No. 05-85

IN THE

Supreme Court of the United States

POWEREX CORP.,
Petitioner,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PLAINTIFFS AND RESPONDENTS IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED

1. Whether the Petition is moot, in light of the fact that the remand has been effectuated and cannot be undone.

2. Whether the Petition is moot, in light of the fact that Plaintiffs' claims have all been either settled or dismissed, and the cross-complaints for indemnity have been dismissed against all cross-defendants except Powerex, solely because Powerex refuses to stipulate to such dismissal.

3. Whether the Court of Appeals applied a new and different test to determine whether Powerex is an "organ of a foreign state" under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1603(b)(2), or merely applied its existing jurisprudence and reached a result dissatisfactory to Powerex.

4. Whether the district court's finding that Powerex is not an "organ of a foreign state" under the FSIA was reviewable by the Court of Appeals or is reviewable by this Court.

5. Whether Powerex is an "agency or instrumentality of a foreign state" under the FSIA.

PARTIES TO THE PROCEEDINGS

Barry H. Himmelstein was not a plaintiff/appellee. (Barry R. Himmelstein was and is *counsel* for plaintiffs-appellees.)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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BRIEF OF PLAINTIFFS AND RESPONDENTS IN OPPOSITION TO THE PETITION

Plaintiffs and Respondents[1] (collectively, "Plaintiffs") respectfully submit this brief in opposition to the Petition for a Writ of Certiorari (the "Petition") filed by

[1] Plaintiffs and Respondents are: People of the State of California *ex rel.* Dennis J. Herrera and John A. Russo; City and County of San Francisco; City of Oakland; County of Santa Clara; Valley Center Municipal Water District; Padre Dam Municipal Water District; Ramona Municipal Water District; Helix Water District; Vista Irrigation District; Yuima Municipal Water District; Fallbrook Public Utility District; Borrego Water District; Metropolitan Transit Development Board; San Diego Trolley, Inc.; San Diego Transit Corporation; Sweetwater Authority; Pamela R. Gordon; Ruth Hendricks; Oscar's Photo Lab; Mary L. Davis; Cruz Bustamante; and Barbara Mathews.

Powerex Corp. ("Powerex").

STATEMENT OF THE CASE

New and additional facts not presented in Powerex's Statement of the Case render the Petition moot. The Court of Appeals issued the mandate on March 11, 2005. The Court of Appeals denied Powerex's motion to recall the mandate on April 6, 2005. The remand was effectuated, and jurisdiction was returned to the Superior Court of the State of California, County of San Diego (the "Superior Court"), on or about May 5, 2005. *See* 28 U.S.C. § 1447(c) ("A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.").

As set forth in the Petition, in the underlying actions, Plaintiffs sued a number of power generators and marketers for violation of California's antitrust law (the Cartwright Act), and California's Unfair Competition Law. Two of these defendants, Reliant Energy Services, Inc. ("Reliant") and Duke Energy Trading and Marketing, LLC ("Duke"), together with their corporate affiliates, subsequently cross-complained against Powerex and over a dozen other entities, seeking indemnity. Several of these cross-defendants, including Powerex, removed the litigation to district court. Plaintiffs moved for remand based on the lack of federal subject matter jurisdiction, which motion was granted by the district court.

In September 2004, while the appeal from the district court's remand order was pending, Plaintiffs entered into a proposed $206.5 million class action settlement with Duke. The settlement was granted preliminary approval by the Superior Court in July 2005. There have been no objections to the proposed settlement, and a final approval hearing will be held by the Superior Court on December 9, 2005.

In August 2005, after the remand was effectuated, Plaintiffs entered into a memorandum of understanding with Reliant setting forth the terms of a proposed class action settlement. The $453 million settlement was formalized on October 12, 2005, and a preliminary approval hearing will be held by the Superior Court on January 6, 2006.

Meanwhile, on October 4, 2005, the Superior Court dismissed Plaintiffs' consolidated complaint with prejudice, holding that the claims asserted by Plaintiffs were preempted by the Federal Power Act and the filed-rate doctrine. At the joint request of Plaintiffs, Duke, and Reliant, the Superior Court's order did not dismiss Plaintiffs' claims against these entities, so as not to interfere with the settlement approval process.

With Plaintiffs' claims against *all* defendants either settled or dismissed, as a practical matter, the Duke and Reliant cross-complaints became moot. Accordingly, Duke, Reliant, and the numerous cross-defendants stipulated to the dismissal with prejudice of the cross-complaints, subject to reinstatement only if the respective settlement is disapproved or overturned on appeal. The only cross-defendant that refused to join in these stipulations was Powerex, reportedly because it did not want to formally moot this Petition, even though it has become moot in fact. Accordingly, the only reason any claims remain pending against Powerex is because Powerex has declined to stipulate to their dismissal.

REASONS FOR DENYING THE PETITION

I. THE PETITION IS MOOT ON MULTIPLE GROUNDS

A. The Petition Is Moot Because the Remand Cannot Be Undone

The district court's finding that Powerex is not an

"organ of a foreign state" under the FSIA was made in ruling on Plaintiffs' motion to remand for lack of federal subject matter jurisdiction. The issue was not presented by any other motion, or ruled on for any other purpose. Accordingly, the Court of Appeals was (and this Court is) without jurisdiction to review this finding. *See* 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise"); *Linton v. Airbus Industrie*, 30 F.3d 592 (5th Cir. 1994) (where defendant removed action under FSIA, and district court determined that removing parties did not qualify as instrumentalities of foreign state and remanded on that basis, Court of Appeals lacked jurisdiction to review district court's ruling on their status under FSIA).[2]

Even assuming, *arguendo*, that this Court had jurisdiction to review this finding, and that the finding was reversed, it would be without consequence, as the case has already been remanded to the Superior Court, and the remand, once effectuated, cannot be undone, as this Court expressly held in *City of Waco v. United States Fid. & Guar. Co.*, 293 U.S. 140 (1934).

In *Waco*, after a cross-defendant removed the case on diversity grounds, the district court granted a motion to dismiss the cross-complaint, and, "since upon that dismissal, there was no diversity of citizenship of the remaining parties, the court held that it lacked jurisdiction, and remanded the cause to the state court." 293 U.S. at 142. The defendant and cross-plaintiff "appealed, not from the order of remand, but from that dismissing its action." *Id.* at 142. The Court held that that "no appeal lies from the order of remand," but that the dismissal was appealable because it preceded the

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[2] Should the Court grant the Petition, Plaintiffs will present more detailed argument on the issue of appellate jurisdiction, which was decided incorrectly by the Court of Appeals.

remand "in logic and in fact . . . and was made by the District Court while it had control of the cause." *Id.* at 143.[3]

> The Court explained that:
>
> *A reversal cannot affect the order of remand*, but it will at least, if the dismissal of petitioner's complaint was erroneous, remit the entire controversy, with the [dismissed cross-defendant] still a party, to the state court for such further proceedings as may be in accordance with law.

Id. at 143 (emphasis added). *See also Allen v. Ferguson*, 791 F.2d 611, 616 (7th Cir.1986) (reversing district court's dismissal of defendant which destroyed diversity after parties were realigned, but stating that resulting "remand must remain undisturbed . . . . Because the dismissal is now a nullity, Ferguson remains a defendant in the action remanded to the Illinois state court.").

> As Petitioner notes:
>
> Powerex conceded that it did not enjoy immunity from suit under the FSIA (because its electricity sales in the United States constitute a "commercial activity" within the enumerated exceptions to sovereign immunity under the FSIA, *see* 28 U.S.C. § 1605(a)(2)). But Powerex maintained that, as a foreign sovereign, the FSIA's jurisdictional and procedural safeguards governed, which meant that the case against it could proceed only in a bench trial in federal court.

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[3] Here, by contrast, Powerex was *not* dismissed from the action, rendering the district court's finding unreviewable. *See Linton*, 30 F.3d at 596-98 (discussing *Waco*).

(Pet. at 9.)

Accordingly, if the finding that Powerex is not an "organ of a foreign state" under the FSIA is reversed, it will have no effect whatsover. It will not result in the dismissal of Powerex from the case, nor will it provide Powerex with "a bench trial in federal court," as the remand itself cannot be undone. Accordingly, the Petition is moot.

B. The Dismissal of Plaintiffs' Complaint and the Cross-Complaints Render the Petition Moot

As noted above, Plaintiffs' consolidated complaint, and the Duke and Reliant cross-complaints for indemnity, have all been dismissed, except that the cross-complaints have not been dismissed against Powerex solely because it refuses to stipulate to the dismissal. Powerex refuses to consent because it does not want to technically moot the Petition, which has already become moot in fact. If the Petition is denied, it seems highly likely that Powerex will join in the stipulation, and the cross-complaints against it will likewise be dismissed. Plaintiffs respectfully suggest that the Court has more important things to do with its limited time than to rule on matters that are moot or would be, but for Petitioner's refusal to stipulate to dismissal of the claims asserted against it.

II. THE NINTH CIRCUIT DID NOT ANNOUNCE OR APPLY A NEW OR DIFFERENT "TEST" FOR ORGAN STATUS UNDER THE FSIA

Straining to find some legitimate ground for review by this Court, Powerex repeatedly protests that the Ninth Circuit has created a new "test," "standard," or "approach" to determining "organ" status under the FSIA. Nowhere in its opinion – a scant seven paragraphs of which are devoted to the finding challenged by Powerex – does the Ninth Circuit

announce or exemplify any new rule of law or approach to the question; the Court of Appeals merely cited to and applied ts prior precedents – which Powerex itself argues state the *correct* rule of law -- to a new set of facts, arriving at a conclusion with which Powerex disagrees. *See* Pet. App. 14a-16a (citing and applying *EIE Guam Corp. v. Long Term Credit Bank of Japan*, 322 F.3d 635, 640-41 (9th Cir. 2003) and *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001)). This is not a valid basis for discretionary review by this Court. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Indeed, it is not until page 21 of the Petition that Powerex reveals the supposedly new "test" it finds wanting: "First, the Ninth Circuit no longer considers the circumstances surrounding the creation of a government entity. . . . Second, the Ninth Circuit gives no weight to the employment policies and responsibilities of the entity." (Pet. at 21.) These statements are belied by the Ninth Circuit's opinion itself, which expressly states that it is "applying *Patrickson*" (Pet. App. 15a), citing the following portion of that opinion:

> In defining whether an entity is an organ, courts consider whether the entity engages in a public activity on behalf of the foreign government. In making this determination, courts examine *the circumstances surrounding the entity's creation*, the purpose of its activities, its independence from the government, the level of government financial support, *its employment policies*, and its obligations and privileges under state law. The entity may be an organ even if it has some autonomy from the foreign government.

Patrickson, 251 F.3d at 807 (citations omitted, emphasis added).[4] As the foregoing quotation makes plain, the Ninth Circuit has not adopted a new or different test for "organ" status under the FSIA; it merely found that the district court did not err in applying *Patrickson*, and chose to highlight those factors that supported the district court's conclusion. *See* Pet. App. at 15a ("As the district court correctly noted, the facts of this case closely mirror the facts of *Patrickson* and compel our conclusion that PowereEx is not an organ of a foreign government.").

III. THE NINTH CIRCUIT'S "OWNERSHIP" HOLDING IS FULLY CONSISTENT WITH *DOLE FOOD*

Under the FSIA, a foreign corporation, such as Powerex, can qualify as an "agency or instrumentality of a foreign state" with removal power if "a majority of [its] shares . . . [are] owned by a foreign state or a political subdivision thereof . . . ." 28 U.S.C. § 1603(b)(2). In *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), the Court expressly held that "only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement," and that "[a] corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation's shares." *Id.* at 474, 477. It is undisputed that Powerex's shares are directly owned by BC Hydro, not by the Province.

In an attempt to end-run *Dole Food*, Powerex argues that the Province is the "beneficial owner" of its shares, because the Hydro and Power Authority Act provides that BC Hydro is an agent of the Province. As the Court of Appeals held, this argument fails, because it ignores the fact

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[4] The Court of Appeals cited this test with approval not once, but twice, as it is also quoted verbatim at page 640 of *EIE Guam*. *See* Pet. App. at 14a-15a.

that BC Hydro remains a separate legal entity, and while it may be an agent of the Province, it is not the Province itself. *See* Pet. App. 16a.

Powerex proposes that the Court engage in exactly the sort of "real party in interest" or "control" analysis expressly rejected by *Dole Food*. *See id.* at 474-76. Whether or not Powerex qualifies as an "agency or instrumentality of a foreign state" under the "ownership" provisions of the FSIA depends entirely on a single "corporate formality" -- whether or not the Province formally and directly holds "legal title" to its shares. *Id.* at 475. As the Court explained:

> Section 1603(b)(2) speaks of ownership. . . . In issues of corporate law structure often matters. It is evident from the Act's text that Congress was aware of settled principles of corporate law and legislated within that context. The language of § 1603(b)(2) refers to ownership of "shares," showing that *Congress intended statutory coverage to turn on formal corporate ownership.*

Id. at 474 (emphasis added). Because Powerex's shares are formally owned by BC Hydro, not the Province, the Court of Appeals correctly held that Powerex is not an "agency or instrumentality of a foreign state" under the "ownership" provisions of the FSIA.

CONCLUSION

The Petition is moot on multiple grounds, and the Court of Appeal did no more than apply the correct rule of law to determine Powerex's status under the FSIA. Accordingly, the Petition should be denied.

RESPECTFULLY SUBMITTED,

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