

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 09-08

**SSA TERMINALS, LLC
AND
SSA TERMINALS (OAKLAND), LLC**

COMPLAINANTS

v.

**THE CITY OF OAKLAND, ACTING BY AND THROUGH
ITS BOARD OF PORT COMMISSIONERS**

RESPONDENT

RESPONDENT'S SUPPLEMENTAL APPEAL BRIEF

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INTRODUCTION

The Commission's Order of July 21, 2011 provided Respondent, the Port of Oakland ("Port"), the opportunity to file a supplemental brief. This brief addresses the 11th Amendment implications of the December 15, 2010 Opinion Letter of the California State Lands Commission ("SLC Opinion Letter")¹ (Dkt. No. 44, Exh. 1, filed Dec. 17, 2010)², and California Public Resources Code ("PRC") § 6009³, enacted on September 27, 2010, containing "legislative findings and declarations" of the California legislature regarding Tidelands Trust lands.

The issue before the Commission is whether the Port is entitled to the 11th Amendment immunity of the State of California as a Trustee of the Tidelands Trust. This federal question "can be answered only after considering the provisions of state law that define the [Port's] character." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429, n. 5 (1997). California law defines the Port's "character" in this case as the Trustee of a Tidelands Trust, the Beneficiary of which is the State of California. This state law "character" means that the claims here are really against the State of California.

Judge Wirth's November 8, 2010 Opinion described a number of the salient structural features of the Tidelands Trust relationship between the State of California and the Port. Dkt. No. 29 (Nov. 8, 2010); see Dkt. No. 35 (Nov. 23, 2010) at 4-5

¹ Letter from Jennifer Lucchesi, Chief Counsel of SLC, to David Alexander, Port Attorney, Dec. 15, 2010, a copy of which is attached hereto as Exhibit A.

² Citations are to the online docket maintained by the Federal Maritime Commission.

³ A copy of PRC § 6009 is attached hereto as Exhibit B.

(describing findings made in Nov. 8, 2010 Order). Based on the SLC Opinion Letter addressing several issues of California law and the applicability of the 11th Amendment, the newly enacted PRC § 6009, and established California law, the Port respectfully submits that the conclusion reached by Judge Wirth in the November 8, 2010 Opinion is not supported by law, and therefore must be reversed.

The SLC Opinion Letter reaches conclusions directly contrary to that of Judge Wirth's November 8, 2010 Opinion on several issues of California law and the applicability of the 11th Amendment. See *Exh. A*. The basic points of contention revolve around whether the State is the Beneficiary, and the Port the Trustee, of the Tidelands Trust, and if so, what such a relationship means for 11th Amendment purposes. The SLC Opinion Letter, PRC § 6009, and other relevant State law demonstrate that the State is the beneficial owner (as trust Beneficiary) of the Tidelands Trust, and that the Port is the Trustee of the Tidelands Trust. This means that, as a matter of California law, all money in the Port Revenue Fund constitutes "state funds" for 11th Amendment purposes, and that the State is the beneficial owner of all Port's lands and operations. This also means that the Port, as Trustee, is acting solely as a fiduciary for the State of California in all the actions at issue here. The funds at issue here are "state funds" and the actions at issue here are all taken as an arm of the state, so the 11th Amendment requires dismissal of SSAT's Complaint.

ARGUMENT

I. **The State of California is the Beneficial Owner of the Port Revenue Fund, the Lands and Operations of the Port. Therefore the Fund, Lands and Operations are State Property for 11th Amendment Purposes.**

A. **The State Lands Commission.**

The California State Lands Commission ("SLC") is the agency of the State of California with statutory responsibility for overseeing the management of public trust lands and assets by legislative grantees. The grantees (such as the Port) manage the public lands in trust on behalf of the State of California. PRC § 6301, *et seq.* The SLC was established in 1938 and was granted general authority to manage lands belonging to the State, including tidelands and submerged lands. 1938 Cal. Stat. ch. 5. In subsequent acts from 1970-1986, the SLC has been given authority to oversee the finances and revenues of the trust lands and the trust grantees. PRC § 6306.

The SLC Opinion Letter outlines the nature of the Tidelands Trust, and the SLC's role overseeing the Port's management of "sovereign public trust lands and assets," and confirms that the management by the Port is over lands that are held "in trust on behalf of the State of California." SLC Opinion Letter, Exh. A at 1. As authority, the SLC cites to PRC § 6301 *et seq.* and to *State of California ex rel. State Lands Commission v. County of Orange*, 134 Cal. App. 3d 20, 23 (Cal. Ct. App. 1982) (explaining that the tideland grants were only made in trust.) The SLC explains that this sovereign public trust extends to "Port funds derived from and generated by these lands" SLC Opinion Letter, Exh. A at 1. The SLC Opinion Letter then provides that "the Port's trust funds, like the trust lands themselves, are held in trust by the Port on behalf of the State of California and may not be allocated to any non-trust purposes." *Id.* at 2.

Because of this, the SLC ruled that the Port's "public trust revenue funds, managed by the Port as trustee for the people of the State of California, should have no less immunity under the 11th Amendment to the United States Constitution than is otherwise applicable to like funds held by the State of California." *Id.*

B. The Public Trust Doctrine.

1. The State has a Sovereign Interest in Public Trust Lands.

A state holding title to land under the public trust doctrine is cloaked in the doctrine of sovereign immunity with respect to that land. See *Cal. ex rel. State Lands Comm'n v. United States*, 512 F. Supp. 36, 45 (N.D. Cal. 1981) (explaining that the State Lands Commission is exempt from equitable defenses under doctrine of sovereign immunity, "especially when [SLC] is asserting title to public trust land"); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997) (explaining that when a lawsuit would "divest the State of its sovereign control over submerged lands, lands with a unique status in the law and infused with a public trust the State itself is bound to respect," the lawsuit was barred by doctrine of sovereign immunity).

California's title "is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing" free from obstruction or interference from private parties. *Ill. Cent. R.R. Co. v Illinois*, 146 U.S. 387, 452 (1892). Under the public trust doctrine, the sovereign holds the navigable waterways and submerged lands, not in a proprietary capacity, but rather "as trustee of a public trust for the benefit of the people" for uses such as commerce, navigation and fishing. *Colberg, Inc. v. State of California ex rel. Dept. Pub. Works*, 67 Cal. 2d 408, 416 (Cal. 1967) (citations omitted).

Thus, SSAT's argument that the State is not the Beneficiary of the Tidelands Trust grant to the Port, but rather that "the people of California" are the beneficiaries, is not supported by law. The State's ownership of the land as trustee for the people does not in any way divest the State of its right to sovereign immunity over the land. See *Coeur d'Alene*, 521 U.S. at 283. Indeed, the fact that the State itself holds the land in trust for the people makes the application of sovereign immunity doctrine "especially" applicable. *Calif. ex rel. State Lands Comm'n*, 512 F. Supp. at 45. Moreover, that Plaintiff brought this claim against the State of California's Trustee, the Port of Oakland, does not alter this analysis. See *Coeur d'Alene*, 521 U.S. at 281-2 (explaining that the fact that Idaho was not named as defendant in lawsuit was irrelevant to application of Sovereign Immunity because its "jurisdictional control over important public lands" was implicated).

2. Public Trust Immunity Includes Revenues Derived from Trust Operations.

The revenues derived from public trust lands are part of the trust itself and should not be treated differently merely because they are placed in a fund. Indeed, the California Supreme Court addressed this specific issue in *City of Long Beach v. Morse*, 31 Cal. 2d 254 (Cal. 1947). In *Morse*, the California Supreme Court rejected the contention that the public trust grants "restrict, not the use of any revenue derived from the lands, but only the physical uses to which the lands may be put." *Morse*, 31 Cal. 2d at 256. Instead, the Court noted that "[i]t would be manifestly absurd to say that although the property is held in trust, none of the benefits of the trust accrue to the beneficiaries, and that none of the rents or profits of the trust property need to be used

in furtherance of the trust purposes.” *Id.* at 258 (quoting *Providence Land Corp. v. Zumwalt*, 12 Cal. 2d 365, 375 (Cal. 1938)).

In *Belanger v. Madera Unified School District*, 963 F.2d 248 (9th Cir. 1992) the Ninth Circuit explained that the revenues derived from an entity protected by sovereign immunity do not lose their sovereign status because they do not come from the state’s general revenue fund. Funds may be freed from the trust upon a finding that the money is no longer needed for trust purposes, *Mallon v. City of Long Beach*, 44 Cal. 2d 199, 206-07 (Cal. 1955), but such “partial revocation of the trust ... necessarily results in a reversion to the state of the monies thus released from the trust, and the city holds those funds upon a resulting trust for the state,” *id.* at 212.

C. The New Provision of the Public Resources Code.

In addition to the SLC’s Opinion Letter, on September 27, 2010, California adopted PRC § 6009, which explicitly confirms the roles of both the Port and the State of California in the Tidelands Trust. Contrary to SSAT’s implication (Complainant’s Reply to Motion To Dismiss, Aug. 4, 2010, at 24 (arguing that tidelands are owned by city in fee simple, with the state having no greater authority over them than any private person), the Fund, lands and operation of the Port remain subject to the Tidelands Trust. Compare Dkt. 26 at 6-8 with PRC § 6009(d). SSAT argues that PRC § 6009 diminishes the State’s beneficial interest in tidelands granted in a Tidelands Trust. This argument rests on a misapplication of the distinction between the discussion of tidelands in subsection b and in subsection c of PRC § 6009. In ungranted lands (subsection b) the State is both Trustee and Beneficiary, whereas in granted lands (subsection c) the grantee (here the Port) serves as Trustee. The difference between subsections b and c relates only to the trustee/administrator role. Nothing in

subsections b or c suggest that the State loses any quantum of the protections of Beneficiary status because it delegated the administration. To further reiterate the State's Beneficiary status, subsection d states that the Port's obligation is to manage the granted tidelands "consistent with the terms and obligations of [the Port's] grants and the public trust, without subjugation of statewide interests, concerns or benefits to the inclination of local or municipal affairs, initiatives, or excises." PRC § 6009(d). Further, subsection e expressly states that "[t]he purposes and uses of tidelands and submerged lands is a statewide concern." PRC § 6009(e).

D. Hanson and Implications of the SLC Opinion Letter and PRC § 6009.

The SLC Opinion Letter and the September 27, 2010 statute both confirm the only state court decision addressing whether port revenue funds in California are "state funds." See *Hanson v. Port of Los Angeles*, Case No. BC 221839 (L.A. Super. Ct. 2001) (Dkt. No. 12, July 7, 2010, at Ex. 7)⁴. *Hanson* holds that claims against the Port of Los Angeles and its trust assets are for legal purposes deemed to be claims against an arm of the State of California rather than against a municipality. See *Hanson*, Ex. C at 8 ("Weighing all the *Belanger* factors ... the court finds that the Defendant City/Board of Harbor Commissioners is acting as an arm or instrumentality of the state for purposes of 'constitutional' immunity under the *Alden* case.") Moreover, *Hanson* holds that "[p]ayment of a judgment out of the Harbor Reserve Fund would be payment out of state funds within the meaning of [the Ninth Circuit's leading 11th Amendment decision] *Belanger*." *Id.* The *Hanson* court's holding—as a state court's analysis of state law treatment of the City as Trustee—is persuasive and equally applicable here. See

⁴ A copy of the *Hanson* decision is attached hereto as Exhibit C.

Durning v. Citibank, N.A., 950 F.2d 1419, 1425-26 (9th Cir. 1991) (courts must look to state law, including state judicial decisions, to determine whether the state treasury is implicated in a lawsuit for Eleventh Amendment purposes).

Hanson is cited as persuasive authority by the only federal court to address whether Tidelands Trust funds are state funds. See *United States ex rel. Mosler v. City of Los Angeles*, No. 02-CV-02278 (C.D. Cal. 2009) (Dkt. No. 12, July 7, 2010, at Ex. 8, pp. 8-9)⁵, *aff'd on other grounds*, 414 Fed App'x 10 (9th Cir. Dec. 22, 2010). SSAT attacks (SSAT Reply (Aug. 4, 2010) at 23-24) the precedential value of *Mosler* on the grounds that the *Mosler* opinion failed to cite to an earlier unpublished opinion of the Ninth Circuit, *Port of Long Beach v. Standard Oil*, 53 F.3d 337, 1995 WL 268859 (9th Cir. 1995) (unpublished). The Ninth Circuit Rules provide that its *Standard Oil* decision is "not precedent" in any unrelated litigation. 9th Cir. Local R. 36-3(a). Moreover, because the decision was issued before January 1, 1997, the decision is not citable even as persuasive authority. *Id.* Accordingly, the Ninth Circuit's decision not to publish *Standard Oil* means that *Standard Oil* has no precedential or even persuasive value. 9th Cir. Local R. 36-3(c).

E. 11th Amendment Equivalence: Los Angeles and Oakland.

Judge Wirth declined to apply *Hanson* to this case on the grounds that the "Long Beach (sic) grant differed in material respects from the Oakland grant at issue, including that in Long Beach (sic), eighty-five percent of excess revenue is remitted to the state's treasury." Dkt. No. 29 at 9; see *Hanson*, Exh. C at 7.⁶ The Port respectfully submits

⁵ A copy of the *Mosler* decision is attached hereto as Exhibit D.

⁶ It appears from context that the use of the term "Long Beach" is a typographical error, and that the reference is to the Port of Los Angeles.

that this distinction does not justify treating the Port of Oakland differently than the Port of Los Angeles.

To manage monies obtained by the Port of Oakland, the Oakland City Charter created a Port Revenue Fund. According to the Oakland City Charter:

All moneys once apportioned or appropriated to the Board, including, without limiting the generality of the foregoing, all moneys heretofore apportioned or appropriated to and now under the control of the Board, shall be and remain under the control and order of and shall be expended by the Board for the purpose for which apportioned or appropriated and shall be kept separate and apart from all other moneys of the City or the Board. All surplus moneys which, in the judgment of the Board, are not needed for the purpose for which apportioned or appropriated, shall be allocated to and deposited in the Revenue Fund.

Oakland Char. § 712(2). The Port Revenue Fund was declared to be used for eight separate purposes. Oakland Char. § 713(3). While the charter does permit "transfer to the General Fund of the City, to the extent that the Board shall determine that surplus moneys exist in such fund which are not then needed for any of the purposes above stated," that transfer is subject to regulation and oversight by the SLC under PRC § 6306. The City's use of revenue arising from the tidelands granted in trust is also limited by the very directives of state law as directed by statute and through the decisions of the Supreme Court of California. For instance, PRC § 6306.2 permits the City of Oakland to "use revenue accruing from, or out of, the use of granted tidelands, for the acquisition of land, or an interest in land," only after making certain findings that such usage was "in the best interest of the state" and only if the purchased land "will be transferred to the state, acting by and through the State Lands Commission, to be held in trust for the public." PRC § 6306.2(a). Moreover, *Mallon* explains that revenues derived from harbor activities must be used by the trustee "for the purposes set forth in the legislative grants in trust, for the city, as trustee, clearly has no authority to

appropriate the corpus to its own uses contrary to the terms of the trust. If the proceeds are regarded as income from trust property, the trustee, *in the absence of a legislative provision to the contrary*, has no more right to them than it has to the corpus.” *Mallon*, 44 Cal. 2d at 218-219 (quoting *Morse*, 31 Cal. 2d at 257-58); *see also County of Orange*, 134 Cal. App. at 27-28 (explaining *Mallon* and *Morse*). There is no legislative provision permitting the Port to use Tidelands Trust revenue for non-Trust purposes.

Ultimately, the question of whether the state’s interest and control of the Port of Oakland (as Beneficiary, in reversion, or otherwise) is not determined by Oakland city law. Since the State’s grant in trust of the tidelands to the city makes the Port of Oakland an arm of the state, no action by the city can undo the State’s rights as Beneficiary and would be beyond the city’s authority in the first place. There is no legal authority suggesting that the City or the Port can use any revenue generated by Port operations for any non-trust purposes. The state may use revenues generated by the Port for non-trust purposes when “[s]uch a partial revocation of the trust will in no way impair the public interest in commerce, navigation, and fisheries,” *Mallon*, 44 Cal.2d at 206, but the State cannot, even by express legislative authority, grant the freed revenues to the city of Oakland, *id.* at 209-10 (explaining that “such a transfer would be a gift of public monies in violation of [the Gift Clause of the California Constitution]”).

F. 11th Amendment Significance of State as Beneficiary.

Both the SLC Opinion Letter and PRC § 6009 provide that the corpus of the Tidelands Trust is beneficially owned by the State, and that both the lands and operations of the Port, and all revenue derived from the operations of the Port, are part of that corpus. The lands, operation and revenues of the Port have sovereign character so that claims against Port revenue is barred by the 11th Amendment. As discussed in

the Port's Motion to Dismiss (Dkt. Nos. 12-13 at 25-26), these funds and property are at least as much the property of the State as cash in the state treasury. In addition, they both provide that the Port's administration of the Tidelands Trust is a statewide function. Under any of the tests discussed in the prior briefs, the *Ceres* test, the *PRPA* test, or the *Belanger* test, the 11th Amendment bars SSAT's claim.

II. The Port Acts Only as a Trustee and Agent of the State.

A. The Port as Trustee of the Tidelands Trust.

The SLC Opinion Letter also confirms that the Port is a Trustee, determining that as "a trustee for the State of California and as administrator and manager of trust lands and funds, the Port performs valuable governmental functions on behalf of the State and as such **should be considered as acting as an arm of the State.**" Exh. A at 2 (Emphasis added). In addition to the SLC Opinion Letter, the new California statute, PRC § 6009(c), confirms that grantees are obligated to act consistent with the terms and obligations of their grants and the public trust. Indeed, the 1911 Grant expressly provides that the tidelands are granted only "in trust for the use and purposes and upon the expressed conditions."

The SLC's opinion letter is supported by decisions of the California Supreme Court. See *Mallon*, 44 Cal. 2d at 208; *Morse*, 31 Cal. 2d at 257. Both *Mallon* and *Morse* hold that the Port is a Trustee and as such "assumes the same burdens and is subject to the same regulations that appertain to other trustees of such trusts."

As explained in detail in the statutory history, the Port of Oakland is not under the control of the City of Oakland *qua* municipality, but *qua* Trustee for the State of California. The revenues derived from port funds are also held in trust for the state. Further, under California law, both the trust, *Mallon*, 44 Cal. 2d at 206, and the trust's

revenues, *County of Orange*, 134 Cal. App. at 28-29 (discussing *Mallon*), can be revoked by the State at any time. Moreover, independent of obligations of the City of Oakland for the Port, the State has a continuing legal duty to preserve the harbor for trust purposes, and is consequently financially responsible for claims against the Port as a matter of law out of Trust assets. Under no circumstances can the State divest the Port of Oakland or other tidelands from the public trust and dedicate them to other uses while they remain useable or susceptible of being used for water-related activities. *People v. California Fish Co.*, 166 Cal. 576, 597-99 (Cal. 1913); *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 524-25 (Cal. 1980); *Atwood v. Hammond*, 4 Cal.2d 31, 42-43 (Cal. 1935).

B. The Limited Scope of Liability Under California Law for Actions Taken as Trustee.

The Port's status as Trustee accords it particular obligations and rights under California law. Trustees of Tidelands Trusts have the same obligations, and the same rights, as other trustees under California law. *Mallon*, 44 Cal. 2d at 208; *Morse*, 31 Cal 2d at 257. See Cal. Prob. Code § 16002 ("trustee has a duty to administer the trust solely in the interest of the beneficiaries"); Cal. Prob. Code § 16001 ("the trustee of a revocable trust shall follow any written direction acceptable to the trustee given from time to time ... by the person then having the power to revoke the trust"). Under California law, the trustee's liability when operating in a representative capacity is limited. The California legislature has instructed that courts "treat [trustees] in a representative capacity, not unlike corporate officers." 18 Cal. L. Revision Comm'n. Reports (1986), Recommendation proposing The Trust Law (Dec. 1985) p. 587 (fn. omitted) (discussing the passage of Cal. Prob. Code §§ 18000-18005). A trustee is also

entitled to repayment for all expenditures that benefit the trust or were properly incurred in the administration of the trust. Cal. Prob. Code § 15684. A trustee who is liable in his representative capacity has a right to satisfy those claims from the trust itself. See Cal. Prob. Code § 15685 (“trustee has an equitable lien on the trust property as against the beneficiary ... for expenses, losses, and liabilities sustained in the administration of the trust or because of ownership or control of any trust property”). Moreover, under California law, it is the trust – and, consequently, the beneficiary – who is held liable in claims proceeding against the trustee for most actions that were committed by the trustee when acting on behalf of the trust.

A trustee thus cannot be held personally liable under California Probate Code § 18001 for any obligation arising from his ownership or control of trust property, nor can he be held personally liable under California Probate Code § 18002 for any torts committed in the course of his administration of the trust, unless the party seeking to impose such personal liability on the trustee demonstrates that the trustee intentionally or negligently acted or failed to act in a manner that establishes personal fault. *Haskett v. Villas at Desert Falls*, 90 Cal. App. 4th 864, 877-78 (Cal. Ct. App. 2001) (citations omitted); see also Cal. Prob. Code §§ 18000-18005 (stating that trustees are not personally liable under contract and only personally liable for obligations in tort if they are personally at fault, and that all claims against a trustee in its representative capacity are “asserted against the trust by proceeding against the trustee in the trustee’s representative capacity”).

As explained in detail above, the trust from which these funds are derived is State property. Moreover, when a trustee has been held liable for damages that cannot

be satisfied from the trust, the trustee has the right to bring a claim against the beneficiary for indemnification. See Restatement (Second) of Trusts § 278 (trustee may proceed against beneficiary when trust amounts are insufficient).

California Probate Code §§ 18000-18005 were added in 1986, as recommended by the California Law Revision Commission and were continued without change in 1990 upon repeal of the Probate Code. (Added by 1986 Cal. Stat. ch. 820, § 40; 1990 Cal. Stat. ch. 79, § 14, operative July 1, 1991; see Cal. Law Revision Com. coms., 54A West's Ann. Prob.Code, supra, foll. §§ 18000-18005, pp. 236-240.) These provisions expressly allow suits against the trust to be asserted by proceeding against the trustee in the trustee's representative capacity (Cal. Prob. Code § 18004) and as the Law Revision Commission had recommended, California Probate Code §§ 18000, 18001 and 18002 "provide[d] more protection to trustees by treating them in a representative capacity, not unlike corporate officers." 18 Cal. L. Revision Comm'n. Reports, supra, p. 587 (fn. omitted).

The Port here is only liable for actions taken as a Marine Terminal Operator, operating the Port's lands and facilities. However, all those actions are all taken exclusively as a Trustee. There is no liability under the Shipping Act for actions except insofar as the Port is a Trustee administering the trust. Accordingly, there is no "personal" liability that can be asserted against the Port under the Shipping Act.

C. The 11th Amendment Consequences of the Trustee Status.

As Trustee, the Port is acting solely on behalf of the State. The analysis of the 11th Amendment immunity applicable to a trustee acting in a representative capacity is addressed by the D.C. Circuit's decision in *PRPA v. FMC*, 531 F.3d 868 (D.C. Cir. 2006). There the Circuit held:

To be sure, even for entities that are *not* arms of the State, sovereign immunity can apply in a particular case if the entity was acting as an agent of the State or if the State would be obligated to pay a judgment against an entity in that case. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n. 11, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984); *Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1311 (11th Cir.2000).

Id. at 878–79.

This analysis applies to both of the roles assigned here by the SLC Opinion Letter, the Port's role as Trustee acting in a representative capacity, and the state's role as the beneficial owner of the corpus of the Tidelands Trust.

This is a sufficient, but not the exclusive, method of establishing that the Port is entitled to 11th Amendment immunity. Under all of the possible tests for 11th Amendment immunity, the SLC's determination that the Port is acting as an arm of the state, both as a characterization of state law and as a manifestation of state intent, are persuasive. The SLC Opinion Letter and PRC § 6009 also make clear that the State has the requisite control over the Port, and that the Port's administration of a Tideland's Trust is in fact a statewide function, exercised on behalf of the State.

CONCLUSION

For the foregoing reasons and as set forth in the prior briefs of the Port, the Port is entitled to 11th Amendment immunity, the Port's appeal should be granted, and the case should be dismissed with prejudice.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondent's Supplemental Appeal Brief was served by hand and electronic mail on the following:

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I further hereby certify that a true and correct copy of Supplemental Appeal Brief was served by U.S. first-class, postage prepaid mail and electronic mail on the following:

Joseph N. Mirkovich, Esq.
Russell, Mirkovich & Morrow
Suite 1280
One World Trade Center
Long Beach, CA 90813-1280
jmirkovich@rumlaw.com



Paul M. Heylman

Dated: August 3, 2011

EXHIBIT A

CALIFORNIA STATE LANDS COMMISSION
100 Howe Avenue, Suite 100-South
Sacramento, CA 95825-8202



CURTIS L. FOSSUM, Executive Officer
(916) 574-1800 FAX (916) 574-1810
California Relay Service from TDD Phone 1-800-735-2929
from Voice Phone 1-800-735-2922

Contact Phone: (916) 574-0234
Contact FAX: (916) 574-1855

December 15, 2010

David Alexander
Port Attorney
Port of Oakland
530 Water Street
Oakland, CA 94607

Subject: Status of Port of Oakland Funds

Dear Mr. Alexander:

The State Lands Commission (Commission) has the statutory responsibility to oversee the management of sovereign public trust lands and assets by legislative grantees who manage these lands in trust on behalf of the State of California. (Public Resources Code Section 6301 et. seq.; *State of California ex rel. State Lands Commission v. County of Orange* (1982) 134 Cal.App. 3d 20, 23.) The Commission and its staff exercise this responsibility and authority through various mechanisms including opinion letters such as this one discussing the status of a particular trust grant.

The State of California's sovereign tide and submerged lands within the city of Oakland (City) were legislatively granted in trust to the City by the State of California under various statutes enacted in the 19th and 20th Centuries and are held subject to the trust as subsequently amended by the Legislature. Through the City's Charter, portions of these public trust lands are within the Port of Oakland (Port) and are managed by the City acting by and through its Board of Port Commissioners. Port funds derived from and generated by these lands are held, in trust, by the Port within a public trust fund pursuant to Public Resources Code Section 6306.

The granting language utilized by the State Legislature has the effect of conveying the State's legal title to the described tide and submerged lands, subject to certain terms and conditions and subject to the statutory and common law public trusts. The grantee, here the City, is a trustee, both as to the lands themselves and as to the revenues derived therefrom. (*City of Long Beach v. Morse* (1947) 31 Cal. 2d 254, 257.) The trust is held for the benefit of the entire State. (*Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 209.) The effect of

December 15, 2010

Page 2

the legislative grant is, therefore, to create a trust in which the grantee is trustee, and the State is the trustor, and the people of the State are the beneficiaries of the trust. The legal consequence of this relationship is that the proper use of public trust lands and public trust revenues is a statewide affair. (*Mallon* at 209.)

In connection with the proceeding before the Federal Maritime Commission you have asked the staff of the State Lands Commission for guidance regarding the legal status of the Port's trust funds. Please be advised that the Port's trust funds, like the trust lands themselves, are held in trust by the Port on behalf of the State of California and may not be allocated to any non-trust purposes. As a trustee for the State of California and as administrator and manager of trust lands and funds, the Port performs valuable governmental functions on behalf of the State and as such should be considered as acting as an arm of the State. Therefore, we conclude that the Port's public trust revenue funds, managed by the Port as trustee for the people of the State of California, should have no less immunity under the 11th Amendment to the United States Constitution than is otherwise applicable to like funds held by the State of California. This is true even though the subject Port trust funds are held in a separate public trust fund administered and managed by the Port of Oakland.

We hope that this information is helpful to you in clarifying the relationship of the Port of Oakland's trust funds in relation to the State of California.

Sincerely,



Jennifer Lucchesi
Chief Counsel

EXHIBIT B

Senate Bill No. 1350

CHAPTER 330

An act to amend Section 11011.13 of, and to add Section 11011.19 to, the Government Code, and to add Section 6009 to the Public Resources Code, relating to public lands.

[Approved by Governor September 25, 2010. Filed with
Secretary of State September 27, 2010.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1350, Kehoe. Public Lands: records and uses.

Existing law requires the Department of General Services to maintain a complete and accurate statewide inventory of all real property held by the state and to categorize that inventory by agency and geographical location. Existing law defines "agency" for that purpose as any state agency, department, division, bureau, board, commission, district agricultural association, and the California State University, and excludes from that definition the Legislature, the University of California, and the Department of Transportation.

This bill additionally would exclude from that definition of "agency" the State Lands Commission, and would require the commission, by July 1, 2011, to furnish to the Department of General Services a record of each parcel of real property, excluding public trust lands, that the commission possesses that is not already being tracked by the statewide property inventory database. The bill would require the commission to update its record of these real property holdings, reflecting any changes occurring by December 31 of the previous year, by July 1 of each year.

The bill also would include legislative findings and declarations regarding public trust lands.

The people of the State of California do enact as follows:

SECTION 1. Section 11011.13 of the Government Code is amended to read:

11011.13. For purposes of Section 11011.15, the following definitions shall apply:

(a) "Agency" means a state agency, department, division, bureau, board, commission, district agricultural association, and the California State University. "Agency" does not mean the Legislature, the University of California, the State Lands Commission, or the Department of Transportation.

(b) "Fully utilized" means that 100 percent of the property is being appropriately utilized by a program of an agency every business day of the year.

(c) "Partially utilized" means one or more of the following:

(1) Less than 100 percent of the property is appropriately utilized by a program of an agency.

(2) The property is not used every business day of the year by an agency.

(3) The property is used by other nonstate governmental entities or private parties.

(d) "Excess land" means property that is no longer needed for either an existing or ongoing state program or a function of an agency.

SEC. 2. Section 11011.19 is added to the Government Code, to read:

11011.19. (a) The State Lands Commission, by July 1, 2011, shall furnish to the Department of General Services a record of each parcel of real property that it possesses that is not already being tracked by the statewide property inventory database. This furnishing requirement shall not apply to public trust lands. The record shall be furnished by the State Lands Commission to the Department of General Services in a uniform format specified by the Department of General Services. The Department of General Services shall consult with the State Lands Commission on the development of the uniform format. The State Lands Commission shall update its record of these real property holdings, reflecting any changes occurring by December 31 of the previous year, by July 1 of each year. Except as provided in subdivision (b), the record shall include all of the following information:

(1) The location of the property within the state and county, the size of the property, including its acreage, and any other relevant property data.

(2) The date of acquisition of the real property, if available.

(3) The manner in which the property was acquired and the purchase price, if available.

(4) A description of the current uses of the property and any projected future uses, if available.

(5) A concise description of each major structure on the property.

(b) For school lands held in trust by the State Lands Commission, the record shall include the location of the property within the state and county and the size of the property, including its acreage.

SEC. 3. Section 6009 is added to the Public Resources Code, to read:

6009. The Legislature finds and declares all of the following:

(a) Upon admission to the United States, and as incident of its sovereignty, California received title to the tidelands, submerged lands, and beds of navigable lakes and rivers within its borders, to be held subject to the public trust for statewide public purposes, including commerce, navigation, fisheries, and other recognized uses, and for preservation in their natural state.

(b) The state's power and right to control, regulate, and utilize its tidelands and submerged lands when acting within the terms of the public trust is absolute.

(c) Tidelands and submerged lands granted by the Legislature to local entities remain subject to the public trust, and remain subject to the oversight authority of the state by and through the State Lands Commission.

(d) Grantees are required to manage the state's tidelands and submerged lands consistent with the terms and obligations of their grants and the public trust, without subjugation of statewide interests, concerns, or benefits to the inclination of local or municipal affairs, initiatives, or excises.

(e) The purposes and uses of tidelands and submerged lands is a statewide concern.

SEC. 4. The addition of Section 6009 to the Public Resources Code by Section 3 of this act does not constitute a change in, but is declaratory of, existing law.

SEC. 3. Section 6009 is added to the Public Resources Code, to read:

6009. The Legislature finds and declares all of the following:

(a) Upon admission to the United States, and as incident of its sovereignty, California received title to the tidelands, submerged lands, and beds of navigable lakes and rivers within its borders, to be held subject to the public trust for statewide public purposes, including commerce, navigation, fisheries, and other recognized uses, and for preservation in their natural state.

(b) The state's power and right to control, regulate, and utilize its tidelands and submerged lands when acting within the terms of the public trust is absolute.

(c) Tidelands and submerged lands granted by the Legislature to local entities remain subject to the public trust, and remain subject to the oversight authority of the state by and through the State Lands Commission.

(d) Grantees are required to manage the state's tidelands and submerged lands consistent with the terms and obligations of their grants and the public trust, without subjugation of statewide interests, concerns, or benefits to the inclination of local or municipal affairs, initiatives, or excises.

(e) The purposes and uses of tidelands and submerged lands is a statewide concern.

SEC. 4. The addition of Section 6009 to the Public Resources Code by Section 3 of this act does not constitute a change in, but is declaratory of, existing law.

[ENLARGED VERSION OF §§3, 4]

EXHIBIT C

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 11/05/01

DEPT. 18

HONORABLE HELEN I. BENDIX

JUDGE R. VEST

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

D. VALENCIA, CA

Deputy Sheriff

NONE

Reporter

8:30 am

BC221839

Plaintiff
Counsel

PHILLIP HANSON
VS
PORT OF LOS ANGELES
R/F 4/28/00-DENIED
RECUSAL-MEIERS
170.6 - Rothschild

Defendant
Counsel

NONE APPEARING

NATURE OF PROCEEDINGS:

RULING UPON SUBMISSION ON OCTOBER 31, 2001;

Defendant seeks summary judgment on the theory that sovereign immunity provides a complete defense to Plaintiff's claim under the Jones Act. It is undisputed that if Defendant is entitled to the defense of sovereign immunity, Defendant has not waived that defense because Plaintiff has failed to satisfy the conditions to such waiver under the California Tort Claims Act ("CTCA"). See Plaintiff's Responses to Defendant's Separate Statement of Undisputed Facts ("Plaintiff's Response"), Paragraphs 19-20; Bobo Decl., Ex. F (Court of Appeal opinion in this case holding that Plaintiff had failed to file a claim within the time period prescribed by statute or timely to seek relief from such time period).

Defendant relies, inter alia, on Alden v. Maine, 527 U.S. 706, 119 S.Ct. 2240 (1999) for the assertion of sovereign immunity. In that case, the Supreme Court recognized that the Constitution reserved to the States a "constitutional immunity" from private suits in their own courts (119 S. Ct. At 2259) and stated: "In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation." Id. at 2266.

MINUTES ENTERED 11/05/01 COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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D. VALENCIA, CA

Deputy Sheriff

NONE

Reporter

8:30 am

BC221839

Plaintiff
Counsel

PHILLIP HANSON
VS
PORT OF LOS ANGELES
R/F 4/28/00-DENIED
RECUSAL-MEIERS
170.6 - Rothschild

Defendant
Counsel

NONE APPEARING

NATURE OF PROCEEDINGS:

The parties conceded at oral argument that application of the immunity recognized in Alden to the Jones Act claim in this case turns upon whether the Defendant City/Board of Harbor Commissioners is an instrumentality or arm of the State or merely a "lesser entit[yl]" like a "municipal corporation." Alden, 119 S. Ct at 2267. The parties also concede that this is a case of first impression. Finally, the parties agree that generally, to determine whether a governmental entity is an instrumentality or arm of the state, the court must look to the five factors set forth in Belanger v. Madera Unified School District, 963 F. 2d 248 (9th Cir. 1992), with "the first and most important factor" being whether a judgment in the case would be satisfied out of state funds. 963 F. 2d at 251. The other factors are "[2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity." 963 F. 2d at 251 (quoting from Mitchell v. Los Angeles Community College Dist., 861 F. 2d 198,201 (9th Cir. 1988), cert. denied, 490 U.S. 1081 (1989)).

The court recognizes that "[t]he elements of, and the defenses to, a federal cause of action are defined by federal law." Streit v. County of Los Angeles, 236 F. 3d 552, 560 (9th Cir. 2001) (internal citation omitted). In determining these issues, courts, however "must consider the states's

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

D. VALENCIA, CA

Deputy Sheriff

NONE

Reporter

8:30 am

BC221839

Plaintiff
Counsel

PHILLIP HANSON

Defendant NONE APPEARING

VS

PORT OF LOS ANGELES

R/F 4/28/00-DENIED

RECUSAL-MEIERS

170.6 - Rothschild

NATURE OF PROCEEDINGS:

legal characterization of the government entities which are parties to [the] action...."Id. at 560 (regarding whether the Los Angeles County Sheriff acts in a state or county capacity for purposes of liability for certain jail release policies in a Section 1983 action):

The court finds that based on California appellate decisions, the Plaintiff's concessions in his Responses to Defendant City of Los Angeles' Separate Statement of Undisputed Facts, and the statutes creating the Harbor Reserve Fund and entrusting State submerged lands and tidelands to the Defendant herein, there is no material issue of disputed fact as to the Defendant City/Board of Harbor Commissioners' being an arm or instrumentality of the State and summary judgment should be granted in favor of Defendant.

First, in *The City of Los Angeles v. Pacific Coast Steamship Co.*, 45 Cal. App 15, 17-18 (1919), the California Court of Appeal expressly characterized the Defendant City/Board of Harbor Commissioners as a "subordinate governmental agenc[y] of the State" and "successor of the state." More specifically, the court, in quieting title in favor of the City of Los Angeles to a tract of submerged land entrusted to the city under the 1911 legislation at issue here, the court wrote:

"The trusts upon which the city of Los Angeles received its title to said premises were the identical public trusts upon which the state had originally received and held said

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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ELECTRONIC RECORDING MONITOR

D. VALENCIA, CA

Deputy Sheriff NONE

Reporter

8:30 am

BC221839

Plaintiff
Counsel

PHILLIP HANSON
VS
PORT OF LOS ANGELES
R/F 4/28/00-DENIED
RECUSAL-MEIERS
170.6 - Rothschild

Defendant
Counsel NONE APPEARING

NATURE OF PROCEEDINGS:

lands up to the time of its said grant of the same to said city. These trusts being for public uses were essentially governmental in their character, and the city of Los Angeles, in taking from the state the title to said lands for the purpose of fulfilling these trusts, was merely acting as one of the subordinate governmental agencies of the state.... This being so, it became possessed of all the power which the state formerly held in relation to said lands and all of the rights to the ownership and possession thereof which the state had prior to said grant, and hence with full power as the successor of the state to maintain this action...." (Emphasis added.) 45 Cal.App. at 17-18.

Second, the legislation entrusting the tideland and submerged lands at issue here to the city confirm the City of Los Angeles case's characterization. Thus, in the original 1911 legislation, the State of California grants to the Defendant City all rights in the subject land held by the state "by virtue of its sovereignty" and limits the purposes for which the City may use the lands, i.e., "purposes consistent with the trusts upon which said lands are held by the State of California." Bobo Decl., Exhibit G ("Exhibit G"), Chapter 626, Section 1. In 1917, the legislation was amended to provide a precise time limit for leases of the subject lands to third-parties. Exhibit G, Chapter 115, Section 1.

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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D. VALENCIA, CA

Deputy Sheriff NONE

Reporter

8:30 am

BC221839

Plaintiff
Counsel

PHILLIP HANSON
VS.
PORT OF LOS ANGELES
R/F 4/28/00-DENIED
RECUSAL-MEIERS
170.6 - Rothschild

Defendant: NONE APPEARING
Counsel

NATURE OF PROCEEDINGS:

In 1970, Section 3 was amended to delineate more particularly the sole purposes for which revenues generated by the lands may be used by the City taking care to note that these are "statewide" purposes, "as distinguished from purely local or private, interest and benefit." Exhibit G, Chapter 1046, Section 1(i).

The 1970 also amendments provide for oversight by the State Lands Commission. Thus, the City is required to file revenue reports with the State Lands Commission for certain expenditures (Exhibit G, Chapter 1046, Section 5). The Attorney General, upon request of the State Lands Commission, "shall" bring judicial proceedings if the City fails to provide the required reports or "refuses to carry out the terms of this act" (id. at Section 8). The State Lands Commission "shall, from time to time, institute formal inquiry to determine that the terms and conditions of the act... have been complied with ... in good faith," (id. at Section 10), and to report "any transaction or condition... which it deems in probable conflict with the requirements of this act" to designated Assembly and Senate officers (id. at Section 11). Finally, the Legislature "reserves the right" to revoke entirely the grant of tidelands and submerged lands to the City as long as the State assumes any lawful existing obligation related to such lands. See Exhibit G, Chapter 1046, Section 12.

Third, turning to the Belanger factors, the following facts are undisputed:

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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D. VALENCIA, CA

Deputy Sheriff

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Reporter

8:30 am BC221839

Plaintiff
Counsel

PHILLIP HANSON
VS
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R/F 4/28/00-DENIED
RECUSAL-MEIERS
170.6 - Rothschild

Defendant
Counsel

NONE APPEARING

NATURE OF PROCEEDINGS:

--The source of any judgment or settlement in this case would be the Harbor Revenue Fund (see Plaintiff's Response, Paragraph 9);

--The funds in the Harbor Revenue Fund are held in trust for the benefit of all of the people of California and not for the sole benefit of citizens of the City of Los Angeles (id. at Paragraph 7);

--The City/Board of Harbor Commissioners has the power to take and condemn property (Plaintiff's Response, Paragraph 14);

-- The City, acting through the Board of Harbor Commissioners may sue and be sued (id. at Paragraph 13); and

--The City of Los Angeles Harbor Department is an independent proprietary department of a municipal corporation (id. at Paragraph 15).

Plaintiff also does not appear to dispute that the funds of the Harbor Department are kept separate from the general funds of the City of Los Angeles. See Plaintiff's Response, Paragraph 5 (although Plaintiff does disagree to whether the Harbor Revenue Fund reimburses the City for services provided to the Harbor Department by the City).

Fourth, Plaintiff conceded at oral argument that the first Belanger factor is the crucial factor and turns on how one characterizes the Harbor Reserve Fund, out of which, as noted above, the parties concede a judgment in this case would be paid.

Again, the language of the statute creating

MINUTES ENTERED 11/05/01 COUNTY CLERK

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Deputy Sheriff

NONE

Reporter

8:30 am

BC221839

Plaintiff
Counsel

PHILLIP HANSON
VS
PORT OF LOS ANGELES
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.170.6 - Rothschild

Defendant
Counsel

NONE APPEARING

NATURE OF PROCEEDINGS:

that Fund is instructive. Thus, Section 2 requires the City to create the Harbor reserve Fund as a "separate tidelands trust" in such manner "as may be approved by the Department of Finance" and requires the City to deposit in that Fund "all moneys received directly from, or indirectly attributable to, the granted tidelands in the city." Exhibit G, Chapter 1046, Section 2. The Defendant City is further required to file an annual statement of financial condition and operations with the Department of Finance. Id. The legislation requires the City to report to the State Lands Commission any proposed expenditure exceeding \$250,000 for capital improvement for purposes of allowing the Commission to determine if the expenditure is "in the statewide interest." Id. at Section 5. If at the end of every third fiscal year, the Harbor Reserve Fund contains more than \$250,000 after deducting operating expenses, then this "excess revenue" "shall be divided as follows: 85 percent to the General Fund in the State Treasury, and 15 percent to the city," which city portion is to be deposited in the Trust Fund for purposes authorized by the statute in Section 3, above. Id. at Section 6.

In *Mallon v. City of Long Beach*, 44 Cal. 2d 199 (1955), the California Supreme Court, moreover, recognized the "state" character of certain oil and gas revenues held in reserve trusts established by the tidelands legislation for the City of Long Beach. There, the Supreme Court rejected the City of Long Beach's use of these trust fund monies for

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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ELECTRONIC RECORDING MONITOR

D. VALENCIA, CA

Deputy Sheriff

NONE

Reporter

8:30 am	BC221839	Plaintiff Counsel	
	PHILLIP HANSON VS PORT OF LOS ANGELES R/F 4/28/00-DENIED RECUSAL-MEIERS 170.6 - Rothschild	Defendant Counsel	NONE APPEARING

NATURE OF PROCEEDINGS:

building storm drains, public libraries, hospitals, public parks and city streets; "We cannot hold that [these purposes] are of such general state-wide interest that state funds could properly be expended thereon." Id. at 211(emphasis added).

Based on the City of Los Angeles and Malloncases, the parties concessions, and the above legislation creating the grant of tidelands and submerged lands to the Defendant and establishing the Harbor Reserve Fund, the court rules that payment of a judgment out of the Harbor Reserve Fund would be payment out of state funds within the meaning of Belanger. These authorities, particularly the City of Los Angeles case, also compel a determination in favor of the Defendant on the second Belanger factor, i.e., that the City is performing a "central governmental function" in performing its obligations and duties under the legislation establishing that trust grant to the subject lands. In the words of the City of Los Angeles court, Defendant literally inherited by grant the state's "right to ownership" and a trust that is "essentially governmental in character."

Weighing all the Belanger factors, recognizing that the first two have been held to be the most important, the court finds that the Defendant City/Board of Harbor Commissioners is acting as an arm or instrumentality of the state for purposes of "constitutional" immunity under the Alden case. Because, as noted above, it is undisputed that the Defendant did not waive that immunity, summary

MINUTES ENTERED 11/05/01 COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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D. VALENCIA, CA

Deputy Sheriff

NONE

Reporter

8:30 am BC221839

Plaintiff
Counsel

PHILLIP HANSON
VS
PORT OF LOS ANGELES
R/F 4/28/00-DENIED
RECUSAL-MEYERS
170.6 - Rothschild

Defendant
Counsel NONE APPEARING

NATURE OF PROCEEDINGS:

judgment shall hereby be granted in favor of Defendant. The court's ruling herein shall constitute its Findings of Undisputed Facts and Conclusions of law.

November 5, 2001

Helen I. Bendix

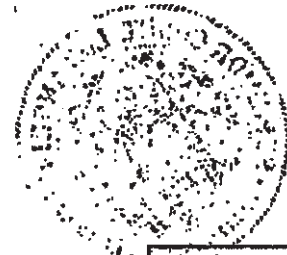
Helen I. Bendix
Judge, Los Angeles
Superior Court

Counsel for Defendant is ordered to file a Proposed Judgment within three days of today.

A copy of the Court's Ruling is sent this date via Facsimile and U.S. Mail to the following:

JOHN HILLSMAN
MCGUINN, HILLSMAN & PALETSKY
535 PACIFIC AVE
SAN FRANCISCO, CA 94133
fax # (415) 403-0202

CHRISTOPHER BOBO
DEPUTY CITY ATTORNEY
425 S. PALOS VERDES STREET
SAN PEDRO, CA 90731
fax # (310) 831-9778



MINUTES ENTERED 11/05/01 COUNTY CLERK

EXHIBIT D

414 Fed.Appx. 10, 2010 WL 5393860 (C.A.9 (Cal.))
 (Not Selected for publication in the Federal Reporter)
 (Cite as: 414 Fed.Appx. 10, 2010 WL 5393860 (C.A.9 (Cal.)))

H

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)

United States Court of Appeals,
 Ninth Circuit.

The UNITED STATES of America ex rel. and State
 of California ex rel. Stanley D. MOSLER,
 Plaintiffs–Appellants,

v.

CITY OF LOS ANGELES, a municipal corpora-
 tion, etc.; et al., Defendants–Appellees.

No. 09–56040.

Argued and Submitted Nov. 5, 2010.

Filed Dec. 22, 2010.

Background: Relator brought qui tam action on behalf of the United States against city alleging violations of False Claims Act (FCA) and California law. The United States District Court for the Central District of California, S. James Otero, J., dismissed. Relator appealed.

Holding: The Court of Appeals held that relator was not original source of relevant information.

Affirmed.

West Headnotes

States 360 ⇨ 188

360 States

360V Claims Against State

360k188 k. Making or presentation of false claims. Most Cited Cases

United States 393 ⇨ 122

393 United States

393VIII Claims Against United States

393k120 Making or Presentation of False
 Claims and Other Offenses Relating to Claims

393k122 k. Penalties and actions therefor.

Most Cited Cases

Relator was not original source of publicly disclosed information, as required for court to have jurisdiction over qui tam action he brought on behalf of the United States against city under False Claims Act and California Government Code, where his knowledge of the allegedly fraudulent transaction was neither direct nor independent of earlier public disclosures; relator relied on documents he obtained from the Port and the Los Angeles District Office of the Army Corps of Engineers which outlined public hearings held on the matter, and on a newspaper article on the topic published prior to his suit. 31 U.S.C.A. § 3730(e)(4); West's Ann.Cal.Gov.Code § 12652(d)(3).

*10 Milford W. Dahl, Jr., Esquire, Rutan & Tucker, LLP, Costa Mesa, CA, Matthew Edward Hess, The Kick Law Firm, APC, James T. Grant, Law Offices of James T. Grant, Los Angeles, CA, Arnold M. Auerhan, U.S. Department of Justice, Washington, DC, for Plaintiffs–Appellants.

Christopher B. Bobo, Esquire, Office of the City Attorney, San Pedro, CA, Melissa K. Eaves, Shepard Mullin Richter & Hampton LLP, Marc Scott Harris, Esquire, Scheper Kim & Overland LLP, Kristen A. Rowse, Mayer Brown, LLP, Los Angeles, CA, Elizabeth P. Beazley, Keesal, Young & Logan, Long Beach, CA, Stephanie M. Byerly, Esquire, Roman E. Darmer, II, Esquire, Jennifer Renee Bagozy, Esquire, Howrey LLP, Irvine, CA, for Defendants–Appellees.

Appeal from the United States District Court for the Central District of California, S. James Otero, District Judge, Presiding. D.C. No. 2:02-cv-02278-SJO-RZ.

414 Fed.Appx. 10, 2010 WL 5393860 (C.A.9 (Cal.))
 (Not Selected for publication in the Federal Reporter)
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11 Before: PREGERSON, RIPPLE,^{FN} and GRABER, Circuit Judges.

FN* The Honorable Kenneth F. Ripple, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

MEMORANDUM^{FN**}

FN** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

**1 Relator Stanley Mosler, suing on behalf of the United States, appeals the district court's dismissal of his qui tam action. On de novo review, *United States ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 520 (9th Cir.1999), we affirm.

Under the False Claims Act, a court lacks subject matter jurisdiction over any qui tam action "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing"; in various kinds of governmental or administrative reports, hearings, or investigations; or in "the news media"; unless the relator is the "original source" of the publicly disclosed information. 31 U.S.C. § 3730(e)(4) (2002). The California analogue is nearly identical. Cal. Gov't Code § 12652(d)(3). For that reason, California courts look to federal decisions to interpret the public disclosure provision of the state statute. *State ex rel. Bowen v. Bank of Am. Corp.*, 126 Cal.App.4th 225, 23 Cal.Rptr.3d 746, 758 n. 11 (2005).

The allegations underlying Relator's complaint were publicly disclosed before he filed suit in 2002, in two ways. First, Relator's written testimony, submitted during a 2001 public hearing of the Army Corps of Engineers, contained sections entitled "Port Breached Agreement with Federal Government and People of California by Converting Pier 400 to Mega-container Terminal" and "The Cover Up." Those sections lay out allegations substantially similar to those contained within Relator's

complaint. Second, an article in *Random Lengths News*, dated January 3, 2002, quoted Relator and reported essentially the same allegations on the part of "outraged" local residents.

Relator was not the original source of any of the information disclosed, under the standard explained in *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir.1992). His knowledge of the allegedly fraudulent transactions was neither direct nor independent of the public disclosures. The district court found that Relator relied on newspaper articles reporting Pier 400's change in use. The district court also found that, in formulating his allegations, Relator relied on documents he obtained from the Port and the Los Angeles District Office of the Army Corps of Engineers. Those findings are not clearly erroneous. See *United States ex rel. Biddle v. Bd. of Trs. of Leland Stanford, Jr. Univ.*, 161 F.3d 533, 535 (9th Cir.1998) (noting that we review for clear error a finding of fact relevant to the determination of subject matter jurisdiction).

In summary, the district court lacked subject matter jurisdiction because the allegations underlying the complaint were publicly disclosed before Relator filed suit and because Relator is not the original source of the relevant information. Accordingly, the district court properly dismissed this qui tam action.

AFFIRMED.

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