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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

JOE REQUA, WENDELL G. MOEN, JAY DAVIS AND DONNA VENTURA, Petitioners, v. REGENTS OF UNIVERSITY OF CALIFORNIA, and DOES, 1 through 99, inclusive, Respondents. _______________________/	NO. RG 10530492 OBJECTION TO REGENTS' REQUEST FOR JUDICIAL NOTICE; MEMORANDUM; PETITIONERS' REQUEST FOR JUDICIAL NOTICE (FOR CONSIDERATION IF COURT GRANTS REGENTS' REQUEST FOR JUDICIAL NOTICE)

BACKGROUND

Regents' Request for Judicial Notice

The Regents have filed a Request for Judicial Notice ("RJN") asking the Court to take judicial notice of two documents. The first document is what the Regents have deemed the "relevant sections" of a "Request for Proposal" ("RFP") from the U.S. Department of Energy ("DOE") for bids on "Management and Operation Contract for the Lawrence Livermore National Laboratory." Regents' RJN, Exh. A. The second document is supposed to be the "Agreement for Transfer of M&O Contractor Responsibilities for the Lawrence Livermore National Laboratory" ("Agreement for Transfer") that purportedly was executed by and among the Regents, Lawrence Livermore National Security, LLC. ("LLNS"),[1] and the U.S. Department of Energy ("DOE"). RJN, Exh. B.

Based on these documents, the Regents contend that, in 2006, "the DOE initiated a full and open competition for award of a new federal contract to operate and manage LLNL, and announced that the successful bidder would be required to sponsor and administer retiree medical benefits." Resp. Br., p. 3, citing RJN, Exh. A. The RFP contains a section entitled "Post Retirement Benefits" in which DOE states that the successful bidder,

> shall become the sponsor and be responsible for management and administration of a retiree medical benefit plan that will provide medical insurance benefits (including dental) *substantially equivalent* to those provided by the predecessor contractor… The Contracting Officer will determine *substantial equivalency* by comparing the Contractor's retiree medical benefit plan with the benefits provided by the predecessor contractor.

Regents' RJN, Exh. A, § B – H, p. 53; emp. added. The portions of the Transfer Agreement submitted by the Regents include a section entitled "Health and Welfare Plans/Retiree Medical

[1] LLNS is a private consortium that includes Bechtel, Babock and Wilcox and other private entities and the Regents. In 2007, DOE awarded LLNS the contract to manage Livermore Labs. Petition, ¶ 37.

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Benefits," which provides that on November 1, 2007, "LLNL UCRP[2] retirees will become members of the health plans of LLNS…"[3] Regents RJN, Exh. B, Appendix S, p. 17.

California Evidence Code allows a court in its sound discretion to take judicial notice of:

> (c) Official acts of the legislative, executive, and judicial departments of the United States…;[4] and
>
> (h) …facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.[5]

Here, the Regents seek judicial notice of two documents in order to show (1) that DOE is requiring the successor Contractor (LLNS) to provide medical benefits to Livermore retirees, and (2) that these benefits are "substantially equivalent" to those provided by the Regents. The Regents suggest that since DOE is requiring LLNS to provide these benefits, they have been relieved of any further obligation to Livermore retirees.[6] They further suggest that since LLNS is required to provide health care benefits "substantially equivalent" to those provided by UC, Livermore retirees have not been harmed in any event. The Request is ill-advised for several reasons:

First, there is nothing in either of these documents that is related to or has any impact on the Regents' obligations to Livermore Lab retirees. As alleged in the Petition, the Regents promised

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[2] "UCRP" is the University of California Retirement Program. "UC" refers to the University of California.

[3] "UC agrees to retain LLNL UCRP retirees in the UC health plans through October 31, 2007. On November 1, LLNL UCRP retirees will become members of the health plans of LLNS but UC will continue to deduct premiums from retiree pension payments and remit to LLNS from the November 1, 2007 and December 1, 2007 pension payments. UC will be reimbursed its cost of administration of the health care program for retirees after the Transfer Date by LLNS."

[4] Evid. Code § 452(c))..

[5] Evid. Code § 452(h)).

[6] By letter dated September 16 2008, LLNS Counsel wrote to Petitioner Joe Requa that it has been "determined by the Department of Energy that Laboratory employees who retired from UC would no longer be included in the UC retiree pool for coverage purposes." Petition, ¶ 36.

retiree health benefits to Petitioners. The Regents are the party responsible for providing the benefit. In neither document did DOE "require" the Regents to jettison their legal obligation to Livermore retirees. Plainly, this obligation was not affected by the Agreement of Transfer executed by the Regents, DOE, and LLNS — but not by Petitioners.

Second, even if LLNS is providing health care, this would not relieve the Regents of their legal duty to Livermore Lab retirees. In fact, even if the benefits that LLNS is providing are "substantially equivalent" to those that the Regents provided – which they are not – this would not relieve the Regents of their legal responsibility.

Third, the Regents ask the Court to take judicial notice of only some, but not all, of the documents in their possession that define LLNS' contractual obligation to provide Petitioners' retiree health benefits.[7] As we explain, after it was awarded the contract, LLNS asked DOE to modify its obligation to Livermore retirees. DOE agreed, which is memorialized in a document called "Modification 42." Requa Decl., ¶ 3, Exh. B. It gives the lie to any claim that LLNS is required to provide retiree health benefits "substantially equivalent" to UC's. Review of Modification 42 discloses that LLNS is only required to provide benefits that meet "industry practices." Apparently LLNS believes the "industry practices" standard has substantially reduced their obligations to Livermore Lab retirees. Why? Because since adoption of Modification 42, LLNS has (a) slashed benefits, (b) advised Petitioners that LLNS may not provide the same benefits as UC's, and (c) asserted the right to terminate these benefits at any time. Petition, ¶ 36.

Petitioners' Objection to Regents' Request for Judicial Notice

Petitioners object to the Regents' Request on the following grounds:

1. The documents are not complete. The RFP is limited to what the Regents declare to be its "relevant sections." The Regents ask the Court to judicially notice the Agreement

[7] These Regents possess these documents as they are one of the entities that comprise LLNS.

of Transfer, but have not included Modification 42, which significantly alters its terms. Neither the Court nor Petitioners can determine if the "relevant sections" establish "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy," as required by Evidence Code § 452. The Regents have not provided the Court with "sufficient information to enable it to take judicial notice of the matter." Cal. Evid. Code § 453.

2. The documents are not properly authenticated; they were not even submitted "under penalty of perjury."

3. The "relevant sections" contain hearsay.

4. The "relevant sections" are not relevant to any issue pending before the Court on the demurrer. The question on demurrer is whether the Petition alleges sufficient facts to state a claim that the Regents have violated their obligation to provide medical benefits. That the Regents entered into an agreement with DOE and a LLNS (a private consortium, of which the Regents are a member) has no bearing on whether they are contractually obligated to Petitioners. In fact, there is nothing in the RJN that has any bearing on the issues at hand.

5. The "relevant sections" do not reflect "official acts" within the meaning of Cal. Evid. Code § 452(c).

6. The "relevant sections" do not concern "facts and propositions that are not reasonably subject to dispute" nor are they "capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy" within the meaning of Cal. Evid. Code § 452(h).

Memorandum in Support of Objection to
Regents' Request for Judicial Notice

"Judicial notice may not be taken of any matter unless authorized or required by law." Cal. Evid. Code §450; *Munoz v. State of California*, 33 Cal. App. 4th 1767, 1773 (1995). Here, there is no basis for the Court to grant the Regents' RJN.

As noted, the documents attached to the Regents RJN are not properly authenticated. "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is," Cal. Evid. Code § 1400, and is "required before [a writing] may be received in evidence." Cal. Evid. Code § 1401. The Regents have not provided any declaration from the author, a signatory, or anyone else with first-hand knowledge of these documents. There is not even a declaration "under penalty of perjury" attesting that the documents are what they purport to be.

One of the documents is simply a "Request for Proposal." It is not a directive from DOE to the Regents (or LLNS or anyone else) that they *must* submit a proposal, or that any proposal submitted *must* contain the terms outlined in the RFP. It is no more than a solicitation of proposals. Although the Regents assert that the RFP shows that DOE "announced that the successful bidder would be *required* to sponsor and administer retiree medical benefits," Resp. Br., p. 4, emp. added, citing RJN, Exh. A, the RFP says no more than that interested parties can submit a proposal. RJN, Exhibit A, does not support the proposition for which it is offered. This alone is grounds for denying the Request.

The Regents offer no authority for viewing the RFP as an "official act … of the United States." Evid. Code § 452(c). Nor do they show that it is a fact or proposition "not reasonably subject to dispute." Evid. Code § 452(h).

Although a court may take judicial notice of appropriate documents in ruling on a demurrer, Cal. Code of Civ. Proc. § 430.30(a), it may not do so where, as here, "the truthfulness and proper interpretation of the document[s] are disputable." *StorMedia, Inc. v. Superior Court*, 20 Cal. 4th 449, 457, fn. 9, citing *Joslin v. H.A.S. Ins. Brokerage,* 184 Cal. App. 3d 369, 374 (1986) ("the hearing on a demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable").

A demurrer tests the legal sufficiency of the allegations, and nothing more. In seeking to introduce new facts, rather than focusing on Petitioners' allegations, the Regents are trying to transform this demurrer proceeding into a *de facto* motion for summary judgment. They do so by way of an improper "speaking" demurrer.

The documents offered are incomplete and do not establish the point for which they are offered. The Regents apparently wish to create the impression that Petitioners are receiving benefits "substantially equivalent" to those provided to UC retirees. Although the Regents knew that DOE acceded to LLNS' request to modify the "substantial equivalent" requirement,[8] they chose not to submit Modification 42 as part of their RJN. Modification 42 would have disclosed that, shortly after becoming the contractor, LLNS sought and obtained a revision of the "substantial equivalent" requirement. As a consequence, DOE agreed to replace "substantially equivalent" with the "industry practices" standard. Requa Decl., ¶ 3, Exh. B, § H-35(i)(2), p. 17. (A PDF copy of Contract Modification M-042 is attached to the Requa Declaration as Exh. B.)

A party requesting judicial notice must provide the court with "sufficient information to enable it to take judicial notice." Failure to do so is grounds for rejecting the RJN. *Willis v. State of California*, 22 Cal. App. 4th 287 (1994) ("Plaintiff simply requested the court to take judicial notice

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[8] The Regents were aware of Modification 42 because they are one of the member entities of LLNS. In addition, Modification 42 is readily available on line at www.llnsllc.com/contract/ContractModPrime.asp, a web page that contains a link to Contract Modification M-042. See Requa Decl., ¶ 2, Exh. A.

without appending any information whatsoever.") Unlike *Willis*, the Regents included documents with their RJN; however, the RFP is incomplete, limited to what Regents deemed "relevant sections," and the Agreement of Transfer was not accompanied by Modification 42, which altered its terms.

"Courts may not take judicial notice of hearsay allegations," that is, a court may not accept a hearsay statement in a judicially noticed document for the truth of the statement. *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort*, 91 Cal. App. 4th 875, 885 (2001); *North Beverly Homeowners Ass'n v. Bisno*, 147 Cal. App. 4th 762, 778 (2007) ("The hearsay rule applies to statements contained in judicially noticed documents, and precludes consideration of those statements for their truth unless an independent hearsay exception exists.") While judicial notice may be taken of public records, a court will not "take judicial notice that everything contained in these documents is true." *Munoz v. State of California*, 33 Cal. App. 4th 1767, 117, fn. 2, citing *Shaeffer v. State of California*, 3 Cal. App. 3d 348, 354 (1970). This principle is particularly relevant here, where the Regents have cherry-picked selected provisions of document, and withheld a modification which significantly modified the terms of the other one.

Even if these two documents could be judicially noticed, they should not be considered because they are not relevant. *Ventura County Deputy Sheriffs' Ass'n v. Board of Retirement*, 16 Cal. 4th 483, 502, fn. 21 (1997) (even where judicial notice may be taken, it "does not follow … that [the documents] are relevant and must be considered by the court"). Here, it is not *relevant* that DOE supposedly "required" LLNS, a successor Contractor, to provide retiree medical benefits. The obligation Petitioners seek to enforce is the one owed to them by the Regents — not LLNS.

Petitioners' Request for Judicial Notice (for Consideration if Court Grants Regents' Request for Judicial Notice)

Based on the foregoing, it is not likely that the Court will grant the Regents' RJN.

However, should it do so, Petitioners request that the Court also take judicial notice of Modification 42 ("Amendment of Solicitation / Modification of Contract," No. M-042, signed September 3, 2008 (effective August 25, 2008), attached to the Declaration of Joe Requa, ¶ 3, Exh. B.) This request is conditional and is made pursuant to Cal. Evid. Code § 452, subparts (c) and (h).

Modification 42 was executed by LLNS and DOE on September 3, 2008, and has an "effective date" of August 25, 2008. It revises section H-35(i) by adding subsection (2). (Former subsection (2) became subsection (3).) The new subpart provides that benefits may be based "on a comparison and analysis to industry practices..." Requa Decl. ¶ 3, Exh. B, § H-35(i)(2). On its face, Modification M-042 is relevant to the documents attached to the Regents' RJN.

Conclusion

For the above reasons, the Court should deny the Regents' Request for Judicial Notice.

In the event the Court should decide to grant the Regent's RJN — and only in that event — Petitioners request that the Court grant their Request for Judicial Notice.

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