29, 2007 through March 19, 2009.

75. The People further hereby seek all appropriate injunctive relief pursuant to Business and Professions Code Section 17535 and any applicable restitution in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them, as follows:

1. For civil penalties and restitution in an amount to be determined at trial;
2. An order enjoining Defendants, and each of them, from violating worker safety laws and maintaining a hazardous and unsafe work place;
3. An order enjoining Defendants, and each of them, from failing to adhere to all written assurances of work place safety and to affirmatively require full and complete compliance with any and all workplace safety laws and applicable illness, injury or safety plans or procedures.
4. An award of costs and any other applicable fees for prosecuting this action; and
5. Any such other relief as the Court may deem just and proper

DATED: July 6, 2012

TONY RACKAUCKAS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA

By: /s/
KELLY A. ROOSEVELT
Deputy District Attorney